

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**NON-DISCRIMINATION BETWEEN PRIVATE ENTITIES AND INDIVIDUALS: DISABILITY AND INSURANCE CONTRACTING
(NO DISCRIMINACIÓN ENTRE PARTICULARES: DISCAPACIDAD Y CONTRATACIÓN DE SEGUROS)**

CASE: *Amparo en Revisión 410/2012*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: November 21, 2012

KEY WORDS: efficacy of fundamental rights between individuals, persons with disabilities, disability-based discrimination, subjective and objective dimensions of fundamental rights, insurance contracts with private entities, right to freedom of contract, free will.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 410/2012*, First Chamber, Alfredo Gutiérrez Ortiz Mena, J., decision of November 21, 2012, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AR%20410-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 410/2012*, Mexico.

SUMMARY OF THE *AMPARO EN REVISIÓN* 410/2012

BACKGROUND: In May 2011, the General Law for the Inclusion of Persons with Disabilities (the Law) was published in the Federal Official Gazette. Seguros Inbursa, Sociedad Anónima, Grupo Financiero Inbursa (Inbursa) filed an *amparo indirecto* lawsuit against articles 2, section IX, and 9 of the Law. It alleged that the challenged provisions violate articles 1, 5, 14 and 16 of the Mexican Federal Constitution (CPEUM) in that they obligate insurance companies to issue contracts to persons with disabilities. The petitioner considered that that obligation disregards the principles of freedom of contract, risk assessment of the insured person, and free will. The District Judge that heard the case denied constitutional protection in relation to the challenged articles. The decision indicated that the challenged provisions comply with the legitimate purpose of protecting the fundamental rights of persons with disabilities, especially the right to non-discrimination. It was also emphasized that the Law does not violate the principles of contractual freedom and free will of private insurance companies, but only specifies their obligations in relation to the mandates of the CPEUM. Inbursa filed a *recurso de revisión* against the decision of the *amparo* judge. The Presidency of the Republic filed an adhesive *recurso de revisión* in which it requested that the constitutionality of the challenged articles be declared and, consequently, that the *amparo* be denied to the insurance company. The court reviewing the *amparo* reserved jurisdiction for the Mexico's Supreme Court of Justice (this Court) to resolve the constitutionality problem in relation to the challenged articles. This Court assumed jurisdiction to hear this case.

ISSUE PRESENTED TO THE COURT: Whether the articles claimed as unconstitutional violate the principles of freedom of contract and free will of private insurance entities by prohibiting them from discriminating against people on the basis of their disability.

HOLDING: The grievance alleged by the plaintiff was declared unfounded since the provisions challenged are constitutional and must be interpreted in the terms set out in the decision. Consequently, this Court upheld the appealed decision but for different reasons. It denied the requested *amparo* and declared that the adhesive *recurso de revisión* filed by the Presidency

was essentially moot for the following reasons. Constitutional principles bind the various sectors of the legal system, including relations between individuals. This means that entities engaged in the contracting of insurance, especially health insurance, are also governed by these higher norms and their status as private subjects does not exempt them from the obligation to respect constitutional mandates. The provisions challenged by the petitioner do not violate the Constitution; in fact, they strictly comply with the human rights treaties on disability signed by Mexico. In this regard, the parameter of constitutional regularity of the actions of individuals, in this case of insurance companies, implies a non-negotiable obligation to respect the right to equal treatment and non-discrimination of persons with disabilities. Freedom of contract and commerce does not imply legal permission to discriminate against and exclude persons with disabilities, much less when the insurance is for essential services and fundamental rights such as the right to health.

VOTE: The First Chamber decided this case unanimously with the five votes of justices Olga María del Carmen Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena and José Ramón Cossío Díaz.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=140322>

EXTRACT FROM THE *AMPARO EN REVISION* 410/2012

- p. 1 Mexico City. The First Chamber of the Supreme Court of Justice of the Nation (this Court), in session of November 21, 2012, issued the following decision.

BACKGROUND

- p.2 On 11 July 2011, Seguros Inbursa, Sociedad Anónima, Grupo Financiero Inbursa (Inbursa), through its legal representatives, filed an *amparo indirecto* lawsuit alleging that articles 2, section IX, and 9 of the General Law for the Inclusion of Persons with Disabilities are contrary to paragraphs 1, 5, 14 and 16 of the Federal Constitution.
- p.2-3 The challenged provisions state: "Article 2. For purposes of this Law, the following definitions shall apply: IX. Discrimination on the basis of disability. Any distinction, exclusion or restriction on grounds of disability which has the purpose or effect of hindering, impairing or nullifying the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or other areas. This includes all forms of discrimination, including denial of reasonable accommodation. Article 9. Any type of discrimination against persons with disabilities in the granting of health or life insurance is prohibited."

