

U. no: 109/2009-0-1

Date: 01/27/2010

Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Article 110 and Article 112 of the Constitution of the Republic of Macedonia, and Article 70 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992), on its session held on January 27, 2010, adopted the following

DECISION

Text

1. Article 10 paragraph 1 item 8 IS REPEALED in the part: "or provided health services in health care facilities where the Fund had not provided health service at its own expense" of the Law on Health Insurance ("Official Gazette of the Republic of Macedonia", no. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008, 6/2009 and 67/2009).

2. This decision has legal effect from the date of its publication in "Official Gazette of the Republic of Macedonia".

3. As a result of the submitted initiatives by Stamen Filipov and Biljana Zhivkovska from Skopje, with a Resolution U.no. 109/2009 and U.no.185/2009 from November 11, 2009, the Constitutional Court instigated a procedure for appraisal of the constitutionality of the provision in item 1 of this Decision of the Law on Health Insurance marked in item 1 of this Decision.

The procedure was instigated as a result of the well-founded question raised before the Court regarding the accordence of the contested article with the Constitution.

4. At the session, the Court determined that in the contested Article 10 paragraph 1 item 8 it is stated that "specialist consultative and hospital health services without referral from the chosen doctor or provided health services in health care facilities where the Fund had not provided health service at its own expense" are not included in the compulsory health insurance.

5. According to Article 8 paragraph 1 lines 3 and 8 of the Constitution, the rule of law and humanism, social justice and solidarity are fundamental values of the constitutional order of the Republic of Macedonia.

According to Article 9 of the Constitution, citizens of the Republic of Macedonia are equal in the freedoms and rights irrespective of gender, race, skin colour, national and social origin, political and religious beliefs, property and social status. Citizens are equal before the Constitution and the laws.

According to Article 34 of the Constitution, citizens have the right to social security and social insurance determined by law and collective agreement.

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According to Article 35 paragraph 1 of the Constitution, the Republic provides social protection and social security to citizens in line with the provisions for social justice.

According to Article 39 of the Constitution, each citizen is guaranteed the right to health care, and according to paragraph 2 of this Article, each citizen has the right and duty to protect and promote his own health and the health of others.

Starting from the constitutional provisions in Articles 34, 35 and 39 of the Constitution, as well as the character of the Republic of Macedonia as a social state aiming to establish social protection and justice, the Republic provides health care which has its basis in the fundamental values of the constitutional order in the Republic of Macedonia – humanism, social justice and solidarity. Thereupon, the Constitution only determined the right to social insurance and guaranteed the right to health care, but the conditions, means and scope of the rights is let to be determined by law.

Health insurance, as one segment of the social insurance system, is regulated with the Law on Health Insurance (“Official Gazette of the Republic of Macedonia” no. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 37/2006, 18/2007, 36/2007, 82/2008, 98/2008 and 6/2009) and in it, among the rest, the scope of rights from the health insurance is determined, i.e. the basic health services which the insured person can exercise at the expense of the Health Insurance Fund. Namely, citizens’ health insurance is regulated by Law through instituting of compulsory and voluntary health insurance.

In accordance with Article 2 of the Law, the compulsory health insurance is instituted for all citizens of the Republic of Macedonia for obtaining health services and monetary compensation on the basis of the principles of comprehensiveness, solidarity, equality and effective use of resources under the conditions established by this Law, and voluntary health insurance is instituted for obtaining health services which are not covered with compulsory health insurance.

In Article 3 of this law it is determined that compulsory health insurance is managed by the Health Insurance Fund of Macedonia, whereas voluntary health insurance can be managed by insurance companies founded according to insurance regulations.

According to Article 4 of the Law, insured persons, in the sense of this law, are insurees as are members of their family.

In line with Article 8 of the Law, with the compulsory health insurance insured persons are provided with the right to basic health services under conditions determined by this Law, in case of: 1) illness and injury outside of work and 2) injury at work and occupational disease.

