

# **The Incidence of Exemption from the Automatic Suspension of the Resolution of Appeals Filed by Creditors in Connection with Claims for the Recovery of Debts Prior to the Opening of Bankruptcy Proceedings of the Debtor Insurance Company**

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## ***Abstract***

*This study analyses the inconsistent judicial practice regarding the effects of opening insolvency proceedings for insurance companies on the appeals filed by both creditors and the insolvent debtor against court decisions resolving creditors' actions to recover debts from the debtor's assets, initiated before the opening of the collective proceedings. The aim is to formulate interpretative proposals to eliminate disparities between the solutions pronounced in such cases. The working hypothesis under consideration is of great practical importance, given the opening of bankruptcy proceedings against insurance companies that hold a significant share of the national insurance market and are inevitably involved in many litigations at various procedural stages.*

**Keywords:** insurance company, insolvency, automatic suspension, debt recovery, unification of judicial practice.

**JEL Classification:** K22

## **1. Introduction**

The premise is that bankruptcy proceedings have been initiated against an insurance/reinsurance company under Articles 245-247 of Law No. 85/2014. According to these provisions, such proceedings are opened based on a request filed either by the Financial Supervisory Authority, the debtor insurance/reinsurance company, or its creditors, as the case may be. Prior to this moment, both creditors and the debtor have filed certain appeals against court decisions resolving creditors' actions for the recovery of individual debts from the debtor's assets, initiated before the opening of the insolvency proceedings against the debtor.

### **1.1. Legal issue analysed**

The legal issue analysed was formulated in response to a request from the High Court of Cassation and Justice (HCCJ) to provide an opinion for resolving a legal recourse in the interest of the law<sup>2</sup>.

The question raised by the referral concerns the interpretation and uniform application of Article 75 of Law No. 85/2014, regarding the procedural measures that

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<sup>2</sup> The issue was raised in Case no. 1533/1/2024, concerning the resolution of the legal recourse in the interest of the law formulated by the High Court of Cassation and Justice (H.C.C.J.) leadership board through decision no. 84 of June 20, 2024.

the court can order when both parties have filed appeals, in the context where insolvency proceedings have been opened against the debtor during the resolution of the appeals, and their criticisms concern the same debt under judgment.

## **1.2. Working hypothesis**

The working hypothesis considered is that the debtor subject to insolvency proceedings is an insurance company. Therefore, we will analyze how the special provisions governing the insolvency of this entity are correlated with the general rules of insolvency law. The Supreme Court must clarify, through the mechanism of legal recourse in the interest of the law, whether, after the initiation of collective enforcement proceedings against an insurance/reinsurance company, the appeals filed by creditors and even the bankrupt debtor against court decisions resolving creditors' actions for monetary claims against the debtor, initiated before the opening of these proceedings, are subject to automatic suspension of judgment.

## **2. Summary of solutions to be reconciled**

### **2.1. First opinion: it has been established that the judgment of appeals filed by both parties should be suspended**

It was considered<sup>3</sup> that the opening of bankruptcy proceedings against the insurer results in the suspension of appeals filed by both the insurer and its creditors, as the provisions of Article 262(4) of Law No. 85/2014 are special norms compared to the general ones of Article 75 of the same law, and the exceptions regulated by Article 75(2) are not applicable.

In the case of insurance/reinsurance companies, according to the provisions of Article 262 paragraph (4) first and second sentences of Law no. 85/2014, the decision to open bankruptcy proceedings results in the automatic suspension of all judicial or extrajudicial actions and enforcement measures against them. The claims asserted in these processes are recorded in the bankruptcy file of the tribunal and are subject to examination and registration in the table of claims, according to Law no. 85/2014.

This opinion is motivated by the specific nature of the insolvency procedure for insurance/reinsurance companies, for which there is no observation period or reorganization procedure, directly opening the bankruptcy procedure. Therefore, the debtor's liabilities must be clarified within a short period, without waiting for the resolution of procedures that can extend over several years.

