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COVID - 19 AS A "SIGNIFICANT CIRCUMSTANCE" FOR RISK ASSESSMENT IN LIFE INSURANCE (IN AND AFTER THE PANDEMIC)

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ABSTRACT

The data on the health status of a policyholder represent a significant circumstance for risk assessment and concluding a life insurance contract, and are also legally relevant circumstances for exercising the rights from that contract. The author starts from a theoretical analysis of the perception of data on the health status of policyholders as personal data, comparing the right to confidentiality of such data with the duty to report them (before concluding a life insurance contract) in terms of reporting all circumstances relevant to the insurance risk assessment. In order to properly fulfil the obligation of pre-contractual nature, the paper analyses the legal norms governing this issue and also provides a comparative overview of the Croatian and German insurance legislation with special emphasis on the scope of health data that the insurer is authorised to require, the clarity of legal standards and legal insurance norms contained in the insurance questionnaires and the life insurance offer. Presenting the importance of COVID-19 infection and possible chronic consequences for human health, the author indicates the extent to which COVID-19 infection (mild or severe form of disease, possible need for hospital treatment) will have an impact on the design of new insurance questionnaires and the relevance of genetic testing results in the context of concluding future life insurance contracts.

Keywords: *COVID-19, life insurance,"significant circumstance"*

1. INTRODUCTION

On 30 January 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a "public health emergency of international concern"[1] and, on 11 March 2020, declared it as a pandemic.[2] The coronavirus disease (COVID-19)

[1] See more Lee, A., *Public health actions against COVID-19 to protect our rights to health*, Medicine and Law, World Association for Medical Law, Vol. 39, No. 2, 2020, pp. 205 - 221.

[2] World Health Organization, *COVID-19 Public Health Emergency of International Concern (PHEIC)*, [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-con-

may result in a milder clinical picture for some individuals. This is confirmed by the WTO data that around 95% of people who have been sick with COVID-19 to date have recovered or are recovering.[3] According to the Croatian Institute of Public Health data from March 2020, the COVID-19 infection in about 80% of cases caused a mild illness (no pneumonia or mild preumonia) and most sufferers recover, while 14% have a more severe illness and 6% have a severe form of the illness.[4] Thus, for a number of people, COVID-19 can cause a more severe clinical condition that may have a fatal outcome. According to European Commission data, every 17 seconds a person dies in the EU due to COVID-19.[5] Moreover, the data from the European Centre for Disease Prevention and Control shows that in 2020, the largest number of COVID-19 reported cases and death cases were in the USA (35 072 089 cases, 848 838 deaths) and then in Europe (24 842 295 cases, 552 404 deaths).[6] These data indicate the severity of the COVID-19 disease, but also the need to amend the insurer's questionnaires *de lege ferenda*. Namely, reporting of all significant circumstances for risk assessment (in life insurance one of the significant circumstances is also the reporting of illness by the policyholder/insured) is an obligation of pre-contractual nature, and its fulfilment has an effect on the exercise of rights from the insurance contract. The aim of this paper is to point out the importance of data on the health status of the policyholder/insured, the right to privacy of such data, the right to their collection and transmission, but also the duty to report them since these are important circumstances for risk assessment and the conclusion of life insurance contracts.

2. DATA ON HEALTH STATUS – COLLECTION AND ACCESS

The effectiveness of the health system depends on the exchange of data on health status. The conditions for the purposeful and efficient use of data and information on health status in the Republic of Croatia are regulated by the Act on Health

cern-(pheic)-global-research-and-innovation-forum], Accessed 13 January 2021.

3 World Health Organization, *COVID-19 severity*, [https://www.who.int/westernpacific/emergencies/covid-19/information/severity], Accessed 1 February 2021.

4 Croatian Institute of Public Health, *Pitanja i odgovori o bolesti uzrokovanoj novim koronavirusom*, [https://www.hzjz.hr/priopcenja-mediji/pitanja-i-odgovori-o-bolesti-uzrokovanoj-novim-koronavirusom/], Accessed 18 December 2020.

5 European Commission, *Communication from the Commission to the European Parliament and the Council, Staying safe from COVID-19 during winter*, COM(2020) 786 final, 2.12.2020., p. 2, [https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-786-F1-EN-MAIN-PART-1.PDF], Accessed 17 December 2020.

6 European Centre for Disease Prevention and Control, *COVID-19 situation update worldwide, as of week 52 2020*, [https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases], Accessed 10 January 2021.

Data and Information.[7] The data on the the insured person's health status are health data since, according to the provision of Art. 3(1)(1) of the Act on Health Data, the data on a person, on his physical or mental health, including the health services provided to him in the health system of the Republic of Croatia are considered to be health data. Health records include medical documentation[8] - medical, nursing and other documentation (i.e. any record that contains information about the patient's health, treatment instructions, as well as how to exercise the patient's rights to health care)[9] and all other documentation that is created or recorded in health care (administrative, financial and other non-medical documentation).[10] In addition to the content of health data and medical documentation, the author points out the legal basis for the exchange of data on the patient's health status.[11] More specifically, according to the provisions of Art. 25, the Patients' Rights Act prescribes the patient's right to confidentiality[12] of health data,[13] i.e. the right to access medical records is regulated.[14] These provisions prescribe the following patient rights: a) the right to access all medical documentation related to the diag-

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7 Act on Health Data and Information, Official Gazette No. 14/2019 (Act on Health Data) - entered into force on 15 February 2019.

8 Medical documentation is a set of medical records and documents created in the process of providing health care by authorised health care providers that contain data on the health status and course of treatment of patients (Act on Health Data, Art. 3(1) point 8). These are the following documentation: discharge letter, medical certificate, medical history, laboratory test results, X-rays, CT findings, etc.

