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THE CONCEPT OF OFFENSES IN THE SPHERE OF CONTRACTUAL INSURANCE RELATIONS

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Summary

In the scientific article the concept and signs of offenses in the sphere of contractual insurance relations are analyzed, the conditions that form the composition of a civil offense are researched. Delimitation of non-fulfilment from improper performance of insurance contractual obligations is carried out. Specific features of one of the type of breach of the insurance contractual obligation, as its delay, are determined. Two interrelated factors are established that indicate the materiality of breach of the insurance contract: the materiality of the breach itself and the materiality of the negative consequences of this breach for the creditor.

Key words: insurance contract, offense, non-performance, improper performance, wrongfulness, legal consequences, insurer, insured, conditions of the contract, materiality of the breach.

ПОНЯТИЕ ПРАВОНАРУШЕНИЙ В СФЕРЕ ДОГОВОРНЫХ СТРАХОВЫХ ОТНОШЕНИЙ

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Аннотация

В научной статье анализируются понятие и признаки правонарушений в сфере договорных страховых отношений, исследуются условия, которые образуют состав гражданского правонарушения. Осуществляется отграничение невыполнения от ненадлежащего исполнения договорных обязательств по страхованию. Характеризуются особенности такого вида нарушения договорного обязательства по страхованию, как его просрочка. Устанавливаются два взаимосвязанных фактора, которые указывают на существенность нарушения договора страхования: существенность самого нарушения и существенность негативных последствий этого нарушения для кредитора.

Ключевые слова: договор страхования, правонарушение, неисполнение, ненадлежащее исполнение, противоправность, правовые последствия, страховщик, страхователь, условия договора, существенность нарушения.

Introduction. The dynamic nature of contractual relations in insurance determines the fulfilment, change and termination of the obligation. Insurance – is the providing of property interests of individuals and legal entities in the event of the occurrence of certain events (insured events), that is, a certain set of actions, a process that includes an object and a subject, which are the subject of performance of the obligation in their totality [1, p. 10].

The Civil Code of Ukraine (hereinafter – CC of Ukraine) [2] provides that the contract is binding for the parties (Article 629). At the same time, Article 651 of CC of Ukraine provides the grounds for changing or terminating of the contract, Article 622 of CC of Ukraine provided an opportunity for the parties to specify in the contract whether the performance of the contract would be binding if it was breached by one of the parties, and Article 615 of CC of Ukraine introduced an important provision that in the event of a breach of the obligation by one of the parties, the other party has the right, in part or in full, to refuse to perform the obligation.

It is known that the fulfilment of contractual obligations is subject to certain general requirements, according to which the legal regulation of the process of exercising subjective rights and fulfilling duties of the parties in legal relationships is being built. That is why, among the principles of fulfilling obligations in the legal literature, it is customary to include: a) proper implementation; b) inadmissibility of unilateral refusal to fulfil the obligation; c) real implementation; d) economy of implementation; e) reasonableness and conscientiousness [3, p. 99]. So, in accordance with Article 526 CC of Ukraine and Part 1 of Article 193 of the Economic Code of Ukraine (hereinafter – EC of Ukraine) [4] the obligation must be properly performed in accordance with the conditions of the contract and the requirements of normative legal acts, and in the absence of such conditions and requirements – in accordance with the customs of business turnover or other requirements that usually treat. Conditions of the insurance contract fulfil the role of the source of the emergence of subjective rights and duties similar to the rules of law. Therefore, breach of conditions of the contract in the aspect of non-fulfilment or improper fulfilment of its conditions leads to the imposition of civil liability on the guilty party.

Literature review. The theoretical basis of the research is the work of such domestic and foreign scientists as Alekseev S.S., Belov V.A., Bobrova D.V., Braginskyy M.I., Vasyleva V.A., Vinnyk O.M., Vitryanskyy V.V., Grybanov O.V., Dzera O.V., Kanzafarova I.S., Krasavchykov O.O., Kuznetsova N.S., Kulyna Yu. A., Kulchiy O.O., Lutts V.V., Maydanyk R.A., Matveev G.K., Nykyforak V.M., Patsuriya N.B., Pendyaga G.L., Sobotnyka R.V., Spasibo-Fateeva I.V., Sidil'ov M.M., Suhanov E.O., Tolstoy Yu.K., Fursa S.Ya., Kharytonov E.O., Shevchenko Ya.M., Shyshka R.B. and other scientists.

