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LIABILITY FOR DAMAGE CAUSED BY PERFORMANCE OF DUTIES ESTABLISHED BY THE INSURANCE LAW

SCIENTIFIC CRITIC

Abstract

The Insurance Law entered into effect on 26th December 2014, but the greatest number of its provisions started to be implemented on 27th June 2015. One of specific details of that law were provisions of Article 217 of the Insurance Law. These provisions regulate relief that persons who performed duties defined by the Insurance Law were relieved from liability for damage. The paper provides general and special characteristics of provisions of Article 217 of the Insurance Law. Article 217 of the Insurance Law was identical to Article 86b of the Law on the National Bank of Serbia when the Insurance Law entered into effect. Decision of the Constitutional Court of the Republic of Serbia stipulated that provisions of Article 86b of the Law on the National Bank of Serbia were not in compliance with the Constitution of the Republic of Serbia, so the author proposed in his conclusions to omit Article 217 of the Insurance Law from that law by a novel.

Key words: *the Insurance Law; the Law on the National Bank of Serbia; supervision of insurance activities; relief from liability for damage caused while performing duties defined by the law.*

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Introductory Notes

The Insurance Law² came into effect on 26th December 2014. It started to be implemented six months after its effective date, i.e. from 27th June 2015. Out of total of 281 Articles, the greatest number of provisions of this law started to be implemented on 27th June 2015, and especially certain provisions of the Insurance Law shall be implemented from the day of accession of the Republic of Serbia to the World Trade Organisation, i.e. from the day of accession of the Republic of Serbia to the European Union. Previous Insurance Law³ ceased to be effective from the effective date of the new Insurance Law, except that several of its provisions continued to be legally valid. Apart from the Insurance Law, supervision of insurance companies is regulated by the Law on the National Bank of Serbia⁴, therefore, the Insurance Law and the Law on the National Bank of Serbia are the most important legal sources for supervision of insurance activities. The Insurance Law, as well as previous Insurance Law from 2004, regulated status issues of insurance companies, and especially supervision of such companies. Specifically, the subject matter of this paper shall be provisions on liability for damage caused by performance of duties established by the Insurance Law. These provisions are contained in Article 217 of the Insurance Law.

1. General Characteristics of Provisions on Liability for Damage Caused by Performance of Duties Established by the Insurance Law

1) *Provisions on liability for damage caused by performance of duties established by the Insurance Law are in Chapter X of the Insurance Law.* That Chapter contains totally 33 Articles and its title is – Insurance supervision. The Chapter X contains three Sections. The first Section closely regulates supervision of insurance activities (Article 187- 196). The second Section deals with numerous measures that can be ordered to the insurance company (Article 197-217), provided that the last Article of that Section, i.e. Article 217 of the Insurance Law regulates directly liability of persons authorised to perform supervision of insurance activities. Finally, the third Section of this chapter combined provisions

² *The Official Gazette of the Republic of Serbia*, No. 139/2014 (hereinafter referred to as the Insurance Law).

³ *The Official Gazette of the Republic of Serbia*, No. 55/2004, 70/2004-correction, 61/2005, 61/2005-state law, 82/2005- state law, 101/2007, 63/2009-Decision of the Constitutional Court, 107/2009, 99/2011, 119/2012 and 116/2013 (hereinafter referred to as the Law from 2004).

⁴ *The Official Gazette of the Republic of Serbia*, No. 72/2003, 55/2004, 44/2010, 76/2012, 106/ 2012 and 40/2015- Decision of the Constitutional Court (hereinafter referred to as the Law on National Bank of Serbia)

on additional supervision of insurance activities (Article 218-219). Therefore, 32 Articles in Chapter X of the Insurance Law addressed supervision and supervision measures of insurance activities, where such entities were objects of supervision, and only Article 217 of the Insurance Law referred to persons that directly supervised those entities. The interest to separately consider Article 217 of the Insurance Law arose from that legal fact.