9 Matijević, B., *Osiguranje, Management, Ekonomija, Pravo*, Naklada, Zadar, 2010, p. 614.

10 Act on Health Data, Art. 3(1) point 9.

11 A patient is considered to be any person, sick or healthy, who requests or is provided with a certain measure or service for the purpose of preserving and improving health, preventing disease, treatment or health care and rehabilitation (Art. 1(2) Patients' Rights Act, Official Gazette No. 169/2004, 37/2008).

12 The principle of protection of patient privacy includes the right to confidentiality and privacy of information on health status, medical status, family circumstances, course of treatment and prognosis, and all relevant data. (Dulčić; K.; Bodiroga-Vukobrat, N., *Zaštita osobnih podataka pacijenata u europskom i hrvatskom pravu*, Zbornik Pravnog fakulteta u Rijeci, Vol. 29, No. 1, 2008, p. 2).

13 These are data that we consider a special category of personal data, the processing of which is in principle prohibited according to the provisions of Art. 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] *OJ L119/1–88 (Regulation (EU) 2016/679).* Exceptions to the application of the decision of Art. 9(1) of Regulation (EU) 2016/679, i.e. cases when the processing of personal data will be allowed (including data related to health) are prescribed by the provision of Art. 9(2) *Regulation (EU) 2016/679.* More on health data processing see *Act on Health Data,* Arts. *4 – 12.*

14 The doctor is obliged to keep accurate, comprehensive and dated medical documentation that can at any time provide sufficient information about the patient's health and treatment (Art. 23(1) Act on Medical Practice, Official Gazette No. 121/2003, 117/2008). In addition to the doctor's obligation to keep medical records of the patient's health and treatment, he is also obliged to keep these medical records while respecting the patient's privacy.

nosis and treatment of their disease;[15] and b) the right to request a copy of the medical documentation, at the expense of the patient.

The right to protection of personal data concerning health is the individuals' right to protection of their (legitimate, moral and economic) interests which relates to the effective protection of their personal health data from the risk of misuse, as well as from all unconstitutional, illegal, unjustified access and use, and to the sanctioning of illegal use and misuse of information.[16] The confidentiality of personal data is a personal right whereby every natural person's personal data is protected in order to exercise the right to privacy, which is one of the personality rights, and other human rights and fundamental freedoms.[17] Although the risk of disclosing personal data related to persons' health status makes all individuals (patients) a vulnerable category of persons[18] - by analysing Art. 23(1) of the Act on Medical Practice, we can see that the doctor is obliged to present the medical documentation to the Ministry of Health, State Administration Bodies in accordance with special regulations and the Croatian Medical Chamber or the judiciary[19] (exclusively at their request). In these cases, the prior consent of the patient to submit the data in question to the said authorities is not required. Upon the analysis of Articles 23 and 30 of the Act on Medical Practice, we can see that insurance companies do not have the right to access health data. However, insurance companies will be able to inspect medical records if the patient voluntarily provides them. In view of the fact that it is forbidden to discriminate or put at a disadvantage any person with regard to their state of health,[20] the author draws attention the importance of providing access to policyholder's medical records in connection with the importance of policyholder's health data when concluding a life insurance contract. More precisely, when concluding a life insurance contract, the insurer considers policyholder's state of health as a significant circumstance for the risk assessment.

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15 One of the patients' rights is the right to access and protection of health data, and the doctor is obliged, at the patient's request, to provide the patient with all medical documentation relating to the diagnosis and treatment of his disease (Act on Medical Practice, Art. 23 (3)).

16 Bevanda, M.; Čolaković, M., *Pravni okvir za zaštitu osobnih podataka (u vezi sa zdravljem) u pravu Europske unije*, Zbornik Pravnog fakulteta u Rijeci, Vol. 37, No. 1, 2016, p.151.

17 *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, 2007, p. 1596.

18 Grozdanić, V.; Škorić, M.; Rittosa, D., *Liječnička tajna u finkciji zaštite privatnosti osoba s duševnim smetnjama*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 64, No. 5 - 6, 2014, p. 127.

19 In that case, the access to the documentation in question will most often come on the basis of a court order, and in connection with the conduct of court proceedings. More on medical documentation as the most important and credible evidence of crucial importance in civil and criminal court proceedings see Golubić, M., *Značaj medicinske dokumentacije u sudskom postupku*, 2017, p. 2, [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2017B1005*], Accessed 27 December 2020.*

20 See Art. 1 of Anti-discrimination Act, Official Gazette No. 85/2008, 112/2012.

3. OBLIGATION OF THE POLICYHOLDER TO REPORT DATA ON HEALTH STATUS - SIGNIFICANT CIRCUMSTANCES FOR RISK ASSESSMENT IN CONCLUDING A LIFE INSURANCE CONTRACT

Life insurance contract is a contract of good faith[21] (*bona fides).* Good faith is a legal standard based on which it is required that the contracting parties, when establishing and exercising the rights from the insurance contract, are guided by the principle of good faith.[22] The principle of good faith implies openness, honesty and reliability in the mutual relations of the parties at the time of conclusion of the contract and after, until its realisation.[23] During the negotiations leading to a contract, good faith might require the parties to: a) keep every promise which is made; b) negotiate in such a way as to avoid taking advantage of another or the counterpart suffering prejudice; c) do one's best to complete the negotiations; d) act fairly and honestly; e) co-operate; f) inform the other party of all that he needs to know; g) avoid lies and misleading conduct; h) abstain from fraud.[24]

The principle of integrity and fairness, trust in the legal order, is one of the central principles of the law of obligations, which means a fair, loyal and just conduct of the contracting parties in establishing and performing contractual obligations.[25] This is an extralegal criterion for assessing the mutual relationship of the parties to obligations, and goes beyond what is explicitly provided or prescribed by the contract.[26] From the nature of the insurance relationship it follows that the policyholder must bear the burden of fully and truthfully informing the insurer of the facts relevant to its decision on concluding the contract and assessing the severity of the risk[27] and it is not permitted for the policyholder to conceal the facts known to him for his own benefit and to the detriment of the other contracting

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21 Clarke, M. A., *The Law of Insurance Contracts*, Sixth Edition, Informa, London, 2009, p. 119: Life insurance is valid if it is *bona fide*.