According to Article 9 paragraph 1, basic health services are:

- a) In primary health care:
 - 1) Health services for purposes of determining, monitoring and checking the health condition;
 - 2) Undertaking expert medical measures and procedures for improving the health condition, preventing, eliminating and early detecting of the diseases and other health disorders;

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- 3) Providing emergency medical assistance, including transport with an ambulance vehicle when necessary;
 - 4) Treatment in a doctor's office as well as in the home of the user;
 - 5) Health care regarding pregnancy and delivery;
 - 6) Performing preventative, therapeutic and rehabilitation measures;
 - 7) Prevention, treatment and healing of oral and dental diseases; and
 - 8) Medicine according to the list of medicines which is determined by the Fund, with a general act approved by the Minister of Health;
- b) In the specialist-consultative health care:
- 1) Examination and determination of diseases, injuries and health condition;
 - 2) Performing specialised diagnostic, therapeutic and rehabilitating procedures; and
 - 3) Prosthetic, orthopaedic and other devices, supporting and sanitary equipment and materials, and dental devices according to the indications determined by the Fund with a general act approved by the Minister of Health;
- c) Hospital (short-term and long-term) health care:
- 1) Examination and determination of health condition, treatment, rehabilitation, care, accommodation and nourishment in hospital conditions;
 - 2) Medicine according to the list of medicines determined by the Fund with a general act approved by the Minister of Health, as well as supporting materials whose purpose is to serve in applying medication and sanitary and other material needed for treatment; and
 - 3) Accommodation and nourishment of a companion during the necessary companionship of a child of up to 3 years of age, during its hospital treatment, but only up to 30 days and
 - 4) Autopsy of the deceased on a request by a health care facility.

According to paragraph 2 of the same Article of the Law, the Fund provides the insured persons with basic health services from paragraph 1 of this Article in health care facilities in the amount of the prices determined with the Pricelist for health services in the Republic of Macedonia, which is brought by the Managing Board of the Fund.

Health services not included in compulsory health insurance are listed in Article 10 of the Law and are as follows:

- 1) Aesthetic operations without medical indication;
- 2) Using a higher standard of health services in hospital health care above the established standards;
- 3) Spa and health resort treatment;
- 4) Medical rehabilitation of degenerative diseases determined with a general act approved by the Minister of Health, except for children up to 18 years of age;
- 5) Medicine not included in the medicine list in Article 9 of this law;
- 6) Prosthetic, orthopaedic and other devices, support and sanitary equipment and materials and dental devices not included in compulsory health insurance or made from nonstandard material;
- 7) General care, accommodation and nourishment in gerontology institution;
- 7-a) Provided in primary health care by a doctor who is not a chosen doctor of the insured person;

- 8) Specialist-consultative and hospital health services without referral from the chosen doctor or provided health services in health care facilities where the Fund had not provided health service at its own expense;
- 9) Termination of pregnancy without medical indication;
- 10) Treatment as a consequence of disobeying doctor's guidelines;
- 10-a) Artificial insemination after a third failed insemination attempt;
- 11) The issuing of all types of medical certificates of health;
- 12) Procurement of all new prosthetic and orthopaedic devices and other supporting devices before the determined deadline;
- 13) Sobering and treatment of an acute drunk condition, as well as deliberate poisonings that are not caused by a mental disorder;
- 14) Treatment abroad, if the treatment is done without permission of the Fund, for part of the expenses higher than the expenses for corresponding services that are part of the basic health services in the country;
- 15) Treatment as a consequence of a criminal offence or a misdemeanour committed by the insuree himself;
- 16) Examinations, tests and referrals to an authority for determining the ability to work, according to the regulations on pension and disability insurance, when these are done from a request of the insuree, the employer or another authority;
- 17) Non-compulsory vaccines;
- 18) Treatment, or rehabilitation from addiction diseases lasting over 30 days;
- 19) Examinations on the deceased and autopsy requested by an authority or citizens;
- 20) Health examination on employees who are sent to work abroad by employers, as well as examinations and preventative measures of health care while travelling abroad;
- 21) Treatment or consequences caused by fraudulent doctors or caused by using counterfeit medicine; and
- 22) Other health services for which the expenses are not borne by the Fund according to this Law.

According to Article 36 of the Law, co-funding using the insured person's personal funds towards the cost of health services and medicine is an income for the Fund, paid at the health care facility, for which the Fund audits the charges.

According to Article 63 of the Law, the Fund, on the basis of the principle of efficient, effective and economic use of resources, among the rest, also covers the expenses for: health services included in the basic package of health services which are provided by the health care facilities to the insured persons.

According to Article 68-a of the Law, the Fund is a buyer of health services in the interest of those insured persons (paragraph 1). Depending on the demand for health services and determined resources for that purpose in the budget of the Fund, the Fund buys health services and concludes and terminates contracts with the health care facilities.

According to Article 69 paragraph 1 of the Law, the Fund with general act, determines the criteria for concluding contracts with health care facilities, the manner for concluding contracts as well as the manner of payment of the health services according to: the number of the insured persons in primary health care; the determined prices of the health services; the programs for certain kinds of health care; or services; the predetermined funds in the budget of the Fund according to their purpose; and other criteria.

