
Solidarity in sickness insurance – selected issues

The author of this paper analyses selected solutions of sickness insurance in terms of the implementation of the principle of solidarity, with the considerations referring to sickness and maternity allowances. A thorough analysis of the regulations concerning the personal scope of sickness insurance, the rules for financing contributions, conditions for the acquisition or continuation of sickness and maternity allowances, the possibility of receiving these benefits after the lapse of the insurance coverage and the basis for contribution assessment leads to the conclusion that sickness insurance is essentially based on the principle of solidarity. However, some detailed solutions violate this principle, by allowing for some abuses at the expense of the risk community or by allowing benefits to be received in a situation where there is no social risk.

Key words: maternity allowance, principle of solidarity, sickness allowance, sickness insurance, solidarity

Submitted: 18.3.2019

Accepted: 27.11.2019

DOI: 10.32088/0000_4

Introduction

Solidarity is recognised as one of the principles or guiding ideas of social insurance as a legal institution.¹ In literature on social insurance law, it is most often analysed within the context of pension insurance.² There seems, however, to be no study that would analyse the sickness insurance regulations (or – to be more precise – regulations on the social insurance in respect of sickness and maternity, referred to by the legislator as “sickness insurance”³) in the aspect of solidarity. Therefore, this article is an attempt to carry out such an analysis. Its purpose is to answer the question of whether the current regulations governing sickness insurance implement the solidarity principle.

The idea of solidarity can be analysed in many aspects.⁴ As regards pension insurance, it would be of interest to adopt the research perspective proposed by Krzysztof Ślęszak, who has looked at the principle of solidarity in various relationships: between the insured person and the contribution payer, between the insured persons, between the insured persons and the beneficiaries, between the beneficiaries themselves and between the state and the beneficiaries.⁵ Due to the different specificity of sickness insurance and the risks covered thereby, it does not seem advisable to analyse all the above-mentioned levels in relation to this insurance. That is why this paper will deal with selected aspects of sickness insurance, such as:

- the personal scope of this insurance,
- the rules for the financing of contributions,
- the conditions to be met to acquire benefits or to continue their collection,

1 See, for example, T. Zieliński, *Ubezpieczenia społeczne pracowników*, Warszawa–Kraków 1994, pp. 18, 20; K. Ślęszak, *Próba charakterystyki prawnej ubezpieczenia społecznego pracowników*, “Państwo i Prawo” No. 12/2001, p. 72; *Id.*, *Aksjologiczne podstawy prawa ubezpieczeń społecznych ze szczególnym uwzględnieniem solidarności i sprawiedliwości* [in:] *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, ed. M. Skąpski, K. Ślęszak, Poznań 2014, p. 250 *et seq.*; *Id.*, *Zasada solidarności w społecznym ubezpieczeniu emerytalnym* [in:] *Z zagadnień prawa pracy i prawa socjalnego. Księga Jubileuszowa Profesora Herberta Szurgacza*, ed. Z. Kubot, T. Kuczyński, Warszawa 2011, p. 539; J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2006, p. 39 (this author refers to the risk community, which is, however, the basis for the functioning of social insurance); I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2016 (who notes that collective solidarity is the basis of a model for all social and economic insurance systems); W. Sanetra, *Aksjologiczne podstawy prawa ubezpieczeń społecznych* [in:] *Ubezpieczenia społeczne w procesie przemian. 80 lat Zakładu Ubezpieczeń Społecznych*, ed. K.W. Frieske, E. Przychodaj, Warszawa 2014, p. 33; K. Antonów [in:] *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2015, p. 664; *Id.*, *Solidarność w prawie zabezpieczenia społecznego (ubezpieczeniach społecznych i chorobowym)* [in:] *Państwo solidarne*, ed. A. Łabno, Warszawa 2018, p. 156.

2 In particular K. Ślęszak, *Zasada...*, *op. cit.*, pp. 538–551.

3 The Act of 13 October 1998 on the social insurance system (Journal of Laws of 2019, item 300, as amended), hereinafter: the Social Insurance System Act.

4 Marek Rymśza points out horizontal and vertical solidarity or solidarity understood as insurance solidarity, civil solidarism and generational solidarism – Cf. M. Rymśza, *Solidaryzm w ubezpieczeniach społecznych* [in:] *Społeczne aspekty ubezpieczenia*, ed. T. Szumlicz, Warszawa 2005, pp. 43, 46–47; it seems that this author treats the concepts of solidarity and solidarism as interchangeable.

5 K. Ślęszak, *Zasada...*, *op. cit.*, p. 540.

- the possibility of receiving benefits after the lapse of the insurance coverage,
- contribution assessment basis.

With the use of the dogmatic method, I will try to find in the applicable legislation the elements that implement the principle of solidarity within the risk community or to identify solutions that infringe this principle. Additionally, due to the divergent material scope of sickness insurance, which covers various social risks (incapacity for work due to sickness and equivalent situations, reduced fitness for work, work interruptions due to parenthood and the need to provide care for a child or other sick member of the family⁶), and thus – benefits of different types, I will limit my analysis to the two most frequently received benefits from this insurance, *i.e.*, sickness allowance and maternity allowance.⁷

Before moving on to matter-of-fact considerations, the term “solidarity” needs to be defined. Due to the limited scope of the study, it is not possible or necessary to analyse this concept in detail, in particular as it has been the subject of many studies, which should only be referred to here.⁸ From a linguistic point of view, solidarity is firstly a sense of community and co-responsibility resulting from the compatibility of views and aspirations, and secondly – the collective and individual responsibility of a given group of persons for the whole of a joint commitment.⁹ K. Ślęzak rightly assumes that from the point of view of research into the law, the second of the indicated meanings is of fundamental importance.¹⁰ It allows one to analyse the existing legal solutions in terms of assessing whether there is a specific form of collective responsibility for risks covered by the material scope of a given type of social insurance, and in the case of this study – sickness insurance, limited additionally only to sickness allowance and maternity allowance. It is worth emphasising, however, that in the legal language, especially in jurisprudence, this concept is given different meanings depending on the context.¹¹

6 I. Jędrasik-Jankowska, *op. cit.*, p. 210.

7 Bearing in mind the sickness fund expenditure, the recognition of these two benefits as the most frequently claimed benefits is fully justified – see Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Informacja o wybranych świadczeniach pieniężnych. Maj 2018 r.* [Information on Cash Benefits. Maj 2018], Warszawa 2018, pp. 5–11, http://www.zus.pl/documents/10182/167606/wst%C4%99pna+_05_2018/5db3a109-ffa-45be-b46c-c0b821af3503 (online access: 19.7.2018).

8 See, for example: J. Zajadło, *Idea solidarności we współczesnej filozofii prawa i filozofii polityki* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012, pp. 74–103; M. Piechowiak, *Solidarność – w poszukiwaniu ideowej tradycji interpretacyjnej tej kategorii konstytucyjnej* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012, pp. 145–185; and in relation to the social security law, in particular K. Antonów, *Solidarność...*, *op. cit.*, pp. 156–158.

9 See: *Słownik języka polskiego*, entry: solidarność, <https://sjp.pwn.pl/szukaj/solidarno%C5%9B%C4%87.html> (online access: 16.7.2018).

