

U. no: 60/2006-0-0

Date: 10/03/2006

Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Articles 110 and 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 October 3, 2006, adopted the following

DECISION

Text

1. Article 10, paragraph 1, item 15 of the Law on Health Insurance ("Official Gazette of the Republic of Macedonia" no. 25/2000, 34/2000-correction, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 119/2005 – refined text and 37/2006) is hereby REPEALED.

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

3. The Constitutional Court of the Republic of Macedonia with Ruling U.no.60/2006 from 14.06.2006 upon initiative submitted by Radovan Zecevic from Skopje, instigated proceedings for appraisal of the constitutionality of the article from the Law stated in item 1 of this Decision, as a well-founded question, raised as to question the provision's accordance with the Constitution.

4. In its session, the Court determined that according to the contested provision from Article 10, paragraph 1, item 15 of the Law, compulsory health insurance does not cover health services provided to treat a health condition resulting from the conduct of a criminal offence or a misdemeanour by the insuree.

5. According to Article 8, paragraph 1, lines 1 and 3 of the Constitution of the Republic of Macedonia, fundamental freedoms and rights of man and citizen, recognized in international law and determined by the Constitution, and the rule of law 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 their freedoms and rights, regardless of gender, race, colour of skin, national and social origin, political and religious belief, property and social status. Citizens are equal before the Constitution and the law.

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

According to Article 35, paragraph 1 of the Constitution, The Republic provides social security for citizens in accordance with the principle of 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.

According to Article 51, paragraph 1 of the Constitution, in the Republic of Macedonia, laws must be in accordance with the Constitution, and all regulations must be in accordance with the Constitution and the laws.

According to Article 54, paragraph 1 of the Constitution, the freedoms and rights of man and citizen can be restricted only in cases determined by the Constitution. According to paragraph 3 of this Article, the restriction of freedoms and rights cannot discriminate on grounds of gender, race, colour of skin, language, religion, national or social origin, property or social status.

Starting from the constitutional provisions in Articles 34, 35 and 39 of the Constitution, as well as from the character of the Republic of Macedonia as a social state aiming to establish social protection and justice, the Republic provides for health care which has its basis in fundamental values of the constitutional order of the Republic of Macedonia – humanity, social justice and solidarity. At the same time, the Constitution determines the right to social insurance and guarantees the right to health care, and leaves further determining of conditions, means and scope of the rights to be regulated by law.

Health insurance, as one segment of the system of social insurance is regulated by the Law on Health Insurance (“Official Gazette of the Republic of Macedonia”, no. 25/2000, 34/2000 – correction, 96/2000, 50/2001, 11/2002, 31/2003, 84/2005, 119/2005– refined text and 37/2006). According to Article 1 of the Law, the object of regulation of the Law is citizens’ health insurance, rights and obligations from health insurance, as well as the means of implementation of health insurance.

Health insurance of citizens, according to Law, is regulated by establishing compulsory and voluntary health insurance.

In Article 2 of the Law, compulsory health insurance is established for all citizens of the Republic of Macedonia in order to provide health services and monetary compensations on the basis of comprehensiveness, solidarity, equality, and effective use of resources under the conditions established by this Law, and voluntary health insurance is established to provide health services which are not covered by compulsory health insurance.

In Article 3 of this Law it is determined that compulsory health insurance is conducted by the Health Insurance Fund of Macedonia, while voluntary health insurance may be conducted by insurance companies established 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. According to Article 5, in this law persons specifically listed in the provision are compulsorily insured.

According to Article 8 of the Law, compulsory health insurance of insured persons ensures they have a right to basic health services under conditions defined by this Law, in case of: 1) Illness and injury outside of the workplace, and 2) Injury at workplace and occupational disease.