22 See more Wham, H. K., „*If They Wanted to Know, Why Didn't They Ask*?" A Review of the Insured' Duty of Disclosure, Auckland University Law Review, Vol. 20, 2014, p. 74; Baretić, M., *Načelo savjesnosti i poštenja u obveznom pravu*, Zbornik radova Pravnog fakulteta u Rijeci, Rijeka, Vol. 24, No. 1, 2003, pp. 571 – 615; Pavić, D., *Primjena načela dobre vjere u osiguranju*, Hrvatska pravna revija, Zagreb, No. 4, 2003, pp. 25 – 36; Galev, G., *Načelo savjesnosti i poštenja*, Zbornik Pravnog fakulteta u Rijeci, Supplement No. 3, 2003, pp. 223 – 236.

23 Andrijašević, S.; Račić-Žlibar, T., *Rječnik osiguranja*, Masmedia, Zagreb, 1997, p. 232.

24 Eggers, P. M.; Picken, S.; Foss, P., *Good Faith and Insurance Contract*, Lloyd's List, London, 2010, p. 6.

25 *Pravni leksikon*, *op. cit*., note 17, p. 233.

26 Pavić, D., *Načelo dobre vjere u poredbenom pravu pomorskog osiguranja*, Zbornik Pravnog Fakulteta u Rijeci, No. 2, 2002, p. 275.

27 The policyholder must accurately and fully report all circumstances relevant to the risk assessment, i.e. he must describe the risk he wants to insure accurately and completely (see Donati, A.; Volpe Putzolu, G., *Manuale di diritto delle assicurazioni*, Giuffre, Milano, 1995, p. 113).

party when taking out insurance.[28] This obligation is standardised in Art. 931 of the Croatian Civil Obligations Act[29] according to which the policyholder shall report to the insurer all the circumstances that are material for assessing the risk,[30] of which he is aware or of which he should have been aware.[31]

Precisely on the basis of fully and accurately reported circumstances relevant to the risk assessment, the insurer decides whether to conclude the insurance contract in question and assesses the severity of the risk.[32] This obligation of the policyholder exists before the conclusion of the contract or "on the conclusion of the contract". The pre-contractual duty of disclosure[33] is the most significant part of the duty of utmost good faith as applied in respect of insurance contracts.[34] This is an active reporting obligation that exists on the part of the policyholder. In other words, the policyholder knows best all significant circumstances that can be subjective and objective in nature.[35] The circumstances that are significant for the risk assessment are determined by the insurer and can only be determined on a case-by-case basis.[36] Generally speaking, significant circumstances are certainly the circumstances that are important for the insurer in deciding whether to conclude an insurance contract, i.e. under what conditions it will conclude it.[37] Although the Croatian legislator has nowhere explicitly prescribed the circumstances in question, the passive obligation to report exists on the part of the insurer who is obliged to define

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28 Pavić, D., *Ugovorno pravo osiguranja*, Tectus, Zagreb, 2009, p. 198.

29 Civil Obligations Act, Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018 (COA).

30 "Circumstances that are significant for the risk assessment" can be defined as information with which the insured approaches the insurer and on the basis of which he requests the conclusion of a contract in order to insure against the possible occurrence of a future risk (Keglević, A., *Ugovorno pravo osiguranja*, Školska knjiga, Zagreb, 2016, p. 346).

31 This obligation is prescribed within the German, Austrian, French, Italian and other EU Member States legislature - see Džidić, M.; Ćurković, M., *Pravo osiguranja*, Pravni fakultet Sveučilišta u Mostaru, Mostar, 2017, p. 173. More on the legal standardisation of this obligation in Slovenian legislation see Ivanjko, Š., *Uvod u zavarovalno pravo*, Univerza v Mariboru Pravna fakulteta, Maribor, 1999, pp. 145 – 146; Pavliha, M., *Zavarovalno pravo*, Gospodarski vestnik, Ljubljana, 2000., p. 168.

32 More on the obligation of policyholders to report significant risk assessment circumstances see Pavić, D., *Primjena načela dobre vjere u osiguranju*, Hrvatska pravna revija, br. 4, 2003, p. 26.; Ćurković, M., *Ugovor o osiguranju - obveza informiranja o značajnim okolnostima*, Osiguranje, Zagreb, No. 11, 2002, pp. 13 – 14.

33 See more Van Niekerk, J. P., *The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: Bruwer v Nova Risk Partners Ltd.*, South African Mercantile Law Journal, Vol. 23, No. 1, 2011, p. 135.

34 Eggers, P. M., *The Past and Future of English Insurance Law: Good Faith and Warranties*, UCL Journal of Law and Jurisprudence, Vol. 1, No. 2, 2012, p. 218.

35 Ćurković, M., *Obveze stranaka iz ugovora o osiguranju*, in: Kuzmić, M. (eds.), Ugovor o osiguranju prema novom ZOO, Inženjerski biro, Zagreb, 2005, p. 32.

