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FENOMENOLOGIJA OSIGURLJIVOG INTERESA U OSIGURANJU ŽIVOTA

ORIGINALNI NAUČNI RAD

Apstrakt

Subjektivni odnos prema nekom materijalnom ili nematerijalnom dobru pokretač je volje lica u traženju načina njegove zaštite. U ovom radu, analizira se institut interesa uopšte kroz filozofiju prosvećenog interesa i ekonomije, dok se u oblasti prava „interes" upoređuje sa subjektivnim pravom i pravnim stanjem. Zatim se istražuje stav pravne teorije prema potrebi postojanja interesa u osiguranju lica, ali i kroz analizu karakteristika pojedinih vrsta osiguranja života i motiva za njegovo zaključenje. Ukratko je obrađeno stanje u uporednim pravnim sistemima, s posebnim osvrtom na englesko pravo. Na kraju rada izložen je primer pravnog regulisanja obaveza prodavaca osiguranja na nivou Evropske unije, po kojem oni imaju obavezu da postupaju u najboljem interesu ugovarača osiguranja i osiguranika, kao i primer regulisanja sukoba interesa u oblasti osiguranja života u francuskom pravu.

Ključne reči: *osiguranje, život, interes, subjektivno pravo, pravno stanje, korisnik osiguranja*

I. Teorijska razmatranja o osigurljivom interesu

U zavisnosti od karakteristika polaznih premisa, filozofija i psihologija daju različite odgovore na pitanje šta je to „interes".[2] U oblasti društvenih odnosa za filozofiju

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[2] Na primer, na koncept interesa u evolucionoj biologiji može se primeniti teorija recipročnog altruizma, koji predstavlja određeno ponašanje nekog organizma kojim ono privremeno smanjuje svoju snagu radi

etike važno je ono što je francuski istoričar, pravnik, filozof i sociolog Aleksis de Tokvil istakao, a to je da je opšti princip prilikom nastanka demokratije u Americi bio u tome što je čovek služio sebi pomažući svoje bližnje i što je njegov lični interes bio da čini dobro.[3] Time je on postao začetnik filozofije prosvećenog sopstvenog interesa u filozofiji etike, po kojoj lice koje postupa tako da pomaže ostvarenje interesa drugih u istoj grupi u krajnjoj liniji ostvaruje sopstveni interes. Taj interes se, u najužem smislu, ispoljava u porodičnim odnosima uzajamnog izdržavanja između roditelja i dece, pri čemu je u osiguranju života upravo jedan od ciljeva ugovaranja obezbeđivanje određene finansijske sigurnosti bračnog druga i dece posle smrti osiguranika. Lični interes koji je istovetan sa interesima drugih pojedinaca u njihovim životima stvara zajednicu interesa koja se izražava kroz opšti, javni interes društva.[4] Time se članovi društvene zajednice blagovremeno i efikasno zbrinjavaju i izbegava se teret koji bi pao na javne fondove socijalnog osiguranja u vidu socijalnih davanja.

U ekonomiji prosvećenog sopstvenog interesa razlikuju se interes u užem smislu (interes na stvarima pojedinca), deljeni interes (interesi koji se ostvaruju u sferi društvenih odnosa, zajednice i u odnosu na društvene vrednosti) i altruistički interes (interesi drugih lica koji se zadovoljavaju na osnovu odnosa starateljstva, etike ili moralnosti).[5] Ekonomski određen interes predstavlja subjektivni odnos izražen u težnji da se neka stanja postignu ili izbegnu ili neka dobra očuvaju ili pribave.[6] U pravnim odnosima, interes je važan predmet prava koje mu daje razna sredstva za ispoljavanje, ostvarenje i zaštitu, zbog čega se na njemu konstituiše neko subjektivno pravo.[7] Prof. Andrija Gams kaže da je interes, u stvari, svestan odnos između potrebe i načina (cilja) njenog zadovoljenja, a u građanskom pravu predstavlja određeni ekonomski odnos.[8] Zato se i govori o tome da lice koje ima pravno relevantan interes stupa u pravni odnos u kojem dolazi do zadovoljenja njegovog interesa i interesa njegove ugovorne strane. U skladu s tim, u pravnoj teoriji se govori o tome da je građansko subjektivno pravo skup ovlašćenja usmerenih na zadovoljenje određenih interesa koje država priznaje i garantuje jednoj strani u građanskopravnom odnosu, kojima

povećanja snage drugog organizma, uz očekivanje da će drugi organizam kasnije postupiti na sličan način (Robert, L. Trivers, „The evolution of reciprocal altruism", *Quarterly Review of Biology*, 46(1), 1971, p. 35–57).

[3] Alexis de Tocqueville, „How the Americans combat individualism by the principle of self-interest rightly understood" (500–503) in: *Democracy in America*, Vol. II, Chapter VIII, The University of Chicago Press, Chicago and London, 2002, str. 500.

[4] Snežana Radovanović, „Slobodni građani, demokratija – Pretpostavke primene rimskog prava", *Megatrend revija*, 17(4), 2020, str. 41–48, str. 43.

[5] John Ikerd, „Rethinking the Economics of Self-Interests", Lecture at the Seminar, September 1999, University of Missouri. Retrieved from: *http://web.missouri.edu/ikerdj/papers/Rethinking.html,* 20. 3. 2019.

[6] Vladimir Janković, Mirjana Milosavljević, (redaktori), *Mala enciklopedija Prosveta – Opšta enciklopedija*, četvrto izdanje, A–J, Prosveta, Beograd, 1986, str. 898.

[7] Borislav T. Blagojević, (gl. redaktor), *Pravna enciklopedija*, tom 1, Savremena administracija, Beograd, 1989, str. 496.