Given the imperative nature of the rule instituting the suspension, it is considered that its application is mandatory in the absence of an express derogation and cannot be left to the discretion of the court.

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<sup>3</sup> This view is supported by H.C.C.J. Decision No. 47/14.01.2020.

## **2.2. Second opinion: it is argued that the judgment of appeals filed by both parties should continue**

According to the second jurisprudential orientation<sup>4</sup>, the courts have held that we are not in the presence of an automatic suspension of the appeal filed by the insurance/reinsurance company against court decisions resolving the actions of one or more creditors introduced before the opening of bankruptcy proceedings. It is considered that the provisions of Article 75 paragraph (2) letter a) of Law no. 85/2014 are applicable, according to Article 242 of the same law. According to this legal text, the provisions of Chapter I (Common Provisions in Insolvency Proceedings - including Article 75), except for those in Section 6 (Reorganization), will apply accordingly to the bankruptcy proceedings of insurance/reinsurance companies, with the exceptions provided in this chapter.

Thus, the provisions of Article 262 paragraph (4) of Law no. 85/2014 are supplemented by the provisions of Article 75 paragraph (2) letter a) of the same law, as there is no contradiction between the two texts and no express derogation. Therefore, the appeals filed by the insurance/reinsurance company will continue to be judged, even if the debtor is in bankruptcy.

Regarding the appeal filed by creditors, it was emphasized that in the case of the bankruptcy of insurance/reinsurance companies, one of the particularities lies in the fact that there are two main categories of creditors: a) insurance creditors, i.e., those creditors whose claims arose from insurance contracts and who are entitled to recover their claim either from the Policyholders Guarantee Fund or by registering in the creditors' table; and b) other creditors of the insurance/reinsurance company, who can recover their claim only by registering in the creditors' table.

## **2.3. Third opinion: it is argued that the judgment of the claimant's appeal should be suspended/terminated, while the judgment of the defendant's appeal should continue**

In this jurisprudential orientation<sup>5</sup>, it was held that we are not in the presence of an automatic suspension of the appeal filed by the insurance/reinsurance company prior to the opening of bankruptcy proceedings against it, because the provisions of Article 75 paragraph (2) letter a) of Law no. 85/2014 are applicable to the bankruptcy proceedings of these categories of companies. The main arguments supporting this thesis are that there is no contradiction between the two texts and no express derogation. Therefore, the continuation of the judgment of the appeal/review of the defendant in insolvency/bankruptcy proceedings will be decided.

In contrast, regarding the appeals filed by creditors, these cannot be exempted from the suspensive effect of the opening of insolvency proceedings, as long as the legislator does not mention them in the exhaustive list that would exclude them from the suspension of judgment. The limiting provisions will therefore be reserved for debtors who had filed appeals before the opening of insolvency proceedings to contest decisions

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<sup>4</sup> This view is supported by HCCJ Decision No. 19/2022 and HCCJ Decision No. 2500/23.11.2022.

<sup>5</sup> This view is supported by several HCCJ decisions, including Decision No. 925/26.04.2023 and Decision No. 819/05.04.2023.

favourable to creditors regarding the realization of claims against them<sup>6</sup>.

It was highlighted that the special nature of the procedure provided by insolvency legislation requires the creation of a unified, collective, consensual, and egalitarian framework in which the creditors of a common debtor can exercise their rights against the debtor in a state of insolvency. In these conditions, the existence of parallel actions with the collective procedure provided by law would create uncertainty regarding the creditors' table, making it impossible to evaluate the debtor's assets and liabilities for the purpose of distributing the liquidation result<sup>7</sup>.

For this reason, to achieve the purpose of the insolvency procedure, the legislator has provided some limitations on the creditors' rights to finalize - starting from the date of the initiation of insolvency proceedings - parallel judicial or extrajudicial actions that could compromise its purpose by affecting the predictability and security of the judicial procedure, by suppressing its collective nature and creating unauthorized breaches in its unified nature<sup>8</sup>.