The purpose of the article is defined the concept and signs of offenses in the sphere of contractual insurance relations, and the characteristic of the conditions that form the composition of a civil offense.

Main body of the article. Breach of the insurance contract is a negative reflection of the existence of insurance relations and can not be regarded as an ordinary stage of its development. Breach of the insurance contract is the complete opposite of its proper execution, since it characterizes atypical behavior of the parties and means such a state of legal relationship when one, and sometimes both of its parties do not comply with the prescriptions of the agreement reached or legally established rules.

The Legislator in Article 610 of CC of Ukraine determines the breach of the obligation through an indication on its types (non-fulfillment or performance in breach of the conditions defined by the content of the obligation (improper performance)), without determining its essence. In turn, in the civil doctrine there are various approaches to understanding civil offense. So, a civil offense is understood as action or inaction of a person that contradicts the current legislation and is united by one term «unlawful behavior» [5, p. 710]. G. F. Shershenevich noted that a civil offense is, first of all, an impermissible act, that is, an action prohibited by objective law. Therefore, any action that is only the exercise of a subjective right, which does not go beyond the limits determined by law, is not an offense [6, p. 392].

Speaking about offenses in the sphere of contractual insurance relations, it should be noted that they are the legal facts that give rise to the legal relationship between the offender and the victim (clause 4, Part 2 of Article 11 of CC of Ukraine), and they form certain claims of the victim to the offender for compensation of damage, caused by his unlawful actions. Accordingly, a breach of the insurance obligation provides for a defect of the fulfillment in the commission of actions by obligated party (or refraining from committing them) from the rules provided for by acts of civil law and/or concretized in the relevant insurance contract, according to which the contractual obligation must be fulfilled.

The actual ground of occurrence of civil liability is the existence of a set of conditions, which form the composition of a civil offense. Thus, in the opinion of G. K. Matveev, the composition of a civil offense is a combination of certain features, which characterize it as a sufficient basis for the onset of liability [7, p. 21]. The author singled out the following elements of a civil offense: a wrongful action (inaction) of a person, a harmful result of this action (inaction) and a causal link between action (inaction) and a damage – as objective elements of the composition and also a fault of the offender, as a subjective element of the composition [7, p. 22].

In modern civil doctrine, the approach to the notion of breach of obligation as an objective category is disseminated [8, p. 185]. This approach is rather interesting with respect to offenses in the insurance sphere, since it is hardly advisable to introduce to the notion of breach such factors as the subjective side, the negative consequences of the breach and the causal connection, since the very fact of the contradiction of the debtor's behavior to conditions of the insurance contract and the lack of proper execution is sufficient, to ascertain the breach of contractual conditions. In addition, this is due to the presence of other means of protection, the possibility of using which is not directly dependent on the debtor's fault [9, p. 199].

Unlawful is debtor’s behavior in the insurance obligation, which does not meet the requirements for its proper execution. Accordingly, the requirements, which imposed for a party who does not fulfill or improperly fulfills the conditions of the insurance contract, are contained not only in CC of Ukraine, EC of Ukraine, other special regulations, customs of business turnover or other requirements that are usually imposed, but also in the most grounds for the occurrence of obligations (conditions of the insurance contract). That is, any non-performance or improper performance of the conditions of the insurance contract is an offense.

In insurance contracts, it is advisable to support the positions of those researchers who impose on the objective nature of the unlawful breach of the insurance obligation. Therefore, it is advisable to recognize unlawful actions (inaction) of participants in insurance relations, which breach the rights and duties of the counterparty, fixed primarily in the insurance contract, in the provisions of Chapter 67 of CC of Ukraine or in the insurance rules. As for the breach of the moral principles of society, then, as is rightly noted in the literature, an action (inaction) that breaches moral norms can be recognized as unlawful only when the law provides a legal nature to specific moral rules [10, p. 491].

