

Универзитет у Приштини
са привременим седиштем у Косовској Митровици
ПРАВНИ ФАКУЛТЕТ
Научни скуп са међународним учешћем
„УНИВЕРЗАЛНО И ОСОБЕНО У ПРАВУ“

Ставови и закључци изнесени у чланцима лични су ставови њихових
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Универзитет у Приштини
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Зборник радова
„УНИВЕРЗАЛНО И ОСОБЕНО У ПРАВУ“

Издавач:

Правни факултет Универзитета у Приштини
са привременим седиштем у Косовској Митровици,
Лоле Рибара 29, 38220 Косовска Митровица, тел. 028.425.336, www.pra.pr.ac.rs

За издавача

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Дизајн корица:

Димитрије Милић

Корица:

Детаљ из Законоправила Светога Саве, Иловички препис, 1262. година.

Штампа: Кварк, Краљево

Тираж: 50 примерака

ISBN 978-86-6083-054-0

Штампање овог Зборника помогло је Министарство просвете,
науке и технолошког развоја Републике Србије

УНИВЕРЗИТЕТ У ПРИШТИНИ
СА ПРИВРЕМЕНИМ СЕДИШТЕМ У КОСОВСКОЈ МИТРОВИЦИ
ПРАВНИ ФАКУЛТЕТ



НАУЧНИ СКУП СА МЕЂУНАРОДНИМ УЧЕШЋЕМ
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Научни скуп са међународним учешћем одржан је 18. маја 2018. године на Правном факултету Универзитета у Приштини са привременим седиштем у Косовској Митровици

Том II

Косовска Митровица, 2018.

САДРЖАЈ

КРИВИЧНО ПРАВО

Драган ЈОВАШЕВИЋ ПРОТИВПРАВНО ЛИШЕЊЕ СЛОБОДЕ У ПРАВУ СРБИЈЕ	13
Владимир В. ВЕКОВИЋ ТЕЛЕСНО И МЕНТАЛНО ЗДРАВЉЕ ИЗВРШИЛАЦА КРИВИЧНИХ ДЕЛА ПРОТИВ ЖИВОТА И ТЕЛА	31
Драган БАТАВЕЉИЋ, Ратомир АНТОНОВИЋ, Драган ИЛИОСКИ ТЕРОРИЗАМ КАО ПРЕТЊА УНИВЕРЗАЛНИМ ЉУДСКИМ ПРАВИМА	57
Недељко ЈОВАНЧЕВИЋ ЗАКОНОДАВНА ДИНАМИКА И ПРАВНА СИГУРНОСТ	73
Александра ЉУШТИНА, Зоран ЧВОРОВИЋ ЕКОЛОШКИ КРИМИНАЛ – ИЛЕГАЛНА СЕЧА ШУМА	101
Горан ЈОВАНИЋ, Весна ЖУНИЋ ПАВЛОВИЋ ПРИМЕНА ПРИНЦИПА РИЗИКА, ПОТРЕБА И РЕСПОНЗИВНОСТИ У ПЕНАЛНОМ ТРЕТМАНУ СЕКСУАЛНИХ ПРЕСТУПНИКА	115
Veljko TURANJANIN UNDERCOVER INVESTIGATOR IN THE JURISPRUDENCE OF THE EctHR	139
Ванда БОЖИЋ, Бранко ЛЕШТАНИН, Жељко НИКАЧ ЕКСТРАДИЦИЈА КАО ВИД МЕЂУНАРОДНЕ САРАДЊЕ У ИЗДАВАЊУ ЛИЦА С ОСВРТОМ НА ПОСТУПАЊЕ ПОЛИЦИЈЕ	155
Иван ЂОКИЋ ПРОГАЊАЊЕ – НОВА ИНКРИМИНАЦИЈА КАО НАСТАВАК КРИВИЧНОПРАВНОГ ЕКСПАНЗИОНИЗМА У РЕПУБЛИЦИ СРБИЈИ	173

Милица КОВАЧЕВИЋ, Марија МАЉКОВИЋ ИЗВРШЕЊЕ КРИВИЧНИХ САНКЦИЈА ПРЕМА МАЛОЛЕТНИМ УЧИНИОЦИМА КРИВИЧНИХ ДЕЛА И ЊИХОВО ПОНОВНО УКЉУЧИВАЊЕ У ДРУШТВЕНУ ЗАЈЕДНИЦУ	193
Емир ЋОРОВИЋ НЕКИ ПРОБЛЕМИ У ВЕЗИ СА ПРИМЕНОМ ПРАВИЛА О ОДГОВОРНОСТИ САУЧЕСНИКА ИЗ ЧЛАНА 36. СТАВ 2. КРИВИЧНОГ ЗАКОНИКА СРБИЈЕ	207
Иван Д. МИЛИЋ ДОВОЂЕЊЕ КАО МЕРА ЗА ОБЕЗБЕЂЕЊЕ ПРИСУСТВА ОКРИВЉЕНОГ И ПРЕКРШАЈНО КАЖЊЕНОГ ЛИЦА	219
Бајо М. ЦМИЉАНИЋ ПРАВНИ КАРАКТЕР НОРМЕ О ЗАБРАНИ УЗИМАЊА ТАЈАЦА	231
Вера ПЕТРОВИЋ, Јелена МИТРОВИЋ РЕИНТЕГРАЦИЈА НАКОН ИЗВРШЕЊА КАЗНЕ ЗАТВОРА	269
ГРАЂАНСКО ПРАВО	
Наташа СТОЈАНОВИЋ О (НЕ)ОПРАВДАНОСТИ ПОВЕРАВАЊА РАЗВОДА БРАКА ЈАВНИМ БЕЛЕЖНИЦИМА	289
Rodna ŽIVKOVSKA, Tina PRŽESKA NULLITY OF LEGAL TRANSACTIONS	313
Марија КРВАВАЦ ОПШТИ И ПОСЕБНИ УСЛОВИ ЗА ПРИЗНАЊЕ И ИЗВРШЕЊЕ СТРАНИХ СУДСКИХ ОДЛУКА	331
Раденко ЈОТАНОВИЋ, Босилка ЧУБРИЛОВИЋ ХИПОТЕКА НА ПРАВУ ГРАЂЕЊА	357
Marija AMPOVSKA LAWYER'S PROFESSIONAL LIABILITY INSURANCE IN MACEDONIAN LAW	377