Persons claiming a right of claim against the debtor insurance/reinsurance company can file a claim declaration within its bankruptcy proceedings or address the Policyholders Guarantee Fund, according to the procedure regulated by Articles 14-16 of Law no. 213/2015 regarding the Policyholders Guarantee Fund, with subsequent amendments and completions (Law no. 213/2015). Moreover, creditors can follow both procedures, both a request addressed to the Fund and a claim declaration for the amount exceeding the ceiling regulated by Article 15 paragraph (2) of Law no. 213/2015.

#### **2.4. Fourth opinion: it is argued that the judgment of appeals filed by both parties should be terminated**

In support of this interpretation<sup>9</sup>, it was argued that, similar to common law, an effect of the opening of bankruptcy proceedings for an insurance/reinsurance company is the automatic suspension of all judicial or extrajudicial actions and enforcement measures against the debtor insurance/reinsurance company. In reality, all these actions will eventually cease because, by force of circumstances, suspension implies the resumption of these actions at some point, a situation impossible in the case of the bankruptcy of insurance/reinsurance companies, as it is known that the debtor company cannot return to its normal existence before bankruptcy<sup>10</sup>.

The decision to open bankruptcy proceedings results in the withdrawal of the operating license of the debtor insurance/reinsurance company by the Financial

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<sup>6</sup> Andreea Diaconescu Deli, "*Implicațiile suspendării legale a acțiunilor în realizarea creanțelor împotriva debitorului în raport de procedura dreptului comun*", in *Phoenix - Revista de Insolvență* no 58/2016, pp.8-16.

<sup>7</sup> In this regard, see Decision no. 842 of October 11, 2012, published in the Official Gazette of Romania, Part I, no. 832 of December 11, 2012.

<sup>8</sup> In this regard, see Decision no. 17 of July 20, 2020 of the High Court of Cassation and Justice - Complete for resolving the appeal in the interest of the law, published in the Official Gazette of Romania, Part I, no. 61 of January 20, 2021

<sup>9</sup> This view is supported by HCCJ Decision No. 827/13.03.2018 and HCCJ Decision No. 17/2020, published in Official Gazette of Romania, Part I, no. 61 of January 20, 2021.

<sup>10</sup> Nicoleta Țândăreanu, "*Aspecte controversate privind aplicarea dispozițiilor art. 75 și art. 262 din Legea nr. 85/2014*", in *Revista română de drept comercial* no. 2/2020, p. 3.

Supervisory Authority, if this measure has not been ordered before the decision is pronounced.

The claims specific to these actions will be registered in the table of claims after being examined by the judicial liquidator<sup>11</sup>.

From the comparative analysis, the intermediate conclusion emerged that the text of Article 262 paragraph (4) actually constitutes a particular application of the automatic suspension effect enshrined in Article 75 paragraph (1) first and second sentences of Law no. 85/2014, adapted to the specifics of the insolvency of this special category of economic agents, for which the failure of financial recovery leads directly to bankruptcy, without an observation period and without the possibility of reorganization based on a plan submitted for confirmation by the syndic judge.

### **3. The opinion expressed and its motivation**

Unclear judicial practice regarding the suspension or continuation of appeals filed by the insurer (whether it is an appeal, review, or another extraordinary appeal) creates real confusion among litigants regarding their procedural obligations in this context: should they continue to exercise their rights in the litigations registered with the courts before the opening of bankruptcy proceedings, or are they required to initiate new specific actions in the context of the opening of bankruptcy proceedings of the insurance company, namely filing claims or requests addressed to the policyholders guarantee fund, according to the procedures regulated by articles 14-16 of Law no. 213/2015.

#### **3.1. Regarding the incidence of the exception to the suspension effect of the appeal filed by the debtor, considering the special status of the insurer**

We consider that the incidence of this exception extends also to their benefit, even in the absence of an express provision of the law. This solution arises from the application of several interpretation methods and rules relevant to the case:

##### **3.1.1. Systematic interpretation**

This method of interpretation assumes that clarifying the content of a norm must be done *subjectam materiam*, to conclude that the provisions of Article 75 paragraph (2) letter a) first sentence of Law no. 85/2014 apply in addition to the provisions of Article 262 paragraph (4) of the same law.