Thus, features of offenses in the sphere of contractual insurance relations are: a) action or inaction by the participant of insurance relations, which is manifested in the non-performance or improper performance of the obligation; b) the non-performance or improper performance of direct duties that constitute the content of the insurance obligation; c) breach of requirements of CC of Ukraine, EC of Ukraine, other special normative legal acts, customs of business turnover, conditions of insurance contracts (wrongfulness); d) breach of the subjective civil right of the counterparty and/or other persons (for example, beneficiaries), that is displayed in non-performance actions by the debtor or in performance actions, from which he could refrain under the contract.

Article 610 of CC of Ukraine identifies two types of breach of contractual obligation: non-performance and performance with a breach of the conditions, defined by the obligation’s content. We note that such a brief exposition of the definition almost always leads to wrong its understanding. Thus, analyzing the insurance legislation on this matter, we come to the conclusion that the terms «non-performance» and «improper performance» are used mainly with elements of formality, because they are used to indicate the legal fact of breach the contractual obligation by the relevant actors. In our opinion, for the criteria of delimitation and avoidance of confusion between such similar, at first glance, concepts, it should listen to V.V. Luts’s opinion, who notes that for proper delimitation between them, one must proceed from the nature of a breach of obligation, namely: in non-fulfillment of contractual obligations, there are no signs of its fulfillment, or there is none at all; and if improperly executed, the obligation is fulfilled, but with a breach of the requirements imposed on it (conditions regarding the place, time, subject, etc.) [11, p. 85].

Improper performance, in the T. V. Bodnar's opinion, is observed if the debtor has committed certain actions aimed at fulfilling the obligation, but these actions do not correspond to those parameters (standards) that are established by the conditions of the contract or the requirements of normative legal acts regarding each element of performance of the obligation (that is, these actions were committed with breach of the conditions regarding the subject and method of performance, the subject composition, place, time of performance) [12, p. 242].

Thus, breach of insurance contracts, as a general category, covers such concepts as non-performance and improper performance of the obligation. Non-performance of insurance obligations is observed when the parties do not do the proper actions at all or do not refrain from committing certain actions to a certain date. Since the participants of the insurance obligation are always clearly defined, it's the offender in most cases is one of its parties (the insurer or the insured). Also, the third person who entered into legal relations (the insured person, the beneficiary) may also be an offender in insurance obligations, but it should be noted that such a third person can be an offender only in the event that the performance of conditions of the insurance contract, is entrusted to him.

On the basis of this, under the breach of insurance contractual conditions should be understood the deviations of the insurer or the insured (and in some cases, a third person, who is entrusted with the performance of a reinsurance obligation) when committing actions (or refraining from committing them) from the rules, according to which the insurance contractual obligation must be fulfilled, that is, from the conditions of performance for any of the elements of proper performance of the contractual obligation.

In the legal literature, a delay is most common type of breach of the contractual obligation, which is provided for in Article 612, 613 of CC of Ukraine, Article 220, 221 of EC of Ukraine, but the definition of this concept can only be found in the doctrine of law, under which is understood the failure to fulfil the obligation within an agreed time [13, p. 6].

According to Part 1 and 4 of Article 612 of CC of Ukraine and Part 3 of Article 220 of EC of Ukraine, the debtor is deemed delayed if he has not started performing the obligation or has not performed it within the period, established by the contract or law. Delay of the debtor does not occur if the obligation can not be performed due to the delay of the creditor.

The creditor is considered such who overdue the performance of the obligation if he refused to accept the proper performance, proposed by the debtor, or did not perform the actions, established by the contract, acts of civil law or customs of business turnover, before performance which the debtor could not fulfil him duty. In addition, according to Part 4 of Article 545 of CC of Ukraine, the creditor is considered such who overdue of obligation in case of refusal to return the debt document or issue a receipt. So, if, in the event of an insured event, the insurer informs the insured within a period set by the contract, and the latter did not take steps to complete all necessary documents for the timely implementation of the insurance payment to the insured, the delay should be considered such that it was due to the fault of the creditor. The insured, in turn, may delay the provision to the insurer of information about any changes of insurance risk.