[8] Andrija Gams, *Uvod u građansko pravo*, Naučna knjiga, Beograd, 1988, str. 90.

nasuprot stoji koegzistentna obaveza druge strane.[9] Međutim, interes lica se može zadovoljiti i putem jednostranih pravnih poslova, na osnovu jednostrano izjavljene volje. Takav jedan primer u osiguranju života predstavlja i određivanje korisnika osiguranja. Prema opšteprihvaćenom stavu pravne teorije, akt kojim se vrši imenovanje korisnika osiguranja jeste jednostrana izjava volje, te izjava korisnika osiguranja o nameri da želi koristiti to pravo nema značaj za nastanak samog prava,[10] bilo da se korisnik imenuje prilikom zaključenja ugovora o osiguranju života bilo nakon njegovog zaključenja.[11] Imenovanjem korisnika osiguranja osiguranik ostvaruje interes zbog kojeg je zaključio ugovor o osiguranju sopstvenog života.

Gledano iz ugla ekonomije, prosvećeni sopstveni interes predstavlja ravnotežu između gorenavedenih vrsta interesa, koji nam ne dozvoljava da jednostavno maksimiziramo ili minimiziramo bilo koji aspekt ili dimenziju našeg života,[12] dok, gledano iz ugla prava, interes uživa zaštitu samo ako je zakonom priznat, odnosno dozvoljen. U tom smislu, u osiguranju života, kao i u drugim vrstama osiguranja, može se osigurati samo zakonit interes. Međutim, ovde bi se moglo postaviti jedno drugo pitanje u vezi s okolnostima pod kojima je osiguranik izgubio život. Na primer, da li je osiguranjem pokrivena smrt osiguranika koji pogine tokom terorističke akcije? Odgovor na to pitanje umnogome će zavisiti od odredaba uslova osiguranja, jer neki od njih isključuju takve događaje iz pokrića osiguranja života, dok ih drugi pokrivaju.[13] S druge strane, osiguranik koji obavlja nedozvoljene radnje ne može biti zaštićen osiguranjem života. Takvo rešenje proizlazi iz opšteg pravila o ništavosti osiguranja u pogledu štetnih događaja koji bi nastupili iz nezakonitih, nemoralnih ili zabranjenih radnji osiguranika, kao što su bekstvo iz zatvora, izbegavanje vojne obaveze itd.[14] U srpskom pravu, ako je osigurani slučaj nastao tokom ratnih operacija, ako nešto drugo nije ugovoreno, osiguravač ima obavezu da isplati samo matematičku rezervu (a ne i osiguranu sumu),[15] dok se u engleskom pravu vodi računa o različitim okolnostima u vezi sa statusom ugovarača osiguranja / osiguranika, kao i o interesima britanskih državljana. Tako će u slučaju nastupanja smrti osiguranika tokom služenja u neprijateljskoj vojsci angažovanoj protiv Velike Britanije ugovor o osiguranju biti ništav. U slučaju nastupanja smrti tokom ratnih operacija obaveza osiguravača će

[9] Nikolić, Dušan, *Uvod u sistem građanskog prava*, sedmo izdanje, Pravni fakultet u Novom Sadu, Novi Sad, 2006, str. 235–236.

[10] Šulejić, Predrag, *Pravo osiguranja*, Dosije, Beograd, 2005, str. 490.

[11] Jovan Slavnić, Slobodan Jovanović, „Zakonsko regulisanje osiguranja života u korist trećeg lica u savremenim evropskim pravima i u pravu Srbije", *Pravni život*, tom LXIV, br. 11/2015, str. 135–152, str. 144.

[12] J. Ikerd, 1999.

[13] Hilary Osborne, „Insurers 'will consider claims resulting from attack", *The Guardian*, 8 July 2005. Retrieved from: *https://www.theguardian.com/business/2005/jul/08/insurance.terrorism,* 20. 3. 2019.

[14] P. Šulejić, 2005, str. 310–311.

[15] Zakon o obligacionim odnosima, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93 (ZOO) i *Službeni list SCG*, br. 1/2003 – Ustavna povelja, čl. 952, st. 1.

postojati ako osiguranik na neprijateljskoj strani pogine pod uslovom da nije bio angažovan u ratnim operacijama protiv Velike Britanije. U slučaju polise osiguranja života osiguranika koji je neprijatelj, a korisnik osiguranja britanski državljanin kao poverilac koji mu je odobrio kredit, osiguranje proizvodi dejstvo u slučaju smrti takvog osiguranika tokom ili kao posledica neprijateljstava.[16]

Subjektivno pravo neretko ne mora da se poklapa s postojanjem interesa. U tom slučaju radi se o postojanju pravno zaštićenog interesa zbog postojanja određenog *pravnog stanja*.[17] Pravno stanje je situacija u kojoj nedostaje još neki od zakonom propisanih uslova za sticanje građanskog subjektivnog prava.[18] Radi se o situaciji u kojoj je neophodno da se ispuni jedna ili više pravno relevantnih činjenica da bi nastalo subjektivno pravo. U oblasti osiguranja života, korisnik nadoknade osiguranja nalazi se u pravnom stanju sve dok se ne ispuni uslov za sticanje prava na osiguranu nadoknadu po polisi osiguranja života osiguranika. Tako korisnik osiguranja stiče pravo na naplatu osigurane sume posle smrti osiguranika.

Iako se u većem delu pravne teorije, kao i u srpskom zakonu o obligacionim odnosima, postojanje interesa vezuje za imovinska osiguranja,[19] postoji i mišljenje da interes, kao pokretač volje na zaključenje ugovora o osiguranju, postoji i u osiguranju lica.[20] Oni što su mišljenja da postojanje interesa nije nužno u osiguranju lica, zanemaruju činjenicu da se u osiguranje lica ubraja i čitav niz vrsta osiguranja lica kod kojih je zastupljen institut obeštećenja. To je slučaj sa zdravstvenim osiguranjem i osiguranjem od nezgode u kojima se nadoknađuju troškovi nastali lečenjem i pružanjem medicinske intervencije, kao i dnevne nadoknade. Kada se radi o osiguranju života za slučaj smrti ili doživljenja, onda se interes osiguranika ogleda u nekim drugim motivima za zaključenje te vrste osiguranja, pa je samim tim i njegovo dejstvo drugačije. U takvom slučaju, interes se može ogledati u finansijskom obezbeđenju srodnika posle smrti osiguranika ili u štednji. Zato se interes u osiguranju života ogleda u volji osiguranika da njegovim zaključenjem postigne finansijsku sigurnost sebe ili svojih srodnika u budućnosti.

