

INSURANCE FRAUD

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Abstract

The sustained development of the insurance market and the constant rise of cases that require insurance mandatorily have also determined a rise in cases where people commit fraud against their insurance companies in order to gain unjust patrimonial benefits. In this context, the legislator has incriminated insurance fraud distinctly as an offence, which has been dismissed by some authors who consider that the previous disposition on fraud also covered this hypothesis.

Insurance fraud is the object of art. 245 of the Criminal Code regarding the insurance of personal possessions (par. (1)) and life and health insurance (par. (2)), the present paper seeking, among others, to analyze the necessary conditions for them to qualify as such, the sphere of subjects involved in the offence, aspects regarding attempt at fraud and its position faced with the offence of fraud.

Key Words: *fraud, insurance, patrimonial benefits, author, sum insured, property damage, insurance company.*

The activity of insurance, as one of the most complex in the financial spectrum, is confronted with numerous problems, the most severe being the economic and financial crisis that has, in the past few years, defined global economy¹.

The insurance industry has, as a core principle at the base of every insurance company, the constitution of a fund, pooled from the insurance premiums paid by the people insured, a fund from which insured sums and indemnities will be provided, only to those to whom one of the specified risks noted within the insurance contract has brought them property damage or bodily harm². The size of insurance premiums that people who choose to be insured pay are calculated such that they cover only the damages done by the risks mentioned³.

Insurance fraud is an offence newly stipulated within the Criminal Code, art. 245. It finds its reason within social reality, where it has been found that, in the last few years, such acts have become increasingly frequent, thusly demanding the

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¹ V. Gârbo, *Insurance Fraud - A Certitude of the Financial Crisis*, in *Calitatea Acces la Succes-Supliment*, 2012, pp. 241-246.

² Gh. Bistriceanu, *Asigurări și reasigurări în România*, Universitară Publishing House, Bucharest, 2006, p. 251.

³ V. Gârbo, *Asigurări și reasigurări în România*, Risoprint Publishing House, Cluj-Napoca, 2010, p. 87.

intervention of the legislator⁴. As noted on the website for the Ministry of Justice, within the section dedicated to the Criminal Code, the text sanctions fraud in both property insurance (par. (1)) and life and health insurance (par. (2)).⁵

Referring to distinctly incriminating these actions, some authors consider that such a solution was not necessary to implement by the Romanian legislator, especially because the modifications in description faced with the classic text on fraud are more than problematic⁶. The same authors demonstrate that these acts are of criminal nature and are subject to the previous Criminal Code on the condition that the person who benefits from insurance solicits, in a fraudulent manner, indemnity for false events backed by their insurance⁷.

Moreover, it has been shown that the manner chosen by the legislative body to formulate the text allows a “premature [intervention] of criminal law, even from the inception of the preparatory actions that forebode the actual defrauding of the insurer⁸.”

Another opinion states that insurance fraud is sanctioned as an offence differing from the one of fraud, is committed in a special case and the consumption of the act is not conditioned by a material result in damages, the “attempt” being thusly punishable with higher sentences (incarceration between one and five years – art. 245, par. (1)) than the finalized act of insurance fraud (incarceration between six months and three years – article 244, par. (1))⁹. In conclusion, the author shows that, such as it is stipulated, insurance fraud is a special form of fraud, which, through the will of the legislator, has been incriminated as a separate offence¹⁰.

However, such acts are incriminated in the legislation of other states, such as Italy (art. 642), Portugal (art. 219), Norway (§ art. 272), Germany (credit fraud, art. 265), etc.¹¹.

⁴ V. Gârbo, *Insurance Fraud - A Certitude of the Financial Crisis*, în *Calitatea Acces la Succes-Supliment*, 2012, pp. 241-246. The author demonstrates that, along with the diminishment in the volume of subscribed gross premiums, the rising cost and frequency of damages, the economic and financial crisis brings insurance carriers numerous clients soliciting damage coverage through fraud or attempted fraud and, even if few of the insurance carriers admit that they face fraudulent requests, the phenomenon is spread throughout the entire insurance industry. In what concerns insurance fraud, it has been shown that the insurance industry is subject to fraud from physical persons and criminal organizations, pursuing the premium money, investment profit and the most widely met reason which is damage coverage; Barac, L. *Drept penal. Partea specială*, Universul Juridic Publishing House, Bucharest, 2014, p. 78.

