Brief presentation of Mr. Kremalis' study

The study reveals the problems concerning the medical liability and the enterprising risk of those persons who plan or realise the fast-growing medical-insurance contracts. It provides the legal and social-policy answers to the questions related to civil and social rights, which preoccupy daily the doctors as medical services' providers, the insurers guaranteeing medical care and the patients, as the basic users and consumers of the medical goods and services.

MEDICAL LIABILITY AND ENTERPRISING RISK RELATED TO MEDICAL-INSURANCE CONTRACTS

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1. Notional definitions and social-economical risks
2. Basic legal problems
3. Legal protection and necessary legislative interventions

1.- Notional definitions and social-economical risks

The traditional medical-care contracts among individual patients and doctors or clinics rarely led to the recognition of the professional or enterprising liability, because of a prevailing conception centred on the doctors' problems. Today, the first and second-degree private medical care often derive from legal constructions, such as medical-insurance contracts, which – due to their standardisation - make health services' and insurance funds liable to huge compensations towards the affected patients or third persons.

Certain collaborations, in particular, among insurance companies and providers of medical services or goods have been introduced and rapidly growing, aiming at the production and distribution, against a standard fee, of the necessary medical care and equipment, reducing the cost through free competition. It concerns the application in Greece of the American-inspired managed health care capitation programs, the so-called Health Maintenance Organisations (HMO's).[1]

In the first stages of the operation of such an institution, appropriate for the completion or even, the partial substitution to the problematic health branches of social insurance, one can see a certain professional and enterprising optimism, as the better-off and privileged ages and categories of the population are attracted. Soon, though, arise certain professional risks for the doctors and enterprising risks for the medical clinics and the insurance companies, due to certain inevitable socio-economical factors. According to the foreign experience, those systems become mature in conditions of uncontrolled increase of the medical and advertising cost, of a cost reduction

[1] In the 3rd National Scientific Conference of Health Services' Management, which took place in Thessalonica (4-6.10.01), it was announced that already 17 capitation programs exist in Greece, with the participation of the greatest medical clinics and insurance companies.

imposed by free competition and of an effective state control as regards their viability. As far as the reinsurance of the necessary assets is not provided for in legal texts, as it is the case in Greece (unlike the U.S.), nor in the enterprise's principles, a general claim on behalf of the insured patients is sufficient to make the medical or insurance organisations concerned liable to high compensations.[2]

In foreign countries, one can identify cases of medical liability and enterprising risk, when saving funds affects some fundamental rights of the patients. In that case, it is strongly recommended that the medical acts should be penalised.[3] Analogous are the results when competition makes it necessary to obtain expensive human resources or medical equipment,[4] which cannot be covered, in the long run, by the contributing capacity of the insured for medical services.

2.- Basic legal problems

Out of the previous section, it can be concluded that the production and distribution of medical services will be justified in the future less by medical choices, which cannot be legally examined as applications of scientific-technical knowledge, and more by enterprising choices, which can be examined –among other rules- by those of Commercial (Insurance) Law and of the fast-growing Health Law. In the framework of the last, theory and case-law daily determine a grid of rules of medical liability corresponding to a bill of patients' rights. We have, therefore, soon passed from the time when legal sciences founded the possibility to take legal action for the right to health protection,[5] to the time when prevention, restoration and maintenance of health constitute some evident rights of the insured in the private sector, as well as of those who turn to the National Health System.[6] On top of this evolution, an independent right to health protection was recognised in the recent amendment of the Greek Constitution (article 5§5 Const.1975/1986/2001).

In many issues, the doctors and the other medical professions may still make decisions on a discretional basis, but we are certainly entering a phase of "normative" medical services, especially following the vote of detailed codes

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[2] Robinson, Physician Organization in California : Crisis and Opportunity, Health Affairs, July/August 2001.

[3] Hammer, Pegram v. Herdrich : On Peritonitis, Pre-emption and the Elusive Goal of Managed Care Accountability, Journal of Health Politics, Policy and Law, Vol. 26, No 4, Aug. 2001. Humbach, Criminal Prosecution for HMO Treatment Denial, Journal of Law-Medicine, vol. 11, No 1, winter 2001.

[4] Farasat, Managed Care and the Adoption of Hospital Technology : The Case of Cardiac Catherterization, SSRN Electronic Paper Collection, Oct. 2000.

[5] Kremalis, The right to health protection, From sickness social insurances to the unified health services' system, Reprint, Athens 1987, p.169 ff.