Дарко ДИМОВСКИ, Петар ПЕШИЋ, Лука АНЂЕЛКОВИЋ
ПРИСТАНАК У ОКВИРУ ОПШТЕ УРЕДБЕ О ЗАШТИТИ
ПОДАТАКА ЕВРОПСКЕ УНИЈЕ 395

Срђан РАДУЛОВИЋ
ОСОБЕНОСТИ У УНИВЕРЗАЛНОЈ ТЕНДЕНЦИЈИ
ПООШТРАВАЊА ГРАЂАНСКОПРАВНЕ ОДГОВОРНОСТИ 409

Никола ИЛИЋ
ЗАШТИТА ИНТЕЛЕКТУАЛНЕ СВОЈИНЕ НА ОСНОВУ
МЕЂУНАРОДНИХ ИНВЕСТИЦИОНИХ СПОРАЗУМА 423

ПРАВО И ЕКОНОМИЈА

Гордана ИЛИЋ ПОПОВ
ЕКОНОМСКА, СОЦИЈАЛНА И ПОЛИТИЧКА ФУНКЦИЈА
ПОРЕЗА НА ИМОВИНУ У СРБИЈИ . 443

Љубиша ДАБИЋ
ЈАВНИ, ПРИВАТНИ И СОЦИЈАЛНИ СЕКТОР ПРИВРЕДЕ 457

Kristina MIŠEVA
CONTEMPORARY TRENDS AND CHALLENGES OF THE
CURRENT SYSTEM OF MANAGING AND FINANCING
THE PUBLIC HEALTHCARE SYSTEM OF THE
REPUBLIC OF MACEDONIA 486

Цвјетана ЦВЈЕТКОВИЋ, Горан МИЛОШЕВИЋ
ПОРЕСКИ ТРЕТМАН ПРЕНОСА УЗ НАКНАДУ
НЕПОКРЕТНОСТИ ФИЗИЧКИХ ЛИЦА СА СТАНОВИШТА
ПОРЕЗА НА КАПИТАЛНЕ ДОБИТКЕ 495

Зоран РИСТИЋ
УМЕТНОСТ КАО ИНВЕСТИЦИЈА – ПРАВНИ
ОКВИР ЗА ПОДСТИЦАЊЕ ИНВЕСТИРАЊА У УМЕТНОСТ 513

Данијела ПЕТРОВИЋ
ПРИРОДНИ МОНОПОЛИ – РЕГУЛАЦИЈА
ИЛИ ДЕРЕГУЛАЦИЈА 527

СПИСАК РЕЦЕНЗЕНАТА 543

ПРЕДГОВОР

Поштовани читаоци, тема овог зборника радова са Научне конференције са међународним учешћем носи назив *Универзално и особено у праву*. На тај начин је истакнута намера да се одвага потребна мера универзалности и потребна мера особености у формирању одговора које траже разноврсни актуелни проблеми. Наиме, наша држава и друштво се налазе на својеврсној прекретници, у времену које испоставља потребу да се одговори на снажне захтеве да се наша државна политика усагласи са интересима најмоћнијих чланова међународне политичке арене. Реч је о процесима којима су захваћени сви аспекти живота. Потребно је да се, имајући у виду са једне стране - оно што би било идеално, а са друге - актуелну стварност (у свој њеној сложености), извага шта је од свега тога могуће.

Широк је спектар потреба и интереса, почев од културе у најопштијем смислу те речи, затим економских, политичких, финансијских, националних, наднационалних, корпоративних, еколошких, који свој израз траже у правним решењима. Због тога су радови груписани у посебне рубрике које одговарају посебним областима права и друштва.

Аутори чланака (еминентни стручњаци из области правних и друштвених наука из земље и иностранства) су понудили своје погледе на поједине видове једне тако сложене ситуације.

Тематски зборник радова који је пред вама представља публикацију радова припремљених поводом обележавања 57. година постојања и рада Правног факултета Универзитета у Приштини са привременим седиштем у Косовској Митровици и саопштених на Научној конференцији са међународним учешћем под називом *Универзално и особено у праву*, дана 18. маја 2018. године.

УРЕДНИК

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LAWYER’S PROFESSIONAL LIABILITY INSURANCE IN MACEDONIAN LAW

Summary: The focal point of the paper is the contract of liability insurance in Macedonian law that a lawyer is obligated to sign in order to start the duty. The paper reviews the legal sources that regulate this obligation in order to present the current legal solutions as well as to compare them to some of the modern legal system. The paper should answer if there is satisfactory level of legal regulation on the matter of lawyer’s compulsory liability insurance, as well as the level of legal compliance or non-compliance of legal regulation between them self, and on the other hand between provision consisted in laws and provision consisted in the autonomous sources of contractual law on insurance – the special conditions created by the insurers. The implementation of the legal provisions in this matter has arise certain issues and doubts in legal theory as well as in legal practice. The aim of the paper is to present an overview of solutions already presented in the legal literature, as well as to analyze the comparative legal systems in order to point some solutions *de lege ferenda*.