Tako se čini pogrešnim opšteprihvaćeno stanovište da osiguranje života nema obeštećujući karakter, jer nema za cilj nadoknadu pretrpljene štete, te da samim tim interes u osiguranju života nema značaj kao u osiguranju imovine.[21] Međutim, iako je tačan stav da je u osiguranju imovine interes materijalne prirode, pogrešan

[16] Nicholas Legh-Jones (General Editor), *MacGillivray on Insurance Law*, Ninth Edition, Sweet & Maxwell, London, 1997, str. 351.

[17] A. Gams, 1988, str. 88; Ilija Babić, *Osnovi imovinskog prava – Uvod u građansko pravo i stvarno pravo*, Službeni glasnik, Beograd, 2008, str. 117.

[18] D. Nikolić, 2006, str. 235.

[19] P. Šulejić, 2005, str. 312.

[20] Nikola V. Nikolić, *Ugovor o osiguranju*, Državni osiguravajući zavod, Beograd, 1957, str. 57.

[21] P. Šulejić, 2005, str. 312–313.

je stav da u osiguranju lica tog interesa nema. Još od vremena robovlasništva i Hamurabijevog zakonika, pa sve do ranog anglosaksonskog prava, postoje dokazi o primeni teorije vrednosti ljudskog života koja se koristila za određivanje nadoknade srodnicima osobe koje ubije treće lice, da bi u današnje vreme na značaju dobilo određivanje vrednosti ljudskog života u postupcima po tužbama za nadoknadu štete zbog (nehatnog ili umišljajnog – prim. aut.) ubistva lica.[22] Kako se to u ekonomici osiguranja SAD navodi, vrednost ljudskog života je (danas – prim. aut.) mera budućih zarada ili vrednosti usluga pojedinca, tj. kapitalizovana vrednost budućih prihoda pojedinca umanjenih za sopstveno izdržavanje kao što su hrana, odevanje i stanovanje, a gledano iz ugla izdržavanog lica, vrednost ljudskog života davaoca izdržavanja predstavlja vrednost beneficija koje izdržavano lice može da očekuje.[23]

U pravnoj teoriji ističe se da osiguranje lica u vezi sa životom, zdravljem, telesnim integritetom nema obeštećujući karakter, niti mu je svojstvo interes osiguranja,[24] iako, kao što smo prethodno videli, interes u osiguranju lica postoji, ali on zavisi od cilja koji se želi postići zaključenjem pojedine vrste osiguranja lica. Samim tim, interes u osiguranju lica ima svoju materijalnu komponentu koja je vezana za neke izdatke, dok je u drugim slučajevima vezana za isplatu određenog novčanog iznosa (osigurane sume) koji nema obeštećujući karakter, jer se ne nadoknađuje vrednost oštećenog ili uništenog materijalnog dobra (stvari). Tako se pobuda za zaključenje ugovora o osiguranju lica javlja iz brige za sutrašnjicu i želje da se sebi, deci, ženi ili kom drugom bližnjem obezbedi zaštita od nesrećnog slučaja i smrti ili zaštita za slučaj nastupanja izvesnog događaja koji uslovljava veće izdatke (venčanje, školovanje), ili utiče na smanjenje zarade osiguranika ili prosto proističe iz želje da se poboljšaju materijalni uslovi života (doživljenje).[25] Kako je u ekonomskoj teoriji ukazano, unapređenje u smeru boljeg razumevanja budućeg razvoja događaja i njihovih posledica u velikoj meri može da doprinese uspostavljanju „spremnog društva".[26] Ali premiju osiguranja, aktuarski utvrđenu na naučnim osnovama koju treba da plati osiguranik treba razlikovati od puke prodajne cene različitih stvari u ugovorima o prodaji u kojima individualni potrošači imaju interes da prodajna cena bude što niža, dok je prodavcu interes da ostvari što višu prodajnu cenu svog proizvoda.[27]

U uporednom pravu ne postoji saglasje u vezi s obaveznim postojanjem osigurljivog interesa u osiguranju života, imovine i transporta. Postoje pravni sistemi

[22] Keneth Black III, Harold D. Skipper, *Life Insurance*, 15th Ed., Lucretian, LLC, Atlanta, 2015, str. 26.
[23] K. Black, H. Skipper, 2015, str. 27.
[24] P. Šulejić, 2005, str. 313; Jovan Slavnić, *Privredno / trgovinsko pravo sa osnovama građanskog prava*, Beogradska poslovna škola, Beograd, 2006, str. 403.
[25] N. Nikolić, 1957, str. 57–58.
[26] Mirjana Radovic-Markovic, Sladjana Vujicic, „Prediction in social sciences", *International Review*, No. 1-2, 2021, str. 15–20.
[27] Milica Stojković, Violeta Jeremijev, „Price formation in trade companies", *International Review*, 3-4, 2021, str. 62–66, str. 63.

koji propisuju obavezno postojanje osigurljivog interesa u osiguranju lica, imovine i transporta pod pretnjom ništavosti osiguranja, kao što su na primer, Velika Britanija i Kina, dok je u Australiji postojanje interesa u osiguranju života napušteno još 1995. godine.[28] Ipak, brojna zakonodavstva ne prihvataju pojam interesa u osiguranju lica, već se umesto njega zahteva pristanak osiguranog lica (lica u čijem životu treba da nastupi osigurani slučaj) da bi osiguranje moglo da dejstvuje.[29]