10 K. Ślęzak, *Zasada...*, *op. cit.*, p. 540.

11 K. Ślęzak, *Aksjologiczne...*, *op. cit.*, p. 252–253 and the case law and literature referred to established there, in particular A. Bielska-Brodziak, I. Bogucka, *Solidarność jako termin prawny i jego funkcjonowanie w praktyce orzeczniczej* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012, pp. 186–235.

The personal scope of sickness insurance

In speaking of the personal scope of sickness insurance, one should have in mind the range of persons covered by this insurance. The solidarity between insured persons should, therefore, be discussed in the context of creating a social risk community. Social risk is understood as a threat (danger) of a random, future event, which is unfavourable (loss-making), uncertain as to the occurrence and independent of the will of the person (*i.e.*, one that cannot be prevented).¹² And restricting the risk to the insurance category (in this case social insurance), it can be defined as the threat of an event defined as loss or limitation of earning capacity, *i.e.*, a future, uncertain, unfavourable event, independent of the will of the insured person, legally distinguished and actuarially computable.¹³ Thus, the risk community concerns persons who are exposed to a particular risk, which is the basis for the identification of this community. It is within this community that responsibility for the effects of the risk is spread on all insured persons.¹⁴ In other words, solidarity is related to the issues of individuals covered by the social security law.¹⁵ So we are talking about people who create a given risk community. As noted in the subject literature, to respect such a value as solidarity in social insurance, it is necessary to exclude or at least limit the freedom of the insured persons and the insurers.¹⁶

Attainment of that objective is clearly visible in pension insurance,¹⁷ in particular in Art. 6 of the Social Insurance System Act, which defines the range of persons subject to mandatory pension insurance. In fact, compulsion is here connected with coercion and automatism, which means that the fact of undertaking any activity or finding oneself in a situation defined in a closed catalogue of insurance titles results in automatic accession to the risk community with all the related consequences.¹⁸ The only exceptions are the overlapping entitlements specified in Art. 9 of the Social Insurance System Act, when, if several insurance titles concur, the legislator allows the contribution to be paid for only one title. Essentially it could, however, be said that practically every gainful activity undertaken on the territory of the Republic of Poland is connected with the obligation to be subject to old-age and disability insurance (with the exception of contracts for specific work). Voluntary coverage by pension insurance is an exception and, apart from the regulation of the overlapping insurance titles, it is also possible pursuant to Art. 7 of the Social Insurance System Act. It applies to persons who do not meet the conditions for being covered

12 R. Babińska-Górecka [in:] *Wielka encyklopedia prawa. Tom XII. Prawo socjalne*, ed. H. Szurgacz, Warszawa 2017, p. 242.

13 *Ibid.*, p. 242.

14 K. Ślebza, *Zasada...*, *op. cit.*, p. 542.

15 J. Jończyk, *op. cit.*, p. 40.

16 W. Sanetra, *op. cit.*, pp. 34–35.

17 For the sake of simplicity, in the further discussion, I will refer only to old-age pension insurance, taking into account the fact that in the vast majority of cases, old-age pension insurance coverage is tantamount to being also covered by disability pension insurance (with the exception of Art. 6b of the Social Insurance System Act).

18 Cf.: K. Antonów [in:] *Prawo...*, *op. cit.*, p. 663.

by this insurance on a compulsory basis, *i.e.*, those who are not in gainful employment or in any other situation which, in accordance with the provisions of Art. 6-6b of the Social Insurance System Act, results in automatic coverage by this insurance.

The legal regulation is different in the case of sickness insurance, whose scope is specified in Art. 11 of the Social Insurance System Act. The personal scope of this insurance, and thus the range of persons forming the risk community is defined in a much narrower way than in the case of old-age pension insurance. The mere limitation of the personal scope of sickness insurance as compared to old-age pension insurance should not give rise to major concerns with regard to the risk of incapacity for work due to sickness. It is obvious that the community related to this risk should include persons who are gainfully employed and who, by reason of damage to health, may temporarily be unable to perform work, and, consequently, suffer material damage consisting in a loss of earnings for the period of this incapacity.¹⁹ Therefore, it is appropriate to create a risk community only out of persons gainfully employed, differently from old-age pension insurance, which also covers persons who are not engaged in gainful employment, but who play other socially important roles.²⁰ In the case of so called non-profit-making insurance titles, there are undoubtedly no economic effects of the disease, because it does not result in the discontinuation of gainful activity, as is the case with profit-making titles. It is therefore appropriate that the risk community should cover only those persons who are at risk of a loss of earnings and that only those persons create a joint risk community in which all insured persons pay relatively low contributions in return for a guarantee that in the event of insurance risk for a given insured person, the contributions of other insured persons will finance his or her benefit. However, the risk here is not the disease itself, but its economic dimension²¹ associated with the inability to continue gainful activity at the time of sickness, which is in principle the basis for maintenance. The cost of covering the material need, resulting from the random event, should be spread over the population of persons who are similarly exposed to this risk.

However, Art. 11(1) of the Social Insurance System Act defines only three groups of individuals who are subject to compulsory sickness insurance. These persons join the risk community automatically and compulsorily upon undertaking activity which constitutes the insurance title. These are employees, members of agricultural production cooperatives and rural circles cooperatives as well as persons undergoing substitute military service. Currently, in practice, these are only the first two of the indicated groups of individuals, because pursuant to the provisions of the Act of 27 August 2009 on the amendment of the Act on the universal defence of the Republic of Poland and certain other Acts

19 Cf. K. Ryś, *Wybrane problemy ubezpieczenia społecznego z tytułu niezdolności do pracy z powodu choroby*, "Ubezpieczenia Społeczne. Teoria i praktyka" 2017, No. 3, p. 78, who rightly concludes that the "disadvantage" of social risks should be considered through the ability to earn and accumulate means of subsistence.

20 Such insurance titles are defined as "not-profit-making titles" – K. Antonów [in:] *Prawo...*, *op. cit.*, pp. 672–673; I disregard here the question as to whether, given the construction of social insurance, the correct solution is to cover a wide range of non-earners through old-age pension insurance.

21 W. Szubert, *Ubezpieczenia społeczne. Zarys systemu*, Warszawa 1987, pp. 89–90.

(Journal of Laws of 2009, No. 161, item 1278), the obligation to do national service, and thus also the obligation to perform substitute military service, has been suspended as of 1 January 2010. It is therefore reasonable to conclude that currently only two groups of individuals compulsorily form the risk community in sickness insurance. Therefore, the basic feature of social insurance, allowing to implement the principle of solidarity, *i.e.*, coercion, is realised only in relation to these groups. This is because these persons may not calculate and estimate their own individual risk and, if they consider that it is low, avoid paying a contribution and participating in creating a joint sickness insurance fund. However, it should be noted here that employees constitute the largest group of insured persons subject to sickness insurance, which clearly results from statistics published by the Social Insurance Institution.²²

The sickness insurance risk community may also be joined on a voluntary basis by other persons, who have been enumerated in Art. 11(2) of the Social Insurance System Act: out-workers, so-called freelancers/contractors (*i.e.*, persons performing work on the basis of an agency contract or a commission contract or another contract for the provision of services, which – according to the Civil Code – is covered by regulations on commission contracts), so-called entrepreneurs (*i.e.*, persons conducting non-agricultural activities within the meaning of Art. 8[6] of the Social Insurance System Act), persons cooperating²³ with freelancers/contractors and entrepreneurs (also with entrepreneurs who, pursuant to Art. 18[1] of the Act of 6 March 2018 - the Entrepreneurs' Law²⁴ are exempt from the compulsory coverage by the social insurance for a period of 6 months from the commencement of business activity), doctoral students receiving a doctoral scholarship, people performing gainful employment on the basis of referral to work during the period of a deprivation of liberty or temporary detention, as well as clergymen. An additional restriction is that the insurance title referred to in Art. 11(2) of the Social Insurance System Act, entitling to voluntary access to sickness insurance, must constitute the compulsory pension insurance title.²⁵ In other words, it will not be possible to join this insurance if, for example, in the event of the overlapping insurance titles, an entrepreneur voluntarily joins the pension insurance in respect of non-agricultural activities under Art. 9(1) of the Social Insurance System Act, and thus will not be able to take advantage of sickness allowance in respect of business activity even in the event of the loss of the possibility to carry out both gainful activities due to sickness.

