Non-payment of subsequent premiums. The suspension of effects of the contract is not enforceable against the injured third party, and the Consorcio de Compensación de Seguros takes over this position when it exercises proceedings for recourse in a claim for the recovery of the amount paid to injured third parties in fulfilment of its function as a Guarantee Fund due to controversy concerning the coverage of the accident by the insurance policy

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1. Introduction

Article 14 of the Insurance Contract Act (LCS) regulates the principal obligation of the policyholder, which consists of the payment of the premium, while article 15 LCS stipulates the legal consequences arising from non-payment, making a distinction in this latter case between the first premium and the subsequent premiums.

Non-payment of a premium brings about different effects, depending on whether the first premium or the subsequent premiums are involved. In the first case it appears, *a priori*, that coverage is conditioned to payment of the premium. Therefore, if a loss occurs and the premium has not been paid due to the policyholder's fault, compensation for the loss will not be paid, because the insurance contract, despite its signature, has not deployed all of its effects. However, in the second situation, the insurance contract is not terminated, but rather the insurer continues to provide coverage one month after the premium due date, during the so-called "one-month grace period". Following this period, the contract is suspended during five months and, as from the end of this second period, the contract is terminated *ex lege*.

Perhaps the most interesting aspect of the judgement examined here is the affirmation that the CCS, in these cases in which it indemnifies the injured party due to controversy and afterwards initiates proceedings for recourse against the insurance undertaking, acquires injured third party status upon taking over the latter's position by subrogation, being able -as occurs in this proceeding- to take direct action against the insurance undertaking which should have paid for the damages.

Although, in principle, all appears to be quite clear, actual experience has shown us that we are looking at one of the most controversial articles of the LCS, due basically to the different interpretations given by our case law in relation to the possible exercise by the injured party of the direct action established in article 76 LCS and the exceptions which, in this context, the insurer may or may not be able to enforce against such injured party.

On the other hand, we must refer to the coverage by the *Consorcio de Compensación de Seguros* (CCS) in cases of controversy between the insurance undertaking and the CCS with respect to who must pay compensation to the injured party in certain situations, associated, in most cases, precisely with the non-payment of the premiums under the insurance contract. Thus, article 11.1. d) of the Motor Vehicle Civil Liability and Insurance Act (*Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor*, LRCSCVM) establishes that the CCS must pay compensation for personal injury and property damage when, in cases included within the scope of compulsory third-party insurance, a controversy arises between the CCS and the insurance undertaking about who must indemnify the injured party.

Notwithstanding the foregoing, this article adds, "if later there is a ruling or decision determining that the insurance undertaking is responsible for paying compensation, it must reimburse the *Consorcio de Compensación de Seguros* for the amount paid plus interest at the legal rate, increased by 25 percent, as from the date of the payment made".

2. The issue at stake

The judgement which we are examining addresses a case of this nature. Due to insufficient funds in his bank account, the insured failed to pay the subsequent premium presented by the company insuring his vehicle.

The accident, with damages to a third party, occurred after the one-month grace period and, therefore, according to article 15.2 LCS, when the contract between the parties was suspended. Since the insurance undertaking refused to pay compensation for the damages, the CCS, pursuant to the aforementioned article 11.1.d) LRCSCVM, paid the compensation, due to the existence of a controversy as to who was responsible for indemnifying the damages sustained by the third party, however, after having made payment, as stipulated in that article, the CCS initiated proceedings for recourse against the insurer of the vehicle.

Both in the first as well as the second instance, the allegations of the CCS were upheld, and the insurance undertaking was sentenced to reimburse the amount paid previously as compensation to the injured party by the CCS.

3. Legal arguments

a) Legal consequences derived from the suspension of the effects of the insurance contract

As can be concluded from what has been said so far, the issue at stake arises from the interpretation to be made of article 15.2 LCS, in those cases where the insurance contract is suspended, after the one-month grace period has transpired following the policyholder's culpable default in payment of the subsequent premium.

The Supreme Court (First Division) Judgement of 30 June 2015 (RJ 2015, 2555), referenced in the decision we are commenting upon here, had been handed down on the culpable default in payment of a subsequent premium by the policyholder, making an analysis of article 15.2 LCS. From this ruling, we find that the legal effects produced in these cases are three in number:

- One-month grace period: starting from the non-payment of the subsequent premium, the insurance contract continues in force during the first month and, with this, the insurance coverage, whereby, if a loss occurs in this period of time, the company is under the obligation of paying compensation to the insured in the terms agreed in the contract and is responsible with respect to the third party exercising direct action under article 76 of the LCS.