The provisions of Article 75 paragraph (2) of Law no. 85/2014 enshrine, in their enumeration, several exceptional hypotheses where the automatic suspension provided in paragraph (1) first sentence of the same article does not operate. Among these exceptional situations, which have no counterpart in the previous regulation, is the hypothesis of appeals filed by the debtor against the actions of one or more creditors initiated before the opening of proceedings - Article 75 paragraph (2) first sentence<sup>12</sup>.

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<sup>11</sup> Stanciu D. Cărpenu, Vasile Nemeș, Adrian Hotca, *Legea nr. 85/2006 privind procedura insolvenței. Comentarii pe articole*, Ed. Hamangiu Bucharest, 2008, p. 182.

<sup>12</sup> Correlated with the provisions of art. 75 para. (2) letter a) the first sentence of Law no. 85/2014, which exempts from the effect of legal suspension the appeals promoted by the debtor against the actions of a

At the same time, Article 262 paragraph (4) of Law no. 85/2014 expressly provides that the decision to open bankruptcy proceedings results in the automatic suspension of all judicial or extrajudicial actions and enforcement measures against the debtor insurance/reinsurance company, with all claims asserted in these processes being registered in the bankruptcy file of the tribunal, subject to examination and registration in the table of claims according to this law.

*“The provisions of Article 262 paragraph (4) of Law no. 85/2014 should not be interpreted in isolation but should consider, on the one hand, Article 262 in its entirety and, on the other hand, the entire legislative framework in the matter; specifically, Article 242 of Law no. 85/2014, according to which the provisions of Chapter I (including the provisions of Article 75, which contain exceptions to the automatic suspension of all judicial, extrajudicial actions, or enforcement measures for the realization of claims against the debtor’s assets), except for those in Section 6, will apply accordingly to the bankruptcy proceedings of insurance/reinsurance companies, with the exceptions provided in this chapter.”<sup>13</sup>*

### 3.1.2. Teleological interpretation

Following a historical and teleological analysis, it is concluded that the regulations previously found in various special laws and for which supplementation with the general insolvency law was possible, either based on a referral norm or by simply applying the principle *generalia specialibus non derogant*, have been harmoniously integrated into the overall architecture of Law no. 85/2014.

According to the referral norms, whenever the special provisions related to the insolvency of certain categories of debtors (groups of companies, credit institutions, and insurance/reinsurance companies) do not regulate a specific situation, the common law rules in insolvency will apply.

In this case, alongside the express repeal of provisions from special normative acts and the concentration of the matter into a single regulation - Law no. 85/2014, avoiding legislative parallelisms and redundancies was also achieved through the use of the referral norm, a legislative technique that highlights legislative interconnection.

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creditor/creditors started before the opening of the procedure, art. 105 para. (1) the second-fourth theses of Law no. 85/2014 offers the following solutions: (i) in the event that court or arbitration decisions are annulled, quashed or modified in appeals, the judicial administrator/judicial liquidator will redo the table of claims accordingly; (ii) if in the course of appeal the court annuls or quashes the judgment, without disentangling the merits of the judgment, pronouncing a judgment of annulment or quashing with referral for retrial, the insolvency practitioner must proceed to the verification of the claim, notifying the creditors in case total or partial non-registration of the claim; these creditors can file the appeal provided by art. 59 para. (5) of the law, following that the syndic judge and, consequently, the competent court of appeal will decide on the way in which the claim will be entered in the table of claims.

<sup>13</sup> In this sense, see the solutions of the Constitutional Court: Decision no. 36 of January 30, 2018, published in the Official Gazette of Romania, Part I, no. 431 of May 22, 2018 (paragraphs 21 and 22), and by Decision no. 690 of November 8, 2018, published in the Official Gazette of Romania, Part I, no. 210 of March 18, 2019 (paragraphs 20 and 22).