2) *One legislative and legal controversy is attached to Article 217 of the Insurance Law.* The controversy lies in the fact that heading above that article refers to a subject – liability – and the contents of provisions in that article undoubtedly refer to – non-existence of liability or relief of liability. That means that the heading above article announced provisions on civic liability and the contents of provisions from that article undoubtedly showed that it was not a civic liability but relief of liability for damage caused by performance of duties established by the Insurance Law. Therefore, legislative and legal controversy attached to Article 217 of the Insurance Law is so obvious that one do not require legal education to notice it.

3) *Official explanation of the Proposal of the Insurance Law⁵ failed to address reasons used by the legislator when introducing provisions for relief of liability for damage caused by performance of duties established by the Insurance Law.* Laws of systemic character often regulate issues of liability of entities, which are authorised or responsible for implementation of the said law, and these laws contain explanation where adequate attention is given to norms used for regulation of liability for implementation of the said law. The Insurance Law is a systemic law in insurance so it was reasonably expected that the explanation contained reasons or grounds for the legislator to introduce provisions on relief of liability caused by damage. Instead of these reasons, the official explanation referred to the other Section in a completely different context. In the Official Explanation it is highlighted that the second Section of the Chapter X contains increased number of supervision measures compared to the previous Insurance Law from 2004. These are supervision measures that, the National Bank of Serbia (hereinafter referred to as the NBS), as a supervisory body, can order to any entity operating in insurance. Therefore, instead of stating reasons for introduction of provisions of Article 217 of the Insurance Law, the Official Explanation focused on a completely different topic.

⁵ Decree of the Governor of the National Bank of Serbia KG No. 4935/1/14 as of 3rd December 2014 entitled to the president of the National Assembly of the Republic of Serbia, where it was registered under 01 No. 400-4390/14 as of 5th December 2014, Proposal of the Insurance Law and Proposal of the Law on Amendments and Additions to the Law on the Protection of Financial Services Consumers, Proposal of amendments to the Law on Foreign Exchange Operations and Proposal of amendments to the Law on Prevention of Money Laundering and the Financing of Terrorism were submitted for consideration and adoption (hereinafter referred to as the Official Explanation).

4) *Article 217 of the Insurance Law and increased number of supervision measures tackled the issue of legal nature of supervision measures that the NBS can order, and especially the issue of legal nature of fines.* Increase of the number of supervision measures as well as increase of general social attention to the administrative supervision, presents an important and actual social occurrence in Serbia. Recognising that trend, the national legal science in the field of administrative law fully explained the legal nature of discretionary authorities in the administrative supervision. However, nearly no attention was given to consideration of issues on legal nature of measures in administrative supervision, even in the event of measures of supervision of the NBS over insurance activities⁶. According to the second Section of the Chapter X of the Insurance Law there are nine measures that the NBS can order to an entity dealing with insurance activities. These are a letter of warning, public disclosure of information about the insurance undertaking's failure to meet its obligations or failure to meet them in a timely manner or about the undertaking's non-compliance with the regulations, measures to eliminate illegal activities and irregularities in the operation of the undertaking, measures for failing to act in line with risk management regulations, order that members of management be dismissed and suspended, interim measures, placing of an undertaking into receivership, order that the insurance portfolio be transferred to another insurance undertaking, revoking the license to carry on specific or all classes of insurance business⁷. Independently of taking those measures, the NBS can order a fine at the range of 100.000 to 5.000.000 RSD, and to a responsible person within that undertaking a fine at the range of 30.000 to 1.000.000 RSD⁸. A fine, according to the signatory to this paper, obviously presents a penalty, a form of punishment for the undertaking and the responsible person, i.e. presents a form of taking assets of the punished undertaking by the supervision authority. The prescribed fine in the Insurance Law is not a criminal fine or a fine for the economic infraction or a sanction for misdemeanour, which, pursuant to our administrative and legal system, can in the prescribed proceeding issued only by courts. Regarding the fine, which according to the stated provisions of the Insurance Law can be issued by the NBS, one should bear in mind that the fine is paid to a special account of the NBS, and thus presents its income, i.e. the paid fine does not present income of the budget of the Republic of Serbia. Supervision authority, its executive or the official person is, in advance and pursuant to Article 217 of the Insurance Law, relieved from liability for damage caused at work or in connection with work, even in the event that such measure was later in the court

