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EXTINCTIVE PRESCRIPTION IN THE MATTER OF THE INSURANCE CONTRACT IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract
The new Civil Code in force since 1 October 2011 introduces novelty provisions both in the field of extinctive prescription and in the matter of the insurance contract. This article deals specifically with the aspects of the insurance contract relating to the prescriptive nature of the rights resulting from the insurance relationships, prescription term applicable to the matter, the particularities of the prescription course.

Keywords: *Private Law, Insurance Law*

De lege lata, the regulation of extinctive prescription is contained in the provisions of the Civil Code (Law 287/2009 in force since 1 October 2011), Book VI, Title I, Art. 2500-2538, which replaces the previous stipulations in the matter of Decree 167/1958 on Extinctive Prescription.

The extinctive prescription consists in extinguishing the material right to action by not exercising it within the time limit set by the law.

The insurance contract is a contract whereby one of the parties - the insurance contractor or the insured - undertakes to pay a premium to the other party - the insurer - in return for which the last one undertakes to pay an indemnity, in case of the insured risk, to the insured or to a third party, beneficiary or injured.

The insurance contract is a named contract, regulated mainly by art. 2199-2241 Civil Code in Chapter XVI of Title IX - *Various Special Contracts* - of the Book of the 5th - *About Obligations*, which contains common provisions to all categories of insurance contracts as well as provisions regarding the different categories of more common insurances, respectively insurance of goods, credit, collateral and financial loss, civil liability insurance, insurance of persons as well as provisions on co-insurance, reinsurance and retrocession. Particular provisions are found in the legislation on compulsory insurances (when the insurance contract is binding), respectively in Law 132/2017 on the compulsory insurance against civil liability for the damage to third parties caused by vehicle and tram accidents (RCA), Law 260/2008 on compulsory home insurance against earthquakes, landslides and floods (PAD), etc.

In the matter of insurance contract, by *right to action* is understood, from the perspective of the insurer, the right to pursue the collection of insurance premiums as well as the right to regress if it subrogates to the rights of its insured person and, from the perspective of the insured or the beneficiary or the third injured party, the right to action is the right to pursue the receipt of the indemnity or compensation.

All these debt rights arising from insurance, having a patrimonial object, are subject to extinctive prescription, with the only exception provided for by law in Art. 2237 Civil Code concerning the policyholders' right to technical provisions in the case of life insurance for future payables that are imprescriptible[1]. The right to technical reserves arises in the situation when the insured denounces the insurance contract and requests the restitution of the established reserve. This legal provision is also contained in the previous regulation[2] and represents a true exception to the principle of the prescription of debt rights.

However, those actions that seek to establish the absolute nullity of the insurance contract as well as those actions in the determination of the existence or non-existence of a right born out of the insurance relationships remain imprescriptible under the conditions of Art. 2502 Cod Civil[3]. In the field of insurance, the absolute nullity of the contract can be invoked in those cases where, at the conclusion of the legal act, the elements related to the nature and essence of the insurance are not observed: the risk ensured that it is impossible to achieve / produced / undetermined, the hazard element (*alea*) is not configured, lack of interest in the insured asset, etc. Regarding the risk, we mention that when it appears later, during the execution of the contract, impossible to achieve, the sanction that may intervene will not be the nullity, but the termination of the contract.

On the other hand, the insurance contract being a contract with a professional (the insurer) may also be incident those grounds for nullity arising from the found abusive clauses in the sense of Law 193/2000 on unfair terms in contracts concluded between professionals and consumers.

At the same time, we have a specific case of express nullity in the matter of the insurance contract which is found in the case of the inaccurate or reluctant statement made in bad faith by the insured or the insurance contractor about the

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[1] Article 2237 Civil Code - Prescriptions

The policyholders' rights to the amounts resulting from the technical reserves for life assurance for future payment obligations are not subject to prescription.

[2] Article 40 of Law 136/1995 on Insurance and Reinsurance in Romania

[3] Art. 2502 Civil Code- Imprescriptibility of the right to action. Cases

(1) The right to action is imprescriptible in the cases provided for by law, and whenever, by nature or object of the subjective right protected, its exercise cannot be limited in time.

(2) Except as provided in paragraph (1), the rights are imprescriptible in respect of:

1 ...

2. action to establish the existence or non-existence of a right;

3. the act of finding the absolute nullity of a legal act;

4....

circumstances which, if known by the insurer, would have determined not to give the consent or not to give it in the same conditions, regardless of their influence on the occurrence of the insured risk[4]. Thus, the finding of bad faith in these circumstances is not subject to any limitation period.

The material right to action on the debt rights of accessories that may arise from insurance relationships, namely contractual/statutory or legal interest, expires with the right to action on the principal right.

In the current regulation, the prescription does not operate *de iure*[5], and the competent jurisdiction body cannot apply the prescription *ex officio*[6]. As the previous regulation (Decree 167/1958 on extinctive prescription) had a diametrically opposed approach - the court may invoke the exception of the limitation period of its own motion - at present, the party having an interest in invoking it has to take due care by invoking it under the procedural conditions prescribed by the Civil Code[7].

In the field of insurance, we have a special 2-year limitation period, derogating from the 3-year general limitation period, applicable to the right of action based on an insurance or reinsurance report[8], which was also stipulated in the old art. 3 al. 2 of Decree no. 167/1958. With regard to this special limitation period, we emphasize that this is an imperative term on which the parties to the insurance contract cannot derogate, in the sense that they cannot increase or decrease it or modify the way this period runs (the prescription course) in the sense that they cannot fix another moment of beginning of the term than that prescribed by the law nor modify the causes of suspension or interruption of prescription, any clause in this regard being affected by absolute express nullity[9].