22 In 2016, out of 15.1 million persons covered by pension and disability insurance, 10.9 million had an employee insurance title in 2016 – Cf. Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Raport roczny ZUS 2016*, Warszawa 2017, p. 20, <http://www.zus.pl/documents/10182/167526/Raport+roczny+ZUS+2016.pdf/74b11b94-eb9c-4d8e-bcae-1debe3cb8f81> (online access: 11.9.2018).

23 A person cooperating with those conducting non-agricultural business activities, with freelancers/contractors and with individuals, indicated in Art. 18(1) of the Act of 6 March 2018 – the Entrepreneurs' Law, referred to in Art. 6(1)(4)-(5a), means a spouse, one's own children, children of the other spouse and adopted children, parents, stepmother and stepfather and adopting persons, if they remain with them in a common household and cooperate in conducting this activity or in performing an agency contract or commission contract; this does not apply to persons with whom a contract of employment has been concluded for the purpose of vocational training.

24 Journal of Laws of 2018, item 646.

25 K. Ryś, *op. cit.*, p. 80.

The voluntary nature of access to the insurance means that each of the persons belonging to the above-mentioned groups independently decides whether he or she wants to participate in the risk community, first of all by assessing whether it is profitable in his/her individual case, *i.e.*, how high is the probability of the risk being materialised. It may happen that earners do not participate in the risk community at all, relying on their own individual precaution, and being aware that the benefits they may receive will not compensate for the lost earnings in any way. Therefore, the voluntary nature of sickness insurance leads to a situation where not all actual earners exposed to risk participate in the risk community. Frequent infringement of the principle of solidarity in this case concerns mainly wealthy, high-income entrepreneurs who do not voluntarily take up sickness insurance and do not co-finance the benefits of those who earn less. Asymmetry occurs here particularly when we take into account the fact that they are compulsorily subject to old-age pension insurance and will in future take advantage of pay-as-you-go pensions, which will also be financed by those who earn less, although within a separate risk community and a separate fund.

From the point of view of the principle of solidarity, it is also important that the solutions adopted by the Polish legislator allow one to join voluntary social insurance (including sickness insurance) at any time by submitting an appropriate application (Art. 14[1] of the Social Insurance System Act). This solution makes it possible to abuse insurance protection at the expense of the risk community by joining it at the last moment before the risk materialises, only to receive benefits from the sickness fund after the risk has materialised. This applies in particular to maternity allowance, because with regard to sickness allowance, the social risk that it protects remains a risk in the classical sense of the word, *i.e.*, it is a future, uncertain event with negative consequences – damage in the form of a loss of earnings. Therefore, planning for the materialisation of the risk of incapacity for work due to sickness should not, by definition, take place. An exception should be made for the situation of undergoing certain medical procedures financed under health insurance, which often takes place at the predetermined period due to the limited availability of benefits. However, in principle, incapacity for work due to sickness meets the social risk conditions, according to the definition of this term, because it is a future and uncertain event. Unfortunately, the author could not obtain the relevant statistical data, but according to the general experience of life it can be assumed that there are occasional cases of voluntary access to sickness insurance only for the purpose of obtaining sickness allowance in connection with the planned incapacity for work due to sickness.

It seems that the so-called waiting periods, which result from Art. 4(1) of the Benefits Act, are a fairly effective legal measure that protects the risk community in this respect.²⁶ According to this provision, sickness allowance is, as a rule, granted only after 30 or 90 days of uninterrupted sickness insurance (in the case of compulsory and voluntary

²⁶ The Act of 25 June 1999 on cash social insurance benefits in respect of sickness and maternity, consolidated text Journal of Laws 2019 item 645, hereinafter: the Allowance Act.

insurance respectively). This legal instrument significantly limits the possibility of abusing the voluntary access to sickness insurance solely for the purpose of obtaining sickness allowance in connection with the planned incapacity for work due to sickness, although of course it does not exclude such abuses completely. It means that the introduction of waiting periods to protect the risk community implements the principle of solidarity, which in turn is not sufficiently protected by regulations that allow for voluntary access to sickness insurance at any time by persons gainfully employed on the basis of insurance titles that are not compulsory. From the point of view of the risk community and the implementation of the principle of solidarity, with reference to an incapacity for work due to sickness, all profit-making insurance titles should be covered by compulsory sickness insurance.

The situation is different in the case of maternity allowance, which is mainly due to the completely different nature of the social risk protected by this allowance. The main concern is whether in the case of maternity, there is still a “risk” understood as a “future and uncertain event.” In the current state of medicine, it is possible to precisely plan maternity or, more broadly, parenthood. Therefore, in many cases, the occurrence of this risk is not an uncertain, random event, but a certain and planned one, and in the situation of taking a child for upbringing and applying to the court for adoption (adoptive parents), uncertainty and randomness is completely excluded.²⁷ Thus, the voluntary nature of sickness insurance allows for non-compliance with the principle of solidarity and abuse of insurance protection (at the expense of a risk community), which occurs when entrepreneurs or principals join it shortly before the risk materialises (childbirth) to collect relatively high benefits for a long period (even one year in the case of the birth of one child). This practice, reprehensible from the solidarity point of view, has not only existed and exists (currently to a limited extent due to changes in the rules for assessing the allowance basis), but it was and is positively perceived by society, as if the insured persons did not realise that such benefits are paid from the fund created from contributions financed by them. This leads to the conclusion that with regard to the maternity allowance, the possibility of voluntary access to sickness insurance results in an even more glaring violation of the principle of solidarity than in the case of sickness allowance. This is unacceptable, especially since no waiting periods are required to acquire the right to this allowance, and such periods are intended to protect the risk community against this type of abuse. The fact that such actions, far from being based on the principle of solidarity, are generally approved, points to a high level of ignorance about social insurance and a lack of solidarity between the insured persons themselves.