Keywords: *professional liability, obligatory insurance, third party, compensation of damage, Lawyers’ duties.*

1. INTRODUCTION

Generally speaking, professional liability exists whenever a holder of a particular profession will violate the Obligations that arise for him in the procedure of providing professional services to his users. Furthermore, professional liability may arise as civil liability, disciplinary liability and criminal liability. Each of the liabilities of the holders of the profession presupposes the existence of special legal rules that determine the conditions for the occurrence of liability, the procedure in which they are determined and the authorities competent for determining and imposing sanctions. The subject of interest for us is the civil liability of the lawyer for damage caused during the

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performance of his practice. In order to even start the practice, there is a condition for the right to practice, provided by the law, that lawyers must have a designated level of professional liability insurance. The lawyers are placed under the burden of entering into contracts which contain express requirements set mainly by the insurer, although both general and specific legal provision in this area is applicable too. In the Macedonian law the compulsory insurance of liability of the lawyers is provided with the Law on the profession of advocacy¹ (will be referred to as Law for advocacy)in article 37-a: "*The lawyer is obligated to have a liability insurance contract for the damage caused to third party intentionally during the lawyers practice. The contract for liability insurance for lawyers – members of a law firm and for lawyers working in that company is concluded by the company.*" This obligation also applies to a foreign lawyer and a law firm.² In this way, the damaged person, irrespective of the solvency of the lawyer, reimburses the damage caused to him by intention or gross negligence, up to the amount of the insured sum with the insurance company³ and at the same time strengthens the confidence in the advocacy and improves the independence and autonomy of the advocacy as a public service for legal assistance.⁴

2. LEGAL SOURCES OF LAWYER'S LIABILITY INSURANCE

By its legal nature, liability insurance of the lawyer is a liability insurance contract, and hence the basic legal source for its regulation is the Law on Obligations of Republic of Macedonia (will e referred as Law on Obligations in the paper).⁵ In the first place, the provisions on liability insurance⁶ are applicable, and since liability insurance is considered to be a subtype of property insurance, general provisions for property insurance⁷ as well as common provisions for property and persons insurances⁸ are applicable

¹ "Official Gazette of the Republic of Macedonia" no. 59/2002, no.60/2006, no.29/2007, no.106/2008, no.135/2011, no.113/2012 and no.148/2015.

² Article 37-b from the Law on the profession of lawyer "Official Gazette of the Republic of Macedonia" no. 59/2002, no.60/2006, no.29/2007, no.106/2008, no.135/2011, no.113/2012 and no.148/2015.

³ Loris Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 264.

⁴ Čurković Marjan, *Osiguranje od odgovornost pri obavljanju profesionalne djelatnosti, Pravo i porezi*, br. 5/1997, 39.

⁵ "Official Gazette of the Republic of Macedonia" no. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009 and 123/130.

⁶ Articles 996 and 997 of the Law on Obligations.

⁷ Part 2 Section 1, article 980-985 of the Law on Obligations.

⁸ Article 953-979 of the Law on Obligations.

too. Regarding the application of the legal regulations as legal sources for regulating the liability insurance here, I would mention the possibility of applying the provisions of this law regarding *actio directa* – the damaged persons' right to a direct lawsuit under which: "*In the case of liability insurance, the damaged person may request directly from the insurer compensation for the damage that he suffered with the event for which the insured responds, but not exceeding the amount of the insurer's liability. The damaged person has, from the moment he became insured, his own right to compensation from insurance, and any subsequent change in the rights of the insured against the insurer is without prejudice to the right of the injured party to compensation.*"⁹ The claim for compensation of damages in these cases is based on the liability insurance contract, and the insurer is responsible for the damage incurred in the insured event only if the third injured party requests her compensation.¹⁰

Furthermore, as a result of the principle *lex specialis derogate lex generalis*, a priority in application of provision is reserved for the provisions of the Law on advocacy. This law provides compulsory liability insurance for damage caused with intention to third party by lawyers during their practice in order to start the practice. The regulation of liability insurance at the level of compulsory insurance in the Republic of Macedonia, in the legal theory and the court practice, is considered to arise from the constitutional ground for legal regulation of the lawyer's activity, which also implies the right of the state, that is, the legislator to provide greater protection of the citizens through guaranteeing compensation for damages caused by gross negligent and intentional work of lawyers. In this way, the compulsory liability insurance of the lawyer is not in the function of limiting lawyers in the performance of their activity and weakening their power, but in order to provide greater security and confidence of the citizens that they will receive the required legal assistance from the lawyer, without the danger that they will be damaged due to negligence.¹¹ The compulsory conclusion of a liability insurance contract is characteristic of several modern legal systems in Europe and the world, more precisely the same is envisaged in the German, Austrian, English, Swiss, Slavic, Serbian law and other legal systems.¹² Insurance specific conditions are

⁹ Article 997 Law on Obligations.

¹⁰ Article 996, Law on Obligations.

¹¹ Decision of the Constitutional Court of the Republic of Macedonia No. 31/2007-0-0 од 12.09.2007 available on <http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/63b623544fc50c8fc12573940042a6b5?OpenDocument>, accessed on 13.03.2018.

