

U. no: 45/2006-0-0

Date: 07/11/2007

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 July 11, 2007, adopted the following

DECISION

Text

1. Article 1 of the Law on amending and supplementing the Law on Health Insurance ("Official Gazette of the Republic of Macedonia", no. 84/2005) is hereby REPEALED.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 upon an initiative submitted by the Ombudsman of the Republic of Macedonia with resolution U.br.45/2006 from May 30, 2007, which instigated proceedings for appraisal of the constitutionality of Article 1 of the Law mentioned in item 1 of this resolution, by well-founded questioning of its accordance with Article 8 paragraph 1 lines 3 and 8, Article 9, Article 35 paragraph 1 and Article 39 of the Constitution of the Republic of Macedonia.

4. The Court established that, according to Article 1 of the Law on amending and supplementing the Law on Health Insurance ("Official Gazette of the Republic of Macedonia", no. 84/2005) in the Law on Health Insurance ("Official Gazette of the Republic of Macedonia" no. 25/2000, 34/2000, 96/2000, 50/2001, 11/2002 and 31/2003) two new paragraphs 2 and 3 are added in Article 9 after paragraph 1, which states:

"The Fund provides to insurees, the basic health services detailed in paragraph 1 of this article in the health care facilities, if they have concluded a contract. If the insuree is using the basic health services in paragraph 1 of this article in a health care facility with which the Fund has not concluded a contract, the costs will be borne by the insuree himself."

5. The Constitution of the Republic of Macedonia in Article 1 paragraph 1 determined that the Republic of Macedonia is a sovereign, independent, democratic and social state.

According to Article 8 paragraph 1 lines 1 and 3 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 paragraph 2, the citizens are equal before the Constitution and the law.

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According to Article 34 of the Constitution, the 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 protection and social security for the 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 each citizen has the right and the duty to protect and promote their own health and the health of others.

According to Article 1 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, 18/2007 and 36/2007) the subject matter of regulation of the Law are citizens' health insurance, rights and obligations from health insurance, as well as the manner of implementation of health insurance.

According to Article 2 paragraph 1 of the Law, compulsory health insurance exists for all citizens of the Republic of Macedonia in order to provide health services and monetary compensations on the principles of comprehensiveness, solidarity, equality, and effective use of resources under the conditions established by this Law, whilst voluntary health insurance under paragraph 2 of the same article of the law is established to provide health services which are not covered by the compulsory health insurance.

According to Article 3 paragraph 1 of the Law, compulsory health insurance is managed by the Health Insurance Fund of Macedonia (hereafter the Fund), founded to this end according to Article 53, the activity that the Fund conducts is of public interest and it exercises public authority determined by this law.

According to Article 4 of the Law, insured persons, as intended by this Law, are the insurees and the members of their family, while Article 5 of the Law enumerates in detail the persons who are compulsorily insured.

According to Article 8 of the Law, compulsory health insurance ensures a right to basic health services for insured persons under conditions determined by this Law, in cases of: Illness and injury outside of the workplace, and in case of injury at the workplace and occupational disease.

According to Article 9 paragraph 1, the basic health services stated in Article 8 of this law are:

- a. In primary health care:
 1. Health services for purposes of determining, monitoring and checking of 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;
 3. Providing emergency medical assistance, including transport with an ambulance vehicle when necessary;

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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 which assist 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
- d. 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, as a buyer of health services, with a general act, closely determines the basic health services stated in paragraph 1 of this article, the manner of exercise of the rights to health services, as well as the standards and norms for implementation of health care, approved by the Minister of Health.

In Article 32 paragraph 1 of the Law it is determined that in using the health services and medicine the insured persons contribute with personal funds, but only up to a maximum of 20% of the average amount of the total incurred expenses of the health service, or the medicine.

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 covers expenses for:

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1. Health services included in the basic package of health services which are provided by the health care facilities to the insured persons;
2. Medicine, supporting medical materials which assist in applying the medicine and sanitation material needed for treatment determined by a general act;
3. Prosthetic, orthopaedic and other devices, supporting and sanitary equipment, and dental devices determined by general act;
4. Monetary compensation;
5. Investment for creating and improving conditions for providing health services to the insured persons;
6. Performing the functions of the Fund;
7. Some of the measures and activities for implementing preventative and other programs in the treatment of certain diseases, as well as for persons with a disability, according to the Law on Health Care; and
8. Other necessities for implementing compulsory health insurance.