### 3.1.3. Interpretation by result

Law no. 24/2000 on the legislative technique norms for drafting normative acts<sup>14</sup> supports this interpretation. Indeed, the provisions of Article 15 paragraphs (2) and (3) of Law no. 24/2000 state the following: “(2) The special nature of a regulation is determined based on its object, circumstantiated to certain categories of situations, and the specific legislative solutions it establishes. (3) The regulation is derogatory if the legislative solutions related to a specific situation contain different norms compared to the framework regulation in the matter, the latter retaining its general mandatory character for all other cases.”

Therefore, a regulation is derogatory only to the extent that the legislative solutions related to a specific situation contain different norms compared to the framework regulation in the matter (the general norm), the latter retaining its general mandatory character for all other cases not differently regulated by the special norm. If the special norm does not regulate something distinct, it is supplemented by the general norm, as, usually, the special norm derogates only in some aspects, for those omitted from regulation (i.e., without the legislator’s intention to regulate differently), the common law norm continues to apply.

Moreover, in the bankruptcy procedure of insurance/reinsurance companies, there is an express referral norm to the common law provisions in insolvency, highlighting the complementary relationship on which the legislative technique instrument of the referral norm is based. This complementary relationship makes it possible to supplement the special norm with the general norm in aspects that, within the special norm, have not received an express derogatory regulation from the general norm, according to the principle *generalia specialibus non derogant*.

For all matters in Chapters II-IV, integrated into Title II of Law no. 85/2014, supplementation with the common provisions in Chapter I of the same title, including the provisions in Section 3 of this chapter, regarding the opening of proceedings and their effects, was achieved through referral norms with approximately identical wording (for groups of companies - Article 183; for the bankruptcy of credit institutions - Article 204; for the bankruptcy of insurance/reinsurance companies - Article 242).

The provisions of Article 262 paragraphs (4) and (5) of Law no. 85/2014 have a derogatory character, determined by the specificity of the bankruptcy of insurance/reinsurance companies, only to the extent that they contain derogatory legislative solutions. To the extent that Article 262 paragraphs (4) and (5) of Law no. 85/2014 do not provide something different from the general norm - Article 75 paragraphs (1) and (2) of the same law, it applies mandatorily, in addition, for situations not differently regulated. For situations not regulated by Article 262 of Law no. 85/2014, the general norm applies, due to the *complementary relationship between the special norm and the general norm*.

### 3.1.4. Logical-legal interpretation

In this case, it is necessary to give effect to the rule: “*where the law does not*

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<sup>14</sup> Republished in the Official Monitor of Romania, Part I, no. 260 of April 21, 2010, with subsequent amendments and additions.

*distinguish, neither should the interpreter distinguish.”*

Although the chapter dedicated to the insolvency of insurance/reinsurance companies reiterates one of the most important effects of the decision to open bankruptcy proceedings against such a debtor, namely the automatic suspension of all judicial or extrajudicial actions and enforcement measures against the debtor insurance/reinsurance company (the claims asserted in these processes being registered in the bankruptcy file, subject to examination and registration in the table of claims according to the rules established by Law no. 85/2014), the legislator did not reiterate the exceptional situations to this general rule.

However, the exceptions to the automatic suspension rule, regulated in the first chapter of Title II - Insolvency Procedure, a chapter that, incidentally, is titled “Common Provisions,” are also applicable to the bankruptcy procedure of an insurance/reinsurance company. This is evident not only from the analysis of the content of Article 242 of Law no. 85/2014, which has already been referred to, but also from the interpretation of the provisions of Article 262 of the aforementioned law<sup>15</sup>.

Therefore, it is undeniable that if the exceptions to the automatic suspension of all judicial, extrajudicial, or enforcement actions could not be applied in the bankruptcy procedure of insurance/reinsurance companies, the special norm, which targets only the insolvency of this category of debtors and allows insurance claims, established by enforceable titles obtained after the bankruptcy decision, to be registered in court under penalty of forfeiture within no more than 10 days from the date of obtaining the title, would be pointless.