¹² L. Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 267-268.

also the source of the liability insurance of the lawyer. It is foreseen in our Law on advocacy that the insurance conditions are determined by the insurance companies, in agreement with the Bar Association of the Republic of Macedonia, except in cases when the Bar Association carries out the insurance of the lawyers.¹³ In Macedonian law there are still no general conditions on lawyers' liability, only specific conditions for lawyers' liability insurance adopted by the insurers.¹⁴ In comparative legal systems we come across the practice of adopting general conditions for liability insurance of lawyers. Thus, in Croatian law, we meet the General Conditions of Lawyer's Professional Liability Insurance, adopted by the Croatian Insurance Bureau, in cooperation with the Ministry of Justice and the Croatian Bar Association. These conditions serve as a complement to the Law on Advocacy in Croatian Law, which regulates the matter of compulsory liability insurance only in one article, Article 44¹⁵. They are adopted in 1994¹⁶, in order to regulate this matter in more detail manner and they are mandatory for all insurance companies.¹⁷

¹³ Article 37-a (11) Law on the profession of lawyer.

¹⁴ The specific terms of the insurers are available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0ahUKEWj_jdLNkenZAhWLDyWkHdKrDcEQFghPMAg&url=http%3A%2F%2Fwww.uniqa.mk%2FRepository%2Fmedia_cnt%2FUNIQA-Macedonia-2018%2F35.Posebni~20uslovi~20za~20osiguruvanje~20odgovornost~20na~20advokati_hcm0105284.pdf&usg=AOvVaw3Qtag3VqUX81efjE3XTala, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=0ahUKEWjCsL3hkenZAhWMCiwKHVa5CFk4ChAWCDUwAw&url=http%3A%2F%2Fwww.uniqa.mk%2FRepository%2Fmedia_cnt%2FUNIQA-Macedonia-2018%2F35.Posebni~20uslovi~20za~20osiguruvanje~20odgovornost~20na~20advokati_hcm0105284.pdf&usg=AOvVaw3Qtag3VqUX81efjE3XTala, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEWiem_rxkenZAhVBVywKHcY2A50QFgg_MAU&url=http%3A%2F%2Fwww.crosig.mk%2FDownload%2FGetFileUpload%3FdownloadId%3Da41bc574-c54f-4fc2-af51-de678b12e0f4&usg=AOvVaw39fpBKY68h7JUTCEwpDK3z, accessed on 13.03.2018.

¹⁵ Zakon o odvetništvu, NN, br. 9/94., 117/08., 50/09. I 75/09.

¹⁶ These terms were adopted at the same time with the adoption of the Croatian Law on Advocacy, although the relevant laws in this area were changing over the years, the terms remained unchanged. In the opinion of the legal theory, this led to their opposition to individual provisions of the Law on Obligatory Relations and even to the insurance profession, and there is a need for adopting new general terms for insurance in the field, see L. Belanić, "Osiguranje od odgovornosti odvetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 266.

¹⁷ Marko Milošević, Mišo Mudrić, "Osiguranje profesionalne odgovornosti odvetnika u hrvatskome pravu i prikaz novije poredbene sudske prakse", *Zbornik radova: Dani hrvatskog osiguranja*, Zagreb, 2015, 11.

3. CONCLUSION OF A LIABILITY INSURANCE CONTRACT

The lawyer in the Macedonian law has an obligation for compulsory conclusion of a contract for liability insurance for damages that he would have done to third parties with intention during his practice. The conclusion of the contract is a prerequisite for starting a lawyer's activity and enrolling in the Directory of Lawyers.¹⁸ This provision includes the liability insurance of the lawyer in the order of so-called mandatory liability insurance because a legal provision requires the conclusion of a contract for one of the parties.¹⁹ The contracting party with a legal obligation to conclude the contract is legal or natural persons, or to be more precise:

- in the case of an individual practice this obligation is mandatory for the lawyer himself, and
- in the case of a law firm, the law firm has the obligation to conclude the liability insurance contract for lawyers - members of the law firm and for lawyers working in that company.²⁰

The Law on the profession lawyer determines the moment of concluding a contract of liability insurance of the lawyer, and in accordance with Article 37-a paragraph 12 it is the moment when the lawyer filed an insurance claim, regardless of whether a contract was reached at that time. It seems that this provision of the *lex specialis* for the perfection of the contract is contrary to the general law (*lex generalis*), the Law on Obligations, as well as to the special terms of the insurers. Namely, the provisions of *lex generalis* and our legal theory, have adopted the acceptance theory in relation to the issue of the moment of contract occurrence (perfection of a contract). According to this theory the contract was concluded at the moment when the sender of the offer received the written or telegram with which the recipient of the offer gives a statement of acceptance.²¹

On the other hand, within the special terms of the insurers we come across the provision that the insurance contract is concluded on the basis of an oral or written offer, and it is concluded when the contracting parties will sign an insurance policy. According to these, the insurer's obligation begins after the expiration of 24 hours from the day that the insurance contract is designated as

¹⁸ Article 37-a(1) and (2), Law on the profession of lawyer.

¹⁹ Ивица Јанковец, Зоран Миладиновић, *Право осигурања*, Центар за публикације Правног факултета у Нишу, Ниш, 2006, 356.

²⁰ Article 37-a (1) Law on the profession of lawyer.