36 Ćurković, *Ugovor o osiguranju - obveza*…, *op. cit.*, note 31, p. 13.

37 Ćurković, M., *Ugovor o osiguranju života*, Inženjerski biro, Zagreb, 2005. p. 80.

what information he considers significant[38] since the policyholder in many cases is unfamiliar with what information represent significant circumstances for the insurer.

Europen insurance contract law is not harmonised,[39] so there are no unified provisions that uniformly regulate the obligation of the policyholder to report significant circumstances for risk assessment, which in turn contributes to legal uncertainty. These rules vary significantly from one EU Member State to another, the practise of using questionnaires[40] to obtain the necessary disclosure from applicants is not mandatory in all EU Member States and the rules relating to allowed questions vary significantly.[41] Insurers are required to ask questions in order to learn about points relevant for their decision whether to accept the risk so, if they do not put questions in respect of some point - that point will be deemed "not relevant".[42] The fulfilment of the obligation to report significant circumstances for risk assessment refers to complete and accurate answering of all questions contained in the insurance offer,[43] reporting of circumstances covered by the insurer's questionnaire,[44] reporting of circumstances not covered by the insurer's questionnaire but stated in general and special policy conditions, as well as reporting those

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38 Pavić, *Ugovorno…, op. cit.,* note 28, p. 198. According to Ćurković, it is about giving answers to questions related to: illness; hospital stay, health resort, rehabilitation; data on the existing diseases of the heart, lungs, stomach, liver, kidneys, bile, nerves, mental illness, cancer, blood pressure, etc. (Ćurković, M., *Ugovor o osiguranju – Komentar odredaba Zakona o obveznim odnosima*, Inženjerski biro, Zagreb, 2017, p. 77).

39 See more Belanić, L., *Harmonizacija prava osiguranja u Europskoj uniji s osvrtom na ugovorno pravo osiguranja*, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, Vol. 60, No. 3, 2010, pp. 1352 – 1353.

40 See more Cousy, H., *The Principles of European Insurance Contract Law: the Duty of Disclosure and the Aggravation of Risk*, ERA Forum, Vol. 9, 2008, p. 120.

41 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, 2014, p. 43, [https://ec.europa.eu/info/sites/info/files/final_report_en.pdf], Accessed 28. December 2020. See more European Commission, *Disclosure duties of the customer*, [https://ec.europa.eu/justice/contract/files/expert_groups/disclosure_duties_of_the_customer_en.pdf], Accessed 27. December 2020.

42 Unan, S., *Some issues related to the content of the policyholder's pre-contractual duty of disclosure – general view*, European Insurance Law Review, No.1, 2016, p. 26.

43 Markov, M., *Posljedice neispunjenja obveza prijavljivanja okolnosti značajnih za ocjenu rizika u osiguranju života*, Osiguranje, Zagreb, No. 9, 1998, p. 3: As a rule, the policyholder is not obliged to inform the insurer about those circumstances for which no questions have been asked, but if the policyholder knew that a certain circumstance was significant for the risk assessment, he was obliged to inform the insurer even if no questions were asked.

44 By creating and handing in the questionnaire, the insurer did not, in terms of information, limit itself to the information contained in the questionnaire, nor did it release the policyholder from the obligation of informing him about the relevant facts that were not requested in the questionnaire (Jakaša, B., *Pravo osiguranja*, Pravni fakultet u Zagrebu, Zagreb, 1984, p. 220). For more on the usefulness of the insurer's questionnaire in terms of referring the policyholder to a list of circumstances that the insurer considers relevant to the risk assessment see Pavliha, *op. cit*., note 30, p. 168.

circumstances for which the insurer is requesting[45] additional information from the policyholder.[46] In life insurance, by means of the questionnaire the policyholder is instructed on the significant circumstances for risk assessment, and this can also be incorporated in a written insurance offer filled in by the policyholder or the insured.[47] Therefore, the insured should only have to answer the insurer's questions honestly and reasonably to fulfil his or her duty.[48]

Here it is important to note that according to the Croatian legislator (COA, Art. 931), the future policyholder must spontaneously report all significant circumstances, and which circumstances are significant - as a rule, only the insurer knows![49] Futhermore, the COA says nothing about the importance of insurer questionnaires.[50] We recognise that this is not a legal norm that provides protection of the weaker party's rights. It is therefore important to point out the valid provisions of the German legislator who saw the shortcomings of the provisions of Art. 16. of the German Insurance Contract Act (Versicherungsvertragsgesetzt – VVG of 1908) which corresponded to the provisions of Art. 931 of the COA. The provisions in question prescribed that the risk arising from any failure to recognise which facts and circumstances not requested by the insurer were of relevance to him therefore lay with the policyholder.[51] Amendments to the aforementioned provisions from 2008 shifted the risk of poor assessment of the importance of a circumstance to the insurer (so-called objective principle of assessment of circumstances).[52] There are clear criteria in German insurance law on the basis of which the policyholder will assess which circumstance is considered significant. Within Chapter I, Section 2 of the VVG of 2008,[53] Art. 19(1) prescribes that,

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45 Šulejić, P., *Pravo osiguranja*, Novinsko izdavačka ustanova, Beograd, 1980, p. 198: There is no obligation on the part of the insurer to request from the insured to complement and explain the answers given in the insurance offer.

46 The court's conclusion that due to the fact that the plaintiff as an insurer asks the policyholder to fill out a form with specific information relating to health problems or illnesses, taking medication, surgery or hospital treatment, disability, etc., all contained in 25 questions of the insurance offer, is correct, it follows that these data are relevant to the plaintiff in deciding whether to conclude such a contract with the policyholder at all, so these are important facts when concluding a contract, which is why the plaintiff's decision to conclude a contract depends on the answers to these questions (judgement of the County Court in Rijeka, Gž-2212/2017 of April 4, 2018).