According to Article 262 paragraph (5) of Law no. 85/2014, insurance claims, established by enforceable titles obtained after the bankruptcy decision, are registered in court under penalty of forfeiture within no more than 10 days from the date of obtaining the title, but no later than the date of the preparation of the consolidated final table<sup>16</sup>.

This text would only be applicable if the provisions of Article 262 paragraph (4) of the same law did not also consider the suspension of appeals filed by the debtor, thus making it possible to obtain titles consisting of enforceable court decisions after the opening of bankruptcy proceedings, for Article 262 paragraph (5) of Law no. 85/2014 to be applicable. These special provisions targeting insurance/reinsurance companies are in line with the general provisions contained in Article 75 paragraphs (1) and (2) of Law no. 85/2014, with the legislator exempting from the automatic suspension provided in paragraph (1) the appeals filed by the debtor against the actions of a creditor initiated before the opening of proceedings [Article 75 paragraph (2) letter a)].

Under these conditions, the only logical-legal conclusion is that the provisions of Article 262 paragraphs (4) and (5) of Law no. 85/2014 apply in conjunction with those of Article 75 paragraph (2) of the same law.

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<sup>15</sup> See Mihaela Ionaș, „Ridicarea suspendării acțiunilor judiciare și extrajudiciare ca urmare a deschiderii procedurii insolvenței”, in *Revista Romana de Drept al Afacerilor*, no. 3 / 2017, pp. 69-97.

<sup>16</sup> See Claudia Antoanela Susănu, *Procedura insolvenței. Jurisdicții în insolvență. Deschiderea procedurii de insolvență. Verificări de legalitate vs. Decizii de oportunitate. Considerații teoretice și perspective practice*, Ed. Universul Juridic, Bucharest, 2023, p. 253.

### 3.2. Regarding the incidence of the exception to the suspension effect of the appeal filed by creditors

We consider that this exception also extends to the benefit of the creditors, but only as a result of the circumstantial association with the debtor's appeal. Thus, in the situation where the creditor's appeal targets the same claim as the one forming the object of the appeal filed by the debtor, the creditor's appeal can also be resolved.<sup>17</sup>

In principle, individual actions of creditors are blocked throughout the insolvency proceedings to ensure the achievement of the collective procedure's purpose, which derives from its collective, consensual, and egalitarian nature. To ensure the efficiency of the procedure and manage the debtor's assets coherently and uniformly, procedures that tend to disperse assets or create inequitable treatments among creditors are halted. For this reason, the rule is that creditors' claims are satisfied under the conditions established within the common framework of the insolvency procedure<sup>18</sup>.

Therefore, creditors' rights are limited in terms of their free exercise precisely to prioritize the collective interest dictated by the proper conduct of the insolvency procedure. More precisely, to stabilize the creditors' table, the rule of suspending individual claims and actions is instituted by an imperative public order norm<sup>19</sup>.

In the particular case of the insolvency of insurance companies, insurance creditors have a special regime compared to others, benefiting from the possibility of filing claims separately, addressing the Guarantee Fund within the 90-day forfeiture period from the opening of insolvency proceedings<sup>20</sup>.

The specific mechanisms available to insurance creditors under both Law no. 213/2015 and Law no. 85/2014 do not prevent the application of the provisions of Article 75 paragraph (2) letter a) first sentence of Law no. 85/2014.

Despite the appearance left by Article 75 paragraph (2) letter a), the exception to the continuation of the appeal filed by the debtor company targets the continuation of the entire process, conditioned by the existence of an appeal filed by the debtor company. Whether only the debtor has filed an appeal/review or both parties have filed an appeal/review, the court is obliged to resolve the process itself and implicitly rule on both appeals/reviews.

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<sup>17</sup> High Court of Cassation and Justice, Civil Decision no. 2338/04.12.2019 in which the court of appeal was vested with both the debtor's appeal and the creditor's appeal, [www.sintact.ro](http://www.sintact.ro), accessed on 07.09.2024.

<sup>18</sup> Radu Bufan (coord.), *Tratat practic de insolvență*, Ed. Hamangiu, Bucharest, 2014, p. 399.