Therefore, taking into account the above, we note that in the insurance contract, in case of failure to take timely measures for the insurance payment by the insurer, the insured has the right to delay the fulfilment of his obligation, and the delay of such an obligation will be deemed to have occurred through no fault of the debtor-insured, but through fault of the creditor-insurer. In this case, the civil liability for improper performance of conditions of the insurance contract will be entrusted in the lender.

Today, by virtue of the current legislation, in dispositive order, the parties are given the right, at their discretion, to set a time limit for notification of the insurance event, noting this in the insurance contract. Non-performance their contractual obligations within the time, specified in the insurance contract, are certainly considered as its breach on the ground of the delay of obligations.

In the legal literature on this subject, there are different opinions. So, M. K. Suleimenov notes that the delay of contractual obligations additionally gives grounds to unite all cases of non-performance or improper performance by the creditor of his duties. In the scientist's opinion, the delay of the creditor is a more complicated concept than the delay of the debtor, because it is not so closely associated with the period, and in some cases, may not correspond to the meaning of the term «delay». It includes, along with untimely performance, also the non-performance and improper performance of duties by the creditor, which leads to an untimely performance of the obligation by the debtor [14, p. 21].

V. V. Lutz occupies a different position on this issue. The scientist notes that in case of breach of obligations under the contract's conditions, the legislator, emphasizing on delay, clearly underlines the connection between the breach of the duty and the time-bound moment for its proper execution. Outside this connection, without taking into account the term of performance of the duty, it is inappropriate to talk about the delay [11, p. 145]. Supporting the scientist's position, we note, in the subject of this research, an indication on the time for the fulfilment of obligation as a creditor and a debtor, in case of insured event, should be placed among the contract's conditions. Thus, in particular, the insurer is deemed to have defaulted the obligation if he did not accept the proper performance offered by the insured at the agreed time, or did not commit actions, before the commission of which the insured could not fulfil his duty.

If the insured has delayed making an insurance payment and did not pay it within ten working days after the insurer submits a written request for payment of the insurance premium, the insurer may refuse the insurance contract, unless otherwise provided by the contract (Article 997 of CC of Ukraine). It should be noted that in accordance with Part 3 of Article 612 of CC of Ukraine, if the creditor lost interest in the contractual conditions, due to delay in performance of the obligation, he may refuse to accept performance and claim damages.

If the debtor delays to fulfil its monetary obligation, takes place illegal to use someone else's money, because the debtor does not transfer funds to the creditor in payment for the debt, assigned to him, so these funds are for him « alien», which means that the percentage of the overdue amount (at a rate of three percent per annum or another amount, established

by the contract or law) is a type of penalty as a measure of civil liability [12, p. 146]. In our opinion, a peculiarity of the debtor's responsibility for breach of the monetary obligation under the insurance contract (in contrast to the general rule of civil liability that occurs when there is fault) is that such liability can occur even if the payer is innocent. After all, the debtor's reference to the lack of money does not relieve him from responsibility for the delay of the monetary obligation, and, in turn, entails unprofitable legal consequences, in particular the cancellation of the insurance contract.

In the sphere of contractual insurance relations can take place also a significant breach of conditions of the contract by the other party that is one of the grounds for changing or terminating of the insurance contract. The category of a significant breach of the contract is formulated in the CC of Ukraine in general form without detailing – a breach of the contract by one party is considered a significant, when, due to the damage caused by this, the second party is largely deprived of what she expected at the conclusion of the contract.

According to Part 2 of Article 651 CC of Ukraine, a significant breach is the ground for applying to the court with a demand for cancellation of the contract, that is, the issue of the signification of breach of the insurance contract's conditions is referred to the discretion of the court. Unlike Ukrainian legislation, the general trend of Western European contract law is the establishment of additional circumstances that should be considered into account when qualifying a breach of the contract as significant. Thus, in the Principles of European Contract Law, when determining the materiality of breach, the following is taken into account: the fundamental importance of a clear performance of contract's conditions that emerges from the contract text; the question of whether the infringement essentially deprives the creditor of what he expected, except in cases where the debtor did not foresee and could not foresee such a result; or the question of whether the breach is intentional and whether it gives to the creditor grounds for not believing in the debtor's continued performance [15].