47 Ćurković, *Ugovor o osiguranju života*, *op. cit.*, note 37, p. 81.

48 Wham, *op. cit.*, note 22, p. 100.

49 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.,* note 38, p. 75.

50 Ćurković, *Ugovor o osiguranju života*, *op. cit.*, note 37, p. 82.

51 Koch, R., *German Reform of Insurance Contract Law*, European Journal of Commercial Contract Law, Vol. 2, No. 3, 2010, p. 164.

52 Gorenc, V. et al., *Komentar Zakona o obveznim odnosima*, Narodne novine, Zagreb, 2014, p. 1502.

53 Versicherungsvertragsgesetz – VVG (BGBI. I S. p. 2631) from 23 November 2007, entered into force on 1 January 2008). English version [https://www.gesetze-im-internet.de/englisch_vvg/], Accessed 5

before the insurance contract is concluded, the insured is obliged to report to the insurer all circumstances that are important to the insurer for risk assessment and concluding insurance contracts, and about which the insurer has asked a question in writing.[54] Therefore, the VVG of 2008 abolishes the pre-contractual duty of the insured and reduces it to a duty to answer questions asked by the insurer in writing, that is, a duty not to misrepresent.[55] The written questions must be specific enough, clear and concise (non-ambiguous) so that there is only one right answer and the question must refer to present or past facts, not to future ones since this can provide no certainty, only presumption.[56] Thus, we can conclude that there is no obligation to present general risk forecasts or to assess the obligation to provide information, but the duty to answer questions about the circumstances of the risk which are put in writing by the insurer,[57] which means that a significant circumstance is considered to be the circumstance asked about by the insurer, in writing.[58] Thereby, the obligation of spontaneous notification was replaced with the insurer's questionnaire,[59] i.e. the principle of spontaneous reporting of important circumstances was abandoned and obliges the policyholder/insured to report only those circumstances that are known to him and for which the insurer asks questions in a written questionnaire.[60]

3.1. COVID-19 as a "significant circumstance"

Without going into the health circumstances that may contribute to the development of a more severe form of the disease and a more severe clinical picture of patients (such as old age, health problems, such as high blood pressure, obesity, heart and lung problems, asthma, diabetes, cancer, etc.), and consequently higher mortality - from the insurance standpoint it is important to indicate under what

January 2021. More on new VVG from 2008 see Heiss, H., *Proportionality in the New German Insurance Contract Act 2008*, Erasmus Law Review, Vol. 5, No. 2, 2012, pp. 105 - 114.

54 Sec. 19 VVG 2008 constitutes the key provision on the policyholder pre-contractual duty not to misrepresent and the revision of the rules on pre-contractual information duties (sec. 16 VVG 1908) was one of the core elements of the reform by the VVG from 2008 – Wandt, M.; Bork, K., *Disclosure duties in German insurance contract law*, Zeitschrift für die gesamte Versicherungswissenschaft, Springer, No. 1, 2020, p. 86.

55 Lowry, J., *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, in: Burling, J.; Lazarus, K. (eds.), Research Handbook on International Insurance Law and Regulation, Edward Elgar Publishing, UK-USA, 2012, p. 59.

56 Koch, *op. cit.*, note 50, p. 168.

57 Đorđević, S.; Samardžić, D., *Nemačko ugovorno pravo osiguranja sa prevodom zakona (VVG)*, Deutsche Stiftung für internationale rechtliche Zusammenarbeit, Beograd, 2014, p. 59.

58 See Wandt, M.; Bork, K., *op. cit.,* note 54, p. 82.

59 Keglević, *op. cit.*, note 30, p. 254.

60 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.,* note 38, p. 78.

conditions COVID-19, as a disease, will represent a significant circumstance for risk assessment in terms of concluding life insurance contracts not only in relation to persons over 60 and the elderly who have certain medical conditions, but also in relation to younger people who previously did not have significant health problems, and yet COVID-19 has led to a moderate to severe clinical picture that could possibly result in a chronic condition. When considering the existing dangers of COVID-19 disease, and the so far unexplored and unconfirmed effects of this disease on the development of another serious illness or the contribution to the creation of a more severe clinical picture for people with underlying health conditions - we can see problems that will soon begin to appear in practice and for which we do not yet have an answer in the scientific community because this requires many years of scientific research in order for certain hypotheses to be scientifically confirmed.

The data on the recovery from COVID-19 by policyholders/insured are not relevant to insurers regarding existing (already concluded) life insurance contracts because the conclusion of these contracts was based on the reporting of those significant circumstances that existed before the conclusion of such a contract (therefore, before or after occurrence of the disease if the insurer's questionnaire does not cover the question regarding the existence of COVID-19 infection in a person wishing to conclude a life insurance contract).[61] For that reason, life insurer cannot change the terms of coverage for active policies, so anyone who was covered remains covered.[62] However, in relation to future life insurance policies, the situation is different since data on the recovery from COVID-19 will be important for concluding life insurance contracts regarding changes in the life insurance application process and the change of questionnaires as guidelines for concluding this type of contract. For instance, some people who have had COVID-19, whether they have needed hospitalisation or not, continue to experience symptoms, including fatigue, respiratory and neurological symptoms[63] so many organs are affected by COVID-19 and there are many ways the infection can affect someone's health.[64] Although not much is known about this disease, numerous analytical studies point to chronic consequences for the health of people

[61] In relation to the existing life insurance policies, in the event of the death of the insured (caused by COVID-19), the insurer will be obliged to fulfil his contractual obligation.