Od nastanka osiguranja kao delatnosti od velikog interesa u pomorskom transportu i trgovini, pa i posle otkrića osnovnih matematičkih postavki moderne tehnike osiguranja lica i izrade prvih tablica smrtnosti u Engleskoj, osiguranje je neretko služilo za klađenje i kocku koju je zakonodavac, u jednom trenutku, morao zabraniti. Tako je u osamnaestom veku u Engleskoj bilo popularno osiguranje života javnih ličnosti, udaljenih srodnika i poznanika, sve dok nisu počele da pristižu pritužbe i novine počele da objavljuju verovatnoću doživljenja javnih ličnosti.[30] Pomenuta pojava je prekinuta stupanjem na snagu Zakona o osiguranju života 1775. godine, koji je i danas na snazi i kojim je propisana obaveza postojanja osigurljivog interesa, pod pretnjom ništavosti. Polazeći od stanja utvrđenog pomenutim zakonom, koji je usled razvoja osiguranja lica postao nejasan u određenim pitanjima, zastareo i restriktivan u nekim drugim aspektima, što je dovelo do sprečavanja osiguravača da osiguravaju određene vrste tražnje, engleski, velški i škotski predlagači izmena i dopuna zakona 2008. godine pokrenuli su proceduru za izradu predloga Zakona o osigurljivom interesu (u vezi sa osiguranjem života – prim. aut.) Predlog zakona o osigurljivom interesu iz juna 2018. godine praktično pokriva sve moguće situacije i statuse u kojima se nalazi lice koje je ugovorna strana kod ugovora u vezi sa osiguranjem života. U skladu s izlaganjima iz prethodnog pasusa, te u skladu sa odredbama pomenutog predloga zakona, osiguranik ima osigurljiv interes ako razumno očekuje da će pretrpeti ekonomski gubitak ukoliko nastane osigurani slučaj. U engleskom pravu osigurljiv interes ugovarača osiguranja u osiguranju života drugog lica ogleda se u krvnom srodstvu između supružnika, dece, roditelja i drugih srodnika na osnovu: (1) obaveze snošenja troškova sahrane, (2) obaveze snošenja troškova izdržavanja ili školovanja osiguranika, (3) troškova unajmljivanja kućnog pomoćnika za slučaj da je osiguranik obavljao dragocene poslove u domaćinstvu, (4) doprinosa osiguranika u zajednički fond za život porodice, i (5) zakonske obaveze izdržavanja osiguranika za slučaj njegove bolesti, radne nesposobnosti, starosti ili siromaštva.[31] Lica na kojima osiguranik može da ima osigurljiv interes su: ugovarač osiguranja koji je istovremeno

[28] Zheng Jing, „Insurable interest in life insurance: a Chinese perspective", *Journal of Business Law*, 5/2014, str. 337–359.

[29] P. Šulejić, 2005, str. 312.

[30] Law Commission & Scottish Law Commission. (March 2015*). Insurance Contract Law: Insurable Interest*, Extract from LCCP 201 / SLCDP 152 (Post Contract Duties and other Issues), str. 105.

[31] N. Legh-Jones, 1997, str. 38.

i osiguranik, bračni ili vanbračni drug osiguranika, deca i unuci osiguranika, lice koje je član penzijskog plana ili druge šeme kojima upravlja osiguranik i lice u čiju se korist zaključuje osiguranje (korisnik osiguranja). U svim pravnim sistemima svojstvene su situacije i kada neko drugo lice, van kruga navedenih lica, može da ima interes u osiguranju tuđeg života. To će biti slučaj sa osiguranjem života lica koje uzima kredit, kada banka kao jedan od uslova obezbeđenja plasmana kredita zahteva zaključenje polise osiguranja života tog lica od rizika nezgode i smrti. Radi se o materijalnom interesu banke koja u slučaju smrti zajmoprimca ili njegove nesposobnosti za rad koristi polisu osiguranja za naplatu preostalog iznosa kredita. Time se štite ne samo banka kao poverilac, već i naslednici preminulog dužnika koji su u tom slučaju zaštićeni od obaveze da isplate dug ostavioca. U navedenom primeru, postoje isključujući interesi, jer naslednici ne bi imali pravo da zadrže osiguranu nadoknadu po osnovu nasleđa već, ako su je naplatili od osiguravača, imaju obavezu da je isplate poveriocu. To proizlazi iz zakonske obaveze po kojoj naslednici, pored imovine, nasleđuju i dugove ostavioca do visine vrednosti nasleđene imovine.[32] Slična situacija postoji i u slučaju osiguranja života ključne osobe u privrednom subjektu od čijeg znanja, veština i kontakata neposredno zavisi održivost i uspešnost poslovanja. U tom slučaju, (materijalni) interes za osiguranje života ključne osobe ima privredni subjekt u kojem je ta osoba zaposlena ili obavlja neku važnu funkciju. U tom slučaju, vrednost života ključne osobe predstavlja vrednost usluga koje ona pruža privrednom subjektu, zbog čega to lice može da ima veći broj suma vrednosti života (u zavisnosti od spektra usluga i poslova koje ono obavlja ili pruža privrednom subjektu – prim. aut.)[33]

Pored nacionalnih zakona, zakonodavna aktivnost Evropske unije bitno utiče na razvoj prava država članica, jer uvodi određene obaveze u oblasti ujednačavanja prava, a kako se zaštita korisnika usluga osiguranja unapređuje, povećavaju se i obaveze prodavaca usluga osiguranja – osiguravača, posrednika i zastupnika u osiguranju. Utvrđuju se nove obaveze i standardi ponašanja u pravnom prometu s ciljem ostvarivanja određenih razvojnih politika. Tako su u oblasti osiguranja, pored postupanja na pošten, iskren i profesionalan način, na šta su i inače dužni po nacionalnim zakonima, prodavci usluga osiguranja obavezani i da postupaju u najboljem interesu ugovarača osiguranja.[34] Taj standard se odnosi na njihove obaveze informisanja, aktivnosti savetovanja, davanja ponude za osiguranje i pripreme teksta ugovora o osiguranju, zaključenje ugovora o osiguranju i učestvovanju u upravljanju i izvršavanju ugovora o osiguranju, pogotovo u slučaju kada ugovarač treba da naplati osiguranu naknadu. Međutim, standard „najboljeg interesa" osiguranika ostao

[32] Zakon o nasleđivanju, *Službeni glasnik RS*, br. 46/95, 101/2003 – odluka USRS i br. 6/2015, čl. 222.

[33] K. Black, H. Skipper, 2015, str. 27.