- Suspension of effects of the contract: as from the month following the default in payment of the premium, and during the following five months, in which the policyholder continues without paying the premium and the insurer

has not terminated the contract, the insurance coverage is suspended. This means that the contract does not produce effects between the parties in the sense that, if a loss occurs in this period, the insurance undertaking will not cover the loss with respect to its insured. However, the suspension of the insurance coverage does not extend to the third party exercising the direct action provided for in article 76 of the LCS, in that this same article stipulates that "the direct action is immune to the exceptions to which the insurer may be entitled to exercise against the insured".

- Termination of the contract: once six months have transpired since the non-payment of the premium, during which period the insurer has not claimed payment, the insurance contract will be automatically terminated through the effects of the legal provision itself, without the need for either of the parties to request termination. Logically, a loss occurring subsequent to the termination of the contract is not covered by the insurance and, for this reason, the insurer will neither be responsible for the compensation to be paid to the insured nor will it be responsible with respect to the third party intending to bring direct action..

We could say that this judgement provides a clear summary of the three legal effects brought about by the culpable default in payment of subsequent premiums by the policyholder/insured, which we will examine in greater detail below. The Supreme Court corroborates the practically unanimous interpretation which both the relevant doctrine as well as the case law have maintained with respect to the legal consequences derived from non-payment of subsequent premiums under insurance contracts, as regulated in article 15.2 of the LCS.

b) Obligation of the CCS to pay compensation in cases of controversy with the insurance undertaking

The other issue raised is whether the CCS should take responsibility for this compensation on account of controversy, based on the provision made in article 11.1.d) LRCSCVM.

In this case, where the effects of the contract were suspended between the parties, the company insuring the vehicle decided not to cover the third-party damages, despite the above-mentioned Supreme Court case law, which establishes that this suspension is not enforceable against an injured third party, by virtue of the exercise by the latter of direct action against the insurer, recognised in article 76 LCS.

For this reason, since this was a case of controversy, the CCS paid the compensation for the damages caused to the third party. However, once payment was made, it exercised its right of recourse against the driver, the owner and the insurer of the vehicle, according to the provision contained in article 11.1.d) itself and in article 11.3, both in the LRCSCVM.

c) Consideration of the Consorcio de Compensación de Seguros as the injured third party, to the effects of article 15.2 LCS

The judgement in first instance upheld the allegations of the CCS and ruled against one of the co-defendants and the insurance undertaking, which appealed the decision. In its appeal, it argued, among other reasons, that the CCS, in the context of the application of article 15.2 LCS, does not have the status of an injured third party and, therefore, the exception of default in payment of the premium by its insured is enforceable.

The Court did not share that argument, considering that the CCS brings action through its right to recourse on behalf of the injured parties under article 11.1.d), in relation to article 11.3 LRCSCVM. For this reason, the judgement adds, "the CCS can be considered as an injured party on having paid, under a legal requirement, the amount of the compensation due to the injured party as the victim of the traffic accident. And, since the contract coverage was suspended upon completion of the one-month grace period, such situation of non-payment by the policyholder -with the contract not terminated- is not enforceable against the injured third party, whose position was taken over through subrogation by CCS, who enjoyed immune direct action against the insurer".

Conclusions

The conclusions we can extract from this judgement are as follows:

- In cases of default in payment of subsequent premiums, the insurance contract, by virtue of article 15.2 LCS, suspends its effects, although this suspension, in accordance with Supreme Court case law, only brings about effects between the parties to the contract but not with respect to third parties. In this case, the insurance undertaking must pay the relevant compensation if a loss occurs, based on the content of article 76 LCS, which regulates the direct action of the injured third party against the civil liability insurer.

- In cases such as the one indicated previously, in which there is a controversy between the insurer of the vehicle and the CCS with respect to which of the two is responsible for indemnifying the injured party, according to article 11.1.d) LRCSCVM, the public institution must pay the compensation to the injured party. Nevertheless, as stipulated in the second indent of that article, once compensation has been paid, the CCS can initiate proceedings for recourse against the insurance undertaking and, if it is later ruled or decided that the insurer is responsible for paying compensation, the latter will reimburse the CCS for the amount paid, plus interest at the legal rate, increased by 25 percent, as from the date when the compensation was paid.

- Perhaps the most interesting aspect of the judgement examined here is the affirmation that the CCS, in these cases in which it indemnifies the injured party due to controversy and afterwards initiates proceedings for recourse against the insurance undertaking, acquires injured third party status upon taking over the latter's position by subrogation, being able -as occurs in this proceeding- to take direct action against the insurance undertaking which should have paid for the damages.