[62] Moon, C., *How Is the Coronavirus (COVID-19) Affecting Life Insurance? An FAQ,* [https://www.valuepenguin.com/life-insurance-coronavirus-faq#cover], Accessed 29 January 2021.

[63] World Health Organization, *Coronavirus disease (COVID-19)*, 12 October 2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19], Accessed 20 December 2020.

[64] Centres for Disease Control and Prevention, *Long-Term Effects of COVID-19*, [https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html], Accessed 19 January 2021.

who have suffered from COVID-19. The analysis of the existing data shows that 12% of all infected people have some degree of heart muscle damage, and as for severe forms of the disease – in 61% of cases patients develop severe lung damage (so-called acute respiratory distress syndrome - ARDS), as many as 44% of these patients develop arrhythmias or other cardiac disorders which have so far been difficult to explain.[65] Precisely these possible consequences for the health of the policyholder will be of interest to the insurer (who will require the insurance applicant to give answers on specific questions on COVID-19 desease before concluding the life insurance contract) as certain diseases can pose a higher risk for the insurer which will, of course, also mean taking out a life insurance policy on less favorable terms for the policyholder, i.e. concluding the contract in question with the obligation to pay a larger amount of insurance premium.

Here it is important to assess the importance of genetic tests. A diagnostic genetic test aims to diagnose a specific genetic disease in a person who has symptoms while a positive predictive genetic test suggests that we have been in contact with a virus or that we have overcome a viral infection, and the test is conducted to find out if this viral infection caused a genetic change that can affect the development of the disease over a lifetime. Given that there are more than 1,000 different genetic tests in the world which are conducted on a voluntary basis (at the initiative of a potentially infected person), the question arises as to the possible significance of the results of these tests on the conclusion of a life insurance contract. In the Republic of Croatia, the issues on genetic examinations and analyses are not regulated in insurance legal acts. However, the provisions on the (im)possibility of using genetic tests for insurance purposes are contained within the already mentioned regulations: Anti-discrimination Act,[66] Patients' Rights Act[67] and Act

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65 Plazonić, Ž., *COVID-19 – srce u središtu*, Hrvatski liječnički zbor, [https://www.hlz.hr/strucna-drustva/covid-19-srce-u-sredistu/], Accessed 10 January 2021.

66 According to the provision of Art. 1(1) of the Anti-discrimination Act, the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia means also protection against discrimination on the grounds of genetic heritage. Consequently, discrimination on the grounds of genetic heritage is prohibited, i.e. placing of a person in a less favourable position based on his or her genetic heritage.

67 The provision of Art. 22(2) of the Patients' Rights Act clearly stipulates that genetic testing or testing for genetic diseases or to identify patients as carriers of a gene responsible for the disease or to detect a genetic predisposition or susceptibility to the disease, may only be for health purposes or for scientific research related to health purposes and with appropriate genetic counselling. It is a provision that regulates the issue of intervention on the human genome by prescribing that these tests can be performed exclusively for health purposes (or for scientific research related to health purposes), and not for other purposes such as insurance.

on the Implementation of General Data Protection Regulation.[68] In the Republic of Croatia, there is an explicit prohibition on the processing of genetic data for the calculation of disease risk and other health aspects of data subjects within the activities taken for the conclusion or execution of life insurance contracts and contracts with survival clauses. This prohibition is regulated by Art. 20(1) of the Act on GDPR. The prohibition on the processing of genetic data applies to data subjects who conclude life insurance contracts and contracts with survival clauses in the Republic of Croatia (if the processing is carried out by a controller established in the Republic of Croatia or providing services in the Republic of Croatia) and the prohibition may not be lifted by the consent of the data subjects.[69] We can also point to the provisions of German legislation. The German Genetic Diagnostic Act (Gendiagnostikgesetzt – GenDG)[70] of 2009, which prevents discriminations against persons with crucial diseases,[71] in section 4 "Genetic Examinations in the Insurance Sector", regulates issues of the genetic examinations and analyses in conjunction with the conclusion of an insurance contract. These provisions prescribe that the insurer cannot demand from the insured (before or after the conclusion of an insurance contract): a) any genetic examinations or analyses to be conducted; or b) any results or data from any previously conducted genetic examinations or analyses, or use or receive the results of any genetic examinations or analyses.[72] So, the insurer cannot request from the policyholder to undergo a predictive genetic test nor demand to disclose to the insurer the results of genetic tests which he has already done.[73] Insurers do not have the right to ask questions to the insured regarding the results of genetic tests (if such questions were asked, in any form, the insured is not obliged to answer them), and in case the insured voluntarily submits the results of genetic tests – they must not be taken into account by the insurer.[74] By analysing the provision of Art. 18 of GenDG, we realise that there must be no initiative by the insurer on conducting genetic testing on the policyholder, nor on submitting the results of genetic tests previously performed by the policyholder. However, in the second sentence of Art. 18 (1) of GenDG

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68 Act on the Implementation of General Data Protection Regulation, Offcial Gazette No. 42/2018 (Act on GDPR).

69 Act on GDPR, Art. 20 (2-3).

70 German Genetic Diagnostic Act (Gendiagnostikgesetzt – GenDG), BGBI I. pp. 2529 - 2538. GenDG je donesen on 31 July 2009 and according to the par. 27. it entered into force on 1 February 2010. Text available on: [https://theprivacyreport.com/wp-content/uploads/2010/11/German-Act-Translation.pdf], Accessed 1 February 2021.

