Can the Massive Increase of Insurance Premiums for Private Room Supplementary Insurance be a Ground for Contract Invalidation?

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A policyholder suffering from leukemia has benefited from supplementary private room insurance for years. During the coverage period, the insurance company has increased the insurance premium by a staggering amount. The policyholder unsuccessfully tried to invalidate the contract to obtain a partial refund of the premiums paid.

Judgment of the Federal Supreme Court of 19 March 2024
Case reference: 4A_489/2023

Facts

A. (the "Client"), took out supplementary insurance (the "Supplementary Insurance") with an insurance company (the "Insurance"). Under the Supplementary Insurance, the Client was entitled to costs reimbursement for treatment in a private room. In 2005, the Client was diagnosed with leukemia. During the course of this illness, the Supplementary Insurance came into effect. Following a stem cell transplant, repeated rejection reactions occurred which led to numerous claims under the Supplementary Insurance.

In 2018, the Insurance informed the Client that the Supplementary Insurance was considered closed (closed portfolio pursuant to Art. 156 of the Ordinance on the Supervision of Private Insurance Companies [SO]). It offered her the opportunity to switch to a comparable supplementary insurance (the "Supplementary Insurance 2"). The Client refused to switch because this insurance did not provide coverage for transplants.

In 2019, the Client asserted that the premiums for the Supplementary Insurance from 2007 onwards were immoral (pursuant to Arts. 19 and 20 of the Swiss Code of Obligations [SCO]). The Insurance refused to retroactively adjust the premiums and to limit future premium increases. In subsequent correspondence with the Insurance, the Client reiterated her position that the successive premium increases were immoral. She also argued that the contract could be invalidated due to unfair advantage (Art. 21 SCO).

In 2022, the Client filed a claim before the Cantonal Court requesting that the Insurance be ordered to pay her CHF 33,489.20 corresponding to overpaid premiums. The Client essentially argued that the premium for the Supplementary Insurance had risen by 282 % between 2006 and 2019 and by 321 % between 2019 and 2022, and was therefore three times higher than that of similar insurances. Also, the premium increases were immoral, and they could even amount to a case of unfair advantage.

The Cantonal Court dismissed the claim. It considered that the Client was unable to prove that the premium increases made over the years were immoral. There was also no case of unfair advantage, namely no emergency situation or exploitation of such by the Insurance.

The Client challenged this ruling before the Federal Supreme Court.

Issue

In its ruling, the Federal Supreme Court first noted that the case of a clear discrepancy between the respective obligations of the contracting parties under a contract is exclusively covered by Art. 21 SCO (unfair advantage), and not by Arts. 19 and 20 SCO (immoral contract). Consequently, only Art. 21 SCO needed to be analyzed.

Art. 21 SCO provides that "Where there is a clear discrepancy between the respective obligations of the contracting parties as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the person suffering damage may declare within one year that s/he will not honor the contract and demand restitution of any performance already made"[1].

In this respect, it was first to be determined whether a clear discrepancy between the respective obligations of the contracting parties was given. Second, it was necessary to assess whether the Client was in an emergency situation (straitened circumstances, recklessness or inexperience), on the one hand, and whether the Insurance deliberately

exploited this situation, on the other.

Decision

The Federal Supreme Court confirmed the Cantonal Court's judgment and thus rejected the appeal filed by the Client.

The Federal Supreme Court first reminded that an emergency situation within the meaning of Art. 21 SCO exists when, at the time a contract is concluded, a party is in severe distress. Severe distress includes but is not limited to economic, personal, family and political distress. The decisive factor is that a contracting party considers that entering into a contract that is unfavorable to it is the lesser evil compared to the disadvantages stemming from not entering into the contract at all.

In the case at hand, the Cantonal Court had noted that the latest increase of the premiums (the only one relevant under the statute of limitation rule of Art. 21 SCO) could be explained by the elimination of the no-benefit discount provided for in the contract. At any rate, there was no emergency situation or deliberate exploitation of such a situation by the Insurance. On the contrary, as the Cantonal Court pointed out, Art. 10 para. 1 of the General Terms and Conditions (GTC) of the insurance contract granted the Insurance the right to modify the insurance contract in the event changes were made to premium tariffs or cost sharing. Furthermore, according to Art. 10 para. 3 of the GTC, the Client shall be notified of changes to the premium tariffs in advance. Therefore, if the Client opposed the changes, she had the possibility to terminate the contract by the end of the calendar year. Alternatively, she could have opted to switch to Supplementary Insurance 2, which would have (merely) resulted in not having expenses covered for a stay in a private room for the treatment of subsequent complications of the stem cell transplant that she had undergone in 2006. Under these circumstances, the Cantonal Court considered that there could be no grounds for the Insurance deliberately exploiting an emergency situation.