The basic health services, according to Article 9, are:

- a. In primary health care:
 1. Health services for purposes of determining, monitoring and checking health condition;

2. Undertaking expert medical measures and procedures for improving health conditions, preventing, eliminating and early detecting of the diseases and other health disorders;
 3. Providing emergency medical assistance, including providing 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, support 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 conditions, 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.

Health services not included in compulsory health insurance are enumerated in Article 10 of the Law and these are:

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;
8. Specialist-consultative and hospital health services without doctors' referral;
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 (contested provision);
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 27 paragraph 1 of the Law, the rights from the compulsory health insurance within the scope determined by this law, can be exercised by insured persons on the basis of a health identification card or health insurance card as well as a proof of payment for the contribution for health insurance.

The Law on Health Insurance in Article 37 determines the sources of funding the compulsory health insurance: contributions from salaries and remuneration from the salary of employees, pensions and remunerations from the pension and disability insurance, the income of persons who are self-employed, funds for the unemployed persons, and funds from other persons with an obligation to contribute, additional contribution in case of injury in the workplace and occupational disease, co-funding by insurees, the budget of the Republic, interest and dividend, gifts, legacies and other income.

According to Article 38 of the Law, insurees from Article 5 of this Law pay a compulsory health insurance contribution.

According to Article 73 of the Law, citizens can receive additional insurance for themselves and for the members of their families, as do employers for their employees, as voluntary health insurance in accordance with this law and other health insurance regulations, which covers the expenses for health services not included in the compulsory health insurance.

According to Article 74 of the Law, voluntary health insurance can be established only as an addition for persons for whom compulsory health insurance is already established.

The part of the provisions of the Law pertaining to compensation of damages, in addition to other cases for which the Fund can request a compensation of damages, is detailed in Article 88 paragraph 1, the Fund's right to seek a compensation for damages by a person who caused sickness, injury or death of a beneficiary of compulsory health insurance rights.

According to Article 81 paragraph 2 of the Law, the damage for which the Fund can seek compensation in cases determined by this law includes expenses for health care, the remuneration of salary and other monetary compensation paid with funds from the Fund.

Article 82 of the Law determines that during the establishment of rights to compensation of damages in cases determined by this law, the provisions from the Law on Obligation Relationships will be applied.

6. From analysing the stated provisions of the Constitution and the law it turns out that the rights and obligations from health insurance as well as conditions under which they can be exercised are determined by the Law on Health Insurance. Within compulsory health insurance, the widest circle of citizens is included on different basis, and an option for citizens not included in this insurance to voluntarily contribute to compulsory health insurance is established. Thus, in the Law on Health Insurance, almost every citizen of the Republic of Macedonia is provided with the constitutionally established right to social safety and social insurance, as well as health insurance, as well as the right to health care, which are an expression of the social character of the Republic of Macedonia.

The fundamental content of health insurance is the protection of health i.e. providing health services to the insured persons. The kind and scope of basic health services included in the compulsory health insurance are determined in the stated Article 9 of the Law, with a positive enumeration of health services on all levels of health care.

The basic package of health services provided by compulsory health insurance to the insurees, are used by the insurees in case of illness and injury outside of the workplace as well as in case of injury at the workplace and for occupational diseases. Under the conditions for using the health insurance rights, the Law includes the regular payment of health insurance contributions. An irregular payment of contributions is a cause under which the health insurance rights may be denied. According to Article 52 of the Law, the insurees for whom the Fund determines that health insurance contribution is not regularly being paid or payment is more than 60 days late, the rights of the insured persons from compulsory health insurance are denied, except for the right to emergency medical assistance.

From the provisions of the Law, it turns out that in using the health services of compulsory health insurance, the so called basic health services, the cause of the illness or the injury for which the need for health care arises is irrelevant.

On the other hand, with the contested provision in Article 10, paragraph 1, item 15 of the Law, it is detailed that compulsory health insurance does not cover health services for treatment which is a consequence of conducting a criminal offence or a misdemeanour conducted by the insuree.