At this point, one cannot help to mention an additional aspect of the personal scope of the sickness insurance in relation to maternity allowance. It is worth noting that this

²⁷ Although it should be noted here that while the allowance is granted in the case of accepting a child for upbringing and applying for adoption, however, due to the adoption procedures, the adoptive parents, after following appropriate procedures and waiting for a child, often do not know when they will receive a proposal to accept a child for upbringing or even how many children will be covered by the proposal, which makes it usually not possible to precisely plan the occurrence of a situation entitling them to maternity allowance.

allowance currently has other functions than it fulfilled in its original form. Due to the limited scope of the study, I refer to the text of Renata Babińska-Górecka, who discusses the evolution of functions of this allowance and draws attention to the fact that some of them have been completely disconnected from the main purpose of social insurance, *i.e.*, to mitigate the effects of the loss of earning capacity (insurance risk materialisation). As a result, the risk community ceases to be a homogeneous community of insured persons, but it becomes an entity that takes over the tasks (in particular the burden of financing) traditionally assigned to the national community, which, however, operates according to completely different principles and values.²⁸ Thus, doubts may be expressed as to the personal scope of a risk community in relation to parenthood, which is the same as in the case of sickness allowance (the risk of incapacity for work due to sickness), especially in the context of voluntary sickness insurance. Perhaps it would be reasonable to exclude from this insurance the maternity allowance, traditionally an element of sickness insurance, and to create regulations that would allow to finance benefits related to parenthood within the widest possible community, *i.e.*, the national community.

The rules for financing the sickness insurance contribution

The principle of solidarity is also manifested in the fact that the financial burden of the insurance risk is spread among those who may be affected thereby, *i.e.*, those who can feel the effects of its materialisation. In the event of an incapacity for work due to sickness, this risk applies not only to persons engaged in gainful employment, but also to employers. This relates to the employer's risk, which in the labour law literature is referred to as “the employer's personnel risk.” And the employer's risk is qualified as one of the defining features of the employment relationship.²⁹ The personnel risk is *inter alia* reflected in the need to tolerate as employees such persons whose employment is not beneficial to the employer (*e.g.*, persons absent from work due to sickness – A.P.).³⁰ In this situation, employers should also be jointly and severally involved in the community of sickness insurance risk, which, however, takes place to a very limited extent. Solidarity between the employers (contribution payers) and the insured persons is reflected in the fact that the former pay a part of the insurance contribution, which is the price of insurance cover, *i.e.*, the price of taking over a given risk by the insurer. It is therefore a division of the contribution.³¹ Such a division does not occur in sickness insurance,

28 R. Babińska-Górecka, *Ewolucja funkcji zasiłku macierzyńskiego (uwagi na tle ostatnich zmian przesłanek nabycia prawa do zasiłku macierzyńskiego dla ubezpieczonego ojca dziecka)*, “Praca i Zabezpieczenie Społeczne” 2015, No. 11, p. 15.

29 Z. Kubot [in:] *Prawo pracy. Zarys wykładu*, ed. H. Szurgacz, Warszawa 2017, pp. 86–87.

30 B. Ćwiertniak [in:] *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2015, p. 159.

31 K. Ślęzak, *Zasada...*, *op. cit.*, p. 541.

since pursuant to Art. 16(2) of the Social Insurance System Act, the sickness insurance contribution (to the amount of 2.45% of the contribution assessment basis) is fully financed from the insured person's funds. Therefore, the employer does not participate jointly and severally in the risk community by creating a sickness fund from which the benefits are financed.

However, we may talk about solidarity between contribution payers and insured persons with regard to insured employees. In this case, the labour law provides for a specific way of employer participation in the risk of any incapacity for work due to sickness – the employer is obliged to partially bear its costs by paying sick pay (Art. 92 of the Labour Code).³² Therefore, the employer bears a social risk related to the necessity to pay certain benefits to the employee for periods of work non-performance by the employee.³³ Thus, although the employer does not participate in financing the contribution and creating the sickness fund, he/she undoubtedly participates in the risk of any incapacity for work of his/her employee³⁴ and this participation has a measurable, financial dimension.

According to statistics provided by the Social Insurance Institution, sick pay paid by employers in 2018 amounted to over PLN 6.9 billion, while Social Insurance Institution (ZUS) expenses on sickness allowances in the same period amounted to PLN 11.5 billion.³⁵ Therefore, one might say that the solidarity of contribution payers and insured persons³⁶ was in this case exercised at an earlier stage, within the so-called primary protection,³⁷ which in the German subject literature is referred to as a so-called internalising solution.³⁸ However, this solution is characterised by solidarity within the sickness insurance risk community, because the period of receiving sick pay by the insured employee is included in the allowance period, which means that in a specific case the risk community does not bear the burden of financing the benefit for the insured employee during 182 (or exceptionally 270) days, but adequately less. Thus, the employer releases the risk community in this respect from the obligation to bear the burden of benefit related to the work incapacity of the insured person concerned. It should be, however, clearly stressed that the above solution applies only to employees and employers. In the case of other insured persons and contribution payers, there are no such solutions within the framework of primary protection, that would

32 See also: K. Ślebza, *Zasada...*, *op. cit.*, p. 541.

33 B. Ćwiertniak, *op. cit.*, p. 159.

34 See also: Ł. Pisarczyk, *Ryzyko pracodawcy*, Warszawa 2008, pp. 236–238; 246.

35 Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Informacja o świadczeniach pieniężnych z Funduszu Ubezpieczeń Społecznych oraz o niektórych świadczeniach z zabezpieczenia społecznego. IV kwartał/ okres I-XII 2018 r.* [Information on cash benefits from the Social Insurance Fund and on some social security benefits. 4th quarter / Period I-XII 2018], Warszawa 2019, p. 12, https://www.zus.pl/documents/10182/167627/Biuletyn_WOJ_K4_2018/3e549502-2692-7c36-804f-943a2845833e (online access: 19.6.2019).

36 In this context, D. Dzienisiuk points to "forced" social solidarity between employers and employees – D. Dzienisiuk, *Prawo pracy a prawo ubezpieczeń społecznych*, Warszawa 2016, p. 315.

37 J. Jończyk, *op. cit.*, p. 54.

38 H.F. Zacher, *Das soziale Staatsziel* [in:] *Abhandlungen zum Sozialrecht II*, ed. U. Becker, F. Ruland, Heidelberg 2008, p. 55.

relieve the risk community. In the event of an incapacity for work of the cooperating person, clergyman, member of an agricultural production cooperative or, above all, freelancer/contractor, the whole burden of financing the benefit immediately passes to the risk community, because the sickness allowance financed from the sickness fund is paid immediately. As a result, in the relationships between insured persons and contribution payers, we may speak about solidarity only in relation to insured employees. In relation to other insured persons, where contribution payers (employers) do not bear any costs of incapacity for work due to sickness, this aspect of solidarity does not exist *de lege lata*.

One may wonder whether this is a correct solution, because in practice it is one of the reasons for the mass employment based on civil law contracts instead of employment contracts – in this case, the employer bears lower costs if the risk of work incapacity due to sickness materialises for a given insured person. Bearing in mind the amounts spent by employers on sick pay, this aspect may be of considerable importance for the choice of the legal basis for employment. Perhaps, therefore, it would be reasonable to introduce legal solutions that would more fully implement the principle of solidarity in the relationship between the contribution payer and the insured person through the participation of all contribution payers, not just employers, in the risk community. While an obligation to pay other insured persons (not being employees) a benefit similar to sick pay (*e.g.*, freelancers/contractors) seems doubtful, the participation of contribution payers of freelancers/contractors in financing sickness insurance contributions could be an appropriate solution, with a reduction in the number of civil law contracts as an additional positive side effect.

