

Case Study

Applying the Assignment Institution in the Pharmaceutical Market: Legislative Lacunae or Unconstitutionality?

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Abstract

Romanian Civil Code provides by Article 1566 that the assignment of debt is a way of forwarding a claim the transferor holds against a third party. Therefore, when signing by the parties of the debt assignment contract, the claim goes out of the assignor's property and is validly entrusted to the transferee (assignee). In this paper, we try to show the effects of the contract which are in accordance with Article 1575 NCC respectively between the parties, from the date of signing of the contract and to the assigned debtor from the date of assignment notification or acceptance. In the pharmacy market, this institution is used to ensure that medicine suppliers secure the value of the products they sell, as they conclude debt assignment contracts with their debtors for passing their claims against Health Insurance Houses.

Keywords

assignment contracts, unconstitutionality, debt

1. Introduction

We will start this work by bringing some explanations related to the assignment of receivables provided by the regulations of the Romanian law. So, we will say that the contract between the original debtor and the new debtor enjoys a distinct regulation within Chapter III of the New Civil Code (NCC) reserved for debt acquisition (Note 1) and can be seen as an operation in which the features of the assignment are found and of the delegation - perfect or imperfect depending on whether the takeover has the effect of releasing or not the initial debtor (2012, p. 11). However, unlike the assignment of

receivables, where the role of the assigned debtor is a passive one, the assignment of debt produces its effects only with the consent of the “assigned” creditor, the solution is called to accommodate the necessity of dynamizing the obligatory relations with the solvency requirements necessary for the creditor’s security (2019, p. 3).

Debt collection in the form of a contract between the initial debtor and a third party can be achieved through the obligatory relationship between the creditor and the initial debtor, such an operation having a certain time advantage, given that, from the beginning, the creditor’s consent is obtained. This contract, although unique, will fulfill two functions - the source of the obligation itself and its transmission to a new debtor. The two obligatory relations will not be confused, the new debtor not being able to oppose the creditor defenses based on the commitment to take over the debt, even if this obligatory relationship between the new debtor and the original debtor was the determining reason for the takeover. At the same time, the parties, in order to benefit from the advantages of taking over the debt - the full transmission of the debt guarantees - must define very clearly the terms of the contract, not neglecting the risk of confusion between the new debtor and guarantor or qualifying the contract as a novation change of debtor or a delegation.

The present paper considers the assignment contract concluded between the distributors of medicines and pharmacies. Considering all the above, as well as the provisions related to this issue, of the assignment of the receivable, we will refer in the following to a certain procedure that approves the receivables of a certain institution from Romania, the National Health Insurance House.

Thus, these assignment contracts concluded between distributors and pharmacies were governed by the general rules laid down in the common law applicable in the matter of assignment until 03.06.2010 when the first Order of the National Health Insurance House (hereinafter referred to as CNAS) no. 546 (2011, p. 9) was issued which governed a certain national procedure for the approval of claims for debt assignment by that public institution. Subsequently, there were a series of CNAS Orders regulating the procedure applicable to the claim assignment, namely 686 / 13.08.2010 and then Order 819/2011, the last of them, which was repealed by Order 706 / 12.10.2012. By Law 125/2011 regarding the approval of Government Emergency Ordinance no. 121/2010 amending and supplementing the Government Emergency Ordinance no. 146/2002 on the formation and use of the resources carried out by the state treasury and for amending Article 52 of Law no. 500/2002 on public finances, a normative act that entered into force on 24.06.2011, Article 6 have been introduced, which unfortunately uses the phrase “[...] the assignment is valid only with the prior written consent of public institution [...]” which allowed the public authorities to consider that the contract itself between the parties was not valid, but not just its effects on the assigned debtor (2011, p. 4, Note 2; 2002, p. 8). The legislator certainly did not want a restriction on the freedom of people to contract and we also do not consider this text changes the general provisions applicable to the conditions of valid conventions as it is shown in the New Civil Code (2009, p. 10; 2012, p. 12).