6 Ljubodrag Pljakic, Judge of the Supreme Court of Serbia: Rešavanje po slobodnoj oceni – izraz načela zakonitosti, *Legal Journal* No. 11/2003, p. 2-4; Professor Zoran R. Tomić, PhD: Diskreciona ocena u upravnom pravu, *Bulletin of the Supreme Court of Serbia* No. 3/2006, p. 187-203.

7 Article 197, 198 of the Law on NBS.

8 Article 197 and 198 in conjunction with Article 259, 260, 261, 262, 263 of the Insurance Law.

proceeding determined as irregularly or illegally issued. Therefore, Article 217 of the Insurance Law and increase of the number of supervision measures in the Insurance Law opened the issue of legal nature of supervision measures stated in the Insurance Law, and especially the issue of legal nature of the fine issued by the NBS during supervision. Finally, administrative and legal issue of the fine in the Insurance Law remained unsolved.

5) *Procedural and legal framework of Article 217 of the Insurance Law deserves a special attention.* Each of prescribed measures, even the fine pursuant to the stated provisions of the Insurance Law, is imposed to an insurance undertaking upon conducted administrative proceeding, provided that the legal condition is that every entity (a legal entity or a natural person) in the administrative proceeding before the supervision authority shall declare, and if necessary, shall be read the report regarding circumstances significant for the specified imposed measure, and all with respect to the sanction-measure. This is important in the light of the fact that the NBS decision on imposition of supervision measure is final in the administrative proceeding, that the appeal against the decision on imposition of measure cannot prevent and delay execution, and that the administrative court does not have a full jurisdiction⁹ over the supervision measure imposed by the NBS. A client dissatisfied with the decision of the administrative court (passed in incomplete jurisdiction) can seek justice before the Constitutional Court of the Republic of Serbia, and if a client is not satisfied then the next step would be the European Court of Human Rights in Strasbourg. Therefore, procedural and legal framework in which Article 217 of the Insurance Law exists opened some new horizons in implementation of human rights and freedom in the legal system of the Republic of Serbia.

6) *Origin of provisions of Article 217 of the Insurance Law has an interesting legal background.* First of all, contents of provisions of Article 217 of the Insurance Law are identical to contents of provisions of Article 86b of the Law on the NBS, which means that Article 217 of the Insurance Law is actually taken Article 86b of the Law on the NBS. Namely, novel of the Law on the NBS¹⁰ from 2010 the legislator, among other things, introduced Article 86b of the Law on the NBS in the legal system of Serbia. With that Article the legislator adopted an opinion that within supervision of financial services any person in charge of supervision and imposition of measures in practice shall not be liable for the damage caused in performance of their duties. That opinion was included in article 180a of the

⁹ Jelena Ivanović, Judge of the Administrative Court in Belgrade: Spor pune jurisdikcije u upravno-sudskoj praksi Republike Srbije, *Pravni život* No. 10/2013, p. 303-317.

¹⁰ Article 90 of the Law on Changes and Amendments to the Law on the National Bank of Serbia (the Official Gazette of the Republic of Serbia, No. 44/2010) was proposed by the Governor Radovan Jelasic, outgoing governor, and the National Assembly of the Republic of Serbia adopted this paragraph in integral version of the Law on NBS.

previous Insurance Law from 2004 by the legislator, with minimum corrections compared to Article 86b of the Law on the NBS, and then, also with minimum correction, the same opinion was included by the legislator in the Law on Banks¹¹. Therefore, our legislator assessed that it was not sufficient in the Law on the NBS, as a document defining organisation of work and status of authorities and employees in the NBS, to stipulate that those in charge of supervision of financial services should not be liable for any damage caused by performance of their duties. Therefore, in that manner contents of provisions of Article 86b of the Law on NBS were transferred to Article 217 of the Insurance Law.