As regards maternity allowance, in the absence of an institution similar to sick pay, none of the contribution payers participates jointly and severally in the creation of the parenthood risk community, although it also applies to them (at least with regard to employers, because employees may take non-compulsory parental leaves during which they are absent from work). During this time, they may not engage in gainful employment constituting the title of the insurance from which the benefit is paid (subject to the possibility of using part-time parental leave – Art. 1821e of the Labour Code). As regards insured persons other than employees who are not entitled to compulsory maternity leave, and only to maternity allowance for a period equal to periods of leave related to parenthood resulting from the provisions of the Labour Code, the receipt of the maternity allowance does not prevent the continuation of gainful employment as an insurance title. Although this situation seems to be contrary to the core of the maternity allowance, *de lege lata* it is explicitly allowed by the legislator. Pursuant to Art. 9(1c) of the Social Insurance System Act, persons referred to in Art. 6(1)(2), (4)-(5a), (8) and (10) of the Social Insurance System Act (and, hence, *inter alia*, entrepreneurs and freelancers/contractors), at the same time meeting the conditions to be covered by compulsory pension insurance in respect of receiving maternity allowance or allowance to the amount of maternity allowance, are subject to compulsory pension insurance in respect of receiving the maternity allowance or allowance to the amount of maternity allowance. However, they may be covered voluntarily, at their request, by pension

insurance also from other titles, or some of them. Therefore, potentially, the entities employing them are less affected by the discussed risk.

The only question is whether, in this situation, one can speak about an actual materialisation of the risk, as described above, following on from Inetta Jędrasik-Jankowska, as “the risk of work interruption due to parenthood”. Persons who, after childbirth, continue their hitherto gainful employment, do not feel the economic effects of this event, and it is against these effects (and not against the birth of the child itself) that the maternity allowance is to protect. In this situation, the receipt of maternity allowance can be assessed as incompatible with the principle of solidarity between the insured persons themselves and between the insured persons and the beneficiaries.

Conditions to be met to acquire benefits or to continue their collection

As indicated above, the possibility of planning the social risk materialisation, taking into account its definition, should not exist in relation to the risk of an incapacity for work due to sickness. The mentioned situation of undergoing specific medical treatment financed under health insurance should be considered as an exception. However, in principle, incapacity for work due to sickness meets the social risk conditions, according to the definition of this term, because it is a future and uncertain event. At the same time, the insured persons should not only take actions that prevent risk materialisation, but also actions that will not contribute to its longer duration. Only in this situation is it justified to rely on the risk community, thanks to the solidarity of which the fund has been created. Therefore, appropriate legal instruments are needed to protect the risk community against any reprehensible conduct on the part of the insured persons that has an impact on the risk or its duration (prolongment).³⁹

Thus, it can be assumed that the principle of solidarity is also implemented by those provisions that protect the risk community against any disloyal and solidarity-less conduct of members of the community consisting in inducing social risk or extending its duration. Such provisions therefore include Art. 14, Art. 15(1), Art. 16 and Art. 17(1)-(2) of the Benefits Act. The common purpose of each of the mentioned provisions is to protect the risk community against abuse, *i.e.*, any conduct contrary to the principle of solidarity. Thus, pursuant to Art. 14 of the Benefits Act, an insured person who is an employee, excluded from work under the procedure specified in Art. 6(2)(1) of the Benefits Act due to the suspicion of being a carrier of infectious germs, is not entitled to the sickness allowance if he/she has not undertaken other work proposed by the employer, not forbidden for such persons, corresponding to his/her professional qualifications or which he/she can perform after some previous training. It is therefore considered that,

³⁹ I. Jędrasik-Jankowska, *op. cit.*, p. 239.

since such an employee can perform other gainful employment, he/she should use this option instead of receiving sickness allowance.

Art. 15(1) of the Benefits Act is even a more explicit example of protection of the risk community, because it deprives the insured person of the sickness allowance during a period of incapacity for work resulting from any intentional offence or petty offence committed by the insured person. It would be incompatible with the principle of solidarity for the risk community to cover the costs of benefits for a person who caused his/her own incapacity for work by his/her own criminal act. Similarly, the interest of the risk community is protected by Art. 16 of the Benefits Act, under which the insured person, whose incapacity for work was caused by alcohol abuse, is not entitled to sickness allowance for the period of the first 5 days of such incapacity. Alcohol abuse is undoubtedly a circumstance depending on the insured person, and it should be assessed as socially harmful. The protection of the risk community is not as absolute here as in the case of an incapacity caused by intentional offence or petty offence, because the right to the allowance is excluded only for the first 5 days. The gravity of both events (committing an offence and alcohol abuse) is, however, completely different from the point of view of social harmfulness, hence any sanction depriving a person who has become incapable of work due to alcohol abuse of a sickness allowance for the whole period of this incapacity would be too harsh. These solutions therefore essentially implement the principle of solidarity within the risk community, in this case solidarity between the insured persons and the beneficiaries.

More attention should be paid to the regulation of Art. 17(1) of the Benefits Act, which formulates two prerequisites for depriving the insured person of the right to sickness allowance. One of them is the use of sick leave in a manner inconsistent with its purpose. It applies to actions that extend the period of any incapacity for work, *i.e.*, the period in which the risk occurs. For obvious reasons, the risk community should bear the burden of the benefit only to the extent it is necessary, *i.e.*, for the period necessary to restore earning capacity (the cessation of the disease giving rise to incapacity for work). Thus, the conduct of the insured person, which is aimed at extending the period of receiving the allowance (the duration of the incapacity to work), is incompatible with the principle of solidarity and is an abuse against which the community should be protected.

The second prerequisite specified in Art. 17(1) of the Benefits Act is of a slightly different (and more questionable) nature. It pertains to the performance of gainful employment during the period of certified incapacity for work. The sickness allowance is intended to protect against the loss of income caused by the incapacity for work due to sickness. Thus, it is not the situation of sickness that is being protected, but its economic aspect, *i.e.*, the inability to earn a living. If the insured person, regarded as incapable of work due to sickness, performs gainful employment during the period of an incapacity for work, it means that the social (insurance) risk has not actually materialised, because the health condition allows him/her to perform work and, as a consequence, to earn

money.⁴⁰ Since the insured person, although formally unable to work due to sickness, does not suffer any material damage due to this inability, there are no grounds for the risk community to bear the cost of the benefit. In other words, it is reprehensible and contrary to the principle of solidarity for an insured person to engage in gainful employment during the period of certified incapacity for work, for which the person concerned would like to receive sickness allowance. Hence, the legislator is right to protect the risk community against such abuses.

However, this issue is not so obvious and clear if the insured person has several sickness insurance entitlements (in practice – several employment contracts), which, after all, is not an uncommon phenomenon.⁴¹ In accordance with the established practice of pension authorities and case law, the insured person may not perform any gainful employment during the period of the certified incapacity for work.⁴² Thus, the Polish legal order does not allow for a separate assessment of an impact of a given disease on each of the performed jobs of work.⁴³ Such a solution is in my opinion incompatible with the principle of solidarity, because, as a result, the insured person may not fulfil his/her, as one could say, remaining earning capacity, since in this way he/she deprives him/herself of both entitlements to sickness allowance. As a consequence, the risk community is burdened with the cost of this allowance taking into account the basis of assessment for each of the insurance titles. A more solidarity-based solution would be to allow the receipt of sickness allowance by the insured person only to the extent that his/her incapacity for work actually prevents him/her from performing gainful employment, while allowing work which entitles them to insurance and which can be performed by the insured person in his/her health condition. The risk community would then bear a lower cost of benefits. It seems, however, that this solution would require legislative intervention.