⁵ <http://www.just.ro/LinkClick.aspx?fileticket=Wpo7d56II%2fQ%3d&tabid=2604>, Accessed on June 2nd 2015.

⁶ S. Bogdan, D.A. Șerban, G. Zlati, *Noul Cod penal. Partea specială*, Universul Juridic Publishing House, Bucharest, 2014, p. 253.

⁷ *Idem*, p. 252.

⁸ *Idem*, p. 253.

⁹ M.C. Iacob, *Reglementarea infracțiunii de înșelăciune în noul Cod penal, în contextul unor aspecte de drept comparat*, the Scientific Annals of „Al. I. Cuza” Iași University, Tome LV, Juridical Sciences, 2009, p. 74.

¹⁰ *Idem*, p. 74.

¹¹ M.C. Iacob, *op. cit.*, p. 74; P. Dungan, T. Medeanu, V. Pașca, *Manual de lege penală. Partea specială. Infracțiuni contra persoanei. Infracțiuni contra patrimoniului*, Universul Juridic Publishing House, Bucharest, 2010, p. 356; V. Păvăleanu, *Drept penal special*, Universul Juridic Publishing House, Bucharest, 2014, , p. 210.

With the previously mentioned motivation, Romanian law has incriminated insurance fraud within Chapter III - Offences against patrimony through confidence abuse, of Title II Offences against patrimony, in two separate paragraphs.

Thusly, according to art. 245 of the Criminal Code:

1. The act of destroying, deteriorating, making unfit for use, concealing or transferring an asset insured against destruction, deterioration, wear and tear, loss or theft, in order to obtain, for oneself or for another, the insured amount, shall be punishable by no less than 1 and no more than 5 years of imprisonment.

2. The act committed by an individual who, for the purposes set out in par. (1), simulates, inflicts upon oneself or aggravates injuries or bodily harm caused by an insured risk shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

If para. (1), art. 245 of the Criminal Code outlines the content of the offence regarding the dispositions of par. (2), which refer to fraud in life and health insurance, the opinions expressed in the doctrine are contradictory. While some authors consider the dispositions of par. (2) as a less severe form of the offence¹², other authors consider them the assimilated form of the offence¹³. In another opinion, the offence is of alternative content, while within the hypothesis of committing the acts that constitute the offence in both par. (1) and (2), the crime will be committed either through a series of criminal actions with one result, and thusly one sentence, or in continuous form, fulfilling their other conditions, the special limits being the ones specific to the form more severely sanctioned (par. (1))¹⁴.

To analyze the offence, we need to clarify concepts like: insurance undertakings, insurance, insured risk, insurance contract.

The doctrine defines insurance undertaking as the activity by a company organized towards that goal, in order to approach and guarantee wellbeing against other persons' risks¹⁵.

According to art. 2, point 1, under Law 32/2000 concerning insurance undertakings and insurance supervision¹⁶, we understand insurance undertakings as an activity done in or from Romania which means, first of all, offering, intermediating, negotiating and signing insurance and reinsurance contracts, receiving premiums, compensating damage, the activity of regression and recoupment, as well as investing or capitalizing on personal funds gathered through the activity undergone;

By insurance, we understand, according to point 3 of the same article, the operation through which an insurer creates, on the principle of mutuality, an insurance fund, to which a number of policyholders, exposed to the occurrence of certain risks, contribute, and from which indemnity is offered to those who suffer a

¹² N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, in: I. Chiș, M. Dobrinioiu, V. Dobrinioiu, M. Gorunescu, M.A. Hotca, N. Neagu, I. Pascu, C. Păun, M.C. Sinescu, *Noul Cod penal comentat. Partea specială, vol. II*, Universul Juridic Publishing House, Bucharest, 2012, pp. 317; I. Vasii, I., *Drept penal. Partea specială*, Albastră Publishing House, Cluj-Napoca, 2014, p. 256.

¹³ Al. Boroî, *Drept penal. Partea specială. Conform noului Cod penal*, C.H. Beck Publishing House, Bucharest, 2014, p. 262.

¹⁴ S. Bogdan, D.A. Șerban G. Zlati, *op. cit.*, p. 253.

¹⁵ A. Duțu, *Considerații privind reglementarea contractului de asigurare în Codul civil român*, Romanian Pandects, no. 2/2015, <http://idrept.ro/Document/View.aspx?DocumentId=11014496>.