The Federal Supreme Court took a different stance.

The Federal Supreme Court reminded that under Art. 21 SCO the required discrepancy between the respective obligations of the contracting parties must exist at the time the contract was entered into, but this was clearly not the case here. Therefore, Art. 21 SCO could only be applied if it were assumed that a new contract between the parties arises with each premium increase. However, such a view is not in line with the general terms and conditions of the contract. Indeed, under these terms, the Insurance may adjust the insurance premium when changes are made to premium tariffs or cost sharing. Thus, every new adjustment to the insurance premium did not result in a new contract each time but rather constituted a mere modification to an already existing contract. Hence, Art. 21 SCO does not apply because any hypothetical discrepancy between the respective obligations of the contracting parties only materialized *after* the conclusion of the Supplementary Insurance.

Even if one were to side with the Client that a new contract was entered into with every premium increase, and that there was a clear discrepancy between the respective obligations of the contracting parties, the other requirements of Art. 21 SCO would clearly not be met. Indeed, the Client failed to prove that she had entered into the contract due to an emergency situation, nor did she prove that the Insurance had deliberately exploited such a situation.

In light of these considerations, the Federal Supreme Court upheld the Cantonal Court judgment and rejected the Client's claim.

Key takeaways

Under Art. 21 SCO, discrepancy between the respective obligations of the contracting parties must exist when the contract is entered into, and not at the time of subsequent amendments.

Indeed, the amendment of an existing contract does not constitute the conclusion of a new contract for the purposes of Art. 21 SCO. In addition, clients wishing to invoke Art. 21 SCO must allege and prove the existence of an emergency situation and the exploitation of this situation by their contracting partner.

Comments

In this decision, the Federal Supreme Court concluded that, under the general terms and conditions of the Supplementary Insurance, the increase in health insurance premiums did not lead to a new contract but merely constituted a modification of the existing contract. However, the modification of a contract is subject to the same rules as those governing the

establishment of the contract, in particular those relating to the establishment and exchange of the parties' will. In other words, contract modifications operate in the same way as the conclusion of a new contract. This means that one should ensure that the policyholder's will is intact each time premium increase results in a modification of the contract.[2] Concretely, in this case, this would mean that Art. 21 SCO could also apply to subsequent changes in insurance premiums. Such a conclusion also seems justified in view of the need to protect the establishment of the contracting parties' will not only at the time of entering into the original contract, but also when the parties' will is subsequently expressed in relation to any contractual modification.

In addition, the general clause on premium increases contained in the GTC does not yet make it possible to rule out any ill-intention according to Art. 21 SCO, particularly when the increase is such that it could raise the question of a clear discrepancy between the respective obligations of the contracting parties resulting from the exploitation of the other party's weakness. Indeed, the reservations that Supplementary Insurances may impose on new policyholders make it nearly impossible in practice for a person undergoing any type of medical treatment to be offered an equivalent coverage under another insurance policy. This should be taken into account when assessing the emergency situation requirement under Art. 21 SCO.

Other sources presenting the case

Bottani Luca/Galli Dario/Vischer Markus, Starke Prämienerhöhungen sind weder sittenwidrig noch übervorteilend, *in*dRSK Weblaw, published on November 27, 2024 (https://www.walderwyss.com/assets/content/publications/Starke-Praemienerhoehungen-sind-weder-sittenwidrig-noch-uebervorteilend.pdf).

Stacchetti Mathias, Assurances complémentaires pour les soins de santé: le piège du produit fermé: analyse de l'arrêt du Tribunal fédéral 4A_489/2023 du 19 mars 2024, *in* RC & Assurances.ch (rcassurances.ch).

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[1] "En cas de disproportion évidente entre la prestation promise par l'une des parties et la contre-prestation de l'autre, la partie lésée peut, dans le délai d'un an, déclarer qu'elle résilie le contrat et répéter ce qu'elle a payé, si la lésion a été déterminée par l'exploitation de sa gêne, de sa légèreté ou de son inexpérience"

[2] Tercier Pierre / Pichonnaz Pascal, Le droit des obligations, 6e éd., Genève, Zurich, Bâle (Schulthess) 2019, N 607.

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