IRSTI 10.27.65

M. Bayan[1], D.A. Ospanova[1], O.A. Plotskaya[2]

[1]Turan University, Almaty, Kazakhstan
[2]Plekhanov Russian University of Economics, Institute of Management Technologies of the Federal State Budgetary Educational Institution of Higher Education "MIREA - Russian Technological University", Moscow, Russian Federation
(E-mail: mirarixos@mail.ru, j.ospanova@turan-edu.kz, olga.plockaya@mail.ru)

Problems of implementation by insurers of the right of recourse to the person who caused the damage

Abstract. *The authors of this article analyze the current legislation in the field of civil liability insurance of vehicle owners in terms of the use of the insurers' right of recourse to the person who caused the damage. Article 28 of the Law "On Compulsory Insurance of Civil Liability of Vehicle Owners" dated July 1, 2003 regulates the recovery of insurance payment by way of recourse (regress claims). Analysis of the practice of implementation by insurers of this right in court has revealed some shortcomings and imperfections of the Article 28 of the Law under consideration. As a result, the authors of the article offer recommendations for improving the rules governing the relations associated with the implementation by insurers of their right of recourse to the insured (insured).*

The introduction of the institution of compulsory insurance of civil liability of vehicle owners has significantly reduced the burden on the judicial system in terms of disputes on recovery of damage caused as a result of a traffic accident. However, in the judicial practice on this type of insurance, many questions arise. The recommendations in the article are based on the results of court disputes involving the author of the article.

Keywords: *compulsory insurance, vehicle owners, civil liability*.

DOI: https://doi.org/10.32523/2616-6844-2023-145-4-146-152

Introduction

Insurance of civil liability of vehicle owners is one of the types of compulsory insurance in the Republic of Kazakhstan. Relevant relations are regulated by the special Law "On Compulsory Civil Liability Insurance of Vehicle Owners" of July 1, 2003 (hereinafter the Law) [1].

Object of compulsory civil liability insurance of vehicle owners is property interest of an insured person. Property interest of the insured is associated with the obligation established by the civil legislation of the Republic of Kazakhstan to compensate for harm caused to life, health and (or) property of third parties, as a result of operation of a vehicle (source of increased danger) [2].

In judicial practice, as noted by judges, a large proportion of cases on claims of insurance companies to policyholders on the recovery of insurance payment by way of recourse (recourse claims) [3].

The analysis of judicial practice and analysis of the activities of insurance organizations will allow to identify problems in the current legislation and to develop recommendations for their elimination.

Research methodology

The methodology of the study is a set of approaches and methods, which in their interaction are designed to most accurately contribute to the analysis of the problems of insurance legislation of the Republic of Kazakhstan. The main methods of legal research in writing this article were methods of legal analysis and the comparative legal method, which allowed to conduct a study of the practice of application of insurance law.

The normative comparison allowed to make conceptual conclusions about the characteristics of insurance law norms and the position of insurance law in the system of Kazakhstani law.

The concrete sociological method made it possible to collect, process and analyze the practical material of judicial practice.

The study includes the systematization of results and the formation of scientific proposals for improving insurance legislation. The results of judicial practice of realization by insurers of the right of return claim to the insured (insured), and also proposals on optimization of the normative-legal mechanism of regulation of the corresponding relations are systematized.

Discussion

The right of claim back to the person who caused the damage is regulated by Article 28 of the Law [1, Article 28]. Paragraph 1 of Article 28 defines an exhaustive list of cases of the insurer's return claim to the insurant (insured) within the amount paid.

However, based on the judicial practice of applying Article 28 of the Law for the implementation of the insurers' right of recourse to the insured (insured), we believe that the current 28th article of the Law requires improvement. Let us outline a number of joint recommendations with company management aimed at improving the current Law and, accordingly, increasing the effectiveness of insurance services in Kazakhstan.