[34] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) („Директива о дистрибуцији осигурања"), *Official Journal of the European Union*, L 26, 2. 2. 2016, čl. 17, st. 1.

je nedefinisan, pa je u takvoj situaciji ustanovljena dužnost da prodavac osiguranja, pored toga što vodi računa o svom komercijalnom interesu, treba da se ponaša i u skladu sa najboljim interesom kupca usluge osiguranja. To znači da je prodavac usluge osiguranja dužan da svojim odlukama i postupcima postiže i održava svojevrsnu ravnotežu svog interesa i interesa korisnika osiguranja. U tom smislu, propisi kojima se štite prava korisnika usluga osiguranja ne odnose se na osigurljiv interes kao *conditio sine qua non* punovažnosti ugovora o osiguranju, već na svaki zamisliv interes ugovarača osiguranja – osiguranika u pogledu njegovih zakonom priznatih interesa kao što su potpuno i tačno informisanje o proizvodu osiguranja, o načinu plaćanja premije, o učešću u dobiti, o trenutku kada dolazi do isplate osigurane sume, zatim način ostvarivanja prava na isplatu otkupne vrednosti osiguranja, aktivi od čijeg kretanja se utvrđuje osigurana suma u osiguranju života vezanom za investicionu jedinicu i druga njegova zakonom priznata prava.

U nekim slučajevima uporedni pravni sistemi regulišu i situacije kada postoji sukob interesa u vezi sa osiguranjem života. Kao primer, u pravnoj teoriji se navodi francusko pravo u kojem se, kada je korisnik naknade po ugovoru o osiguranju života lice koje je upravnik poslova ili staratelj osiguranog lica, smatra da je on u sukobu interesa sa poslovno nesposobnim licem, kao i da se zamena korisnika osiguranja ne može izvršiti bez odobrenja suda ili porodičnog saveta od trenutka kada je ustanovljeno starateljstvo u odnosu na pravo ugovaranja ili otkup polise osiguranja života.[35]

II. Zaključak

Konačno, možemo reći da je institut interesa nastao i razvijao se tokom istorije u skladu s datim društvenim odnosima i specifičnostima pojedinih tržišta. Uočljivo je razlikovanje anglosaksonske tradicije u kojoj je interes bio i do danas ostao jedan od važnih instituta osiguranja koji utiče na njegovu punovažnost, dok u kontinentalnim (evropskim) pravnim sistemima uglavnom nema taj značaj u osiguranju lica. Ipak, negiranje postojanja interesa u osiguranju lica nije osnovano i ne treba ga tumačiti na način koji je svojstven imovinskim osiguranjima. Institut obeštećenja koji je karakterističan za imovinska osiguranja svojstven je i svim vrstama osiguranja lica kod kojih se svrha osiguravajuće zaštite ostvaruje kroz nadoknadu određenih troškova ili dužnih iznosa. S druge strane, interes u osiguranju života vezuje se za sopstveno materijalno obezbeđenje u starosti ili obezbeđenje svojih srodnika, kao i na pokrivanje nekih izdataka. Zato, osiguranje lica, iako je predmet osiguranja nematerijalno dobro (život i zdravlje lica ili troškovi u vezi sa određenim licem kao korisnikom osiguranja ili osiguranikom), ima svoju materijalnu osnovu koja se poklapa sa interesom zbog kojeg se ta vrsta osiguranja i zaključuje. Od tako

[35] J. Slavnić, S. Jovanović, 2015, str. 147.

shvaćenog instituta interesa ugovornog prava treba razlikovati primenu pretpostavljenog najboljeg interesa ugovarača osiguranja i osiguranika kao nadzorno-regulatorne obaveze svih prodavaca usluga osiguranja života prilikom reklamiranja, davanja ponude za osiguranje, informisanja ugovarača osiguranja i osiguranika, zaključivanja i izvršavanja samog ugovora o osiguranju života.

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PHENOMENOLOGY OF INSURABLE INTEREST IN LIFE ASSURANCE

SCIENTIFIC PAPER

Abstract

Subjective attitude towards tangible or intangible possessions is the driving force of the person's will to seek the means of their protection. In this paper, the institute of interest is generally analysed through the philosophy of enlightened self-interest and economics, while in in the field of law, "interest" is compared to the subjective right and condition in law. Subsequently, the subject of research is the position of legal theory in relation to the need for interest in personal insurance, also explored through the analysis of the characteristics of certain types of life assurance and rationales for effecting such assurance. The current circumstances are briefly addressed in comparative legal systems, with a special focus on English law. At the end of the paper, an example of legally regulated obligations of insurance sales agents to act in the best interest of policyholders and insured persons is presented at the level of the European Union, together with the example of French law regulating conflicts of interest in life assurance.

Keywords: *insurance, life, interest, subjective right, condition in law, insurance beneficiary*

I. Theoretic Considerations of the Insurable Interest

Depending on their initial premises, philosophy and psychology provide different answers to the question of what "interest" is.[2] In the field of social relations,

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[2] For example, to the concept of interest in the evolutionary biology the theory of reciprocal altruism may be applied whereby an organism acts in a manner that temporarily reduces its fitness while increasing

for the philosophy of ethics, it is important to note what the French historian, lawyer, philosopher, and sociologist Alexis de Tocqueville pointed out. Namely, he claimed that the general principle in the emergence of democracy in America is that man serves himself in serving his fellow creatures and that his private interest is to do good.[3] He thus became the founder of the philosophy of enlightened self-interest in the philosophy of ethics, according to which persons who act to further the interests of others in the same group ultimately serve their own self-interest. This interest, in the narrowest sense, is manifested in family relations where parents and children mutually support one another, whereas one of the goals of contracting life assurance is to ensure a certain financial security of the spouse and children after the death of the insured. A personal interest that is identical with the interests of other individuals creates in their lives a community of interests expressed through the general, public interest of society.[4] Thus, the members of the community are timely and efficiently provided for, evading social benefits and the burden on public social security funds.