[6] See, law 2619/1998 (Off. Journal n°132/A/19.06.98) ratifying the Council of Europe Convention concerning the human rights' protection and the personal dignity as regards the applications of biology and medicine. At the same time, according to article 1 of law 2071/1992, the state guarantees the citizen's right to prevent or cure his/her health problem through procedures that totally secure his/her free choice and the respect to human dignity. See also, article 47 of law 2071/1992 concerning the rights of the hospitalized patient, Medicine and Law revue vol. 10, 11-12/1991, 30.

of professional ethics[7] and other measures. Recently, the Greek Courts have resorted to the adequate interpretative methods in order to substantially expand the content of civil, administrative, criminal and disciplinary liability of the doctors,[8] when specifying medical duties and breaches of discipline.[9] Moreover, with the first signs that the medical-insurance programs arrive at their maturity, the insurance companies run the known risks of insufficient reserves.[10] Finally, as the state does not guarantee the reinsurance of problematic benefits from medical-insurance contracts,[11] only two possibilities exist : either the denunciation of the contracts or the bankruptcy of the funds concerned.[12]

In the framework of the European Union, the concerns focus on the compatibility and the limits between the principles of social solidarity and free competition in a free insurance market of medical services,[13] whereas the European Court of Justice facilitates, through its case-law, the extension of the health insurance market over the national borders.[14]

3.- Legal protection and necessary legislative interventions

From the above-mentioned cases, a safe conclusion can be drawn : the legal liability of the persons and the funds contributing to the plannification, financing and benefits deriving from medical-insurance contracts is – in many ways – enlarged, if it is compared to the typical forms of personalised liability from medical acts and insurance cover. Before, the contracting parts acted according to their contractual will, providing the health protection needed. Today, they are more often obliged to comply with the occurring external factors that undermine the kind and the extend of the agreed clauses. A characteristic example is provided by the limitation of the medical inscriptions, which can unbalance health expectations, but not always to such a degree that could justify an appeal to the unexpected modification of the conditions.[15]

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[7] See, Code of Nursing Ethics in the presidential decree n°216/2001 (Off. Journal n°167/A/25.07.01).

[8] See among others, Council of the State's decision n°2463/1998, Social security law revue (EDKA) 1998, 547, Supreme Court's decision n°534/1998, EDKA 1998, 897, Supreme Court's decision n°195/1990, Medicine and Law revue vol. 11/1992, 19, Supreme Court's decision n°1163/1989, Medicine and Law revue vol. 11/1992, 18, Athens Admin. Court of First Instance decision n°10933/1997, Administrative Justice revue (DiDik) 1997, 177.

[9] See, Code of Medical Ethics in Royal decree 25/5-6/6/1955 and the related delegating clause in article 62 of law 2071/1992, as well as the detailed list of disciplinary breaches in article 35§2 of law 1397/1983.

[10] See, article 7§1 of codified Presidential decree 400/70 and Kremalis, Social Law consultatory responses (1989-1999), Papazissi ed. 2000, p.415 ff.

[11] On the contrary, in the U.S. since 1973 the interstate ERISA program (Employee Retirement Income Security Act – 1974) guarantees part of the medical benefits, but only as regards certified medical-insurance funds fulfilling certain quality and quantity standards : see, Furrow, Greaney, Johnson, Jost, Schwartz, Health Law – Cases, Materials and Problems, 3rd ed., West Group, 1997, 298, 800, with references to the american case-law.

[12] A characteristic example is provided by the bankruptcy of Maxicare, the second biggest medical-insurance fund in the country, with two million members.

[13] Van de Ven, How to achieve solidarity in a competitive health insurance market ?, in : Pronk, The future of health insurance in Europe : between competition and solidarity, 2001, p.14 ff.

[14] European Court of Justice, decision of 12.07.2001, case C-157/99, Smits, Peerbooms, EDKA 2001, 661.

[15] Article 288 of the (Greek) Civil Code.

It is therefore necessary to look for those legal guaranties, which would enforce the effectiveness of the choices made by the doctors, the insured patients and the entrepreneurs, in the application of the health-insurance contracts.

A) First, emphasis should be put on the prevention of professional or enterprising risks of the medical and insurance companies.

Prevention, first of all, means that the health-insurance contract, as well as the contracts of employment of the doctors and the other health professionals, are adequately formulated ; it also implies the legal elaboration of the health care rates, in order to avoid the infringement of the insured patients' rights. Prevention also implies the elaboration of a legally imperative and secure actuarial basis, the investment of the capitals coming from the capitation programmes, the planning of the insurance contracts according to the available medical and financial data, the continuous legal – i.e. not only financial and accounting – evaluation of the application of health insurance contracts. Prevention finally implies the development of foreign models of health-care protection taking into account the negative aspects of their application, as revealed by national and international science and case-law.