¹⁶ Official Journal (2000) [148].

loss, based on the premiums paid, as well as from other income resulting from the activity undergone.

The insured risk constitutes one of the fundamental elements of the insurance contract. According to the doctrine, it represents the future event, possible but uncertain and found outside the influence of the parties' will, with consequences that the client takes precautionary measures against by signing the insurance contract¹⁷. It is only through the occurrence of the risks stipulated within the insurance contract that the insurance carrier will be required to pay indemnity¹⁸. As shown in the academic literature¹⁹, personal possessions can be insured against: partial or total destruction, theft, fire, flood, earthquakes, landslides, cyclones or hurricanes, any other events that may lead to the degradation of the personal possessions and cost to their owner. In what concerns life and health insurance, among the risks are: death, surviving someone's death, bodily harm, permanent or temporary disability, hospitalization and medical fees, severe diseases, etc.²⁰ The risk can be assessed by the insurance carrier considering the number of events occurred in the past and in similar circumstances, calculating on the basis of this evaluation, the amount of the premium²¹.

Insurance relations take place between the insurance carrier and the policyholder only after signing the insurance contract²².

According to art. 2.199 of the Civil Code, through the insurance contract, the person signing the contract or the insured person agrees to pay a premium to the insurance agent, the agent agreeing to pay, in case of the occurrence of the insured risk, indemnity to the insured person, to the beneficiary or to a third party victim of loss²³.

Signing the insurance contract is verifiable by the insurance policy or the insurance certificate emitted and signed by the insurance carrier or through the cover note emitted and signed by the insurance broker (par. (2), art. 2.200 of the Civil Code). According to art. 2.201 of the Civil Code, the insurance policy must contain at least:

¹⁷ A. Duțu, *op. cit.* <http://idrept.ro/DocumentView.aspx?DocumentId=11014496>; V. Nemeș, *Dreptul asigurărilor*, Hamangiu Publishing House, Bucharest, 2012, p. 223.

¹⁸ V. Nemeș, *op. cit.*, p. 223.

¹⁹ *Idem*, p. 257.

²⁰ V. Nemeș, *op. cit.*, p. 268.

²¹ A. Duțu, *op. cit.*, <http://idrept.ro/DocumentView.aspx?DocumentId=11014496>.

²² V. Nemeș, *op. cit.* p. 186.

²³ There are risks not covered by the insurance. Thusly, according to art. 2.208 para. (2) of the Civil Code, in the case of possessions and civil responsibility insurance, the insurance carrier does not owe indemnity to the policyholder if the insured risk is willingly produced by the policyholder, the beneficiary or a member from the management of the juridical person insured, operating in that quality. See: para. (3) art. 2.208 Civil Code. In what concerns life and health insurance, according to art. 2.233 Civil Code, the insurance carrier does not have to pay indemnity if: the insured risk was produced through the policyholder's suicide within two years from the signing; the risk was intentionally produced by the policyholder. Also, according to para. (2) and (3) of art. 2.233 Civil Code, when a beneficiary intentionally produces the insured risk, the indemnity is paid to the other designated beneficiary or, should they not be present, to the policyholder. In the case in which the insured risk is the policyholder's death, and a beneficiary intentionally caused, the indemnity is paid to the other designated beneficiaries or, should they not be mentioned, the policyholder's heirs.

- a) The name or denomination, the domicile or headquarters of the contract's parties, as well as the name of the beneficiary, if he or she is not part of the contract;
- b) The object insured;
- c) The insured risks;
- d) The moment from which the agent's responsibility begins and ends;
- e) The insurance premiums;
- f) The sums insured.

Although the Civil Code regulates several categories of insurance contracts: of personal possessions – art. 2.214, of credits and warranties – art. 2.221, of financial losses – art. 2.222, of civil responsibility – art. 2.223, of persons – art. 2.227, Romanian law has understood to protect through the incrimination within art. 245 of Criminal Code solely the due fulfillment of contracts concerning personal possessions and people. Fraud in other kinds of insurance will be subject to the offence of fraud regulated within art. 244 of the Criminal Code, should the conditions fit the content. It has been claimed in the doctrine that fraud in a civil responsibility insurance contract is not left outside incrimination, but it does not meet the constituent elements of insurance-related fraud²⁴.