²¹ Гале Галев, Јадранка Дабовиќ Анастасовска, *Облигационо право ЦЕППЕ*, Скопје, 2009, 462.

the beginning of the insurance, and terminates with the expiration of 24 hours from the day that the insurance contract is listed as the expiration date.²²

Regarding the form of the contract, if we consider the specific provisions regarding the liability insurance contract contained in our Law on obligations, there is no legal form of this agreement envisaged. This means that in the field of the property insurance contract, as well as liability insurance, as its subtype, the principle of informality of the contract is accepted, and the handover and signing of the insurance policy serves only to prove that the contract exists and proving its contents, that is, *forma ad probationem*. On the other hand, within the special terms of the insurers we meet with requests for fulfillment of a certain form when concluding an liability insurance contract, which form represents *forma ad solemnitatem*, that is, essential condition for the validity of the contract to be valid. The special terms stipulate that the contract is concluded when the contracting parties sign an insurance policy, or when in accordance with the Law on profession of lawyers, the lawyer or the bar association submit an insurance claim.²³ In these special terms, it is not entirely clear whether the moment of signing the policy is the decisive moment for the occurrence of the insurance contract, since it also mentions article 37-a paragraph 12 of the Law on the profession lawyer according to which the contract is concluded at the moment when the lawyer filed an insurance claim. These are two different moments of the occurrence of a liability insurance agreement and the uncertainty in the terms and the contradiction of the first part of the provision in the special terms, with the second part of the provision

²² Special terms obligatory liability of lawyers and law firms for damages caused to third parties during the practice Eurolink Insurance Skorje (Посебни услови за осигурување законска одговорност на адвокати и адвокатски друштва за штети сторени на трети лица во рамките на дејноста која ја вршат, ЕуролнкИншуранс, Скопје) <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwj4yPWw8frZAhWNw6YKHYrkBOoQFggqMAE&url=http%3A%2F%2Fwww.eurolink.com.mk%2Fuploads%2F13-11.pdf&usg=AOvVaw06Qde9YymPGALdQxYD3Ua6>, accessed on 20.03.2018; Special terms for lawyer's liability insurance, Uniqa Insurance (Посебни услови за осигурување одговорност на адвокати, Уника осигурување) http://www.uniqa.mk/repository/media_cnt/UNIQA-Macedonia-2018/35.Posebni~20uslovi~20za~20osiguruvanje~20odgovornost~20na~20advokati_hcm0105284.pdf, accessed on 20.03.2018; Special terms for lawyer's liability insurance, Croatia Insurance (Посебни услови за осигурување од одговорност на адвокати, Кроација осигурување), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi atY698vrZAhUwyKYKHxirCC0QFggI MA A&url=http%3A%2F%2Fwww.crosig.mk%2FDownload%2FGetFileUpload%3FdownloadId%3Da41bc574-c54f-4fc2-af51-de678b12e0f4&usg=AOvVaw39fpBKY68h7JUTCEwpDK3z>, accessed on 20.03.2018

²³ Article 6 Special terms for lawyer's liability insurance, Uniqa Insurance; article 7 Special terms for lawyer's liability insurance, Croatia Insurance

leading to vagueness regarding the question: from which moment on the lawyer is considered to be insured. This can further result in double-sided insurance coverage or a "hole" in coverage, which can be negative for the lawyer both from the perspective of the potential liability for damages and from the aspect of disciplinary responsibility towards the Bar.²⁴

4. SUBJECTS -ENTITIES IN THE MATTER OF LAWYER'S LIABILITY INSURANCE CONTRACT

In the contract for liability insurance of the lawyer, three entities are included: insurer, insured person and third party, the damaged person. This is in line with the general learning of liability insurance where we have a lawful or contractual set of legal relationships between three persons: a insurer, as an entity that, by collecting a premium, assumes the property consequences of a predetermined harmful case; an insured person who is exempted from liability for damages if it occurs as a consequence of an event for which the insurer is responsible, and which is covered by the insurance; and a third party to whom compensation is paid in the event of damage.²⁵

As an insurer we have the legal entity that according to the Law on Insurance Supervision²⁶ is registered for performing insurance activities in the Republic of Macedonia. Pursuant to Article 37-a paragraph 8 of the Law on profession of lawyer, insurance of all lawyers in the Republic of Macedonia, can be taken over by the Bar Association of the Republic of Macedonia, and in that case the lawyers are obliged to pay the liability insurance fee to the Bar Association.²⁷ In any case, the insurer is obliged to conclude a liability insurance contract with the lawyer who will be addressed to them or with the Bar Association.

²⁴Ема Мендушић Шкугар, "Обавезно осигурање од одговорности одвјетника", *Zbornik radova s međunarodne znanstveno-stručne konferencije Hrvatski dani osiguranja 2017*, Zagreb, 2017, 83-84.

²⁵ И. Јанковец, З.Миладиновић, *Право осигурања*, Центар за публикације Правног факултета у Нишу, Ниш, 2006, 353.

²⁶ "Official Gazette of Republic of Macedonia" no. 27/2002, 79/2007, 88/2008, 67/10, 44/11, 188/13, 43/14, 112/14, 153/15, 192/15 and 23/16.

²⁷ In our legal theory we come across the opinion that the role of the Bar Association in this particular case is not clear enough and it only opens the question if there is possibility for collective insurance, contracting the terms of insurance and others, see Liability for damage in legal profession, assistant professor Neda Zdraveva, Faculty of Law, Justinian the first, Скопје (Одговорност за штета во правната професија, доцент д-р Неда Здравена, Правен факултет Јустинијан Први Скопје), available at <http://www.jpacademy.gov.mk/upload/materijali%202015/PPP%20Doc.d-r%20Neda%20Zdraveva.pdf>, accessed on 06.03.2018.

