

论文 对我国保险人说明义务制度的反思和重构----兼评新《保险法》第17条

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摘要:

我国保险人说明义务制度在实际适用的过程中屡屡被投保人滥用,成为投保人抗辩保险人合法利益的“万能事由”。在我国,该项制度的范畴仅指保险条款本身,其法理基础应是合同法对格式合同的规制原则。我国保险人说明义务制度需要重构,其基本思路是:说明对象为除“法定免责条款”之外的“权利义务条款”和“准权利义务条款”;说明方式原则上为“口头和书面”,“约定免责条款”例外;说明标准在“主动说明”时为“一般理性人理解”,而在“被动说明”时为“投保人理解”;法律后果则为“该条款不订入保险合同”。新《保险法》第17条仍需要修正,在说明对象上应排除“法定免责条款”,在说明方式上应增加对“被动说明”的法律规制,在法律后果上则应采用“不订入合同”规则。

关键词: 保险人说明义务 重构 说明对象 说明方式 说明标准 法律后果

A Reflection on and Reconstruction of China's Insurance System of Insurer's Explanation Obligation :Comments on Article 17 of New Insurance Law

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Abstract:

In the course of practice ,China's Insurance System of Insurer's Explanation Obligation is frequently abused by the insured , who tends to take it as a universally applicable tool when defending himself/herself against the insurer for interest . However , the range of this legal system is only restricted to insurance clauses ,and its jurisprudence basis should be the restrictive principle of contract law for standard form contract .In this paper , the reconstruction of China's Insurance System of Insurer's Explanation Obligation is proposed .The basic ideas of the proposal include the following points :the explanation targets should be "clauses of rights and obligations" and "clauses of quasi rights and obligations" rather than "legal exemption clauses";the explanation method in principle ought to be "oral and written", with "hold harmless clauses" as an exception;the explanation criterion should be "the understanding of an ordinary reasonable person" on an active explanation basis , and "the understanding of the insured" on a passive explanation basis;and the legal consequence should "not be laid into the insurance contract". Therefore , it seems that Article 17 of the new Insurance Law still needs the following amendments : "legal exemption articles" should be excluded in the explanation target;the legal regulation of "passive explanation" should be included in the explanation method;and the rule of "disintegration of contract" should be adopted when the legal consequence is taken into consideration .

Keywords: insurer's explanation obligation reconstruction explanation target explanation method explanation criterion legal consequence

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