7) *The Constitutional Court of the Republic of Serbia did not agree with the legislator regarding provisions of Article 86b of the Law on the NBS.* The Constitutional Court of the Republic of Serbia (hereinafter referred to as the Constitutional Court) provided the first evidence of that disagreement by enacting a Ruling on the initiation of a procedure to assess constitutionality of provisions of Article 86b of the Law on the NBS as of 19th December 2013¹². The stated Ruling was delivered as a response to the National Assembly. Committee on Constitutional and Legislative Issues of the National Assembly of the Republic of Serbia sent a reply to the Constitutional Court¹³. The final evidence of disagreement of the Constitutional Court with the legislator's opinion regarding contents of provisions of Article 86b of the Law on the NBS was stated in the Decision of the Constitutional Court of the Republic of Serbia IY3-1243/2010 as of 23rd December 2014¹⁴. In other words, the Constitutional Court removed from the legal system of Serbia the entire Article 86b of the Law on the NBS. Such decision of the Constitutional Court did not mention Article 217 of the Insurance Law, but it has to be concluded that the contents of provisions of Article 217 of the Insurance Law became contrary to the Constitution of the Republic of Serbia. Otherwise the decision of the Constitutional Court has a full legal power.

8) *Shorter comparative-legal overview of the issue of liability of employer for damage caused by an employee to any third party, and overview of that issue in national applicable law.* According to the Civil Code of Austria, the Serbian Civil Code and the General Property Code for Montenegro the employer was liable for its employees unless proven guilty, while the German Civil Code and the Swiss Civil Code stipulated that the employer was liable for its employees under principle of assumed guilt¹⁵. According to provisions of Article 170

11 *The Official Gazette of the Republic of Serbia*, No. 107/2005, 91/2010 and 14/2015.

12 Ruling IY3-1243/2010 as of 19th December 2013. See: <http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS79976/?NOLAYout=1>

13 Explanation of the Committee on Constitutional and Legislative Issues of the National Assembly of the Republic of Serbia in the case IY3-1243/2010 can be found in detail, Mr Slobodan Ilijić: Na marginama Zakona o osiguranju, *Pravo i privreda* 7-9/2016, p.577-586.

14 *The Official Gazette of the Republic of Serbia*, No. 40/2015 as of 7th May 2015.

15 Professor Ilija Babić, PhD: Odgovornost radnika i poslodavca za stetu koju radnik prouzrokuje

Paragraph 1 of the Law on Contracts and Torts¹⁶ that employer shall be liable for damage caused by an employee while working or in relation to work, to a third party, under the rules of strict liability. The employer cannot be relieved from liability by proving its innocence regarding caused damage. The employee shall be liable for damage under the principle of guilt (subjective liability for damage)¹⁷. Furthermore, according to Article 124 of the Law on Civil Servants¹⁸ the Republic of Serbia shall be liable for any damage caused by a civil servant to a third person due to illegal or incorrect work of a civil servant (Paragraph 1). The claimant shall have the right to request indemnity directly from a civil servant if a civil servant deliberately caused damage (Paragraph 2). If the Republic of Serbia pays damage to a claimant caused by a civil servant to a third person intentionally or with gross negligence, it shall have the right to compensatory claim against the civil servant in the amount of damages paid within six months from the day of payment of caused damage (Paragraph 3). This short overview of the main legal sources of comparative and national law regarding civil liability of an employer for any damage caused to a third party shows the following general characteristic. Therefore, in future and current comparative and legal practice, i.e. among applicable legal sources, there were no codes or laws that stipulated or shall stipulate that the employer shall be in advance relieved from the civil liability for any damage caused to a third party while working or in relation to work, and in that respect provision of Article 217 of the Insurance Law, presented a legal anachronism.