71 Wandt; Bork, *op. cit.*, note 54, p. 84.

72 GenDG, Art. 18(1).

73 See more Unan, *op. cit.*, note 42, p. 30.

74 Bodiroga-Vukobrat, N., Belanić, L., *Osigurani rizik u zdravstvenom osiguranju u svjetlu novih otkrića genetike*, Zbornik Pravnog fakulteta u Rijeci, Rijeka, Vol. 39, No. 1, p. 362.

the provision clearly stipulates that the prohibition to require the policyholder to submit the results of already performed genetic tests does not apply to life insurance if the agreed insured sum exceeds the amount of EUR 300,000. Therefore, with regard to concluding a life insurance contract, the insurer is prohibited from requesting from the insured to undergo any genetic examinations or analyses, but has the right to request information from the policyholder about the results of already performed genetic testing if the above conditions are met.

3.2. Intentional Misrepresentation or Concealment of the circumstances on health status of the policyholder/insured – theory and case law

The principle of good faith prevents both parties from concealing what they know privately in order to persuade the other party, to whom these facts are not known and believes otherwise, to enter into a contract.[75] According to Jakaša, the policyholder is also required to state whether he or she suffers from a disease that is not listed in the questionnaire, if that disease can have an impact on the assessment of the extent of the risk.[76] However, it is accepted that the policyholder, who correctly and fully answered all the questions from the questionnaire, after which another significant circumstance was determined that the policyholder had not reported (in relation to which the insurer did not even ask a question!) - cannot be held accountable for his oversight,[77] which is very important for assessing the effects of an incorrect or incomplete application.[78]

Violation of the principles of integrity and fairness is intentional misrepresentation[79] or concealment[80] of circumstances on health status of the policyholder/insured. According to Art. 932(1) of the COA, if a policyholder has intentionally[81] misrepresented or has intentionally concealed a circumstance the nature of which is such that the insurer would not have concluded the contract had he been aware

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75 Pavić, *Ugovorno…, op. cit.*, note 28, p. 198.

76 Jakaša, *op. cit.*, note 44, p. 401.

77 Nikolić, N., *Ugovor o osiguranju*, Državni osiguravajući zavod, Beograd, 1957, p. 129.

78 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.*, note 38, p. 77.

79 We will consider as misrepresentation a positive statement of fact, which is made or adopted by a party to the contract and which is untrue (Clarke, *op. cit.*, note 21, p. 678) or reporting circumstances that are untrue compared to the actual situation (Scalfi, G., *Manuale delle assicurazioni private*, Egea, Milano, 1994, p. 98).

80 Concealment of a circumstance or failure to provide information about a circumstance can be considered an incomplete application– Ćurković, M., *Ugovor o osiguranju – Komentar…, op. cit.*, note 38, p. 75.

81 There are two preconditions for the existence of an intentional violation of the reporting obligation: a) the policyholder is aware of this fact; b) the policyholder is aware that this fact is relevant to the risk assessment (Gorenc, V. et al., *Komentar Zakona o obveznim odnosima*, RRIF, Zagreb, 2005, p. 1404).

of the true state of affairs, the insurer may ask for annulment of the contract.[82] This is the right of the insurer, not his obligation. Accordingly, the insurer has the right to request the annulment of the contract, and if it does not submit a request for the annulment of the contract - that contract will remain in force (will remain valid).

The annulment of the insurance contract (due to intentional misrepresentation or concealment) requires a cumulative fulfilment of these conditions: a) the insurer must prove the intention of the policyholder; b) the insurer must prove that the intentional misrepresentation or concealment is so significant that the insurer would not have concluded the contract if he had known about it;[83] c) the insurer must request the annulment of the insurance contract (the contract is voidable[84] and by bringing an action the insurer may request the annulment of the contract); d) the request for cancellation of the insurance contract must be submitted within the preclusive period of 3 months following the day of becoming aware[85] of the misrepresentation or concealment.[86] The insurer bears the burden of proving that the said conditions have been met. The insurer's right to demand the annulment of the insurance contract shall expire if he has failed to communicate to the policyholder, within three months following the day he has become aware of misrepresentation or concealment that he intends to exercise this right (COA, Art. 932(2)).

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82 Intentional misrepresentation of a serious illness (cirrhosis of the liver) of the policyholder that caused his death after the conclusion of the contract, and of which if the insurer had known, it would not have agreed to conclude a life insurance contract, is the reason for voidability of the concluded contract so, if the insurer did not request and obtain (in court proceedings) its annulment, he is not released from the obligation to pay the agreed fee - judgement of the County Court in Bjelovar, Gž-1987/11-2 of November 17, 2011.

83 Whether the evidence was successful, is judged by the court' in its free assessment (Jakaša, *op. cit.*, note 44, p. 216.). As the defendant's predecesor presented himself as completely healthy when concluding the life insurance contract, this justifies the court's conclusion that the deceased A.Š. (who died from a heart attack and in respect of whom an expert medical report established that he had suffered from a serious chronic heart disease since 1991, when he suffered a major heart attack at the age of 40 and went through a cardiac arrest, that is, resuscitation twice) made an intentional misrepresentation or concealment of some circumstances that were relevant to the insurer when concluding the contract and that the insurer, had he known about the real situation, would not have concluded such a contract (judgement of the County Court in Rijeka, Gž-2212/2017 of April 4, 2018).

84 The insurer cannot request the determination of the nullity of the contract, because the COA explicitly states in Art. 932(1), that the consequences of intentional misrepresentation or concealment by the policyholder are of such a nature that they do not cause the nullity of the contract but voidability.

85 Suspicion (not knowledge) of a particular circumstance that the insurer considers significant is not sufficient– see more Ramljak, B., *Pravo osiguranja*, Mate, Zagreb, 2018, p. 143).