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The Minister of Health gives the consent for the general act from paragraph 1 of this Article (paragraph 2).

According to Article 70 paragraph 1 of the Law, so as to provide health services, the Fund as a buyer of health services concludes and terminates contracts with health care facilities.

Starting from the listed constitutional provisions, as well as from the analysis of the Law on Health Insurance, it turns out that almost every citizen in the Republic of Macedonia, in the cases and under the conditions determined with the above mentioned law, is given the opportunity to exercise the constitutional right to social security, i.e. the right to health insurance, as well as the right to health care as a proof of the social character of the Republic of Macedonia.

The type and the scope of the health services which result from compulsory health insurance are determined in Article 9 of the Law, with the exhaustive list of the health services in primary health care, in specialist-consultative health care and in hospital health care, which are covered by the Fund in the amount of prices determined in the Price list for health services in the Republic of Macedonia.

On the other hand, in Article 10 of the Law, the legislator gives an exhaustive list of the health services which are not covered by the basic package of compulsory health insurance and for which the Fund does not provide any funds, and therefore the expenses for those services fall at the insured person's expense.

Having in consideration the content of the contested part of Article 10 paragraph 1 item 8, the Court finds the fact that the Fund does not enter in agreement with certain health care facilities for provision of some of the services listed in Article 9, to affect and bring into question the exercising of the basic package of health services, i.e. those services are provided at the insuree's expense.

In regard to this matter, the Constitutional Court of the Republic of Macedonia has already discussed it and appraised that insurees can exercise the basic package of health services in any health care facility at the Fund's expense, regardless of whether the Fund entered into agreement with it or not (U.no.45/2006).

After that Decision was reached by the Constitutional Court, for a certain period of time the insurees who used health services from the basic package of health services in health care facilities, irrespective of whether the Fund entered into agreement with those facilities or not, paid the full amount of expenses for the obtained services, and then asked the Fund for reimbursement for the paid service, which was approved in the amount recognized for that service by the Fund.

After that, with amendment of the Law on Health Insurance (whose amendments are contested), in a way again, the claiming of the health services from the basic package covered by the Fund, is conditioned by the legislator with whether the Fund entered into agreement or not with the health care facility which provides the service.

Regarding this contested part of Article 10 paragraph 1 item 8, the Constitutional Court of the Republic of Macedonia did not instigate a procedure for the contested part, but with Resolution U.no.25/2009 from June 10, 2009 stated that the goal for amendment of the Law was to specify

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the health services which were not included in the compulsory health insurance in the part of specialist-consultative and hospital care.

Regarding the submitted initiatives, the Court appraised that the contested provision does not specify any health service which should be excluded from those provided at the expense of the Fund in line with its medical nature (such as aesthetic surgeries), but that a certain health service in the Law (in Article 9 as specialist service) is additionally conditioned by the decision of the Fund to enter into agreement with a certain health care facility. In other words, these health services can be used by insurees only in relation to whether the Fund entered into agreement with these health care facilities, i.e. to exclude all the basic health services listed in Article 9 of the Law, which are covered at the Fund's own expense.

According to the above mentioned, health care based on insurance is not exercised anymore under the conditions stipulated in the Law, but in accordance with additional condition, such as the discretion of the Health Insurance Fund. Because of that, the Court appraised that, with the contested provision, not only is the right of the users of health services to choose a doctor infringed, but it also essentially infringes the constitutional level of lawful regulation of the rights and obligations from health insurance.

In relation to the aforementioned, and having in consideration the findings from the initiatives and the indisputable fact that, upon entering into legal effect of the amendments of the Law, the users of health services in health care facilities which do not have an agreement with the Fund, are not able to reimburse the expenses in the amounts that are certainly borne by the Fund, which unequivocally refers to the conclusion that the contested resolution in the Law is not in accordance with the marked provisions of the Constitution.

6. On the basis of the above, the Court has decided as stated in item 1 of this Decision.

7. This Decision was delivered with a majority vote by the following composition of the Court: President of the Court Trendafil Ivanovski PhD and the judges Natasha Gaber-Damjanovska PhD, Ismail Darlishta, Liljana Ingilizova-Ristova, Vera Markova, Branko Naumoski, Igor Spirovski, Gzime Starova PhD and Zoran Sulejmanov PhD.

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PRESIDENT
of the Constitutional Court of the Republic of Macedonia
Trendafil Ivanovski PhD