The special juridical object. The offence of insurance fraud has, in principle, a special juridical object similar to other fraud offences and is based in social values related to good faith and reciprocal trust of the subjects found in patrimonial relations in the domain of insurance.

The material object of the offence consists of, in the case of the regulated form of par. (1), personal possessions insured against destruction, degradation, overuse, loss or theft.

The generic notion of personal assets includes, according to the doctrine, written documents, atypical objects or animals, thusly anything that can be insured and affected by the actions / non-actions indicated by the legislator²⁵. According to article 2.216 of the Civil Code, the insured client is obligated to maintain the personal possessions insured in appropriate conditions, in order to prevent the insured risk.

In the case of the form found in par. (2), we believe there is a material object of the offence the moment the crime is committed to cause or amplify trauma or bodily harm created by an insured risk, in these cases the actions being directed against the body of the insured person²⁶. We consider that the material object is missing in the situation in which trauma or bodily harm is simulated, to give the impression of the occurrence of the insured risk.

Article 245 of the Criminal Code states that **the independent active subject (the author)** of the crime can be described thusly:

- in the version contained in art. 1, he or she may be any physical or juridical person, penally responsible, including the beneficiary, the owner of the personal

²⁴ N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, *op. cit.*, p. 356.

²⁵ P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, p. 356.

²⁶ Art. 2.227, Civil Code reads: Through life and health insurance contracts, the insurance carrier is obligated to pay insurance indemnity in the event of death, reaching a certain age, permanent total or partial disability or any other such cases, conforming to the norms adopted by the organ of state whose jurisdiction, as stated by law, includes supervising insurance undertakings.

possession, acting with the purpose stated by the law²⁷. Some authors do not exclude the possibility that the operations per se can be carried through by a third party²⁸. We believe that, in such a case, the intermediary will answer as the author of the crime, should they act with the purpose stated in the law, with the form stipulated within par. (1), art. 245 of the Criminal Code.

- in the version contained in para. (2), the active subject is the policyholder, being in the presence of an active, qualified subject. Through “policyholder,” we understand, following the directives within point 4, art. 1 of Law 32/2000 concerning insurance undertakings and insurance supervision, the person who has an insurance contract signed with an insurance carrier. We agree with the opinion expressed by some authors stating that the offence in this form cannot be committed by a juridical person, which does not have the actual possibility to sustain self-harm²⁹.

Criminal association is possible under the form of instigation and complicity. In what concerns shared authorship, it is possible under the regulated form in para. (1) concerning the insurance of personal possessions, but we consider it not possible in the case of life and health insurance from para. (2), the offence presuming an active qualified subject simulating, self-inflicting or worsening trauma or other bodily harm covered by the insurance. However, the doctrine affirms that the act can be committed even with accomplices, without any other specification³⁰, while other authors believe in the possibility of the existence of co-authorship, but only if the accomplices have the special quality requested by the law, the one of insured clients³¹.

The passive subject of the crime is a special one, represented by the insurance company that signed the insurance policy for the personal possession or person. The insurance carrier is the Romanian juridical person authorized within the aforementioned laws to exert insurance undertakings, the office or subsidiary of a third party state insurance carrier, or the office of an insurance company or mutual insurance company from a member state who has an authorization from the competent authority of the member state of birth (point 5, article 1 of Law 32/2000 concerning insurance undertakings and supervision).

In one doctrine, it has been shown that, in some cases, there may be a passive subsequent subject, as a third party with rights and responsibilities over the insured risk may be affected. For example, there are cases of salesmen specializing in leasing, carters, people working in security, creditors, those whose occupation consists in preservation of personal possessions and products, etc.³²

1. The objective standard

²⁷ R. Moroşanu, Fl. Streteanu, *Instituţii şi infracţiuni în Noul Cod penal. Manual pentru uzul formatorilor SNG*, Bucharest, 2010, p. 294.

²⁸ P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, pp. 357.; S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 253.

²⁹ S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 253.

³⁰ P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, p. 357, V. Păvăleanu, *op. cit.*, pp. 210; Al. Boroi, *op. cit.*, pp. 262; N. Neagu, *Înşelăciunea privind asigurările (Comentariu)*, *op. cit.* p. 318.

³¹ I. VasIU, *op. cit.*, pp. 257; C. Duvac, *Înşelăciunea privind asigurările (Comentarii)*, in: G. Antoniu, C. Duvac, D.I. Lămăşanu, I. Pascu, C. Sima, T. Toader, I. VasIU, *Explicaţii preliminare ale noului Cod Penal, vol. III*, art. 188-256. Universul Juridic Publishing House, Bucharest, 2013, p. 553.