<sup>19</sup> In the same sense, the Constitutional Court ruled and by Decision no. 746 of November 22, 2018, published in the Official Gazette of Romania, Part I, no. 100 of February 8, 2019, and Decision no. 484 of June 25, 2020, published in the Official Gazette of Romania, Part I, no. 1214 of December 11, 2020, by which the exceptions to the unconstitutionality of the provisions of art. were rejected as unfounded. 75 para. (1) from Law no. 85/2014.

<sup>20</sup> Only for insurance creditors (the insured person, the insurance beneficiary or the injured third party), by Law no. 213/2015 regulated a guarantee scheme in the field of insurance, which aims to protect them from the consequences of the insolvency of an insurer. In this sense, the person who claims an insurance claim against the insolvent insurer can make a reasoned payment request, addressed to the Insured's Guarantee Fund, under the conditions established by this law, but no later than 90 days from on the date of the definitive stay of the decision to open the bankruptcy procedure or from the date of birth of the right to claim, when it was born later, under the penalty of forfeiture. The fund ensures the payment of indemnities/compensations from its availability, to insurance creditors, according to the conditions and guarantee ceiling established by Law no. 213/2015.

### 3.3. Correlation between the solution of suspension and the termination of appeals

Reinstatement on the docket is possible only if the decision to open insolvency proceedings has been annulled or revoked. If the decision to open insolvency proceedings becomes final, the claims filed before the opening of the proceedings, which aim to exercise individual rights, will cease, even if they were in the appeal stage. The only exception is the one admitted by the legislator in favour of the debtor.

Regarding the solution of terminating the claims filed in the appeal stage, this is possible only when suspension can be ordered. In the exceptional conditions mentioned, where the suspensive effect is removed, the alternative of terminating the resolution of the case is not considered, but only the continuation of the trial, in parallel with the insolvency proceedings.

Both suspension and termination of the process are effects of the international principle in insolvency law “automatic stay,” and not two entirely distinct hypotheses without any connection between them. The difference between the two procedural incidents is that suspension represents a temporary situation, while termination represents a definitive situation. The rationale is fair, as long as the incidence of insolvency proceedings is not indubitable and irreversible, it does not justify terminating the process and losing all the efforts made by the parties up to that point to clarify the claim. On the contrary, if the state of insolvency of the defendant company is definitively established, then the ambiguity does not justify the existence of two parallel procedures, and the already suspended common law file will be terminated<sup>21</sup>.

The exception to the rule of suspending the resolution of individual creditors’ claims is also justified by the principle of ensuring equal treatment and the principle of respecting the right to defence and ensuring free access to justice.

## 4. Reference to fundamental rights and procedural norms

We believe that the solution in such a case should be assessed from the perspective of constitutionality, with an emphasis on respecting the right to a fair trial, which involves, according to Article 21 paragraph (3) of the Romanian Constitution and Article 6 of the European Convention on Human Rights, ensuring equal procedural treatment, where both parties can support and exercise their rights and defenses. Additionally, the principles retained by the High Court - the principle of the uniqueness of the appeal, the right to defense, the right to a fair trial, should underpin the interpretation of the relevant legal texts.

Another solution could not be successfully justified, as there is no possibility in Romanian procedural law to suspend a creditor’s appeal while another is in the debtor’s trial stage; there is only the suspension of the process provided by Articles 412 and 413

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<sup>21</sup> Razvan-Alexandru Marginean, „Deschiderea procedurii de insolvență față de pârât. Natura juridică a soluțiilor de suspendare și încetare prevăzute de art. 75 alin. (1) din Legea nr. 85/2014. Sistematizarea soluțiilor care pot fi pronunțate în primă instanță, apel sau recurs în acțiunea în pretenții de drept comun”, *Revista Romana de Drept al Afacerilor* no. 2/2024, available at: <https://trda.ro/deschiderea-procedurii-de-insolventa-fata-de-parat-natura-juridica-a-solutiilor-de-suspendare-si-incetare-prevazute-de-art-75-alin-1-din-legea-nr-85-2014-sistematizarea-solutiilor-care-pot-fi-p/>, consulted on 11.09.2024.