2. The Interpretation of the Assignment Contracts

Taking into consideration the special regulations established by CNAS regarding the application of the assignment institution of the amounts due to the pharmacies by the Health Insurance Houses, although the provisions of Article 6 (Note 3) has begun to take effect as of 24.06.2011 until repealing the provisions of Order 819/2011 by Order 706 / 12.10.2012 was not invoked by any insurance house, these regulations being completed and giving a coherent and correct dimension to the applicability of legal provisions.

After repealing the Order 819/2011, the Health Insurance Houses, without taking a unitary action at their level, determined on their own initiative the fact that, considering the provisions of this Article 6 of Law 125/2011, they have complete and absolute freedom of agreeing with the eventual assignment of claims by their creditors or not (2011, p. 4).

Although there are methodological regulations that show how the provisions of GEO 146/2002 apply (2002, p. 7, Note 4), none of them lists the necessary and sufficient conditions for validly assigning the claims the public institution owes to an economic agent.

Leaving aside the inappropriate nature of the terminology used in the validity of a contract, a situation to which we will refer below only in the circumstance of the subjective nature of the interpretation of the assignment contracts which this article suggests, giving the discriminatory possibility to the insurers to arbitrarily take any decision, in our opinion this article also breaches the provisions of Articles 44, 45 and 53 of the Constitution (1991, p. 6).

We consider this because, for example, in Article 44, paragraph (1), from Romanian Constitution, “the property right, as well as the claims on the state, is guaranteed. The content and limits of this right are established by law” (1991, p. 6). By the contrary interpretation of this legal text regarding the equal protection of private property, as the Romanian state is obliged to bear an unjustified diminution of the patrimony by double, undue payment of a debt already paid, considering that the agreements concluded by Romania with other states financial suspensions have a liberating effect for the Romanian state (2008, p. 2).

Article 45 of the Romanian Constitution reflects the “person’s free access to an economic activity, free initiative and their exercise under the law is guaranteed” (1991, p. 6).

In our opinion, the legal provisions criticized in this article contradict the constitutional provisions contained in Article 53 (Note 5) in which is specified issues about the restriction of the exercise of certain rights or freedoms.

We also consider this article in its current form also breaches the provisions of Article 17 of the Universal Declaration of Human Rights (1948, p. 5), Article 1 of the First Additional Protocol to the Convention for Protection of Human Rights and Fundamental Freedoms, concluded in Paris on March 20, 1952, in conjunction with the provisions of Article 11 of the Romanian Constitution, which clearly states “the Romanian State undertakes to fulfill in good faith its obligations under the treaties to which it is a party” (1991, p. 6).

In essence, all of these deficiencies highlighted by us are and must be applied to all economic agents, at least for some time, CNAS has regulated the situation in this market; this is the exception, the rule being that of the arbitrariness of the representatives of public institutions regarding the prior written consent.

Therefore, through provisions of Article 6 of Law 125/2011, it is mandatory to obtain prior written consent of the public institution without having any controlling key on how this consent is issued (2011, p. 4). Nothing in the law text and/or in the Methodological regulations outlines the conditions under which such consent should be granted.

So, the Health Insurance Houses have understood to differently apply the provisions of this law, some refusing to use the assignment institution of others applying it to the drafting of internal rules, obviously without any normative support. Thus, you will notice that, in our opinion, the term of validity used by the lawmaker for debt assignment contracts creates the impression the public institution determines whether and under what conditions a contract representing the parties' will is validly concluded. It may well be that the legislator referred to the validity of the application of the debt assignment, but the fact is that the grammatical interpretation of this article shows the analyzed validity is the contract itself and not the assignment institution.

How the validity of the contract must take into account the fulfillment of the general conditions applicable to the contracts, conditions settled by normative acts, the public institution cannot overcome these laws and consequently consider a valid contract.

Returning to those mentioned, there is no clear, concrete dimension of the conditions to be fulfilled by the parties wishing to conclude such debt assignment contracts, which means the respective public institution may arbitrarily accept or not the application of the assignment institution according to such subjective criteria.