The situation with the insured as the subject of this agreement is little different and more complicated. This is firstly because the insured at the same time can also appear as a contracting party for insurance. Namely, as a legal or natural person that is a contracting party when concluding an agreement with the insurer, there are three possible entities: 1) the lawyer in case when the insurance contract is concluded for his own account, and in this case he occurs in the role of the insured, 2) the law firm in case when it concludes a liability insurance contract for lawyers - members of the law firm and lawyers working in that company, and 3) the Bar Association of the Republic of Macedonia in case when and took over the insurance of all lawyers in the country which is a legal opportunity under Article 37 and paragraph 8 of Law on the profession of lawyer. In the second and third cases, the term contracting party of the insurance contract is used in order to distinguish it from the term insured because it is insurance for the benefit of a third, where the law firm and the Bar are appearing as insurance contractors on behalf of certain lawyers, members of the company, and employees of the company.²⁸ The special terms are not harmonized in terms of the manner in which the insured entity is determined. However, these inequalities are not essential for liability insurance, such as inequality in the determination of the term third party. Thus, while certain special terms in the most general way determine the notion of a third party as an insurance user who will suffer damage from performing lawyer's work²⁹, other special terms state and which persons will not be considered a third party. In certain circumstances, a third person is not considered as family members of the lawyer to a second hereditary order, employed by the lawyer or other employees with the sole attorney, that is, the law firm, as well as the founders of the law firm.³⁰ It seems that the determination of third-party entities is of particular importance for the liability insurance of the lawyer, which from the theoretical point of view depends primarily on the assumption of liability as a contractual liability or non-contractual liability of the lawyer. If the liability of the lawyer is considered as contractual liability as third parties will appear only persons in a contractual obligation with the lawyer. On the other hand, if the liability of the lawyer is treated as a non-contractual liability, the third person may appear outside the contract. Regarding this issue, the legal literature states that there are no clear boundaries between the contractual and the non-

²⁸L. Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 270.

²⁹ Special terms for lawyer's liability insurance, Uniqa Insurance.

³⁰ Special terms for lawyer's liability insurance, Croatia Insurance; Special terms obligatory liability of lawyers and law firms for damages caused to third parties during the practice Eurolink Insurance Skopje.

contractual liability of the lawyer and should be decided on a case by case basis.³¹

5. OBJECT OF LIABILITY INSURANCE OF A LAWYER

Considering the fact that in the legal system of the Republic of Macedonia there are no general terms for regulating the liability insurance in lawyers' practice, the situation is quite expected when we come across non-compliance between the provision of the special terms on conceptual determination and legal regulation of the object of insurance. In general, they all differently determine the object that is insured, but by abstracting their provisions we can say that all the special terms speak about the existence of two elements that comprise the content of the object of insurance: the existence of legally regulated civil liability for damage and damage caused in the lawyer's practice. These two elements are also the assumptions that should exist for the existence of cover by the insurer. Namely, speaking of the first assumption, we can say that the existence of civil liability of the lawyer is determined by applying the rules for the occurrence of obligations as a result of causing damage and the rules for liability for compensation of damage contained in our Law on obligations, as well the rules contained in specific laws, such as the Law on the profession of lawyer, especially with regard to the issue of the existence of a harmful unlawful act. Regarding the manner of determining the existence of the liability of the lawyer, they would point out that it is not always necessary to make the determination through a court procedure. Namely, this conclusion also refers to the provisions of the special terms according to which: "Damages are determine and evaluate together by the insured and the insurer or their authorized representatives."³² If these entities can not agree in terms of determining the damage, it may be required to determine the damage and assess it by means of an expert report. However, determining the damage essentially involves determining the liability for damages, so in practice it may happen that the lawyer does not recognize his liability. In these cases it is necessary to

³¹ See S. Petrić, "Temeljne pretpostavke građansko pravne odgovornosti odvjetnika" *Pravo I porezi*, br. 12/2002, 41-44; also see L. Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 270.

³² Article 19 Special terms for lawyer's liability insurance, Croatia Insurance; Article 15 Special terms for lawyer's liability insurance, Uniqa Insurance; Article 13 Terms of Lawyer's liability insurance Winner – Viena Insurens Group Скопје (Услови за осигурување од одговорност на адвокати на Винер – Виена Иншуренсгруп Скопје), available at <http://www.winner.mk/wp-content/uploads/2017/02/%D0%A3%D1%81%D0%BB%D0%BE%D0%B2%D0%B8-%D0%90%D0%B4%D0%B2%D0%BE%D0%BA%D0%B0%D1%82%D0%B8.pdf>, accessed on 23.03.2018.

establish the liability of the lawyer by a court procedure.³³ The second assumption is that the damage occurred during the practice.

6. FAULT LIABILITY

The liability of the lawyer, whether based on a tort or contract, is always a fault liability. Considering that in Macedonian law, as well as in most of the old and newer codes of the obligations law, two types of fault are known: intent and negligence³⁴, the question arises as to what kind of fault is required for the liability of the lawyer. The type of fault of a lawyer is firstly regulated by a general provision in the contract law contained in the Law on obligations, in Article 11 which regulates the conduct in the performance of obligations and in the application of rights. According to this article: "*The participant in the obligatory relationship is obliged to act with increased attention, in accordance with the rules of the profession and the customs (attention of a good expert) in carrying out the obligation of his professional activity.*" The demand for increased attention is one of the two requirements that make up the standard "due attention" and whose definition is essential for the determination of the contractual and non-contractual liability of the lawyer. The second element of this standard is the objectified request for knowledge and observance of the rules of the profession.³⁵ We can conclude that the liability of the lawyer occurs in any case when he did not deal with the attention of a good expert, and even more in the cases when he behaved with intent and gross negligence, as two harder types of fault. On the other hand, the liability of the lawyer for compulsory liability insurance in accordance with the Law on the profession of the lawyer concerns only liability insurance for damages that would be done to third parties with intention and during his practice. This method of determining liability insurance cases is called the method of positive numbering of damage compulsorily included in the cover from the insurer, which also leads to the conclusion that excluded from the object of insurance are the damages that the lawyer will cause with ordinary negligence, except in case when he / she has concluded a voluntary liability insurance contract. Further, analyzing the special terms, we can say that we come across provisions that the insurance

³³ Ćurković M., Osiguranje od odgovornost pri obavljanju profesionalne djelatnosti, *Pravo i porezi*, br. 5/1997, 40.