of the Civil Procedure Code. Regarding the creditor's appeal, it has been argued that the judicial review court cannot "refuse" to judge the appeal filed by the creditor since, according to Article 471 of the Civil Procedure Code, all appeals filed against the same decision are assigned to the same panel and resolved simultaneously<sup>22</sup>, the institution of disjunction not being compatible with the judgment in appeals, and the right to a fair trial implies the analysis of all parties' defences in a unified manner<sup>23</sup>. Moreover, disjunction can only be ordered before the first instance. If the solution were to judge only the debtor company's appeal, it would evidently result in a violation of equality before the law, equality of arms, and a situation of discrimination.<sup>24</sup>

## 5. Conclusions

We consider the second jurisprudential orientation to be in line with the letter and spirit of the law, so we opine that the second solution should be followed.<sup>25</sup>

Therefore we appreciate that the appeal in the interest of the law is admissible and that, in the interpretation and uniform application of the provisions of Article 262 paragraph (4), in relation to the provisions of Article 75 of Law no. 85/2014, the appeals filed by the debtor insurance/reinsurance company against court decisions resolving the actions of one or more creditors for the realization of claims against the debtor's assets introduced before the opening of these proceedings, are not automatically suspended. For the same reason, in the hypothesis of creditors filing an appeal/review regarding the same claim, we support the recognition of identical legal treatment from the perspective of applying the exception to the rule of suspending the judgment<sup>26</sup>.

Therefore, in the appeal or review stage, the trial can be suspended or terminated if there is no appeal filed by the debtor company, respectively, it will continue if there is an appeal filed by the debtor company. Consequently, as long as the premise situation is met, namely the existence of the debtor company's appeal, the entire file proceeds as if the insolvency proceedings had not been opened against the debtor<sup>27</sup>.

It is essential that ambiguous legal provisions are interpreted and applied in such a way as to respect the specificity of the insolvency procedure of insurance companies, as well as the creditor's right to a fair trial, by ensuring equal procedural treatment, where

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<sup>22</sup> See Mihaela Tăbărcă, *Drept procesual civil*, Vol. II, Universul Juridic Publishing House, Bucharest, 2005, p. 59; Ioan Leș, *Codul de procedură civilă, Comentariu pe articole*, 3<sup>rd</sup> edition, C.H. Beck Publishing House, Bucharest, 2007, p. 783.

<sup>23</sup> See Andreea Ciucă, *Apelul*, Universul Juridic Publishing House, Bucharest, 2008, pp. 498-499.

<sup>24</sup> Razvan-Alexandru Marginean, *op.cit.*

<sup>25</sup> The Appeal decision in the interest of Law no. 19/2022 pronounced by the High Court of Cassation determines *mutatis mutandis* that the solutions proposed for the interpretation of art. 75 para. (2) lit. a) from Law no. 85/2014 to be applicable and art. 262 para. (4) from Law no. 85/2014.

<sup>26</sup> Arguments supported in the session of scientific communications "Dynamics of the interpretation of the legal norm - theoretical scenarios, practical scenarios" organized on 25.10.2024 by the Faculty of Law of the University Al. I. Cuza Iasi, in the presentation with the theme: *Arguments for the unified interpretation of provisions regarding the limitation of creditors' rights to complete certain judicial actions parallel to the insolvency procedure subsequently opened against the debtor* [https://laws.uaic.ro/images/aaimagini/2024/10/ev/Program\\_conferinta\\_25\\_oct2024.pdf](https://laws.uaic.ro/images/aaimagini/2024/10/ev/Program_conferinta_25_oct2024.pdf).

<sup>27</sup> See the "Minutes of the meeting of the presidents of the specialized sections (formerly commercial) of the High Court of Cassation and Justice and the courts of appeal", dedicated to the debate on non-unitary practice issues in the matter of litigation with professionals and insolvency Bucharest October 24-25, 2022, point 3, pp. 23-27.

both parties can support and exercise their rights and defences.

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