Chapter VIII of the Law titled "Relations of the Fund with health care facilities" contains articles 68 through 72.

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.

The Minister of Health gives approval for the general act in 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.

Health insurance as an element of the right to social insurance has in its foundation the constitutional provision of Article 8 paragraph 1 line 8 in the Constitution, which states that humanism, social justice and solidarity are fundamental values of the constitutional order.

In this sense, the responsibility of the Republic for the social security of citizens includes also the normative framing of a system for providing material resources needed to realize that right. According to this, the Republic should, among other things, determine conditions for realization of social rights, determine the sources of resources for providing this right, and create normative prepositions so that all citizens can exercise their right in equal conditions, within the normative acts.

Starting from the analysis of the complete text of the Law on Health Insurance it turns out that with it, the system of health insurance as part of the social insurance is regulated, which should provide a function of receipt and provision of health services within the framework of health care for the insurees, and to this end the Law determines the intertwining rights and duties of health insurance subjects, meaning the insurees, the health care facilities, and the Fund as the organ in charge of implementation of compulsory health insurance.

Furthermore, by analysing the contested provision it turns out that with it is anticipated that the Fund will provide basic health services, only for insurees who receive a health service in health care facilities which have concluded a contract with the Fund, and in the opposite case the insuree himself will bear the costs for using the basic health services determined in Article 9 of the Law. The Court decided that this represents conditioning of the right to health care only in the circumstance of whether a contract exists or not with a certain health care facility, instead of conditioning dependent on whether the health care facility provided a basic health service for which the insured has paid funds which are managed by the Fund.

From this aspect, the constitutionally and legally guaranteed right to health care of the citizens of the Republic of Macedonia is brought into question, as well as the right to freely choose the type of health care facility where they will exercise the right to health insurance.

Especially if we take into consideration the fact that the Health Insurance Fund, in its legal position is an organ conducting activity in the public interest, but it also has the attribute of a buyer of health services in the interest of the insured persons, thus according to the Court it cannot condition the insuree in exercise of the right to health care guaranteed by the Constitution and the law.

Furthermore, on the basis of the constitutional provision in Article 34 of the Constitution which states that the rights of the citizens in this sphere should be regulated by law and collective agreement, the Law on Health Insurance provides for a system of health insurance as a part of social insurance, which should also provide the function of provision and receipt of health

services in the framework of health care of the insurees. In order to provide resources for the functioning of this system, Article 36 of the Law details the co-funding of the insured person, with personal funds, in the cost of the health services and medicine, and that this co-funding is considered income to the Fund.

According to the Court, a system of values in health insurance must not be related to the circumstance of whether the Fund has concluded a contract with a health care facility or not, with the simple reason that the insuree is not a participant in the relationship created that way, and can bear the consequences even less when such contract won't be concluded.

Therefore, the Court is of the opinion that with this concept the insurees are being prevented in exercising one of the basic rights to freely choose a doctor to whom they will place their trust, and from whom they expect correct and above all an expert and competent health care. If contrary, the choice of the insuree will depend mostly on their ability to pay, in which case the principle of equality of the citizens before the Constitution and the laws, stated in Article 9 of the Constitution, is brought into question.

On the basis of the above stated, according to the Court, the contested legal provision in the context of the other provisions of the Law does not allow accomplishment of values determined with the provisions of the Constitution and it infringes the constitutional right and duty of the citizens to preserve and improve their own health, stated in Article 39 of the Constitution.

Considering the above stated, it turns out that the contested provision of the Law is not in accordance with Article 8 paragraph 1 lines 3 and 8, Article 9, Article 35 paragraph 1 and Article 39 of the Constitution.

6. On the basis of the above, the Court decided as 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 Mahmut Jusufi and judges Trendafilvanovski PhD, LiljanaNgilizova-Ristova, Vera Markova, Branko Naumoski, Bajram Polozani PhD, and Zoran Sulejmanov PhD.

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July 11, 2007

Skopje

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