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[4] See Art. 2204 Civil Code: Inaccurate statements or risk reluctance

[5] Art. 2506 Civil Code: The effects of prescription fulfilled

(1) The prescription does not operate fully.

[6] Art. 2512 Civil Code: Invoking the prescription by the interested party

(1) The prescription may be opposed only by the person for whom it flows, either personally or through a representative, and without having to produce any contrary title or be in good faith.

2. The competent jurisdiction body may not impose the limitation period of its own motion.

3. The provisions of this Article shall apply even if the invocation of the limitation period would be in the interest of the State or its administrative-territorial units.

[7] Article 2513 Civil Code: The time at which the prescription can be invoked

The prescription may be opposed only in the first instance, by way of a pleading, or, failing that, at the latest at the earliest possible period of time to which the parties are legally cited.

[8] See Art. 2519 Civil Code. 2-year limitation period

[9] Art. 2515 Civil Code: Extinctive prescription rules

(1) Extinctive prescription is regulated by law.

(2) Any clause by which either a direct or indirect action would be declared imprecise, although it is prescriptive according to the law, or vice versa, an action declared by an imprecise law would be considered prescriptive.

(3) However, within the limits and under the conditions laid down by law, parties with full exercise capacity may, by express agreement, modify the length of limitation periods or alter the

We highlight that the special 2-year limitation term applies only to contractual legal relationships, respectively between the insured/contractor and the insurer, whether we are in the presence of a voluntary or compulsory insurance contract. We consider that this term also applies to the relationships created with the beneficiary of the insurance who, although not a party to the contract, acquires the right to indemnity directly from the contract concluded between the insured and the insurer, unlike the injured third party whose right to compensation derives from the unlawful action of the insured person. As regards the injured third party, being outside the contractual insurance relationships, the 3-year general limitation period applicable to the debt rights will be the case. The same solution is also required in the case of the insurer's regress against the person responsible for causing the damage or his RCA insurer or in the situation of the insured against the third party guilty of damages in addition to the indemnity received when the amount insured was less than the value of the damage. In the latter cases, we are in the presence of non-contractual juridical relations, based on civil liability for damages, which attract the incidence of the general limitation period, in the absence of any other special provisions.

Regarding prescription course, in the field of insurance, prescription begins to run from the expiry of the statutory terms or set by the parties for the payment of the insurance premium, or for the payment of the indemnity or, as the case may be, for the compensation owed by the insurer[10].

The expiration of the terms - as the starting point of the prescription course - although it is regulated as a particular case of the starting point of the prescription, is merely an application of the general rule in fulfilling the obligations *to give* and *to do* affected by a term when the limitation period starts to run from the date when the obligation became due or when the deadline was reached. However, fixing this moment is a novelty in the matter, until the entry into force of the New Civil Code, the beginning of the prescription course was generally considered to be the date of producing the insured risk[11].

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limitation period by setting the beginning of the limitation period or by modifying the legal grounds for suspension or its interruption, as the case may be.

(4) The limitation periods may be reduced or increased, by express agreement of the parties, but without their new duration being less than one year and not more than 10 years, with the exception of the prescription periods of 10 years or more long, which can be extended up to 20 years.

(5) The provisions of paragraph Paragraphs 3 and 4 shall not apply to rights of action which the parties may not have, nor to shares deriving from the adhesion, insurance and consumer protection legislation.

(6) Any convention or clause contrary to the provisions of this Article shall be punished by absolute nullity

[10] See Art. 2527 Civil Code

[11] M.Tăbăraş, M.Constantin, Insurance and Reinsurance Legislation in Romania, Remarks and Explanations, p.105

In the case of successive benefits, such as insurance premiums payable in tranches, we appreciate that, in relation to art. 2526 final sentence Civil Code, the right to action begins to run from the date on which the last benefit becomes due, given the unique nature of the insurance premium. If the payment of the insurance premium is not made on time, the insurer may either pursue the receipt of the premium or request the termination of the contract in order not to take responsibility for it.

With regard to the insurer's regression against the person causing the damage or against his RCA insurer, the limitation period will begin to run from the date of payment of the indemnity to his own insured, this being the moment of subrogation in the rights of his insured, the moment of the material right to action, till then being blocked from acting - *contra non valentem agere non currit prescriptio*[12].

Regarding *the suspension*[13] of the prescription course in the field of insurance, given the specificity of the long-term "orchestration" of the settlement of the claims files, we consider that the case of suspending the prescription may be common in the case of the negotiations conducted for the amicable settlement of the misunderstandings of the parties but only if they have been held in the last 6 months before the expiry of the limitation period.

Cases of *interruption of prescription* are expressly provided for by law[14] and can also be found in the case of insurance.

It is worth mentioning that the present regulation expressly introduces the interruption caused by the existence of a criminal trial. Thus, the prescription course is interrupted by being constituted in the criminal proceedings as a civil party until the commencement of the judicial investigation, and if the compensation is granted *ex officio*, regardless of whether there is constitution as a civil party concerned. This regulation put an end to the unfair judicial practice created by those courts which sanctioned a state of fact imputable to any party by imposing the prescription of the right to a right of regress/the right to compensation.

Finally, the parties to the contract may give up the prescription, expressly and tacitly, but through unambiguous manifestations in this respect, but only after the prescription has started to run. Upon this, a new prescription will run, according to the provisions on interruption of prescription by the recognition of the law.

The person who, for good reason, has not exercised the right to an action subject to prescription within the time limit, may request the competent jurisdiction body to restrict the limitation period and to hear the case.

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[12] Latin adage which translates as follows: against the impeded to act, the prescription does not flow

[13] See Art 2532 Civil Code: General cases of prescription suspension

[14] See Art 2537 Civil Code: Cases of interruption of prescription