While analysing the contested provision, starting first and foremost with its formulation, the issue of meaning and content in the term "treatment" arose before the Court. Namely, if this provision is analysed in the context of the other basis or applications of Article 10 paragraph 1 when health services are not included in compulsory health insurance, it can be concluded that in almost all other provisions the specific health services who's cost is borne by the insuree himself are clearly and precisely defined (aesthetic operations without medical indication, using a higher standard of health services in hospital health care above the established standards, spa and health resort treatment, medical rehabilitation of degenerative diseases, prosthetic, orthopaedic and other devices, support and sanitary instruments and materials, and dental devices not included in compulsory health insurance or made from nonstandard material, general care, accommodation and nourishment in gerontology institution, specialist-consultative and hospital health services without referral

from the chosen doctor and so forth). This isn't the case in the contested provision, in which it is not listed which specific health services are in question, using instead the general term "treatment". Hence, it is not clear to the Court whether the term "treatment" includes the basic health services in Article 9 which are under the scope of compulsory health insurance and which should be available to anyone under the conditions determined by the Law, irrespective of the reason which has caused the need for using health services which are included within basic health care.

Also from the formulation of the provision, is not clear whether it pertains to the treatment of the insuree who committed the criminal offence or misdemeanour, or it pertains to treatment needed for another person as a result of a criminal offence committed by the insuree, or whether it covers both cases.

According to the Court, the provision in Article 10, paragraph 1, item 15 of the Law, is troublesome considering that its objective is to not let the burden of costs for treatment fall on the Fund in cases of treatment of the insuree from consequences of the criminal offence, or misdemeanour that he himself has committed. This, according to the Court, represents a limitation of the right to compulsory health insurance for reasons relating to a person's behaviour, or his guilt for a committed criminal offence, irrespective of whether the person fulfils the conditions stipulated by the law for using the rights from health insurance, or irrespective of the fact that the insuree regularly and neatly fulfils the obligations relating to payment of a contribution, thus placing these persons in an unequal position compared to the rest of the insured persons.

Determining the guilt for a committed criminal offence falls within the competence of a court, the court is the only one to determine the circumstances under which a criminal offence is committed, its consequences, as well as the guilt of the perpetrator and on this basis the court pronounces a sanction stipulated by the law.

According to the Court, the contested provision limits the right to compulsory health insurance. The limiting of the right to health insurance of citizens for committing a criminal offence or a misdemeanour, irrespective of the fact that the person fulfils the conditions stipulated by the law for realization of the right to compulsory health insurance, is disproportionate and places these persons in an unequal position compared to the rest of the insurees.

According to the Court, because of the imprecise formulation the contested provision leaves vast space or discretion for whoever will enforce it (a clerk at the Pension and Disability Insurance Fund) to determine her scope pertaining to the kind of health services which are not included in compulsory health insurance because of a committed criminal offence or a misdemeanour, as well as pertaining to the persons to who it applies (whether to the insuree -perpetrator of a criminal offence or other persons also, insuree who sustained damages from a criminal offence, or misdemeanour done by an insuree), which is a violation of the constitutional principle of the rule of law guaranteed in Article 8 paragraph 1 line 3 of the Constitution.

Due to the stated reasons, the Court determined that the contested provision in Article 10 paragraph 1 item 15 of the Law on Health Insurance is not compliant with the provisions of Article 8 paragraph 1 line 3, Article 9 and Article 34 of the Constitution.

7. On the basis of the above, the Court decided as stated in item 1 of this decision.

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8. This decision was delivered by the following composition of the Court: president of the Court Mahmut Jusufi and judges Trendafil Ivanovski PhD, Vera Markova, Branko Naumoski, Bajram Polozani PhD, Igor Spirovski and Zoran Sulejmanov PhD.

U. no: 60/2006
October 3, 2006
Skopje

PRESIDENT
of the Constitutional Court of the Republic of Macedonia
Mahmut Jusufi