³² P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, pp. 357; Al. Boroi, *op. cit.*, p. 263.

In order for the offence to be acknowledged in its regulated form from para. (1), art. 245 of the Criminal Code, the following conditions must be met:

a. The existence of an insurance contract for personal assets. Concerning this condition, there has been discussion on whether the charge will still hold in the case of an annulable or a null contract or in case the insurance contract had been terminated by the insurance carrier because of lack of payment on the insurance premiums³³;

We believe, as other authors do, that if at the moment of the offence, there had been no annulment or ascertainment of the nullity of the contract, the good is insured in the view of penal law, and so, the accusation should be sustained³⁴. If the contract had been terminated by the insurance carrier and the crime takes place following this moment, there will be no content to the crime in the form it has taken. According to an opinion, in this situation, there will be an attempt with the specified nature (sanctioned by law) at insurance fraud³⁵. In our opinion, as the condition of a contract to produce the benefits sought after by the attempt no longer exists, this cannot be an attempt at insurance fraud, but an attempt at fraud stated in art. 244 of the Criminal Code.

b. The personal assets must be insured against destruction, degradation, wear and tear, loss or theft;

c. The offender must act in order to destroy, damage, make unfit for use, conceal or transfer an insured good;

d. Destroying, damaging, making unfit for use, concealing or transferring an insured good must be done in order to obtain, for oneself or for another, the sum insured.

Thusly, in **the regulated form from par. (1), article 245 of the Criminal Code**, the offence can be **committed** by one of the alternative means described by the legislator, namely:

- Destroying, damaging, making an object unfit for use which is insured against destruction, deterioration, wear and tear, loss or theft;

- Concealing an insured object;

- Transferring an insured object;

Destroying an insured good is an activity that has the corruption of the good's substance as a result, in such a way that it ceases to exist³⁶. It may be total or partial, done in any manner and by any means³⁷.

Deterioration consists of interacting with an object such that it loses some of its qualities in such a way that its potential for use is reduced³⁸.

Making a possession unfit for use means the activity through which the offender interacts with the good such that it can no longer be used (e.g. stealing a car part from a vehicle)³⁹.

³³ S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 254.

³⁴ *Idem*, p. 254.

³⁵ *Ibidem*.

³⁶ Al. Boroi, *op. cit.* p. 263.

³⁷ C. Duvac, *Înşelăciunea privind asigurările (Comentarii)*, *op. cit.*, p. 554.

³⁸ *Idem*, p. 263.

Destruction is thought to be lacking as a term within Romanian law, as it does not cover sabotaging preservation or recovery measures for an insured good, as well as sabotaging the measures already taken, two actions which fall under the description of destruction as found in article 253 of the Criminal Code⁴⁰. The authors referenced consider that even in the absence of an express position, the action will constitute insurance fraud when committed through hindering preservation and recovery measures for a good or by removing them as they represent specific forms of destruction, deterioration and making unfit for use.

In this form, the act may be committed both by action and lack of action (not feeding the animals insured in order to receive indemnity over their death)⁴¹.

Concealing the good entails its placement in a highly inaccessible space, such that it appears stolen or that it has disappeared⁴².

Transferring the object means transmitting its possession rights to another person, giving the impression of its disappearance or theft⁴³.

As proven, in the case of insurance for personal possessions, the insurance carrier has the responsibility to pay indemnities to the insured client, the beneficiary or any other entitled persons, should an insured risk happen.

All of these manners to commit the crime have the purpose of simulating the occurrence of the risk so that the beneficiary receives compensation (the sum insured). If several of these are used in the same circumstances, only one charge will be kept, as it is only one set of benefits that they pursue and the same unique offence that they commit⁴⁴.

The doctrine claims that a person could commit insurance fraud in this manner if they, because of real estate financial crisis, burn their house down in order to receive the sum insured, which is much higher than what the market offers, or they can enact their car being stolen to receive the money it is insured for against theft⁴⁵.