2. Special Characteristics of Provisions on Liability for Damage Caused while Performing Duties Defined by the Insurance Law

1) *A group of persons not liable for damage caused by performing duties shall be stipulated according to the Insurance Law.* That group shall include the NBS and employees of the NBS, as well as persons that perform duties determined by this law upon order of the NBS (Paragraph 1 Article 217 of the Insurance Law). Provisions of the Law on the NBS and provisions of the Insurance Law shall apply in order to regularly interpret this group of persons. According to the Law on the NBS this group of persons, in terms of Paragraph 1, the legal term of NBS shall include: the NBS, as a legal entity and authorities of the NBS. Authorities of the NBS shall mean the governor, vice-governors, the Executive Board and the Council of the Governor. When it comes to a legal term – employees of the NBS – its interpretation in practice should not cause any difficulties because it

trećem licu, *Pravna riječ* No. 43/2015, p. 45-58.

16 *The Official Gazette of the Socialist Federal Republic of Yugoslavia* No. 29/78, 39/85, 45/89 and 57/89 and the *Official Gazette of the Federal Republic of Yugoslavia*, 31/93 (hereinafter referred to as the Law on Contracts and Torts).

17 Professor Ilija Babić, PhD-footnote No. 14.

18 *The Official Gazette of the Republic of Serbia*, No. 79/2005.

shall mean a person that has concluded a contract with the employer, i.e. the NBS. Interpretation of legal formulation is different – a person that upon the order of the NBS performs a duty defined under the Insurance Law. This legal formulation in each specific case shall require interpretation. One case can be stated regarding this legal formulation. Namely, Article 174 of the Insurance Law stipulates the right of the NBS to, in the process of supervision, require that the opinion of a certified actuary be reviewed by another certified actuary – if there are reasons to doubt the correctness of the opinion. In that case, the NBS shall choose another actuary to review previously given opinion of the first actuary. The second actuary, chosen by the NBS, could be classified in the group of persons that perform duties upon order of the NBS defined by Article 217 of the Insurance Law. Therefore, a group of persons that are not liable for damage caused while performing duties defined by the law is greatly stipulated and defined in provisions of the law.

2) The legislator stipulated one exception regarding the group of persons from Article 217 of the Insurance Law. Article 217 Paragraph 1 of the Insurance Law stipulates that the National Bank of Serbia and its employees, as well as the person performing duties in line with instructions of the NBS in compliance with this Law, shall not be held liable for the damage that arises from the performance of such duty, unless it has been proven that such damage was caused deliberately or by gross negligence. Words from the final part of Paragraph 1 that read – unless it has been proven that such damage was caused deliberately or by gross negligence – present that exception. This legal formulation shall mean that there is liability of the NBS, employees of the NBS and persons performing duties in line with instructions of the NBS in compliance with this Law. However, it only appears so. If a claimant filed a claim to the court and provided evidence that while performing supervision an employee from the NBS deliberately or with gross negligence caused damage, the court would dismiss the claim due to the first part of the enacting clause from Paragraph 1 Article 217 of the Insurance Law regarding non-existence of liability of a tortfeasor in the NBS. Therefore, the stated exception only makes Article 217 Paragraph 1 of the Insurance Law contrary by its nature and nothing more.

