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SECURING THE LOAN AGREEMENT OF AN ENTITY CONDUCTING PRIVATE MEDICAL ACTIVITY IN POLAND BY MEANS OF AN ASSIGNMENT OF RECEIVABLES FROM A CONTRACT WITH THE NARODOWY FUNDUSZ ZDROWIA (NATIONAL HEALTH FUND)

The subject of this article is an analysis of the possibility of securing a loan agreement of an entity conducting non-public medical activity in Poland by means of the assignment of receivables under the contract with the National Health Fund. The author of this publication focused on considering whether, in the light of the law, non-public entities conducting medical activity in Poland may secure their debts incurred for medical activity under contracts with the National Health Fund in agreements with banks. Is it possible, despite the fact that it is not possible for a non-public entity conducting medical activity in Poland to assign the contract for the provision of healthcare services to the bank, to guarantee the bank an effective collection of receivables from the National Health Fund, which are due to private hospitals for healthcare services provided.

Keywords*: the loan agreement of an entity, private medical activity, means of an assignment of receivables.*

Скорик П.

Забезпечення кредитного договору особи, яка веде приватну медичну діяльність в Польщі, шляхом дебіторської уступки за договором з Національного фонду здоров'я

Предметом даної статті є аналіз можливості забезпечення кредитного договору суб'єкта, який веде недержавну медичну діяльність у Польщі, шляхом переуступки дебіторської заборгованості за договором з Національним фондом охорони здоров'я (НФЗ). Автор цієї публікації зосередився на розгляді того, чи можуть у світлі закону недержавні організації, які здійснюють медичну діяльність у Польщі, забезпечити свої борги за медичну діяльність за договорами з Національним фондом охорони здоров'я в угодах з банками. Чи можливо, незважаючи на те, що недержавна організація, яка веде медичну діяльність у Польщі, не може передати банку договір про надання медичних послуг, гарантувати банку ефективне стягнення дебіторської заборгованості з Національної охорони здоров'я? Кошти, які належать приватним лікарням за надання медичних послуг.

У висновках зазначено, що не можна ототожнювати уступку вимог приватної лікарні до НФЗ з уступкою договору про надання медичної допомоги. Набувачем прав та обов'язків, що випливають із переуступлення договору про охорону здоров'я, не може бути будь-хто. Це може бути лише особа зі статусом суб'єкта, що надає медичну допомогу (наприклад, Лікарня), що відповідає вимогам надання медичних послуг. Тут слід зазначити, що відповідно до ст. 5 п. 41 Закону про медичні послуги, що фінансуються за рахунок державних коштів, статус надавача послуг має: а) суб'єкт, який здійснює медичну діяльність у розумінні положень про медичну діяльність; б) інша фізична особа, яка отримав професійні права на надання медичних послуг та надає їх у підприємницькій діяльності; в) суб'єкт, який здійснює діяльність у сфері постачання медичних виробів.

Ключові слова: *кредитний договір суб'єкта, приватна медична діяльність, способи уступки дебіторської заборгованості.*

Formulation of the problem. On the assumption that the legislator, as a rule, does not forbid entities conducting nonpublic medical activities in Poland from securing credit agreements with receivables, a process available to private hospitals due to healthcare services agreements concluded with the NFZ, the collateral procedure itself is complicated and risky enough that banks are not very willing to grant any such loans. Most importantly, the problematic nature of concluding such a credit agreement necessitates adapting it to the provisions of the Act on health services financed through public funds, the Banking Law, the Civil Code, Public procurement law. In addition, it should be noted that often healthcare providers have oversupply that are not always recognized by the NFZ.

Presentation of the main research material. First and foremost it should be noted that in order to ensure effectiveness of concluding such security agreements, the private hospital must acquire a written consent from the director of the regional NFZ unit to conclude it in the first place. The consent of the regional unit director is a statutory requirement (prerogative) of the legal transaction assuming the rights and obligations of healthcare services agreements, in this case entailing assignment of rights to receivables for executing an NFZ contract by

the private hospital. It should be noted that the consent for assignment of receivables may be expressed in the NFZ contract itself or acquired following the conclusion of the receivable transfer agreement. Consent acquired following the legal transaction is tantamount to confirmation and, according to art. 63.2 of the Civil Code, is applied retroactively (ex tunc), i.e. from the moment of submission of the statement of will (to perform the legal transaction). It should also be noted that such consent is necessary to ensure effectiveness of the assignment and of the transfer [1].