The aforementioned admissibility of performing gainful employment while receiving maternity allowance is interesting but at the same time raises doubts from the point of view of the solidarity principle. Such situation is possible because Art. 17(1) of the Benefits Act does not apply to this allowance at all.⁴⁴ In contrast to employees who are obliged to take advantage of maternity leave, other insured persons may freely receive maternity allowance and at the same time continue their gainful activity entitling them to sickness insurance or perform other gainful activity (which is confirmed by Art. 9[1c]

40 R. Babińska-Górecka, *Wykonywanie pracy zarobkowej jako przesłanka utraty prawa do zasiłku chorobowego (uwagi na tle art. 17 ust. 1 ustawy chorobowej)*, "Z zagadnień zabezpieczenia społecznego" 2014, No. 6, p. 9.

41 Cf.: *Ibid.*, p. 8 *et seq.*

42 Cf.: A. Jabłoński, *Prawo do zasiłku chorobowego osoby wykonującej równocześnie pracę w ramach kilku tytułów ubezpieczenia* [in:] *Z zagadnień prawa pracy i prawa socjalnego: księga jubileuszowa Profesora Herberta Szurgacza*, ed. Z. Kubot, T. Kuczyński, Wrocław 2011, pp. 436–40.

43 It is worth noting that a different position in this regard is presented by I. Jędrasik-Jankowska (Cf. *op. cit.*, p. 245), who indicates that the continuation of the second employment should not result in the loss of the right to sickness allowance if it is shown that the employee was only incapable of work, from which he abstained. I consider this position to be correct.

44 I. Jędrasik-Jankowska, *op. cit.*, p. 223.

of the Social Insurance System Act referred to above). Employees may also take up other gainful activities during maternity leave (*i.e.*, other than the one performed under an employment contract entitling them to insurance coverage and to allowance payment). Thus, as noted by R. Babińska-Górecka, exercising actual, personal care of a child is not *de facto* a condition for the acquisition of the right to maternity allowance and if it does not constitute a legal obstacle (maternity leave) or an actual obstacle to the performance of work, then it is possible to perform gainful employment and earn the hitherto income.⁴⁵ However, this raises questions as to whether the sickness insurance risk community should bear the burden of financing the maternity allowance in such a case and to what extent such an obligation is compatible with the principle of solidarity.⁴⁶ The possibility of combining the maternity allowance with gainful employment obviously does not correspond to the above-mentioned understanding of risk in social insurance. For the purposes of social insurance, however, an effect in the form of earning capacity is assessed.⁴⁷

Receipt of the benefit after the lapse of the sickness insurance coverage

The Benefits Act provides for the possibility of receiving benefits in spite of a lapse in sickness insurance coverage. Art. 7 of the Benefits Act is of particular importance here. This provision makes it possible to obtain the right to sickness allowance by persons who have become incapable of work after the lapse in sickness insurance coverage if the incapacity lasted not fewer than 30 days and occurred within 14 days (exceptionally 3 months) from the lapse of this insurance coverage. In other words, it allows to obtain the right to benefit and receive it even for the entire maximum allowance period by persons who are no longer entitled to sickness insurance, *i.e.*, who do not perform gainful employment. This regulation imposes on the risk community an obligation to finance benefits for persons who no longer belong to this community, and this in a situation where there is in fact no insurance risk – in this case, the disease does not cause an incapacity for work and does not constitute an obstacle to earning money, since the person does not conduct any gainful activity. In my opinion, this is an alien burden imposed on the risk community and, therefore, one breaking the principle of solidarity. Although it can be said that since the insured person created him/herself a risk community, it is reasonable to adopt solutions extending the period of insurance coverage, as is also the case, for example, in pension insurance as regards a pension in respect of incapacity for work. However, the risk protected by sickness

45 R. Babińska-Górecka, *Wykonywanie...*, *op. cit.*, p. 12.

46 *Ibid.*, p. 14.

47 K. Roszewska, *Ryzyko niezdolności do pracy*, Warszawa 2018, p. 53.

allowance is of a different, by definition, temporary nature. Moreover, in practice, this provision is frequently abused and persons losing their jobs prefer to receive sickness allowance, which is much higher than the unemployment benefit they could receive in connection with the unemployment – in a situation where their health condition does not in fact limit their earning capacity.⁴⁸ Although there are mechanisms that eliminate such threats – *i.e.*, substantive verification of the legitimacy of the issued certificate of an incapacity for work – but in practice it seems impossible to check all such cases in order to detect when the sickness allowance is paid on the basis of Art. 7 of the Benefits Act, in spite of a lack of incapacity for work due to sickness.

Similar doubts, though here to a lesser extent, may be formulated in relation to the possibility of receiving sickness allowance until the end of the allowance period, although the insurance entitlement has ceased to exist. The legal situation here is obviously different – the incapacity for work itself occurred during the insurance period, not after its termination. However, in practice, it is not uncommon that people try to obtain a medical certificate of an incapacity for work in the last days of the expiring notice period or before the termination of a fixed-term employment contract due to the lapse of time for which it was concluded, especially if the insured person does not have new employment to go to. From a financial point of view, sickness allowance is much more profitable than unemployment benefit, and this further encourages abuse. In this case, if the principle of solidarity is to be implemented more fairly, more importance should be attached to the efficient and quick verification of issued medical certificates, which would make it possible to better protect the risk community against such abuses. The complete abolition of the possibility to continue paying sickness allowance in the event of a loss of insurance entitlement would be a too far-reaching solution.

Similar concerns should be raised in relation to the regulation of Art. 30 of the Benefits Act, which allows one to obtain the right to a maternity allowance in spite of the absence of insurance entitlement. Although this Article provides for strictly defined, exceptional situations which allow one to acquire the right to this allowance and should be assessed positively in terms of other legally protected values (*e.g.*, a child's welfare or special protection of the family), but from the point of view of the risk community and

⁴⁸ It should be noted here that the legislator is inconsistent in treatment of an incapacity for work as a prerequisite for acquiring and maintaining the status of an unemployed person. On the one hand, the incapacity certified by a medical decision excludes the possibility of registration as an unemployed person (Art. 2[1][2] of the Act of 20 April 2004 on employment promotion and labour market institutions, consolidated text Journal of Laws of 2017, item 1065, as amended), which could support the position that granting a sickness allowance after the lapse of the sickness insurance coverage is an expression of solidarity between the insured persons. On the other hand, however, after registering as an unemployed person the occurrence of an incapacity for work does not automatically result in the loss of unemployed status as such – this happens only when the unemployed person is incapable of work due to sickness or stay in a drug treatment institution for an uninterrupted period of 90 days (Art. 33[4][9] of the aforementioned Act). Thus, the legislator allows persons who have become incapacitated for work due to sickness to have the status of an unemployed person and to receive benefits provided for the unemployed persons during this period, if the incapacity occurred after acquiring the status of the unemployed person. Therefore, I believe that from the perspective of the principle of solidarity of the risk community, in the event of sickness after the lapse of the sickness insurance coverage, the cash benefit should not be financed from the sickness fund. It is because there is no social risk in this case, but a specific need that should be met using a fund other than the sickness fund.

social insurance, we have here again benefits for persons for whom risk materialisation has no negative consequences with regard to the earning capacity. In this respect, the question raised earlier becomes relevant: whether the solution providing for parental benefits financed not by sickness insurance, but within the national community would not be justified and more appropriate in the light of the principle of solidarity.