³⁴ Гале Галев, Јадранка Дабовиќ – Анастасовска, *Облигационо право*, Скопје, 2008, 574.

³⁵ S. Petrić, "Odgovornost odvjetnika za savjet i mišljenje" *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 37.

compensates the damage caused with gross negligence and intent,³⁶ as well as provisions that ensure the insured's liability for damages caused to third parties in the performance of the practice, if they are the consequence of intentional and unlawful conduct opposite of the regulations governing the lawyer's profession, or unlawful treatment or failure to act in accordance with the regulations governing the lawyer's profession, as well as damages caused by incorrect written legal advice and written opinions given by the insured with gross negligence or intent.³⁷

In the comparative law, we come across a reverse situation, which is a method of negative numbering of the intention and gross negligence, that is, exclusion of the damage caused by intent, gross negligence and fraud from the subject of compulsory liability insurance of the lawyer and liability insurance only in a case of damage caused by ordinary negligence. In comparative legal literature, the exclusion of damage caused by intent and gross negligence is considered to be one of the most commonly used, and less clear exclusions.³⁸

7. TYPES OF DAMAGE COVERED BY THE COMPULSORY LIABILITY INSURANCE OF THE LAWYER

It is a question that is regulated in the special terms of the insurers in the matter of compulsory liability insurance of the lawyer. The Law on the profession of the lawyer does not contain provisions on the type of damage that the lawyer is obliged to compensate in case of his / her liability. Regarding the legal regulations, applicable are the general provisions of the Law on obligations for property insurance, since the liability insurance is a subtype of property insurance, as well as the provisions on liability insurance. According to the general provisions for insurance of property in our law, the purpose of the insurance is to provide compensation for damage that occurred in the insured's property due to the occurrence of the insured event, and the amount of damage cannot be higher than the damage suffered by the insured with the occurrence of insured case.³⁹ However, the provisions of the agreement with stipulate underinsurance are valid too. Regarding the lost profit (*lucrum cessans*), as a type of material damage, the law stipulates that it will be

³⁶ Article 1(2) Special terms obligatory liability of lawyers and law firms for damages caused to third parties during the practice Eurolink Insurance Skopje.

³⁷ Article 2(1) Special terms for lawyer's liability insurance, Croatia Insurance.

³⁸ E. Mendušić Škugar, "Obavezno osiguranje od odgovornosti odvjetnika", *Zbornik radova s međunarodne znanstveno-stručne konferencije Hrvatski dani osiguranja 2017*, Zagreb, 2017, 88.

³⁹ Article 981(1) and (2) Law on obligations.

compensated only if it is agreed upon.⁴⁰ Analyze of the special terms for liability insurance of the lawyer in the Macedonian law, lead to the conclusion that the only type of damage that the insurer is obligated to compensate to the third person on the basis of the liability insurance contract of the lawyer is pecuniary damage, that is, purely property damage. This is defined by the provision that we find in most of the special conditions that states that the insured event is considered to have occurred when the act was committed, that is, a failure occurred during the performance of the lawyer's activity that caused the property damage to a person.⁴¹ The non-pecuniary damage in the sense of the general theory of damages and Article 9-a of the Law on obligations as any violation of personal rights such as the right to life, physical and mental health, honor, reputation, dignity, personal name, privacy of personal and family life, freedom, intellectual creation and other personal rights, are not object to liability insurance of lawyers. Within the special terms, the non-pecuniary damage itself is subject to exclusion and is stated together with a number of other claims excluded from the insurance. The special terms using the method *numerus clausus* specify which damages are excluded from liability and this list of excluded claims from insurance under special terms is different, although it is undeniable overlapping of certain types of damages in most of the special terms in Macedonian law. However, we cannot speak of a single solution to this issue, which is a result of the lack of general terms for liability insurance of the lawyer. In legal literature we come across a division of such exclusions into: exclusions that are not disputable and exclusions that are disputed. Justifications are given to those exclusions that reflect the general law on obligations, such as damages arising from military or political risks or damages for which the injured party is fully responsible, as well as exclusions based on special law in this area, for example damages due to the denial of legal assistance for reasons prescribed by a certain legal act. The most significant disputable exclusions, or unjustified exclusions in the legal theory, include the exclusion of non-pecuniary damages, then damages caused by overstepping of the authorizations under the power of attorney and damages incurred as a consequence of intent, gross negligence and fraud.⁴²

⁴⁰ Article 981(4) and (5) Law on obligations.

⁴¹ Article 5(3) Special terms obligatory liability of lawyers and law firms for damages caused to third parties during the practice Eurolink Insurance Skopje; Article 5(4) Special terms for lawyer's liability insurance, Croatia Insurance; Article 4(1) Special terms for lawyer's liability insurance, Uniqa Insurance.

⁴² E. Mendušić Škugar, "Obavezno osiguranje od odgovornosti odvjetnika", *Zbornik radova s međunarodne znanstveno-stručne konferencije Hrvatski dani osiguranja 2017*, Zagreb, 2017, 86.