The economics of enlightened self-interest includes narrow self-interests (which focus on individual possessions), shared interests (which focus on relationships, community, and social values), and altruistic interests (which focus on interests that are solely others', which one pursues only out of a sense of stewardship, ethics, or morality).[5] Economically determined interest is a subjective relationship expressed in the desire to achieve or avoid certain conditions or to preserve or acquire certain possessions.[6] In legal relationships, interest is an important subject of law that gives various means for expression, implementation and protection, which is why a subjective right is constituted thereon.[7] According to Professor Andrija Gams, interest is, in fact, a conscious relationship between the need and the means (goal) of its satisfaction, and in civil law it represents a certain economic relationship.[8] That is why it is said that a person who has a legally relevant interest enters into a legal relationship in which his interest and the interest of his contracting party are

another organism's fitness, with the expectation that the other organism will act in a similar manner at a later time (Robert, L. Trivers, "The evolution of reciprocal altruism", *Quarterly Review of Biology*, 46(1), 1971, pp. 35–57).

[3] Alexis de Tocqueville, „How the Americans combat individualism by the principle of self-interest rightly understood" (500–503) in: *Democracy in America*, Vol. II, Chapter VIII, The University of Chicago Press, Chicago and London, 2002, pp. 500.

[4] Snežana Radovanović, „Slobodni građani, demokratija – Pretpostavke primene rimskog prava", *Megatrend Review*, 17(4), 2020, pp. 41–48, pp. 43.

[5] John Ikerd, "Rethinking the Economics of Self-Interests", Lecture at the Seminar, September 1999, University of Missouri. Retrieved from: *http://web.missouri.edu/ikerdj/papers/Rethinking.html,* 20. 3. 2019.

[6] Vladimir Janković, Mirjana Milosavljević, (editors), *Mala enciklopedija Prosveta – Opšta enciklopedija*, fourth edition, A–J, Prosveta, Beograd, 1986, pp. 898.

[7] Borislav T. Blagojević, (Editor-in-Chief), *Pravna enciklopedija*, volume 1, Savremena administracija, Beograd, 1989, pp. 496.

[8] Andrija Gams, *Uvod u građansko pravo*, Naučna knjiga, Beograd, 1988, pp. 90.

satisfied. Accordingly, legal theory states that civil subjective law is a set of powers aimed at satisfying certain interests that the state recognizes and guarantees to one party in a civil law relationship, as opposed to the coexistent obligation of the other party.[9] However, the interest of a person can also be satisfied through unilateral legal transactions, based on a unilaterally expressed will. One such example in life assurance is determining the insurance beneficiary. According to the generally accepted legal theory, the act by which the insurance beneficiary is appointed is a unilateral statement of will, and the insurance beneficiary's statement of intent to exercise that right is irrelevant to the creation of the right itself,[10] whether the beneficiary is named at the time of concluding the life assurance contract or after its conclusion.[11] By appointing the insurance beneficiary, the insured person realises the interest for which the contract for insurance of his own life was concluded.

From the perspective of economics, enlightened self-interest is a product of balance between the abovementioned types of interests which does not allow us to simply maximize or minimize any one particular aspect or dimension of our lives,[12] whereas from the legal perspective, the interest enjoys protection only if it is recognised or allowed by law. In this regard, in life assurance, as in other types of insurance, insurable is only a legitimate interest. However, another question could be raised here regarding the circumstances under which the insured person had lost his life. For example, does insurance cover the death of an insured person due to a terrorist act? The answer to this question will largely depend on the provisions of the insurance terms and conditions, as some of them exclude such events from life assurance cover, while others cover them.[13] On the other hand, an insured person, who is a wrongdoer, cannot be protected by life assurance. Such a solution derives from the general rule on the nullity of insurance in respect of harmful events that would occur from illegal, immoral or prohibited actions of the insured, such as escape from prison, evasion of military service, etc.[14] In Serbian law, if the insured event occurred during the war operations, unless agreed otherwise, the insurer shall be liable to pay only the mathematical reserve (and not the sum insured),[15] while

[9] Nikolić, Dušan, *Uvod u sistem građanskog prava*, seventh edition, Faculty of Law in Novi Sad, Novi Sad, 2006, pp. 235–236.

[10] Šulejić, Predrag, *Pravo osiguranja*, Dosije, Beograd, 2005, pp. 490.

[11] Jovan Slavnić, Slobodan Jovanović, „Zakonsko regulisanje osiguranja života u korist trećeg lica u savremenim evropskim pravima i u pravu Srbije", *Pravni život*, tom LXIV, no. 11/2015, pp. 135–152, pp. 144.

[12] J. Ikerd, 1999.

[13] Hilary Osborne, "Insurers 'will consider claims resulting from attack", *The Guardian*, 8 July 2005. Retrieved from: *https://www.theguardian.com/business/2005/jul/08/insurance.terrorism,* 20. 3. 2019.

[14] P. Šulejić, 2005, pp. 310–311.

[15] Law of Contract and Torts, *Official Gazette of SFRY*, no. 29/78, 39/85, 45/89 – decision of CCY And 57/89, *Official Gazette of FRY*, no. 31/93 (ZOO) and *Official Gazette of Serbia and Montenegro,* no. 1/2003 – Constitutional Charter, Article 952, paragraph 1.

English law takes into account various circumstances regarding the status of the policyholder / insured, as well as the interests of British citizens. Thus, in the event of the insured person's death during the service in the enemy army engaged against Great Britain, the insurance contract will be null and void. In the event of death during war operations, the insurer's obligations will exist if the insured dies on the enemy's side, provided that he was not engaged in war operations against Great Britain. In the case of a life assurance policy of an insured person who is an enemy, where the insurance beneficiary is a British citizen as the creditor who granted such insured the loan, the insurance shall take effect in the event of the death of such an insured person during or as a result of hostilities.[16]

Subjective right often does not have to coincide with the existence of an interest. In this case, there is a legally protected interest due to the existence of a certain *condition in law*.[17] Condition in law is a situation in which some of the legally prescribed conditions for acquiring a civil subjective right are missing.[18] It is a situation in which to create a subjective right, it is necessary to fulfil one or more legally relevant facts. In the field of life assurance, the insurance beneficiary is in the condition in law until the condition for acquiring the right to indemnity under the life assurance policy is met. Thus, the insurance beneficiary acquires the right to collect the insured amount after the death of the assured.