One hypothesis holds the question whether the act fulfills the concept of insurance fraud as stated in the law when the beneficiary's passive conduct leads to further deterioration to a good already endangered not as a direct result of his or her conduct. Proving that such a conduct may be part of the act of destroying, deteriorating or making unfit for use, as the offender, exerting no efforts beyond the reasonable, could have prevented the amplification of the state of endangerment and does nothing in order to receive his or her indemnity, authors consider that the action fits the notion of insurance fraud⁴⁶.

Keeping in mind article 2.216, par. (3) of the Civil Code according to which, in the cases supported by the contract, at the moment the risk occurs, the client has

³⁹ *Idem*

⁴⁰ S. Bogdan, D.S. Șerban, G. Zlati, *op. cit.*, p. 254.

⁴¹ *Idem*, p. 254.

⁴² N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, *op. cit.*, p. 318

⁴³ *Idem*, p. 318

⁴⁴ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 254.

⁴⁵ N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, *op. cit.*, p. 319.

⁴⁶ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, pp. 255. The authors give the example of a car fire not started directly or indirectly by the owner, but who idly witnesses the fire spread, in order for the CASCO-insured car to burn completely such that he or she may be compensated by the insurance company.

the obligation to take measures, backed by his insurance carrier out of his insured money, to limit damages, we believe that it is up to judicial authorities to establish whether the offender's activity fits the content of the charge.

In **the form stipulated in par. (2)**, concerning life and health insurance, the offence is committed through:

- Simulating lesions or other bodily harm;
- Causing lesions or other bodily harm;
- Worsening lesions or other bodily harm.

In order for this form of the offence to be valid, the next conditions must be met:

a. The existence of a life and health insurance contract, as stated in article 2.227 of the Civil Code;

b. The insured client is to simulate, cause him- or herself or worsen trauma or other bodily harm caused by an insured risk. By trauma or other bodily harm, we understand, according to an opinion, anything affecting the health or bodily integrity of the person, represented by an insured risk⁴⁷;

c. Simulating, causing or worsening lesions or other bodily harm through an insured risk is to be done in order to obtain, for oneself or another, the sum insured.

In order to obtain said sum, the offender either simulates, causes or worsens trauma or any other bodily harm upon him- or herself. As exemplified in the doctrine, he or she may commit the crime of insurance fraud in this form if insured against permanent, total or partial disability or disease, and causing themselves said affliction on purpose in order to obtain their insured sum⁴⁸.

Simulating means falsifying the occurrence of the insured risk, as it has not actually happened (through false medical documents, wearing bandages, etc.⁴⁹). In the case the method used to simulate the ailment is in itself an offence, the charge will be double⁵⁰.

Causing or worsening trauma or other bodily harm presumes that the author him- or herself produced the insured risk, creating the appearance that it is the result of an external event⁵¹ (causing themselves such suffering or amplifying pre-existing disorders or wounds⁵²).

In these cases, we are facing sanctioning self-harm when it is done in order to defraud the insurance carrier. There is the issue over whether the action would still fit the type should it not be for the insured person to directly cause themselves the bodily harm. Some authors, with which we agree, consider that the offence is valid even if the wounds are indirectly inflicted through somebody else, if the purpose is that

⁴⁷ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.* pp. 256. It has been proven that they also embody the acts in art. 193, 194 Criminal Code. See: V. Păvăleanu *Op. cit.*, pp. 212; C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, *op. cit.*, p. 555.

⁴⁸ N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, *op. cit.*, p. 320.

⁴⁹ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 256.

⁵⁰ Also see: S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 256.

⁵¹ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 256.

⁵² C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, *op. cit.*, p. 555.

which is stated in the law⁵³. The other party will thusly be an accomplice to insurance fraud⁵⁴.

We agree with the opinion that the offence of insurance fraud will not be valid when the insured client in accord with the beneficiary commits suicide, and the beneficiary simulates the occurrence of an insured risk with the victim's body, the purpose being collecting the sum insured. In this case, it is the offence of fraud that will be charged, as written in article 244, Criminal Code⁵⁵.

The immediate result refers to creating a state of endangerment around the patrimony of the insurance agent, producing or simulating the insured risk, the offence being one of endangerment. There is no need for the author to obtain the indemnity in order for the offence to be charged, the only necessary condition being that of acting towards this goal⁵⁶. Analyzing the text, we can see that there is no need for the compensation to be solicited for the offence to exist⁵⁷. There are other authors however who consider that the damage stemming from the analyzed offence resides in creating a situation that has produced losses to the patrimony of the insurance companies, by loss understanding effective and certain material detriment caused to a physical or juridical, private or public person⁵⁸.