8. MINIMUM AMOUNTS OF INSURED SUM FOR LIABILITY INSURANCE OF THE LAWYER

The sum insured is an amount determined by a contract or by a law that is considered an upper limit of the insurer's liability for compensation in the coverage of the insurance so that the insurer is obliged to pay compensation only up to the amount of the insured sum. On the other hand, the minimum amount of insurance is an amount that is legally prescribed as the lowest amount to which the insured amount must be stated when concluding a compulsory liability insurance contract. A special agreement or general terms of insurance may also provide for a higher amount of the insured amount, but not lower than the minimum amount prescribed by law.⁴³ In the Macedonian law, the minimum amount of insurance for which the lawyer is obliged to conclude a liability insurance contract is EUR 10 000. The lawyers who are founders of a law firm are also subject to this insurance and are obliged to make individual liability insurance. On the other hand, the lowest amount of insurance for which the law firm is obliged to conclude a contract for insurance against liability for damage is EUR 50 000. Comparing the lowest amounts of liability insurance of the lawyer in Macedonian law with the ones provided in German, Austrian, Slavic, Swiss and English law, the conclusion is that the amounts are very low.⁴⁴

9. CONCLUDING REMARKS

Analyze of the compulsory liability insurance of the lawyer under the Macedonian law showed that this institute is a place for improvement both in legislation and theory. Our conclusion is that in this particular case the institute compulsory liability insurance doesn't serve its purpose to the damaged person and to the insured person. The first problem is the confused regulation of the insurance. It is mainly provided by the provision consisted in the special terms. The nonexistence of general terms in this matter is causing legal insecurity both for third parties and lawyers as insured persons. Not everyone gets the same protection because the terms differ from one another. There is not only non-compliance between the terms provided by different insurers, but there is also non-compliance between them and the provisions in the general and special laws. Of course there is always the possibility for the judge to decline the application of some provisions from the special terms, as provided with *lex*

⁴³ L. Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 285.

⁴⁴ L. Belanić, "Osiguranje od odgovornosti odvjetnika", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Rijeka, 2010, 287-288.

generalis. The conclusion is the existence of the need to revise the special terms in order to harmonize them with the general and specific legal rules and eliminate the ambiguities and contradictions between the provisions themselves, as well as the oppositions between the special terms and the legal regulations.

But, our remarks go also to the way that the essential element of the lawyer's liability are regulated. The insurance covers only the damage caused with intention and gross negligence. Uncovered with the compulsory insurance are all the cases of damage caused with ordinary negligence of the lawyers. These cases are more likely to happen in practice often than the intended damages and gross negligence resulted damages, but the insurance will cover them only if they are object of liability insurance contract determent on voluntary level. In this cases the general provision on fault liability and damage compensation are applicable but the success of the damaged person will depend, among the other requests of the law, and of the financial situation of the lawyer.

The other essential problem is the non-pecuniary damage that is not covered with the compulsory liability insurance. This suggests that the damaged person will never get the "full damage compensation" from the insurer.

However, before suggesting any changes, first in order is analyze of the court practice and the practice before the insurers, as well as study of the reasons for these exclusions (the ordinary negligence and non – pecuniary damage) before criticizing them.

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ОСИГУРАЊЕ ПРОФЕСИОНАЛНЕ ОДГОВОРНОСТИ АДВОКАТА У ПРАВУ РЕПУБЛИКЕ МАКЕДОНИЈЕ

Апстракт: У раду је дат фокус на уговору о осигурању одговорности, у македонском праву, који је адвокат обавезан да потпише како би започео дужност. У раду се разматрају правни извори који регулишу ову обавезу како би се представила постојећа законска решења, као и упоредила са решењима у неким модерним правним системима. Рад треба да одговори да ли постоји задовољавајући ниво законске регулативе у вези са обавезним осигурањем од одговорности адвоката, као и то који је степен законске усклађености или неусклађености законске регулативе између њих самих, а са друге стране између одредби садржаних у законима и аутономним изворима уговорног права о осигурању - посебним условима које су створили осигуравачи. Са применом законских одредби у овој области појавила су се одређена питања и сумње у правној теорији, као и у правној пракси. Циљ рада је да се представи преглед решења која су већ представљена у правној литератури, као и да се анализирају компаративни правни системи како би указали на нека решења *de lege ferenda*.

Кључне речи: *професионална одговорност, обавезно осигурање, трећа страна, накнада штете, дужности адвоката.*

Рад је предат 27. априла 2018. године, а након мишљења рецензената одлуком одговорног уредника одобрен за штампу.

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ПРИСТАНАК У ОКВИРУ ОПШТЕ УРЕДБЕ О ЗАШТИТИ ПОДАТАКА ЕВРОПСКЕ УНИЈЕ

Апстракт: Општа уредба о заштити података Европске Уније која ступа на снагу 25. маја ове године са собом доноси корените промене у област права приватности и заштите података. Један од аспеката Уредбе који са собом доноси бројне контроверзе јесте и пристанак корисника на прикупљање и обраду података. Сада је дата знатно већа „моћ“ сваком лицу да може одредити да ли ће пристати на прикупљање и обраду података али и да одреди за које податке ће свој пристанак дати а за које ће исти ускратити. Истовремено, корисник ће имати могућност да у сваком тренутку повуче свој пристанак и то повлачење ће са собом носити и обавезу да се моментално престане са прикупљањем и обрадом података корисника. Сам пристанак је сада дефинисан на знатно јаснији начин, што носи са собом мање могућности за различита тумачења између земаља као што је то до сада био случај.

Значај ове Уредбе је и у томе што су казне за непоштовање одредби знатно веће и могу износити до двадесет милиона евра или до 4% глобалног годишњег промета прекршиоца, зависно од тога који износ је већи.

За Србију је ова уредба значајна у неколико праваца. Пре свега, јер ће се она примењивати на све оне који своју робу или услуге нуде унутар ЕУ без обзира што се налазе у Србији. Друго, кроз процес приступања ЕУ значајна је ова уредба јер представља пут који наши прописи требају следити како бисмо испунили захтеве у овој области. Треће, за сама лица је значајна јер ће им у пословању са субјектима са простора ЕУ, а међу којима је и добар део нама суседних земаља, ова уредба пружати заштиту.

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