86 Pavić, *Ugovorno…, op. cit.*, note 28, p. 202. See more Ćurković, M., *Obveze…, op. cit.,* note 35, pp. 33 – 35.

The Croatian legislator has prescribed cases when the insurer cannot invoke misrepresentation or incomplete representation. The first case concerns the inability of the insurer to invoke misrepresentation or concealment in the application if at the time of concluding the contract he was aware or could not have been unaware[87] of the circumstances relevant for the risk assessment, which the policyholder has misrepresented or concealed. (COA, Art. 935(1)). This is a case that violates the principles of integrity and fairness,[88] i.e. the case when the insurer at the time of concluding the contract knows the actual facts, concludes a contract with the policyholder and subsequently calls for misrepresentation and/or concealment in the application. The second case refers to the inability of the insurer to invoke misrepresentation or concealment in the application if he has become aware of these circumstances during the insurance period, but has failed to exercise his legal powers (COA, Art. 935(2)). In this case, the insurer learned about the circumstances that were significant for the risk assessment after the conclusion of the contract (during the duration of the insurance contract) and did not submit a request for the annulment of the contract.

4. CONCLUSION

Having taken as a starting point the protection of a patient's right to privacy regarding the data on health status and the inability of the insurer to access this data (if the patient does not provide it voluntarily), this paper has drawn special attention to the importance of this data from the aspect of the insurance law. To be more precise, the paper analyses the theoretical and practical implications of the pre-contractual duty of the policyholder to diclose to the insurer all circumstances, e.g. all risk relevant facts which he/she is aware of (including the data on his/her health status), if he/she wants to conclude a life insurance contract. It is an obligation to accurately and fully inform the insurer about significant circumstances for risk assessment, and this pre-contractual obligation exists on the part of the policyholder immediately before or during the conclusion of a life insurance contract. Based on the reported circumstances significant for the risk assessment, the insurer makes a decision whether to conclude/not conclude a life insurance contract, that is, a decision whether to assume/not assume a future contractual

[87] Having in mind the finding and opinion of the expert, from which it clearly follows that it could have been clear to the medical layman that the policyholder was not healthy due to the existence of jaundice, the court correctly applied Art. 935(1) of COA, from which it follows that the plaintiff (insurer) at the time of concluding the contract could not have been unaware of the circumstances relevant to the risk assessment, and the plaintiff did not provide evidence on the basis of which he could have excluded the said possibility - judgement of the County Court in Zadar, Gž-162/19-2 of August 29, 2019.

[88] See Džidić; Ćurković, *op. cit.*, note 31, pp.179 – 180.

obligation, i.e. the payment of insurance if the insured event occurs. The policyholder is not aware of the significance of these circumstances, and the fact that there are no appropriate criteria that would assist the policyholder with assessing whether a circumstance is significant or not is of no help, and it is in relation to those circumstances that the insurer carries out the insurance risk assessment. As there are no uniform provisions at European level governing the obligation to report all circumstances relevant to the risk assessment, this has contributed to the creation of legal uncertainty. For this reason, this paper puts a special focus on the analysis of the effects of violation of principles of integrity and fairness in insurance contracts in case of policyholder's intentional misrepresentation or concealment of the circumstances significant for risk assessment and legal effects of this violation on the validity of life insurance contracts, i.e. a possible annulment of the contract in question.

The data on the health status of policyholders, in the future, will most certainly include the data on the recovery from the COVID-19 disease, which, due to the right to protection of patient privacy, the insurers will not have the right to inspect. Due to the possible chronic consequences to human health, the fact that someone has had COVID-19 and recovered may be relevant to concluding a life insurance contract because of the possible long-term effects of COVID-19. Therefore, the insurers will undoubtedly require introducing specific questions on the COVID-19 desease in the existing insurance questionnaires (offers to conclude a life insurance contract). Their importance is emphasised in this paper because they indicate to the policyholder those circumstances which are important for risk assessment, and their completion also requires answering questions on the policyholder's health status. In the Croatian legal system, the risk of poor assessment of significant circumstances for risk assessment, as a rule, exists on the part of the policyholder. The author provides a comparative review of the provisions of the German VVG of 2008 which transferred this risk to the insurer given that the policyholder is required to report only those circumstances that are significant for the risk assessment, and in relation to which the insurer required a written statement from the policyholder. I consider these provisions as a positive step towards the protection of the rights of policyholders and I suggest their appropriate transposition to the Croatian legal system.

The author indicates and analyses appropriate Croatian provisions on using genetic testing results in insurance, e.g. prohibition of the discrimination on the grounds of genetic heritage (Anti-discrimination Act), performing genetic tests exclusively for health purposes, e.g. not for insurance (Patients' Rights Act) and explicit prohibition on the processing of genetic data for the calculation of disease risk and other health aspects of data subjects within the activities taken for the conclusion

or execution of life insurance contracts and contracts with survival clauses (Act on GDPR). Pointing to the Croatian regulatory prohibition requesting from the insured to submit their genetic testing results and prohibition to process the genetic data for the purpose of conclusion or execution of life insurance contracts and contracts with survival clauses, the author points to the provisions of the German GenDG of 2009 which states (as an exception) the right of the insurer to require genetic results from the insured in life insurance if the agreed insured sum exceeds the amount of EUR 300,000. Different provisions that regulate the use of genetic tests for the purpose of concluding life insurance contracts within the legal systems of EU Member States (from an absolute prohibition to a relative prohibition on the use of genetic test results) indicate the need to unify provisions at European level, i.e. prescribing an explicit prohibition on conducting genetic testing and processing genetic data for insurance purposes. This would enable a uniform legal protection for future insured persons, i.e. protection against discrimination on the basis of genetic heritage.

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