Although a large part of legal theory, as well as the Serbian Law of Contract and Torts refers to property insurance when considering the existence of interest,[19] there is also a perception that the interest, as the driving force behind the conclusion of the insurance contract, also exists in the personal insurance.[20] Those who think that the existence of interest is not necessary in the insurance of persons, ignore the fact that the personal insurance also includes a whole range of personal insurance lines where compensation is represented. This is the case with health and accident insurance, which reimburses the costs incurred by treatments and medical aid, as well as daily benefits. When it comes to life assurance in the event of death or survival, the insurer's interest is reflected in some other rationales for concluding this type of insurance, and thus its effects are different. In such case, the interest may be reflected in the financial security of the relatives after the death of the insured person or in the savings. Therefore, the interest in life assurance is reflected in the will of the insured persons to achieve financial security for themselves or their relatives in the future.

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[16] Nicholas Legh-Jones (General Editor), *MacGillivray on Insurance Law*, Ninth Edition, Sweet & Maxwell, London, 1997, pp. 351.

[17] A. Gams, 1988, pp. 88; Ilija Babić, *Osnovi imovinskog prava – Uvod u građansko pravo i stvarno pravo*, Official Gazette, Beograd, 2008, pp. 117.

[18] D. Nikolić, 2006, pp. 235.

[19] P. Šulejić, 2005, pp. 312.

[20] Nikola V. Nikolić, *Ugovor o osiguranju*, Državni osiguravajući zavod, Beograd, 1957, pp. 57.

Thus, it seems wrong to take the generally accepted view that life assurance does not have a compensatory character because it does not aim to compensate for the damage suffered, and therefore the interest in life assurance does not have the same significance as in property insurance.[21] However, while it is true that the property insurance is an interest of a material nature, it is wrong that the personal insurance has no such interest. From the times of slavery and the Hammurabi Code to the early Anglo-Saxon law, there was evidence of the application of the theory of the value of human life used to determine compensation to the relatives of a person who kills a third person. In modern times, it is also important to determine the value of human life in proceedings for compensation of damage caused by a murder (manslaughter or premeditated – author's comment).[22] According to the US insurance economy, the value of human life (today – author's comment) is a measure of future earnings or the value of individual services, i.e. the capitalized value of an individual's future income less his or her own subsistence, such as food, clothing, and accommodation. From a dependent's point of view, the value of the human life of the breadwinner is the value of the benefits that the dependent can expect.[23]

Legal theory points out that the insurance of a person in connection with life, health, bodily integrity does not have a compensatory character, nor is characterised by insurance interest,[24] although, as we have seen, there is an interest in personal insurance, but it depends on the goal to be achieved by concluding a particular type of personal insurance. Therefore, the interest in insuring a person has its material component which is related to particular expenses, while in other cases it is related to the payment of a certain amount of money (insured amount) which is not compensatory, because the value of damaged or destroyed material property (object) is not compensated. Thus, the rationale for concluding a contract on personal insurance arises from caring for tomorrow and the desire to provide yourself, children, wife or any other relative with protection against accidents and death or protection in the event of a certain occurrence that causes higher expenses (wedding, schooling), or affects the reduction of the insured's earnings, or simply stems from the desire to improve living conditions (survivorship).[25] As indicated in economic theory, advances towards a better understanding of future developments and their consequences can greatly contribute to the establishment of a "ready society".[26] However, an insurance

[21] P. Šulejić, 2005, pp. 312–313.
[22] Keneth Black III, Harold D. Skipper, *Life Insurance*, 15th Ed., Lucretian, LLC, Atlanta, 2015, pp. 26.
[23] K. Black, H. Skipper, 2015, pp. 27.
[24] P. Šulejić, 2005, str. 313; Jovan Slavnić, *Privredno / trgovinsko pravo sa osnovama građanskog prava*, Belgrade Business School, Beograd, 2006, pp. 403.
[25] N. Nikolić, 1957, pp. 57–58.
[26] Mirjana Radovic-Markovic, Sladjana Vujicic, "Prediction in social sciences", *International Review*, No. 1-2, 2021, pp. 15–20.

premium, actuarially determined on a scientific basis to be paid by the insurer, should be distinguished from the mere selling price of different items in sales contracts where individual consumers have an interest in keeping the sales price as low as possible, while the distributor has an interest in achieving the highest possible selling price for his product.[27]

In comparative law, there is no agreement on the compulsory existence of an insurable interest in life, property and transport insurance. There are legal systems that prescribe the mandatory existence of an insurable interest in the insurance of persons, property and transport under the threat of insurance nullity, such as Great Britain and China, while in Australia, the existence of an interest in life assurance has been abandoned since 1995.[28] However, a number of legislations do not accept the concept of interest in personal insurance, but instead require the consent of the insured person (the person in whose life the insured event is to occur) in order for the insurance to operate.[29]

From the emergence of insurance as an activity of great interest in maritime transport and trade, and even after the discovery of the fundamental mathematical principles of modern personal insurance methods and the first mortality tables in England, insurance has often served as means for betting and a gambling that, at one point, the law had to forbid. Thus, in the 18th century England, it was common for policies to be taken out on the lives of public figures, distant family members, and acquaintances until the complaints were made when newspapers started to print the odds of survival of public figures.[30] To put a stop to this phenomenon, the Life Assurance Act 1774 was adopted and is still in force. It stipulates the existence of insurable interest under threat of nullity. Because of the situation determined by the mentioned law, which due to the development of personal insurance became unclear in certain matters, as well as obsolete and restrictive in some other aspects, insurers were prevented from insuring certain types of demands. In 2008, English, Welsh and Scottish proponents of the amendments to the Law initiated the procedure for drafting the Insurable Interest Bill (in life assurance, author's comment). The draft Insurable Interest Bill of June 2018 covers almost all possible situations and statuses of the person who is a party to the life-related insurance contract. In view of the above and according to the provisions of the said Bill, the insured will have an insurable interest if there is a reasonable prospect that it will suffer an economic loss if the insured event occurs. In English law, the insurable

[27] Milica Stojković, Violeta Jeremijev, "Price formation in trade companies", *International Review*, 3-4, 2021, pp. 62–66, pp. 63.