However, one should mention here a solution that in a way protects the community in the above-mentioned cases: this being the limitation of the basis for assessing the benefit, which may not be higher than 100% of the average wage/salary. This results from Art. 46 of the Benefits Act.

Contribution assessment basis

Another aspect that demonstrates the solidarity of the risk community in sickness insurance is the uniform interest rate used to calculate the insurance contribution. The risk community itself is created from persons exposed to this risk so that by paying relatively low contributions⁴⁹ these persons may obtain a guarantee of protection (benefit) in the case of risk materialisation. However, members of the community have an unequal ability to bear this burden and are unequally vulnerable to risk and its consequences.⁵⁰ The solidarity principle is manifested in this case by the fact that all people, depending on their abilities, contribute to the creation of the risk community, by participating in that community for a longer or shorter period of time. Compensation is granted only to the member of the community who has suffered damage (*i.e.*, in relation to whom the risk has materialised). It may happen that a given insured person will never use his/her insurance protection, because the risk will not materialise in his/her case. However, his/her contributions⁵¹ will be used to finance benefits paid to people who have not been so lucky and in relation to whom the risk has materialised. The sense of participation in such a joint and several risk community is based on the fact that its members do not know whether and when the risk will occur in their individual case, but because it is likely to occur, they agree to bear the costs of contributions, being aware that in the event of a risk they will be able to count on the solidarity of other members of the community. *De lege lata* the sickness insurance contribution is determined in the same way for all insured persons as 2.45% of the contribution assessment basis, which means that each insured person contributes to the creation of a sickness fund according to his/her

49 R. Babińska-Górecka indicates a relatively low contribution as a reflection of the principle of solidarity in sickness insurance. Cf.: R. Babińska-Górecka, *Wykonywanie...*, *op. cit.*, p. 16.

50 J. Jończyk, *op. cit.*, p. 40.

51 The Polish language does not distinguish between social insurance contributions and commercial insurance premiums [translator's note: in both cases - "składka"], however, for example in German, the social insurance contribution is *Beitrag*, which literally means the contribution from the verb *beitragen* – to contribute. Such nomenclature emphasises the solidarity aspect of social insurance contributions. A similar linguistic distinction exists in English.

(earning) capabilities. The age of the insured person is immaterial, similarly as his/her health condition and any other factors that could reduce or increase the contribution if it were to be calculated individually. In other words, the same (percentage) contribution is paid by an elderly or ailing person, and by a young person who does not fall ill. In this case, therefore, one can speak of the solidarity between the insured persons. This is particularly visible in the case of insured persons being employees, for whom the contribution is each time assessed based on their income from the employment relationship (Art. 18[1] in conjunction with Art. 4[9] of the Social Insurance System Act) – the higher the earnings, the greater participation in creating the risk community (but also correspondingly the higher benefits in the event of social risk materialisation).

Doubts may be expressed in this respect in relation to a regulation under which some insured persons pay contributions to sickness insurance not on actual income, but on the declared amount, not lower than 60% of the average wage/salary (and exceptionally 30% of the minimum wage/salary). This concerns mainly entrepreneurs (and persons cooperating with them), if they have voluntarily joined sickness insurance at all.

In my opinion, this regulation does not implement the principle of solidarity. If entrepreneurs participate in the creation of a fund from which benefits are financed, we face a situation where, on the one hand, wealthy entrepreneurs pay contributions from relatively low amounts, often constituting a fraction of their actual monthly revenues or even income. In other words, they bear relatively imperceptible costs of insurance protection. On the other hand, we have small entrepreneurs, often self-employed, for whom the payment of contributions from the declared, minimum basis of assessment is a relatively high burden (sometimes more than 2.45% of actual income or even revenues). Of course, one can defend the thesis that the amount of the subsequent benefit depends on the amount of the declared basis for contribution assessment, so in the case of wealthy entrepreneurs the benefit will cover only to a small extent the actually lost earnings, and in the case of small entrepreneurs it may even exceed the amount of earnings lost. The question, however, is whether such a solution can be assessed as joint and several, especially when we take into account the aforementioned risk of abuse by entrepreneurs being subject to voluntary sickness insurance. In my opinion, taking into account the principle of solidarity, such a solution raises doubts.

However, certain elements of the solidarity principle can be seen in the regulation providing an upper limit for the basis for contributions assessment for persons insured voluntarily, which does not allow these persons to declare a very high contribution basis in a situation where risk is very likely to materialise, *e.g.*, in a situation where medical treatment is planned many months in advance and results in an incapacity for work for several months. These persons could then pay a very high contribution (taking as a basis for its assessment an amount of tens of thousands of zlotys) before the planned date of risk occurrence, in order to obtain a high benefit. The cost of such a benefit would be imposed on the whole risk community, and therefore such conduct should be assessed as incompatible with the principle of solidarity and as an abuse of the insurance protection. Limitation of the maximum contribution basis (*i.e.*, of any amount declared as this basis)

of up to 250% of the average wage/salary is intended to prevent such situations. As a result, the benefits dependent on the basis for the contribution assessment are also limited.

However, such a limitation does not exist in the case of employee insurance. The basis for the assessment both of the contribution and the benefit is the employee's remuneration corresponding to his/her actual income after deducting contributions for pension and sickness insurance. These may even amount to several dozen or several hundred thousand zlotys per month. Here, too, one may have doubts about the proper implementation of the principle of solidarity in social insurance. On the one hand, these people pay high contributions and, therefore, their input to the risk community is high, but on the other hand, in the event of any subsequent receipt of benefits, the transfer is reverse to the intended one, *i.e.*, from the lower to higher wage earners, whereas in social insurance, by definition, this transfer should be directed to the lower wage earners. Therefore, it would be joint and several to introduce specific limits on the basis of benefit assessment for the most wealthy, which would result in a joint and several, lower cost of the risk community in respect of benefits for these people. On the other hand, it would be joint and several to impose a burden of contributions on high income earners by removing the upper limit of the assessment basis in such a way that the contributions in respect of this insurance are paid from actual revenues (or possibly income). This would obviously also require the introduction of compulsory sickness insurance for all profit-making insurance titles. Such a combination of solutions would make it possible to better implement the principle of solidarity between the insured persons, but any limitation of the benefit assessment basis without limiting the contribution assessment basis may be incompatible with the provisions of ILO Convention No. 102 concerning minimum standards of social security.

A few words in conclusion

The above considerations raise several important issues from both a theoretical and practical point of view. The analysis of selected issues regarding sickness insurance in relation to sickness and maternity allowances have allowed to show that basically – as with any insurance institution – this type of insurance is constructed on the basis of the principle of solidarity. A closer analysis of the applicable legal solutions has also shown that in many aspects the principle of solidarity is not fully implemented or that some solutions even violate this principle. This mainly concerns the following: 1) provisions allowing for voluntary access to sickness insurance by some groups of insured persons (which enables individual risk calculation and allows for potential abuse of insurance protection by joining insurance shortly before the risk materialises), 2) lack of participation of principals in the risk of an incapacity for work on the part of persons employed under civil law contracts (which may be one of the reasons for the abuse of such contracts as a basis for employment, because employers are obliged to pay sick pay and thus participate in the protection of the risk of incapacity for work due to sickness),

3) the possibility of receiving maternity allowance during the performance of gainful employment (which again applies mainly to freelancers/contractors and entrepreneurs), 4) regulations forcing insured persons to abandon any gainful activity, even if the sickness does not result in their inability to perform all the jobs carried out by the insured person or 5) regulations allowing for the acquisition of the right to sickness allowance after the lapse of the sickness insurance coverage.