When analysing the procedure of concluding credit agreements with receivable assignment as collateral, it should be noted that according to art. 155.1 of the Act of 27 August 2004 on health services financed through public funds (Dz. U. 2018, item 1510, as amended), "Healthcare services agreements are regulated by the provisions of the Civil Code, unless the provisions of the Act stipulate otherwise" [2]. This provision determines the general rule that when dealing with healthcare services agreements, one should rely on the provisions of the Civil Code, unless the provisions of the Act state otherwise. The provisions of the Civil Code are therefore applicable only in cases not regulated by the Act on health services financed through public funds (Kowalska-Mańkowska Iwona. Art. 155. in: Act on health services financed through public funds. Commentary, issue III. Wolters Kluwer Polska, 2018) [3].

Moving on to the provisions of the Civil Code (art. 509) and the Banking Law of 29 August 1997 (Dz.U. 2018, item 2187, as amended): it is permissible to conclude a receivable transfer agreement as collateral for bank loans [4]. Such an agreement, unless decided otherwise by the parties, has a dispositive effect and transfers the receivable to the bank (the assignee), and the parties should include in the agreement a clause stipulating that once the loan is repaid, the receivable should be transferred back to the private hospital (the assigner). Such a clause concerning the re-transfer of the receivable may be included as a restriction of the resolutive condition, the fulfilment of which results in the receivable being transferred back to the assigner, and where the assignment ceases due to the condition being fulfilled. In such a case, the assigned receivable returns to the private hospital (the assigner) without the need to undertake any subsequent legal transactions [5]. The private hospital, once the loan is settled, therefore again becomes, by virtue of law (ipso iure), the owner of the assigned receivable. Another method of including the clause concerning the re-transfer of the receivable in the agreement is to restrict the obligation to return the assigned receivable, subject to the debt being repaid [6]. Such a restriction does not in itself have any dispositive effects in the form of returning the receivable to the assigner's assets. Such a result may only be achieved once the juridicial act (of the return-assignment) is fulfilled. In practice, in agreements aiming at securing loans with NFZ contracts, one usually utilises provisions for transferring the receivables back to the hospital (return transfers). In such cases the bank should inform NFZ of the return transfer of the receivable [7].

The agreement for securing loans with receivables to NFZ may contain obligations by the bank (the assigner) to utilise the transferred receivable in ways restricted by the goal of the transfer, which is typical for such transfers [8]. The amount of this transferred receivable may be greater than the amount of the secured receivable. It remains as part of the assets of the bank, which retains the status of an eligible creditor, including all consequences thereof, with the basis of the assignment agreement retained for as long as the loan is not paid. Moreover, in accordance with the established case law and the predominating doctrine views, as a rule, it is permissible for the private hospital to secure the loan with future receivables, of course only if there are no obstacles to disposing them [9]. Obstacles that may make it impossible to secure a loan with future receivables against NFZ include the specifics of the duration of the healthcare provision agreement, usually concluded for a definite period, provided the hospital fulfils certain conditions, or the necessity of acquiring consent from the director of the regional NFZ unit.

Moving on to the practical implications of the provisions concerning the necessity of refinancing the NFZ contract receivable for the bank: it should be noted that the refinancing is restricted in cases where the receivable instalments, as per the loan refinancing schedule, are not paid by the private hospital in time. The bank may therefore demand a direct payment of the receivable, as per the agreement with the hospital, from the NFZ, when the secured loan is not properly repaid. Simultaneously, hospitals (especially public hospitals, obliged to undergo proper public tender procedures) usually include in their agreements additional conditions that a bank will have to fulfil in order to claim the NFZ receivable. Such conditions may include: issuing a request for payment of the instalments resulting from the loan refinancing schedule, determining the validity of issuing invoices for receivables against NFZ by private hospitals, or determining, whether the receivable against NFZ is required in the first place.

Conclusions. At the end, it should be noted that the assignment of a private hospital's claims against the NFZ with the assignment of an agreement for the provision of health care can not be equated. The purchaser of rights and obligations resulting from the assignment of a health care contract can not be anyone, it can only be

an entity with the status of an entity providing health care (eg Hospital) that meets the requirements of providing health services. It should be noted here that pursuant to art. 5 point 41) of the Act on healthcare services financed from public funds, the status of the service provider has a) an entity conducting medical activity within the meaning of the provisions on medical activity, b) a natural person other than the mentioned, who has obtained professional rights to provide health services and provides them in business activity, c) an entity operating in the field of supplying medical devices.

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