Inbursa indicated that the challenged articles limit its freedom of contract in terms of insurance, since they do not allow an adequate selection of risks for people with disabilities. This undermines the nature of the insurance contract, since it obligates companies to contract insurance with any person with disabilities, despite the fact that said contract is consensual, without allowing for an adequate analysis of the particularities of each case. This violates the insurance regulations, specifically, the General Law on Insurance Institutions and Mutual Companies and the Insurance Contract Law.

- p.3 The articles challenged seek equality between persons, but this principle has limits, and one of them is the principle of freedom of commerce which is violated by preventing insurance companies from assessing the risks of people with disabilities. Especially if it is considered that most of these people are already generating treatment expenses and,

therefore, the risks have already been verified. To try to execute insurance contracts in these cases would break with sound usage and custom in the industry.

- p.3 The District Judge that heard the case in Mexico City issued a decision in which, on the one hand, she ordered the dismissal in relation to the effects and consequences that directly and indirectly result from the challenged articles and, on the other, denied the *amparo* and protection of the federal courts in relation to the challenged articles.
- p.4 The District Judge made a systematic and teleological interpretation of the articles challenged, concluding that the content of those provisions pursues a legitimate aim, grants rational protection and is not excessive. Therefore, the challenged articles are harmonious with article 1 of the Constitution and do not violate article 5 thereof, since the latter article must respect other principles of constitutional rank. The challenged articles do not restrict the freedom of commerce because insurance companies are not prevented from carrying out their activities. They only require them to guarantee the principle of non-discrimination, which is one of the limits on the freedom of commerce.
- p.5 Inbursa filed a *recurso de revisión* against the *amparo* decision, indicating that it only determined that the challenged articles did not violate the provisions of articles 1 and 5 of the Constitution. However, it did not resolve the apparent conflict of laws between the discrimination provisions and the rules applicable to insurance matters.

The challenged articles of the General Law for the Inclusion of Persons with Disabilities are incompatible with the regulations on insurance, since they prevent an adequate selection of risks, which is a sound usage and custom in the insurance industry, and make this sector financially vulnerable.

- p.5-6 The President of the Republic filed an adhesive *recurso de revisión* in which he requested that the decision of the judge denying the *amparo* be upheld. He argued that there is no contradiction between the General Law for the Inclusion of Persons with Disabilities and the General Law on Insurance Institutions and Mutual Companies and the Insurance Contract Law. The purpose of the challenged articles is to ensure that persons with disabilities are not denied access to health or life insurance on the grounds that they have a disability. This does not imply that insurance companies must carry out their work in

violation of the provisions governing their activity. However, they must make reasonable accommodations to offer insurance that covers risks corresponding to a generality of people.

p.6-7 The Collegiate Circuit Court that heard the case decided, among other things, to reserve the jurisdiction for this Court, considering that the *amparo* under review contains a constitutionality problem, specifically in relation to articles 2, section IX, and 9 of the General Law for the Inclusion of Persons with Disabilities.

STUDY OF THE MERITS

p.10 The appellant's arguments are not viable for granting the *amparo* because the grievance it asserted is unfounded.

I. Theoretical legal framework of disability under the doctrine of the principles of equality and non-discrimination

p. 10-11 Disability must be analyzed in light of the principles of equality and non-discrimination. The ultimate aim of both national and international legal regulations on persons with disabilities is to prevent discrimination against this social sector and, consequently, to promote equality between individuals.

The norms relating to persons with disabilities cannot be separated from their legal purpose, i.e. the elimination of any type of discrimination on the basis of such circumstance, in the interests of achieving equality between individuals.

A. Disability theoretical framework

p.12-13 The social model holds that the causes of disabilities are social. People with disabilities can have full social participation, but through the appreciation and respect of their differences.

In light of the social model, a disability should be considered as a disadvantage caused by the barriers that the social organization generates by not adequately addressing the needs of people with functional diversities. The individual deficiency is what generates a functional diversity, which when put in contact with a social barrier produces a disability.

p.14 The leveling of opportunities for the full social integration of people with disabilities must be pursued, since only this will lead to full validation of non-discrimination policies. People with disabilities have special circumstances, but similar purposes or needs as the rest of the population. This has led to the creation of the so-called reasonable accommodation.

Reasonable accommodation is a palliative measure that introduces differentiating elements that seek the full implementation of the principle of equal opportunities for persons with disabilities. Accepting that people are different promotes the implementation of positive measures –which implies an action and not just an abstention from discriminating– that attenuate inequalities and allow greater inclusion of people with functional diversity.

p.15 The series of variables that will be taken into consideration to perform an inequality analysis must be selected.