As practice shows, the greatest public danger is represented by driving while intoxicated, transport accidents committed by such persons often lead to serious consequences, causing harm to health and death. In our opinion, it is necessary to make an addition to subparagraph 2) of paragraph 1 of Article 28 of the Law under consideration. The addition of this subparagraph "the civil liability of the insured (insured) occurred as a result of driving a vehicle in a state of alcoholic, narcotic or substance abuse" [1] with the following expression "either the fact of the use of a psychoactive substance (substances) by the insured (insured) has been established, or the insured (the insured) has not complied with the requirement of the Road Traffic Regulations of the Republic of Kazakhstan [4] to prohibit the driver from consuming alcoholic beverages, narcotic or psychotropic substances after a traffic accident in which he is involved" will reduce the cases of psychoactive substance use by drivers and minimize serious consequences, and will also allow to stop illegal attempts of persons to avoid the liability provided for by law, including the satisfaction of the right of the insurer's return claim.

The need for this addition is due to the fact that in practice there are cases when a person, driving a vehicle while intoxicated, committing an accident and causing damage, without waiting for the police, deliberately, in the presence of witnesses drinking alcohol. Upon the arrival of the police officers, the said person falsely testified that he was driving sober, and that he had consumed alcohol after the accident, because he was agitated. Subsequently, the court, due to the lack of evidence of a person driving a vehicle in a state of intoxication, that is, a violation provided for by part 3 of Article 608 of the Code of the Republic of Kazakhstan on Administrative offenses [5], is forced to impute to the culprit "failure by the driver of the duties provided for by the legislation of the Republic of Kazakhstan in the field of road traffic …" in part 1 of Article 611 of the Code of the Republic of Kazakhstan on Administrative offenses [5, part 1 of Article 611]. As a result of the application of this article to the offender, the insurer has no grounds for returning the insurance payment.

The next point to which we would like to draw your attention is subparagraph 4) of paragraph 1 of Article 28 of the Law. The wording of this subparagraph reads: "in the course of

court proceedings it was established that the insured accident was caused by technical defects of the vehicle, of which the insured (insured) knew or should have known". In this wording, the expression "it was established during the trial" means that the norm can only be applied to insured events that occurred as a result of technical malfunctions of the vehicle, which were established during the trial. However, there are cases when, as a result of a traffic violation by a person, which negligently caused moderate harm to health [6, subpar. 12) Art. 3] of a person, the criminal case may be terminated at the stage of pre-trial investigation (after reconciliation of the parties), during which a technical malfunction of the vehicle that occurred before the accident should be established.

Such cases do not fall within the scope of the norm in question. Therefore, we propose that the phrase "in the course of the trial it was established" be excluded from the rule.

Further, the expression "knew or ought to have known" in the wording of subparagraph 4) of paragraph 1 of Article 28 of the Act, implies the imputation of knowledge of the presence of the malfunction of the vehicle. The fact that the insured (the insured) "knew or should have known" is impossible to establish, much less prove. Failure is most often possible to establish by carrying out a special study. However, often with the connivance of the body that initiated the case of an administrative offense, the court that considers it, such a study is not appointed. The court does not investigate the circumstances of the malfunction, whether the person who caused the accident knew about it or not, the "judicial act" only describes the event of the accident, such as "...driving a car of the brand ... allowed the wheel to fly out, which collided with the car behind the moving car, resulting in material damage ...".

At the same time, according to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated 06.10.17 No. 8 "On judicial practice in disputes arising from insurance contracts" [7], evidence that the insured event occurred due to technical malfunctions of the vehicle, about which the insured (the insured) knew or should have known, are provided to the court by the insurer.

Given that the insurer is not involved in the investigation of the circumstances of an accident either at the stage of initiating a case on an administrative offense or at the stage of its consideration, if there is the above "judicial act" "on a wheel that has flown out", at the claim of the insurer for the return of the insurance payment made, the court, in the insurer refuses to satisfy the right of a return claim, since the very fact of a wheel falling out is not recognized as a technical malfunction, since this circumstance is only a consequence of a possible technical malfunction, for example, loosening of the fixing bolt or its absence, which the court or body considering the case of an administrative offense did not investigated.