[28] Zheng Jing, "Insurable interest in life insurance: a Chinese perspective", *Journal of Business Law*, 5/2014, pp. 337–359.

[29] P. Šulejić, 2005, pp. 312.

[30] Law Commission & Scottish Law Commission. (March 2015*). Insurance Contract Law: Insurable Interest*, Extract from LCCP 201 / SLCDP 152 (Post Contract Duties and other Issues), pp. 105.

interest of the policyholder in insuring the life of another person is reflected in the blood relationship between spouses, children, parents and other relatives on the basis of: (1) obligations to bear the funeral costs, (2) the obligation to bear the costs of support or education of the insured, (3) the cost of hiring a home-care worker if the insured performed important household chores, (4) the insured's contribution to the common family fund, and (5) legal obligations to support the insured in case of his illness, incapacity for work, old age, or poverty.[31] The persons in whom the insured may have an insurable interest are: the policyholder who is also the insured, the spouse or common-law partner of the insured, children and grandchildren of the insured, a person who is a member of a pension plan or other scheme managed by the insured, and the person in whose favour the insurance is concluded (insurance beneficiary). All legal systems are also characterised by the situations when another person, beyond the circle of the mentioned persons, may have an interest in insuring someone else's life. This will be the case with the life assurance of the person taking the loan, when the bank, as one of the conditions for securing the loan, requires the conclusion of that person's life assurance policy against the risk of accident and death. This is the material interest of the bank which, in the event of the borrower's death or incapacity for work, uses an insurance policy to collect the remaining loan amount. This protects not only the bank as a creditor, but also the heirs of the deceased debtor who are in such case protected from the obligation to pay the debt of the testator. In the above example, there are excluded interests, because the heirs would not have the right to keep the insured compensation based on the inheritance. However, if they collected it from the insurer, they have the obligation to pay it to the creditor. This arises from the legal obligation according to which the heirs, in addition to the property, inherit the debts of the testator up to the value of the inherited property.[32] A similar situation is the case of insuring the life of a key person in a business entity whose knowledge, skills, and contacts directly influence the sustainability and success of business operations. In such case, the (material) interest in insuring life of the key person has the business entity in which that person is employed or holds an important office. In that case, the value of the key person's life represents the value of the services he or she provides to the business entity, due to which that person may have a larger number of life sums (depending on the range of services and jobs he or she performs or provides to the business entity -author's comment).[33]

In addition to national laws, the legislative activity of the European Union significantly affects the development of the law of member states, because it introduces certain obligations in the field of equalization of rights. As the protection of

[31] N. Legh-Jones, 1997, pp. 38.

[32] Law on Inheritance, *Official Gazette of RS*, nos. 46/95, 101/2003 – Decision of CCRS and no. 6/2015, Article 222.

[33] K. Black, H. Skipper, 2015, pp. 27.

insurance service users improves, the obligations of insurance distributors/insurers, intermediaries, and insurance agents increase. New obligations and standards of conduct in legal transactions are established with the aim of implementing certain development policies. Thus, in insurance industry, in addition to acting honestly, fairly and professionally, which is otherwise their obligation under the national laws, insurance service providers are obliged to act in the best interests of the policyholders.[34] This standard applies to their obligations concerning information, advisory activities, insurance proposals, and preparation of the text of the insurance contract, conclusion of the insurance contract, and participation in the management and execution of the insurance contract, especially when the policyholder is to collect the insured benefit. However, the standard of "best interest" of the insured person remained undefined and consequently, the duty was imposed on the insurance distributors to act, in addition to taking into account their commercial interests, in the best interests of the insurance customers. This means that with their decisions and actions, the insurance service distributors are obliged to achieve and maintain a certain balance of their interests and the interests of insurance beneficiaries. To that extent, the regulations protecting the rights of insurance customers do not refer to the insurable interest as a *conditio sine qua non* validity of the insurance contract, but to every conceivable interest of the policyholder / insured person in terms of its legally recognised interests such as full and accurate information on the insurance product, the method of premium payment, profit sharing, moment when the sum insured is paid out, exercising the right to payment of the insurance redemption value, movement of assets which determines the life assurance unit-linked sum insured, and other legal rights.

In some cases, comparative legal systems also regulate situations where there is a conflict of interest regarding life assurance. As an example, legal theory cites French law according to which, the beneficiary of a life assurance contract, who manages the business of the insured person or is his or her guardian, is considered to be in a conflict of interest with the incapacitated person, and the insurance beneficiary may not be replaced without the approval of the court or the family council from the moment when the guardianship has been established in relation to the right to contract or redeem life assurance policy.[35]

II. Conclusion

Finally, it can be said that throughout history, the institute of interest was created and developed in accordance with the given social relations and specificities

[34] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), *Official Journal of the European Union*, L 26, 2. 2. 2016, Article 17, paragraph 1.
[35] J. Slavnić, S. Jovanović, 2015, pp. 147.

of individual markets. There is a noticeable difference between the Anglo-Saxon tradition in which interest has been and remains to this day one of the important insurance institutes that influences its validity, while in continental (European) legal systems there is generally no such importance in personal insurance. However, the denial of the existence of interest in personal insurance is unfounded and should not be interpreted as inherent to property insurance. The institute of compensation, which is characteristic of property insurance, is also inherent to all types of personal insurance where the purpose of insurance protection is achieved through the reimbursement of certain costs or amounts due. On the other hand, the interest in life assurance is related to one's own material security in old age or the security of one's relatives, as well as to covering particular expenses. Therefore, although the subject of personal insurance is an intangible value (life and health of a person or costs related to a particular person as a beneficiary or insured), personal insurance has its own material basis that coincides with the interest for which this type of insurance is concluded. The institute of contract law interests thus explained should be distinguished from the application of the presumed best interest of the policyholders and insured persons as a supervisory and regulatory obligation of all life assurance distributors when advertising, offering insurance, informing policyholders and insured persons, concluding and executing life assurance contracts.

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