A claim to equality does not imply a scenario of egalitarianism, but the possibility that there is inequality in some areas in order to promote equality in another area that implies a more basic need. This is the requirement of reasonableness in both equal treatment and differentiated treatment, taking into account the comparative importance of the areas under analysis.

B. Disability regulations

p.16 The Constitution establishes a link between the principle of non-discrimination and disabilities as an express classification of protection.

p.19-20 The view of disability as an individual problem faced by persons with disabilities in their personal sphere must be overcome. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities adopts the so-called social model. It emphasizes disability as a social construct determined by the way people are treated in a context. The Convention points out that disability does not arise from the deficiencies that the individual has, but from social barriers that limit their possibility of interacting in the environment with equal opportunity.

The social model and its postulates are not exhausted on a merely doctrinal level but have full binding force. It involves legal principles that are binding in all branches of the law, which is known as the principle of transversality.

C. Jurisdictional criteria on disability

- p.22 Several countries and international organizations have adopted the interpretation that addressing the problem of discrimination against persons with disabilities is not limited to prohibitive actions, but includes the implementation of positive measures.

D. Principles and guidelines on disability

- p.23 The standard of analysis related to disability will follow these guidelines: a) Premises. Principles on which the issue of disability is based and, consequently, the theoretical bases, but of a legal nature, on which the measures implemented are based. b) Instrumental values. Mechanisms implemented in relation to disability, whose teleology is oriented to the search for certain objectives. c) Final values. Goals of the mechanisms related to achieving an optimal contextual situation for people with disabilities.
- p.24-25 The premises of the issue of disability follow the social model, which is based on the following principles: a) Dignity of the person. Full respect for people for the mere fact of being human, without a functional diversity reducing or diminishing such recognition. b) Universal accessibility. Possibility for people with disabilities to participate on equal terms, in all areas and services of their social environment. c) Transversality. The culture of disability must permeate all areas of society, whereby disability should not be understood as an isolated aspect within a context but should be conceived in close relationship with all facets of that environment. d) Design for all. That policies are designed in such a way that they can be used by as many users as possible –both by people with functional diversities, as well as by the rest of the population. e) Respect for diversity. Disability measures are not intended to deny the functional differences of individuals, but precisely to recognize them as the foundation of a plural society. f) Horizontal efficacy. Issues relating to respect for persons with disabilities are directed to both the authorities and individuals. Thus, the principles take a comprehensive approach to those bound by them.

II. Principles of disability in the legal regime of insurance

- p.27 Equality and non-discrimination are values of a constitutional nature that are enshrined in the text of our Constitution. To admit the possibility that a particular area of the legal system represents an exception to compliance with the principles enshrined in the Constitution would lead to the conclusion that it is not binding, which cannot be accepted by the doctrine this Court has been building in the sense that the Constitution is, above all, a legal norm.
- p.29 The principles contained in the Constitution bind all sectors of the legal system, which includes relations between private parties. These principles apply to the sphere of private insurance, as this does not constitute an exception to the principle of transversality for the application of disability provisions, in light of the constitutional principles of equality and non-discrimination.
- p.29 Fundamental rights enjoy full efficacy, including in private legal relations. This horizontal efficacy of fundamental rights means that the courts pay attention to the values underlying those rights, a link between the Constitution and private parties when they resolve a specific case.
- p.30-31 Fundamental rights are fully valid in spheres such as the contracting of insurance, in which principles such as free will and freedom of contract operate. Constitutional principles relating to fundamental rights such as equality and non-discrimination have a dual nature, sharing a subjective and an objective function.

The subjective function implies the conformation of fundamental rights as subjective public rights, which become immunities enforceable in relations of formal inequality, i.e., in relations with the State. The objective dimension of fundamental rights makes them principles that guide the actions of all State authorities –legislators, public officials and judges.

By virtue of their more abstract and general normative configuration, fundamental rights unify, identify and integrate, in a given legal system, the other norms that play more specific functions.

Fundamental rights are also objective norms whose principles permeate the other components of the legal system, guiding and inspiring norms and institutions belonging to it. Even the legal concepts of private law can be modified because they are part of the Mexican legal system and none of the elements that compose it are immune to the constitutional filter.

p.31-32 The legal sphere of insurance -despite the principles of private law that are intertwined in it-, can present nuances in the effort to address the values derived from fundamental rights, which not only become guidelines for the normative development linked to the work of the legislator, but also parameters in the interpretative task of the judges.

The conception of the contracting of insurance as a single and exclusive regime of private law cannot be accepted, especially when it involves areas relating to the protection of human health.

p.32-33 While there are principles such as free will and freedom of contract, it must also be considered that executing contracts has repercussions on the protection of the health of the insured persons, which is a purpose that goes beyond the mere interest of the contracting parties as it is a goal inherent to the existence of the State.