Claims subject to assignment contracts are and must be true proprietary rights the entitled parties hold against their debtors, in this case, the pharmacy holds a claim against the CAS whose property sells to the transferee (assignee).

By applying this Article 61 of Law 125/2011, the public institution can and even succeeds in intervening in the parties will by eliminating the legitimate belief of the transferee that, to the extent of fulfilling all the special legal provisions related to the assignment, it will become the creditor of the public institution as claimant as his author.

The right of claim submitted by the Assignor to the Assignee is an asset that the Assignor must be able to use without any disturbance from any third party, whether it is a public institution if it is based on an arbitrary attitude.

In this respect, ECHR (2007, p. 1) ordered that "by the concept of "assets" in the first part of Article 1 of Protocol no. 1 is intended to be an autonomous meaning, which is not limited to the ownership of physical assets and is separate from the formal classification in the relevant legislation (1948, p. 4). Certain other rights and interests, such as debts, constitutive assets, may also be considered "property

rights” and thus “property” within the meaning of this provision. The question to be considered is whether the circumstances of the case, taken as a whole, given the applicant the right to a material interest guaranteed in Art. 1 of Protocol no. 1 [see *Broniowski v. Poland* (dec.) (GC), no. 31443/96, paragraph 98, ECHR 2002 X]” (GC no. 31443/96, CEDO 2004-V) - the case of *Kechko v. Ukraine* (Second Section Case of *Kechko V. Ukraine* (Application No. 63134/00) Judgment Strasbourg 8 November 2005 Final 08/02/2006).

3. Conclusion

Therefore, by establishing that these claims object of the debt assignment contracts are assets, the parties must have a legitimate expectation that, to the extent, they meet the correct conditions, settled by normative acts, they will enjoy the same legal treatment; see, in this respect, the ECHR Decision in the *Buchen case v Czech Republic* (CEDO, section II, *Buchen v. Cehia*, 26.11.2002, 36541/97).

In fact, as the above-mentioned legal text gives the CAS the exclusive right to apply or not, upon their discretion, whether and to whom it gives this prior agreement, which does not represent in any universe a state of jurisdiction normality and/or legitimate expectation of the parties to benefit from the result of their manifestation of will.

In the authors' view, the provisions of the article are unconstitutional, breach the provisions of the ECHR decisions and, moreover, manage to create a state of contractual uncertainty by maintaining a legal breach in the hands of one person, the representative of the public institution who, arbitrarily and without even an explanation may or may not accept the application of a legal institution.

Similarly, although there is no impediment to the application of the provisions of the applicable law in the matter, a free conflict situation arises by the passivity of the public institution or the refusal to regard the assignment as applicable.

It is true that the Assignee will have an action against for the amount of the debt assigned under the same conditions as the Assignor, but the present study envisages, at the ideological level, the deficiencies of the challenged law.

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Notes

Note 1. from Title VI - Transmission and Transformation of obligations.

Note 2. Law no. 125/2011 on the approval of Government Emergency Ordinance no. 121/2010 amending and supplementing the Government Emergency Ordinance no. 146/2002 on the formation and use of the resources carried out by the state treasury and for the modification of Article 52 of Law no. 500/2002 on public finances.

Note 3. Article 17 – 1. Everyone has the right to property, both by himself/herself and in association with others. 2. No one can arbitrarily be deprived of his/her property.

Note 4. GEO no. 146/2002, Emergency Ordinance on the formation and use of resources through the State Treasury, republished 2008.

Note 5. Art. 53/Romanian Constitution - Restriction of the exercise of certain rights or freedoms: (1) The exercise of certain rights or freedoms may be restricted only by law and only if required, as the case may be, for: the defense of national security, order, public health or morals, the rights and freedoms of citizens; conducting the criminal investigation; prevention of the consequences of a natural

calamity, of a disaster or of a particularly serious disaster. (2) Restriction may be ordered only if it is necessary for a democratic society. The measure must be proportionate to the situation which gave rise to it, be applied in a non-discriminatory manner, and without prejudice to the existence of a right or freedom.