Of course, the limited scope of this study did not allow for a deeper analysis and evaluation of the violation of the principle of solidarity in sickness insurance from the standpoint of the possible attainment of other objectives (and if so, which) justifying such a violation. For this reason, this paper should be a contribution to further discussion on the essence and role of solidarity not only in sickness insurance, but also in other types of social insurance and in social insurance in general as a legal institution.

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SOURCES

- Antonów K. [in:] *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2015.
- Antonów K., *Solidarność w prawie zabezpieczenia społecznego (ubezpieczeniach społecznych i chorobowym)* [in:] *Państwo solidarne*, ed. A. Łabno, Warszawa 2018.
- Babińska-Górecka R., *Ewolucja funkcji zasiłku macierzyńskiego (uwagi na tle ostatnich zmian przestanek nabycia prawa do zasiłku macierzyńskiego dla ubezpieczonego ojca dziecka)*, "Praca i Zabezpieczenie Społeczne" 2015, No. 11.
- Babińska-Górecka R. [in:] *Wielka encyklopedia prawa. Tom XII. Prawo socjalne*, ed. H. Szurgacz, Warszawa 2017.
- Babińska-Górecka R., *Wykonywanie pracy zarobkowej jako przestanka utraty prawa do zasiłku chorobowego (uwagi na tle art. 17 ust. 1 ustawy chorobowej)*, "Z zagadnień zabezpieczenia społecznego" 2014, No. 6.
- Bielska-Brodziak A, Bogucka I., *Solidarność jako termin prawny i jego funkcjonowanie w praktyce orzeczniczej* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012.
- Ćwiertniak B. [in:] *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2015.
- Dzienisiuk D., *Prawo pracy a prawo ubezpieczeń społecznych*, Warszawa 2016.
- Jabłoński A., *Prawo do zasiłku chorobowego osoby wykonującej równocześnie pracę w ramach kilku tytułów ubezpieczenia* [in:] *Z zagadnień prawa pracy i prawa socjalnego: księga jubileuszowa Profesora Herberta Szurgacza*, red. Z. Kubot, T. Kuczyński, Wrocław 2011,
- Jędrasik-Jankowska I., *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2016.

- Jończyk J., *Prawo zabezpieczenia społecznego*, Kraków 2006.
- Kubot Z. [in:] *Prawo pracy. Zarys wykładu*, ed. H. Szurgacz, Warszawa 2017.
- Piechowiak M., *Solidarność – w poszukiwaniu ideowej tradycji interpretacyjnej tej kategorii konstytucyjnej* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012.
- Pisarczyk Ł., *Ryzyko pracodawcy*, Warszawa 2008.
- Roszewska K., *Ryzyko niezdolności do pracy*, Warszawa 2018.
- Rymśa M., *Solidaryzm w ubezpieczeniach społecznych* [in:] *Społeczne aspekty ubezpieczenia*, ed. T. Szumlicz, Warszawa 2005.
- Ryś K., *Wybrane problemy ubezpieczenia społecznego z tytułu niezdolności do pracy z powodu choroby*, "Ubezpieczenia Społeczne. Teoria i praktyka" 2017, No. 3.
- Sanetra W., *Aksjologiczne podstawy prawa ubezpieczeń społecznych* [in:] *Ubezpieczenia społeczne w procesie przemian. 80 lat Zakładu Ubezpieczeń Społecznych*, ed. K.W. Frieske, E. Przychodaj, Warszawa 2014.
- *Słownik języka polskiego*, entry: solidarność, <https://sjp.pwn.pl/szukaj/solidarno%C5%9B%C4%87.html>, (online access: 16.7.2018).
- Szubert W., *Ubezpieczenia społeczne. Zarys systemu*, Warszawa 1987.
- Ślęzak K., *Aksjologiczne podstawy prawa ubezpieczeń społecznych ze szczególnym uwzględnieniem solidarności i sprawiedliwości* [in:] *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, ed. M. Skąpski, K. Ślęzak, Poznań 2014.
- Ślęzak K., *Próba charakterystyki prawnej ubezpieczenia społecznego pracowników*, "Państwo i Prawo" 2001, No. 12.
- Ślęzak K., *Zasada solidarności w społecznym ubezpieczeniu emerytalnym* [in:] *Z zagadnień prawa pracy i prawa socjalnego. Księga Jubileuszowa Profesora Herberta Szurgacza*, ed. Z. Kubot, T. Kuczyński, Warszawa 2011.
- Zacher H.F., *Das soziale Staatsziel* [in:] *Abhandlungen zum Sozialrecht II*, ed. U. Becker, F. Ruland, Heidelberg 2008.
- Zajadło J., *Idea solidarności we współczesnej filozofii prawa i filozofii polityki* [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012.
- Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Informacja o świadczeniach pieniężnych z funduszu ubezpieczeń społecznych oraz o niektórych świadczeniach z zabezpieczenia społecznego. IV kwartał okres I-XII 2018 r.*, https://www.zus.pl/documents/10182/167627/Biuletyn_WOJ_K4_2018/3e549502-2692-7c36-804f-943a2845833e (online access: 19.6.2019).
- Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Informacja o wybranych świadczeniach pieniężnych. Maj 2018 r.*, Warszawa 2018, http://www.zus.pl/documents/10182/167606/wst%C4%99pna+_05_2018/5db3a109-ffa-45be-b46c-c0b821af3503 (online access: 19.7.2018).
- Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Raport roczny ZUS 2016*, Warszawa, <http://www.zus.pl/documents/10182/167526/Raport+roczny+ZUS+2016.pdf/74b11b94-eb9c-4d8e-bcae-1debe3cb8f81> (online access: 11.9.2018).
- Zieliński T., *Ubezpieczenia społeczne pracowników*, Warszawa–Kraków 1994.

Solidarność w ubezpieczeniu chorobowym – wybrane zagadnienia

W niniejszym opracowaniu autor analizuje wybrane rozwiązania ubezpieczenia chorobowego pod kątem realizacji zasady solidarności, przy czym rozważania dotyczą zasiłków chorobowego i macierzyńskiego. Dogmatyczna analiza przepisów dotyczących zakresu podmiotowego ubezpieczenia chorobowego, zasad finansowania składek, warunków nabycia lub kontynuowania pobierania zasiłków chorobowego i macierzyńskiego, możliwości pobierania tych świadczeń po ustaniu tytułu ubezpieczenia oraz wysokości podstawy wymiaru składki prowadzi do wniosku, że zasadniczo ubezpieczenie chorobowe opiera się na zasadzie solidarności. Niektóre szczegółowe rozwiązania zasadę tę jednak naruszają, pozwalając na pewne nadużycia kosztem wspólnoty ryzyka czy na pobieranie świadczeń w sytuacji, w której nie występuje ryzyko socjalne.

Słowa kluczowe: zasiłek macierzyński, zasada solidarności, zasiłek chorobowy, ubezpieczenie chorobowe, solidarność