Note, the current wording of the basis of the right of recourse allows a dishonest driver or owner of the vehicle, in the process of driving on the road to allow the wheels and other mechanisms (elements) to fall out of the driven vehicle, thereby causing harm to other road users and not be liable to them financially, which leads to a sense of impunity and ineffectiveness of the Law.

On the basis of the foregoing, we consider it expedient to set forth subparagraph 4) of paragraph 1 of Article 28 of the Law in the wording "insured accident occurred due to failure of the insured (insured) to ensure reliability of the operated vehicle, including its serviceability", excluding expressions which complicate or even make it impossible to apply this norm in practice. The wording "reliability" included in the subparagraph follows from paragraphs. 2) paragraph 3 of the Rules for the technical operation of motor vehicles, approved by the Order of the Minister for Investment and Development of the Republic of Kazakhstan dated April 30, 2015, No. 547 [8]. According to the Rules, "reliability is the technical condition of units, assemblies and parts of a motor vehicle, ensuring the performance of specified functions, maintaining performance within the established limits, under specified operating modes and operating conditions, maintenance, repair and storage".

Thus, the proposed change is caused by law enforcement practice, is fully consistent with the requirements of the legislation in the field of traffic and vehicle operation. Moreover, this change will increase the effectiveness of the Law and will contribute to road safety.

Along with the above, subparagraph 7) of paragraph 1 of Article 28 of the Law also requires improvement based on law enforcement practice. When the court considers a case on violation of traffic rules, the wording of this paragraph "the person driving the vehicle fled the scene of the traffic accident" prompts the court, when issuing a decision in the case of an administrative offense, to illegally re-qualify the actions of the guilty person from "leaving the driver in violation of the Rules of the Road [4] the scene of a traffic accident" under part 2 of Article 611 of the Code of Administrative Offenses of the Republic of Kazakhstan to part 1 of the same article "failure by the driver to fulfill the obligations stipulated by the legislation of the Republic of Kazakhstan in the field of traffic, in connection with a traffic accident in which he is a participant" [5] on the basis of the lack of intent of the perpetrator to escape from the scene of an accident. Thereby the court, in the interests of the guilty person, excludes the possibility of the insurer to apply the right to reverse the claim due to non-recognition of the person guilty under Part 2 of Article 611 of the Code of Administrative Offenses of the Republic of Kazakhstan [5] and lack of evidence from the insurer of the intent of the person to escape from the scene of the accident.

Consider the following. The right of a claim against the person who caused the harm arises from the insurer who made the insurance payment, in accordance with subparagraph 8) of paragraph 1 of Article 28 of the Law, if "a person driving a vehicle and sent for examination to establish the fact of using a psychoactive substance and being intoxicated, without good reason, such an examination did not pass" [1, p. 8) subparagraph 1 of Art. 28]. Moreover, we note that subparagraph 6-1 of paragraph 2 of Art. 16 of the Law of the Republic of Kazakhstan "On Compulsory Insurance of Civil Liability of Vehicle Owners" directly provides for the obligation of the insured to immediately undergo a medical examination to establish the fact of using a psychoactive substance and being intoxicated when a traffic accident occurs.

However, in practice, there are quite often cases when traffic police officers, when registering a traffic accident, do not issue directions to road accident participants for examination. In such cases, the wording contained in the norm under consideration "and directed for examination" allows unscrupulous drivers to avoid liability for the return of the insurance payment made. As a rule, persons avoiding the examination are under the influence of alcohol or drugs, which is recorded by ambulance doctors who go to the scene of an accident. The courts, when considering administrative materials to confirm the fact of intoxication, accept only conclusions issued in accordance with the Rules for conducting a medical examination to establish the fact of the use of a psychoactive substance and the state of intoxication [9], as well as subsequently when considering civil claims. In other words, in the absence of an examination report issued in accordance with these Rules, it is impossible to confirm the fact of alcoholic or other intoxication.

