

## Insurance - Switzerland

### Prescription period for paid sick day allowance clarified

Contributed by **BADERTSCHER Rechtsanwälte AG**

April 01 2014

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#### Introduction

In an extensive series of cases the Federal Supreme Court has laid out the rules regarding the applicable limitation periods in insurance law. A recent case clarified that the general limitation regime applies with regard to the underlying right for loss-of-income insurance, unless a special rule is stipulated (for further details please see

"[Prescription period clarified for benefits under loss-of-income insurance](#)"). The Federal Supreme Court found that the Insurance Contract Act does not affect the prescription for the underlying right and that the limitation period of the underlying right is therefore 10 years. According to the court, the scope of application of Article 46 of the act is limited to the individual instalments paid under the insurance contract. Therefore, each individual instalment falls under the two-year limitation period.

#### Facts

In a recent Federal Supreme Court decision<sup>(1)</sup> the court developed its case law with regard to the prescription of daily allowances. The claimant was insured against accident through his employer (ie, occupational accident insurance) and also had insurance cover for loss of income in case of inability to work due to sickness (ie, daily sickness allowance insurance). He suffered an accident on January 27 2005 and subsequently received benefits from the occupational accident insurance. Ten months after the accident, the employer terminated the claimant's employment contract. The occupational accident insurance thereafter stopped the payment of benefits. The claimant appealed the decision, but to no avail.

In a letter dated September 21 2007, the claimant applied for daily sickness allowance from the defendant insurer, which denied its obligation for coverage. On June 8 2012 the claimant sued the insurer and claimed daily sickness allowance benefits from January 9 2006. However, the competent cantonal administrative court rejected the claim on the grounds that it had become time barred and no coverage existed for the respective period.

The court found that the insurer's obligation to pay the insured benefits was triggered by the claimant's inability to work and the expiration of the waiting period, which occurred on February 27 2005. It found that the prescription period for all daily allowance payments during the claimant's inability to work started at that moment and became time barred two years later in accordance with Article 46 and the two-year limitation period. The claimant eventually appealed to the Federal Supreme Court.

#### Decision

The claimant argued that the case law which distinguishes between the (10-year) prescription period of the underlying right and the (two-year) prescription of each individual instalment should not only be applied to pension entitlements (eg, loss of income insurance), but should also apply to daily allowances (in particularly daily sickness allowances).

Pursuant to case law, the claim for daily sickness allowances becomes time barred in total two years after the moment the insured's incapacity to work is certified by a doctor and the agreed waiting period lapses. This case law has been criticised in the doctrine.

In this case, the issues at stake were whether the Federal Supreme Court should uphold its case law and thus:

- treat sick day allowance as a claim in its entirety; and
- decide at what point the limitation period should commence.

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The Federal Supreme Court held that sick day allowance is intended to replace loss of income due to incapacity to work. Such allowances can therefore be claimed and should be paid out on a rolling basis (ie, as long as the insured is unable to return to his or her workplace.) Consequently, each instalment (ie, each sick day allowance) should be regarded as a separate claim, and therefore the limitation period for each sick day allowance should begin at a different point. The court concluded that it is therefore unjustified to let a claim for sick day allowance become time barred in total, since this would mean that the underlying right becomes time barred within two years instead of 10 years.

In order for the continued prescription of each individual sick day allowance, the insured must be entitled under the insurance agreement to request payment of the individual sick day benefits. If the general conditions of insurance state that the (private) insurer will make advance payments in case the obligation of the state insurer to grant benefits is in doubt, the separate sick day allowances become time barred individually (and all at different times), since the claimant can continuously request such allowances despite the uncertainty regarding the state insurer's obligation.

However, if the general conditions of insurance leave it up to the insurer to decide whether it wants to make advance payments in case of uncertainty regarding the obligation of the state insurance, the prescription period for the sick day allowances begins at the moment when this uncertainty has been removed. Only then are all facts certain which trigger the insurer's duty to grant insured benefits. Consequently, the limitation period for all accumulated sick day allowances begins at this moment.

The Federal Supreme Court then applied the findings to the case and concluded that since the general conditions of insurance obliged the insurer to make advance payments, the claimant was entitled to continuously request the sick day allowance payments; therefore, each sick day allowance claimed from January 9 2006 would become time barred separately within two years. Since the insurer had waived the pleading of the statute of limitations on January 7 2008, the individual sick day allowances had not become time barred. The appeal was therefore granted.

### Comment

For the first time, the Federal Supreme Court has held that sick day allowances cannot become time barred in their entirety; it is necessary to distinguish between the underlying right and the individual instalments (similar to a pension entitlement). In addition, the court defined the point in time at which the limitation period starts running. If an insurance covenant is to make advance payments in case the obligation of the state insurer remains uncertain, the prescription period of the claims for daily allowances start separately and as soon as the insured can demand payment.

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### Endnotes

(1) BGE 139 III 418 *et seq.*

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