

Subrogation Claims for Terror Damage

Latest Developments

On 28th February, 2012, just days before the onset of a new round of shelling of mortar bombs from Gaza onto civilians in the towns and villages of southern Israel, The Supreme Court in Jerusalem issued a precedential ruling upholding Insurers' right of subrogation against the State Tax Authority regarding damage to private and business properties caused by such terror attacks.

This new precedent (Leave for Appeal no. 10164/09 **Property Tax Authority v. Arieh Insurance Company Ltd.**), if it prevails following a possible additional hearing, changes the relationship between the State Compensation Fund and Insurers.

According to *Property Tax and Compensation Fund Law* ("**the Law**"), enacted in 1961, a statutory compensation fund was established, managed by the General Manager of the Tax Authority. Through this fund, The State of Israel assumes responsibility for all physical damage caused to civilian property as a result of acts of war or terror. In certain defined areas, close to the borders, limited compensation for consequential financial damage may also be awarded.

The traditional position of the Tax Authority is that voluntary/private insurance covering terror or war damage is **primary** to any right of compensation from the fund. As a result, the Tax Authority has only recognized claims in excess of insurance benefits that the injured party received or is entitled to. Subrogation attempts by Insurers have been rejected consistently by the Tax Authority on this basis.

The Tax Authority's position is based on the regulations, section (3) of which states as follows:

Should the sum the *injured party* is entitled to according to these regulations, together with sums the *injured party* is entitled to receive or has already received as compensation for the damage from an insurance company or any other party, exceed the actual damage, the *injured party* will be paid only the balance between such compensation and the actual damage. The said rule will not apply regarding compensation the *injured party* is entitled to as a result of damage to an aircraft.

The Tax Authority viewed this rule as meaning that where insurance coverage was in place, there was no right by law to compensation from the statutory fund. It followed then that there was no right that could be transferred to the insurer and therefore no basis for subrogation.

The new precedent rejects the Tax Authority's interpretation ruling that not only does the regulation not prevent the right of subrogation, but serves to preserve it. The regulation does not expropriate the right of compensation from the fund, but simply transfers it to the Insurer whose right of subrogation is preserved.

The precedent is very significant. The implications of this innovative precedent are that the injured party can now approach the Tax Authority for compensation for his loss even if he holds a valid insurance policy that covers such loss. In addition, if the injured party decides to approach his insurer, the latter now has the right to subrogate the Tax Authority for the insurance benefits paid. It should be noted that the insurer's right applies solely to the amounts the injured party is entitled to receive under the regulations.

In other words, the precedent is important as it transfers the risk back to the statutory fund, whereas up till now the insurer was devoid of subrogation relief. The precedent is still subject to a possible additional hearing that may be granted. Nonetheless, if the precedent prevails, it should certainly affect insurers' assessment of terror risk in Israel.