Therefore, we consider it appropriate to strengthen the obligation of the insured in the event of a traffic accident to immediately undergo a medical examination to establish the fact of using a psychoactive substance and intoxication, provided for in subparagraph 6-1 of paragraph 2 of Art. 16 of the Law of the Republic of Kazakhstan "On Compulsory Insurance of Civil Liability of Vehicle Owners". For this purpose, we propose to change the wording of subparagraph 8) of paragraph 1 of Article 28 of the Law to read as follows: "a person driving a vehicle has refused to undergo an examination to establish the fact of the use of a psychoactive substance and the state of intoxication or has failed such an examination without a valid reason". The proposed wording of subparagraph 8) of paragraph 1 of Article 28 of the Law will ensure effective application of legal mechanisms of consciousness and responsibility among drivers along with responsibility for failure to comply with the law.

Analysis of the practice of insurance legislation shows, in particular Article 28 of the Law regulating the right of recourse to the person who caused the damage, that paragraph 1 does not provide all cases of possible recourse to the person who caused the damage, when such person is the driver of the vehicle through whose fault the accident occurred.

We are referring to cases where the driver of the vehicle allows spontaneous movement of the vehicle, as a result of which causes significant damage to other road users. Note that the obligation of the driver not to leave the vehicle without taking measures to exclude spontaneous movement of the vehicle is regulated by paragraph 2.1.3 of the Rules of the Road [4].

We consider it necessary to draw attention to the fact that taking measures to keep the vehicle stationary using the hand or parking brake in the situation of parking or briefly leaving the vehicle is a basic knowledge and mandatory action for a person allowed to drive a vehicle.

However, often drivers do not comply with the prescribed obligation, allow the vehicle to move spontaneously, thereby causing significant damage to other road users, which the insurer must compensate. By knowingly violating this requirement of the rules of the road, the driver is certainly aware that the allowed violation may be followed by harmful consequences for other road users, to which he is indifferent. At the same time, the unscrupulous driver hopes to compensate for the damage caused at the expense of the insurance company. In this regard, we consider it necessary to amend the Law on the basis of the right of recourse and to supplement paragraph 1 of Article 28, subparagraph 9). We propose the following wording of this subparagraph: "the insured event occurred as a result of spontaneous movement of the vehicle".

Results

As a result of research of judicial practice and activities of insurance organizations on application of Article 28 of the Law, the following changes and additions to the mentioned Article are suggested:

1) to supplement subparagraph 2) of paragraph 1 of Article 28 of the Law with the following expression "or the fact of use of psychoactive substance(s) by the insured (insured) is established, or the insured has not fulfilled the requirement of the Traffic Rules of the Republic of Kazakhstan on prohibition to use alcoholic drinks, narcotic or psychotropic substances after a road traffic accident in which he was involved";

2) to amend the wording of subparagraph 4) of paragraph 1 of Article 28 of the Act as follows: "the insured event occurred due to a failure of the insured (insured) the reliability of the vehicle operated, including its serviceability";

3) to amend the wording of subparagraph 7) of paragraph 1 of Article 28 of the Law as follows: "*the person driving the vehicle has left the place of the road traffic accident, to which he was a participant (if it was not related to the provision of medical assistance to the injured person)";*

4) to amend the wording of subparagraph 8) of paragraph 1 of Article 28 of the Law to read as follows: "a person driving a vehicle refused to undergo examination to establish the fact of use of a psychoactive substance and the state of intoxication or failed such examination without a valid reason";

5) to supplement paragraph 1 of Article 28 with subparagraph 9) "the insured event occurred as a result of spontaneous movement of the vehicle".

Conclusions

Thus, as a result of the conducted research of court practice related to the claims of insurance companies to insured persons for recovery of insurance compensation by way of recourse (regress claims), as well as of analysis of norms of current legislation governing relations connected with compulsory insurance of civil liability of vehicle owners, certain drawbacks of Article 28 of the Law governing the procedure of realization by insurers of the right of recourse against a person who caused damage have been revealed. Analysis of the activity of insurance organizations, in particular the insurance company JSC "Insurance Company Eurasia", along with the study of judicial practice, allowed to develop recommendations to improve Article 28 of the Law. We hope that the recommendations set out in this article will be implemented, which will affect the effectiveness of the application of Article 28 of the Law. In other words, the relations related to the right of recourse to the person who caused the damage will be improved.