According to the UNIDROIT Principles (Article 7.3.1), the following is taken into account in determining the signification: first, whether the creditor 's significant breach deprives him of what he expected at the conclusion of the contract, unless the debtor foresaw and could reasonably foresee such a result; secondly, whether the compliance of the contract in this case is of a principled nature; thirdly, whether the breach is intentional or committed by gross negligence; fourth, whether does the breach give the creditor grounds for not believing in further implementation; fifthly, whether the debtor will incur irrelevant losses in the event of cancellation [16].

Analysis of the definition of a significant breach, enshrined in Part 2 of Article 651 CC of Ukraine indicates that the legislator as a ground for termination of the contract provides not only the fact of breach of the contract's conditions by the other party, but also the presence of damage caused by this breach by the other party. Indeed, a breach of a contractual obligation should result in causing damage. However, it should be borne in mind that the damage may already have been caused or conditions may arise for possible of causing damage to the other party.

By itself, a significant amount of damage does not yet give the right to recognize such a breach as essential. So, in the case of a car accident, the same damage to different car brands provides different amounts of losses, however, the materiality of a breach, depending on the amount of losses, does not change. In order to compensate for such damage, it is sufficient to apply measures of property liability that are imposed on the offender. In determining whether a violation is material, the court must find out «there is indeed a substantial difference between what the party was entitled to expect when concluding the contract and what it actually could receive» [5, p. 210]. On the whole, the position of those authors who believe that the seriousness of the breach should be determined not by damage, but by its relation to what the party could expect from the performance, is fair [17, p. 4].

Thus, in assessing the materiality of a breach of the insurance contract, two interrelated factors must be taken into account. First, it is necessary to highlight the factor of materiality of the breach itself, which indicates how seriously the contractual obligations were breached. Secondly, one should take into account the factor of the materiality of the negative consequences of this breach for the creditor (the presence of damage, the inability to achieve a certain result, the loss of interest in the performance of the contract, etc.). Only considering both factors, it is possible to talk about the materiality of the breach and the permissibility of termination the insurance contract.

One of the criteria, proposed by the UNIDROIT Principles (whether a breach of the contract is intentional or this is the result of gross negligence) indicates the need to determine the form of the party's fault, which violated the contract. That is, for a significant breach of the insurance contract, its intentional non-performance may have some significance [16].

Based on the interpretation of Part 2 of Article 651 CC of Ukraine, in the Ukrainian legislation the fault of the offender in committing the breach does not affect the occurrence of grounds for termination of contractual obligations in this way. The fact of presence or absence of a fault can not influence the usefulness of conservation the contract. The creditor has the right to terminate the contract, even if the debtor is not fault of breach, in order to avoid further losses. However, it should be borne in mind that the intention to break the contract can be taken into account when the party's wilful or negligent conduct of a party creates uncertainty in the future of its proper execution. Thus, this criterion plays the role of an optional one and should be taken into account only in certain cases.

Conclusions. Summing up, we can formulate the following conclusions.

1. The insurance contractual obligation is carried by executing by the parties (the insurer and the policyholder) properly a complex of duties, assigned to them by law and by the contract.

2. Under the breach of insurance contractual conditions should be understood the deviations of the insurer or the insured (and in some cases, a third person, who is entrusted with the performance of a reinsurance obligation) when committing actions (or refraining from committing them) from the rules, according to which the insurance contractual obligation must be fulfilled, that is, from the conditions of performance for any of the elements of

proper performance of the contractual obligation. Breach of conditions of the insurance contract in the aspect of non-performance or improper performance of its conditions leads to the imposition of civil liability on the guilty party.

3. In assessing the materiality of a breach of the insurance contract, two interrelated factors must be taken into account. First, it is necessary to highlight the factor of materiality of the breach itself, which indicates how seriously the contractual obligations were breached. Secondly, one should take into account the factor of the materiality of the negative consequences of this breach for the creditor (the presence of damage, the inability to achieve a certain result, the loss of interest in the performance of the contract, etc.).

4. Among the conditions of the insurance contract, it is advisable to fix an indication that the insurer is deemed to have defaulted the obligation if he did not accept the proper performance offered by the insured at the agreed time, or did not commit actions, before the commission of which the insured could not fulfil his duty.

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