2. The causality connection

In order for the insurance fraud felony to be treated as an offence, there must be a connection of causality between the fraudulent action of the offender and the damages he or she creates⁵⁹. This is deducible from the materiality of the action.

3. The subjective standard

From the perspective of the subjective standard, the action is committed with **direct intent**, the goal being qualified – to obtain, for oneself or another, the sum insured.

There is also an opinion stating that the offence can be committed by both direct and future intent⁶⁰. Other authors claim that the subjective standard consists of actions or non-actions committed purposefully, thusly suggesting that they can be committed with both forms of intent⁶¹. As long as the law stipulates, within art. 245, that the offence needs to be committed to obtain the sum insured either for personal

⁵³ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, pp. 256; P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, p. 357.

⁵⁴ R. Moroșanu, Fl. Streteanu, *op. cit.*, pp. 295; S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 256.

⁵⁵ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 257.

⁵⁶ P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, p. 358.

⁵⁷ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 258.

⁵⁸ Al. Boroi, *op. cit.*, p. 263; V. Păvăleanu, *op. cit.*, p. 211.

⁵⁹ According to another opinion, there is need for the existence of causal ties between the material element, the action of deceit and the damages done to be proven. In this sense, Al. Boroi, *op. cit.* p. 263.

⁶⁰ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 257.

⁶¹ P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, p. 357.

gain or for somebody else, the intent cannot be but direct, being qualified based on its purpose.

In order for the offence to exist, it is irrelevant whether the goal has been met or not⁶², if the sum has been received or not. Some authors⁶³ consider that, as specified in the law, the circumstance in which the insurance indemnity has been obtained will only be of relevance from the perspective of the judicial individualization of the charge. Other authors claim that, should the compensation be solicited, the offence can be placed under the charge of attempt at fraud, stipulated in article 244 of the Criminal Code, while if it has been obtained, the charge will be of fraud, as mentioned in article 244 par. (2) of the Criminal Code⁶⁴. In our opinion, in the case in which, after committing the offences signaled within article 245 of the Criminal Code, the sum has been collected, thusly causing losses to the insurance carrier, the final dispositions of par. (2) of article 244 of the Criminal Code will be carried out, the offender being faced with both a charge for fraud, as stated in art. 244, and one for insurance fraud, as stated in art. 245 of the Criminal Code⁶⁵.

We agree with the authors who consider it appropriate to create a more severe form of the offence found in art. 245 of the Criminal Code if the sum insured has been collected⁶⁶.

In order for the offence of insurance fraud to be considered as such, it is however necessary that the offender act towards fulfilling this goal, otherwise, the action will not form the basis of the discussed offence.

According to some authors, if the goal was not met, the act is only categorized as an **attempt**, punishable by law (art. 248 of the Criminal Code)⁶⁷.

One opinion states that there is an attempt when the offender commences the act of destroying, deteriorating, making unfit for use, concealing or transferring of an insured possession, or to cause or worsen lesions and other bodily harm produced by an insured risk, in order to obtain the sum insured, but the act is interrupted⁶⁸.

Incriminating attempt at fraud as stated in art. 245 of the Criminal Code is, according to another opinion⁶⁹, subject to criticism, as it is considered to have a minimal practical relevance, because “the existence of the special goal will be extremely difficult to prove,” and through incriminating the attempt, we reach “an advancement even more emphasized of the intervention of penal law, thusly charging the attempt at preparing for fraud, in fact.”

From our point of view, being in the presence of an offence that jeopardizes the insurance agent’s patrimony, even if with no actual result, whose possibility for

⁶² C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, op. cit., pp. 556; S. Bogdan, D.A. Șerban, G. Zlati, op. cit., p. 258.

⁶³ S. Bogdan, D.A. Șerban, G. Zlati, op. cit., p. 257.

⁶⁴ P. Dungan, T. Medeanu, V. Pașca, op. cit., p. 358.

⁶⁵ Also see: C. Duvac, *Înșelăciunea privind asigurările*, op. cit., p. 561.

⁶⁶ S. Bogdan, D.A. Șerban, G. Zlati, op. cit., p. 257. Also see the *lex ferenda* proposition made by C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, op. cit., pp. 566; also see: Observațiile Parchetului de pe lângă ICCJ, http://www.mpublic.ro/Cp/observatii_piccj_cp.pdf. [pdf] Bucharest: s.n, accessed 09.07.2015.