References

1. The Law "On compulsory insurance of civil liability of vehicle owners" dated July 1, 2003 No. 446-II. [Electronic resource] – URL: https://online.zakon.kz/Document/?doc_id=1041172&doc_id2=1041172#pos=28;-102&pos2=870;-108 (accessed: 23.06.2023).

2. Civil Code of the Republic of Kazakhstan (special part) No. 409 dated July 1, 1999. [Electronic resource] – URL: https://adilet.zan.kz/rus/docs/K990000409_ (accessed: 23.06.2023).

3. Tleubaeva A.K. Insurance of civil liability of vehicle owners. [Electronic resource] – URL: https://online.zakon.kz/Document/?doc_id=34270409&pos=4;-90#pos=4;-90 (accessed: 23.06.2023).

4. Resolution of the Government of the Republic of Kazakhstan dated November 13, 2014 No. 1196 "On approval of the rules of the road, the basic requirements for the admission of vehicles to operation, the list of operational and special services, the transport of which is to be equipped with special light and sound signals and painted according to special light schemes". [Electronic resource] – URL: https://adilet.zan.kz/rus/docs/P1400001196 (accessed: 23.06.2023).

5. Code of the Republic of Kazakhstan "On Administrative Offenses" dated July 5, 2014 No. 235-V. [Electronic resource] – URL: https://adilet.zan.kz/rus/docs/K1400000235 (accessed: 23.06.2023).

6. Criminal Code of the Republic of Kazakhstan No. 226-V dated July 3, 2014 [Electronic resource] – URL: https://online.zakon.kz/document/?doc_id=31575252&pos=560;18#pos=560 (accessed: 23.06.2023).

7. Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated 06.10.17 No. 8 "On judicial practice in disputes arising from insurance contracts". [Electronic resource] – URL: https://adilet.zan.kz/rus/docs/P170000008S (accessed: 23.06.2023.

8. Rules of technical operation of motor vehicles approved by the Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30.04.15 No. 547. [Electronic resource] – URL: https://adilet.zan.kz/rus/docs/V1500012221 (accessed: 23.06.2023).

9. Rules for conducting a medical examination to establish the fact of the use of a psychoactive substance and a state of intoxication, approved by Order of the Minister of Health of the Republic of Kazakhstan dated November 25, 2020 No. KR DSM-203/2020. [Electronic resource] – URL: https://online.zakon.kz › amp › download (accessed: 23.06.2023).

М. Баян[1], Д.А. Оспанова[1], О.А. Плоцкая[2]

[1]Тұран университеті, Алматы, Қазақстан

[2]Г.В. Плеханов атындағы Ресей экономикалық университеті, «МИРЕА - Ресей технологиялық университеті» Жоғары білім берудің федералды мемлекеттік бюджеттік білім беру мекемесін басқару технологиялары институты, Мәскеу, Ресей Федерациясы

Сақтандырушылардың зиян келтірген адамға кері талап қою құқығын іске асыру мәселелері

Аңдатпа. Осы баптың авторлары сақтандырушылардың зиян келтірген адамға кері талап қою құқығын пайдалануы бөлігінде көлік құралдары иелерінің азаматтық-құқықтық жауапкершілігін сақтандыру саласындағы қолданыстағы заңнамаға талдау жүргізеді. 2003 жылғы 1 шілдедегі «көлік құралдары иелерінің азаматтық-құқықтық жауапкершілігін міндетті сақтандыру туралы» Заңның 28-бабы кері талап (регрессиялық талаптар) тәртібімен сақтандыру төлемін өндіріп алуды регламенттейді. Сақтандырушылардың сотта осы құқықты іске асыру тәжірибесін талдау Заңның 28-бабының кейбір кемшіліктері мен кемшіліктерін анықтауға мүмкіндік берді. Нәтижесінде мақала авторлары сақтандырушылардың сақтанушыға (сақтандырылушыға) кері талап қою құқығын іске асыруына байланысты қатынастарды реттейтін нормаларды жетілдіру бойынша ұсынымдар ұсынды.