One of the legal interests protected by executing insurance contracts is the right to health, and since this is a value protected both in the Constitution and in international treaties, the sphere of such contracting cannot be restricted to private law. This is one more reason to accept the inclusion of measures relating to persons with disabilities in the insurance scheme.

The foregoing does not imply that the principles of equality and non-discrimination annul the various principles of freedom of contract and free will, but that they survive and must be taken into account when analyzing the reasonableness of the measures implemented in disability matters.

p.33 The parties retain a margin of discretion to execute acts in their relations between private entities and individuals, before which private law retains its essence, but with certain adjustments that are essential to give full normative force to the constitutional text.

p.34 Considering the principles and guidelines on disability, insurance companies are bound by the regulations applicable to persons with disabilities, unless they have a reasonable justification.

The appellant's assertion that the provisions alleged as unconstitutional apply only to the procurement of insurance in the public sphere is incorrect. The objective functions of fundamental rights are translated into principles that influence, permeate and affect the entire legal system. This implies the expansion of the normative force of the Constitution, in particular the rights of equal treatment and non-discrimination.

The provisions regarding disability in accordance with the rights of equal treatment and non-discrimination are applicable in all areas of insurance contracting, whether it involves entities of a public nature or companies of a private nature since fundamental rights enjoy efficacy even in relations between private parties.

III. Study of the challenged provisions

p.35 The articles challenged are not contrary to the constitutional text. These legal provisions aim at eliminating discriminatory practices against persons with disabilities in the contracting of insurance and their non-observance implies discrimination on the basis of disability.

The fifth paragraph of article 1 of the Constitution is categorical that any discrimination on the basis of disability is prohibited, and since article 9 of the General Law for the Inclusion of Persons with Disabilities states that persons with functional diversities may not be discriminated against in the contracting of insurance, it is undeniable that the latter law coincides with the provisions of the Constitution.

p.36 The constitutional prohibition of discrimination on the basis of disabilities must be interpreted as a general principle, which is binding on the basis of its full normative efficacy and can be developed and adapted to the different spheres that are intertwined in a social context.

Since the insurance system is bound to the observance of constitutional principles, including non-discrimination on the basis of disabilities, a provision prohibiting

discrimination against persons with functional diversities in the sphere of insurance cannot be contrary to the constitutional text.

- p.37 The provision of the General Law for the Inclusion of Persons with Disabilities is not in violation of the constitutional principle of equality because a prohibition of discrimination, in an area such as insurance, in which daily practices allow this situation, is coincident with the right to equal treatment, understood as the possibility of a person to develop their abilities, in order to achieve a state of well-being.

Taking into consideration the scope governing life and health insurance and accepting its importance in the development and well-being of a person, given the existence of discriminatory practices, a provision that aims to eradicate them seeks the principle of equality and, therefore, is harmonious with the constitutional text.

- p.38 The challenged articles have a clear constitutional basis, since they coincide with the principles of equality and non-discrimination.

- p.39 The express stipulation of non-discrimination and the qualification of its non-observance as discriminatory conduct are not disproportionate provisions but minimum contents required in the sphere of disability. A prohibition of discrimination in a sphere is the minimum that must be stipulated if the aim is to eliminate discriminatory practices and to seek material equality. Constitutional principles have full regulatory efficacy in all components of the legal system, including the insurance system.

The challenged articles are not contrary to the Constitution, since they seek the development of the fundamental rights that it enshrines. They are disability measures that are reasonable to achieve the principles of equality and non-discrimination.

The Convention on the Rights of Persons with Disabilities establishes provisions that are almost identical to those which were challenged in this case.

- p.44 Because of the prevailing situation in the contracting of insurance for persons with disabilities, it is not possible to interpret a prohibition on discrimination as a negative measure , but as a requirement to implement the necessary adjustments in order to

generate a situation of equality in which a mere negative measure against discrimination makes perfect sense.

- p.46 Insurance companies, in order to respect this model and, therefore, the rules on disability applicable in our country, must design their policies and adapt their actions under the principles of universal accessibility -allowing people with functional diversities to have access to insurance services in equality of opportunity-, transversality -enacting comprehensive policies that encompass the different aspects concerning the development of the person–, design for all -establishing plans that include both people with disabilities and those without functional diversities- and respect for diversity -taking into account the types of disability and the characteristics of each functional diversity for the specific design of policies.

DECISION

- p.51 In the case under review, the appealed decision is upheld, albeit on different grounds.
- The justice system does not cover or protect Seguros Inbursa, Sociedad Anónima, Grupo Financiero Inbursa against articles 2, section IX, and 9 of the General Law for the Inclusion of Persons with Disabilities. The adhesive *recurso de revisión* is moot.