3) What reasons are the basis of the opinion of the signatory to this paper that provisions of Article 217 of the Insurance Law do not comply with the Constitution of the Republic of Serbia? Article 35 Paragraph 2 of the Constitution of the Republic of Serbia stipulates that everyone (legal entity or natural person) shall have the right to compensation of material or non-material damage inflicted on him by unlawful or irregular work of a state authority, entities exercising public powers, authorities of the autonomous province or local government. While performing supervision of insurance activities, the NBS is merely an authorization holder

whose rights, duties and responsibilities are closely defined in the Law on the NBS, the Insurance Law and the Law on Contracts and Torts. Furthermore, the stated fundamental constitutional right is defined in Article 172 of the Law on Contracts and Torts. That Article stipulates that a legal entity shall be liable for damage caused by its body to a third person and that a legal entity shall be entitled to recover against a person being at fault for damage inflicted deliberately or by gross negligence. Hence, opinion of the signatory to this paper is that according to the stated basis in the Constitution of the Republic of Serbia and the Law on Contracts and Torts, a legal entity or a natural person that suffered a damage due to unlawful or irregular work of the NBS during supervision of insurance activities, may require in legal proceeding a compensation for such damage from the NBS. Depending on the success of the claimant in the proceeding initiated against the NBS, due to actions or omissions while performing supervision in line with the Insurance Law, the NBS is authorised to require in recourse claim determination of wilful intention or gross negligence committed by a person from Article 217 of the Insurance Law, so that the exception stated in the end of Paragraph 1 can only then be applied. Essentially, the decision of the Constitutional Court that Article 86b of the Law on the NBS is not in compliance with the Constitution of the Republic of Serbia was based on Article 35 Paragraph 2 of the Constitution of the Republic of Serbia and Article 172 of the Law on Contracts and Torts, so these bases can be effective compared to legality of Article 217 of the Insurance Law, considering that, at the moment of enacting of the decision of the Constitutional Court, provisions of Article 86b of the Law on the NBS and Article 217 of the Insurance Law were identical. Therefore, these two bases are the main reasons based on which the signatory to this paper formed his opinion that provisions of Article 217 of the Insurance Law were not in compliance with the Constitution of the Republic of Serbia.

4) *Privileges and immunities for persons stipulated in Article 217 of the Insurance Law.* Provisions of Paragraphs 1 and 2 of Article 217 of the Insurance Law constitute the so called syndrome of sovereignty. That means that previous holder of an individual or a collective function in the body of the NBS, whose employment with the National Bank of Serbia has terminated (became employed with a business bank, retired and the like), has kept and shall still keep all previous privileges and immunities. Starting with the above stated opinion of the signatory to this paper that Article 217 of the Insurance Law was not fully in compliance with the Constitution of the Republic of Serbia, that opinion shall include provisions of Paragraph 2 of that Article.

5) *New expansion of privileges and immunities of persons from Article 217 of the Insurance Law (Paragraphs 3 and 4).* These provisions expand in a new

manner the so called syndrome of sovereignty because it is stipulated that the NBS shall reimburse the expenses of representation in court and administrative proceedings initiated in relation to duties that such employees performed even after termination of their employment in the NBS. At first it could be understood that provisions of Article 217 of the Insurance Law, Paragraph 3 and 4 of the Insurance Law referred only to employees of the NBS. However, legal formulation that had in mind – persons whose employment with the National Bank of Serbia has terminated – could have referred to holders of functions of boards and individual bodies of the NBS, so that it would be wrong to reduce privileges and immunities from Paragraph 3 and 4 of Article 217 of the Insurance Law only to employees of the NBS. Hence, it should be considered that provisions of Paragraphs 3 and 4 of Article 217 of the Insurance Law are stipulated to the interest of all persons stated in all paragraphs of that article. Therefore, it is a new expansion of privileges and immunities for persons from Article 217 of the Insurance Law and the NBS shall reimburse the expenses of representation in all court proceedings and without time limits.

Conclusions

1) Decision of the Constitutional Court of the Republic of Serbia stipulated that provisions of Article 86b of the Law on the National Bank of Serbia are not in compliance with the Constitution of the Republic of Serbia.

2) Article 217 of the Insurance Law was identical to Article 86b of the Law on the National Bank of Serbia when the Insurance Law entered into effect that lead to constitutional and legal reasons for Article 217 of the Insurance Law to be omitted from that law by a novel.

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