Көлік құралдары иелерінің азаматтық-құқықтық жауапкершілігін міндетті сақтандыру институтын сақтандыру заңнамасына енгізу жол-көлік оқиғасы салдарынан келтірілген залалды өндіріп алу туралы дауларды қарау бөлігінде сот жүйесіне жүктемені айтарлықтай азайтты. Алайда, сақтандырудың осы түрі бойынша сот практикасында әлі де көптеген даулы мәселелер туындайды. «Көлік құралдары иелерінің азаматтық-құқықтық жауапкершілігін міндетті сақтандыру туралы» заңның 28-бабына өзгерістер мен толықтырулар енгізу туралы ұсынымдар мақала авторының қатысуымен болған сот дауларының нәтижелері бойынша негізделген.

Түйін сөздер: міндетті сақтандыру, көлік құралдарының иелері, азаматтық-құқықтық жауапкершілік.

М. Баян[1], Д.А. Оспанова[1], О.А. Плоцкая[2]
[1]Университет Туран, Алматы, Казахстан
[2]Российский экономический университет им. Г.В. Плеханова, Институт технологий управления Федерального государственного бюджетного образовательного учреждения высшего образования «МИРЭА – Российский технологический университет» Москва, Российская Федерация

Проблемы реализации страховщиками права обратного требования к лицу, причинившему вред

Аннотация. Авторами настоящей статьи проводится анализ действующего законодательства в области страхования гражданско-правовой ответственности владельцев транспортных средств в части использования страховщиками права обратного требования к лицу, причинившему вред. Статья 28 Закона «Об обязательном страховании гражданско-правовой ответственности владельцев транспортных средств» от 1 июля 2003 года регламентирует взыскание страховой выплаты в порядке обратного требования (регрессные требования). Анализ практики реализации страховщиками данного права в суде позволил выявить некоторые недостатки и несовершенство рассматриваемой статьи 28 Закона. В результате этого авторами статьи предложены рекомендации по совершенствованию норм, регулирующих отношения, связанные с реализацией страховщиками своего права обратного требования к страхователю (застрахованному).

Введение института обязательного страхования гражданско-правовой ответственности собственников транспортных средств в страховое законодательство существенно снизило нагрузку на судебную систему в части рассмотрения споров о взыскании ущерба, причиненного в результате дорожно-транспортного происшествия. Однако в судебной практике по данному виду страхования все еще возникает много спорных вопросов. Рекомендации о внесении изменений и дополнений в статью 28 Закона обоснованы по результатам судебных споров с участием авторов статьи.

Ключевые слова: обязательное страхование, владельцы транспортных средств, гражданско-правовая ответственность.

Information about authors:

Bayan M. – PhD student, Turan University, 16A Satpayev str., Almaty, Kazakhstan.

Ospanova J.A. – Candidate of Legal Sciences, Associate Professor, Turan University, 16A Satpayev str., Almaty, Kazakhstan.

Plotskaya O.A. – Doctor of Law, Associate Professor, Plekhanov Russian University of Economics, Institute of Management Technologies of the Federal State Budgetary Educational Institution of Higher Education "MIREA - Russian Technological University", 36 Stremyanny Lane, 78 Vernadsky Avenue, Moscow, Russian Federation.

Меруерт Б. – докторант, Тұран университеті, Сәтбаев к-сі, 16А, Алматы, Қазақстан.

Оспанова Д.А. – заң ғылымдарының кандидаты, қауымдастырылған профессор, Тұран университеті, Сәтбаев к-сі, 16А, Алматы, Қазақстан.

Плоцкая О.А. – заң ғылымдарының докторы, доцент, Г.В. Плеханов атындағы Ресей экономикалық университеті, «МИРЕА - Ресей технологиялық университеті» Жоғары білім берудің федералды мемлекеттік бюджеттік білім беру мекемесін басқару технологиялары институты, Стремянный переулок көшесі, 36-үй, Вернадский даңғылы, 78-үй, Мәскеу, Ресей Федерациясы.