The fulfilment of health-insurance contracts in our country, has not yet fully developed all professional and enterprising risks run by the concerned parts. Besides, the intense search, in other countries,[16] for alternative forms of co-operation between providers and consumers of health goods or services, indicates the difficulty to discipline this new economic and scientific phenomenon in a secure legal framework. In order to reduce the related costs, the employers, the state and the other contributing parts to the health services, tend to transfer the responsibilities and the risks towards the producers of health goods and services, who – in their turn – try to transfer the responsibilities and the risks to the patients. In those aspects, there is a great need for legal protection in the elaboration of the contractual and normative clauses, which balance the opposing lawful interests.

B) Then, the rights of the individuals, as patients and as consumers of health services and goods, should be determined.

As regards the protection of the individuals as patients, the general declarations in ethics' codes or in (public-servant inspired) lists of medical duties and disciplinary breaches, are insufficient. It is recommended, on the contrary, that a clear contractual or normative list is elaborated concerning the patients' rights towards the harmful acts or omissions of doctors and private health-care institutions in general. It is that specific list which will represent the protection of the human dignity and the personality, as well as the abolishment of any unjustified discrimination. Some empirical research has proved that health-insurance contracts cause discriminations against the economically weak and the elder parts of the population.[17] Therefore, it would be worthwhile to create some motives so that health-care protection deriving from health-insurance contracts is not inferior to the national (public) health-

[16] Furrow, Greaney, Johnson, Jost, Schwartz, Health Law, Hornbook Series, West Group, 1995, 160, 220 ff.

[17] Hashimoto, The Proposed Patients' Bill of Rights : The Case of the Missing Equal Protection Clause, Journal of Health Policy, Law and Ethics, vol. 1, No 1, 2001.

care standards. The mutual completion between private and public health-care institutions covering the population is a task in continuous evolution.

As regards the protection of the individuals as consumers, we should emphasize on the importance of the clause concerning the fulfilment of the obligations according to the good will specified in article 2 of law 2251/1994, as completed by article 10 §24 al.e of law 2741/1999, concerning the general terms of transactions, where fall into the contracts between consumers and providers of goods and services,[18] including health-insurance contracts.

C) Finally, the guaranties for the unobstructed execution of the health-insurance contracts should be enforced, as much as possible, allowing the funds involved to resist to exogenous socio-economical factors.

The expression "managed care problem" corresponds in the United States, to the need for legal protection of the individuals towards the big companies, more interested in statistics than in human needs. We often talk about a conflict of values, in the transaction from the health coverage of the patient to the health coverage of the population.[19] In Greece, where there is a composite system of (public and private) health care, there is a difficult-to-cover legislative gap as regards the institutional guarantee of the private health-insurance, unlike the respective guarantee concerning the social security sickness branches (article 22 §5 of the Constitution 1975/1986/2001.

It is, therefore, necessary to take certain measures, in order to guarantee the application of the capitation programmes and the related medical and insurance acts, according to good will. Besides, we should not exclude the introduction of a state-controlled reinsurance covering the totality or part of the benefits deriving from health-insurance contracts. In this way, the negative results would be moderated, as regards individuals, in the case of medical or insurance liability, or in the case of mature programmes implying an inevitable deterioration in health benefits. Finally, tax reductions and healthy competition guaranties in favour of the institutions executing the health-insurance contracts, would enforce their financial resistance, while patients, financiers and their providers should be in a better position in a collocation list.

It will be proved in practice whether the professional and enterprising risks related to health-insurance contracts will affect the adequacy of the health-care needed in any specific case. One thing is certain, that the prompt "diagnosis" of those risks contributes to the reduction of eventual negative effects and underlines the positive results for the patients that a collaboration between doctors and insurers may have.

[18] See, Georgiades, General Principles of Civil Law, 1997, §33 n°15 ff.; Karakostas, The consumer's protection, 1997, 37, 64; Doris, The specification of the good will in article 2 of law 2251/1994 as regards the consumers' protection and its importance for civil law, Nomiko Vima vol.48, p.738 ff.; see also, Havinghurst, Consumers versus Managed Care: The New Class Actions, Health Affairs, July/August 2001.

[19] Randel, How Managed Care Can Be Ethical, Health Affairs, July/August 2001.