⁶⁷ R. Moroșanu, Fl. Streteanu, op. cit., p. 295.

⁶⁸ N. Neagu, *Înșelăciunea privind asigurările (Comentariu)*, op. cit., p. 320.

⁶⁹ S. Bogdan, D.A. Șerban, G. Zlati, op. cit., p. 257.

the existence of attempt is still disputed within the doctrine⁷⁰, the Romanian legislator should have exempted insurance fraud from incriminating the attempt.

The fulfillment of the offence occurs at the moment where one of the incriminated acts is successfully executed (action or non-action, by case), when the immediate result happens, meaning the state of endangerment of the insurance carrier's patrimony⁷¹. As we have seen, in a contrary opinion, it is shown that the offence is fulfilled when the immediate result is produced, that is the situation bringing losses to the victim, materialized through an effective loss produced in the patrimony of the defrauded subject⁷².

Some authors claim that, from a practical standpoint, to retain a charge, there is need for the author to also attempt to fraudulently obtain the sum insured, as it is only in this manner that the existence of the special purpose be confirmed beyond any doubt⁷³. We consider that, indeed, to be able to prove the intent, it would be necessary for the author not only to commit the incriminated acts, but also undergo the operations leading up to obtaining the sum insured. Otherwise, the purpose behind his or her actions may be entirely different.

4. Penalties

As seen in art. 245, par. (1) of the Criminal Code, a physical person committing the act of insurance fraud is sentenced to jail for a period of time between one and 5 years.

For the form of offence found in art. 245, par. (2) of the Criminal Code, the punishment stated within the law is between six months and three years or a fine.

In what concerns penalizing the juridical person, the orders specified in art. 137 of the Criminal Code referring to establishing a fine for the juridical person will be applied.

Referring to penalizing insurance fraud, one author⁷⁴ believes that there is room for more consideration on whether the punishment set by the law should not be correlated to that of fraud, showing that it is hard to admit for an act of endangerment that offers the possibility of a result to be punished more severely than a subsequent offence that has met its goal, given that they are related. Indeed, it is absurd for, in case the result of the act is in certifiable loss, the punishment to be less significant than in the situation in which the damages are hypothetical.

5. Procedural aspects

⁷⁰ For further details, see: D. Nitu, Fl. Streteanu, *Drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2014, p. 481.

⁷¹ C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, *op. cit.*, pp. 558; I. Vasiu, *op. cit.*, p. 257.

⁷² Al. Boroi, *op. cit.*, p. 264.

⁷³ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, pp. 258; N. Neagu, *Înșelăciunea privind asigurările (Comentarii)*, *op. cit.*, p. 321.

⁷⁴ C. Duvac, *Înșelăciunea privind asigurările (Comentarii)*, *op. cit.*, p. 566.

Penal action is set in motion *ex officio*, but according to art. 145, par. (3) of the Criminal Code, yet if the parties reach an agreement, penal responsibility is removed (upon the fulfillment, of course, of the conditions set by the law within article 159 of the Criminal Code).

6. Conclusions

Insurance fraud has been incriminated by the legislator in order to underline the importance of social relations that are born tied to the activity of insurance, a domain found in a continuous expansion. The frequency of these offences and the difficulty in how they are categorized legally has led to a different set of rules for the analyzed crime.

As is now common in law, the offence entails as a premise the existence of an insurance contract and is viewed as such at the moment the actions or non-actions done in order to obtain the sum insured.

We underline that this is not a mere amplified form of fraud, but an independently perceived offence, this decision having a multitude of theoretical and especially practical implications. Compared to fraud (art. 244 of the Criminal Code), in the case of the offence signaled by art. 245 of the Criminal Code, it is not necessary for any loss to be sustained, the offence being one of danger. Although other opinions have been stated, we believe that, should the beneficiary as a result of his doings, collect the sum insured, there will be two charges of insurance fraud and fraud, effected by article 244 of the Criminal Code, par. (2), final thesis.

However, to avoid practical problems in applying legal directives, we sustain the proposition *de lege ferenda*, as we've seen, suggested by some authors, concerning the creation of a more severe form of offence for insurance fraud should the sum insured be obtained.

Also, we consider that, in order for the rules to be complete and correct, it would be advisable to include the other forms of insurance within the new offence category.