**Failure by Insured to Implement Measures for Mitigation of Risk -**

**Dismissal of Insurance Claim**

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**Introduction:**

Prior the **Insurance Contract Law** (1981) (also: "the law") failure to take protective measures could lead to a complete loss of benefits. Since then, most court rulings have applied Article 21 of the law, which provides that if the insured fails to take measures for mitigation of risk as stipulated in the contract, the insurer may be entitled to reduced benefits or even be totally discharged from liability.

In **Lloyds Underwriters v. Slutzky[[1]](#footnote-1)** (hereinafter: **"Slutzky"**), which was the first binding ruling by the Supreme Court on this matter, the insured failed to lock his jewelry in a safe as preconditioned in the policy. The jewelry was subsequently stolen in a burglary.

The Supreme Court ruled that Article 21 should apply also where a protective measure was installed but not activated or used, and that failure to install or apply a protective measure should be examined by using the following analysis: 1.Does the insurer market a policy which does not require the risk mitigation measure in question ("alternative policy")? If so – the benefits should be proportional to the premiums charged for this alternative policy; 2. If such alternative policy is not marketed, the question is – whether a reasonable insurer would issue a policy which does not require said protective measure. If so – the benefits would be proportional to the estimation of premiums to be charged for this hypothetical alternative policy; 3.If both questions above are answered in the negative, the insurer will be totally relieved from liability.

It should be noted that the burden of proof in this analysis lies with the insurer. In order to prove that no reasonable insurer would issue a hypothetical alternative policy, a testimony by an actuary or other insurance professional, stating that he/she are unaware of such a policy marketed in Israel, shall suffice.

**Pollack Brothers Import Agencies Ltd. v. The Phoenix Insurance Co.[[2]](#footnote-2)**

**Facts:**

The insured was an importer-exporter whose business was insured in a policy which covered content and inventory damage, burglary and robbery risks and structural damage. In the previous year, the business was broken into, and the insured was indemnified to the sum of 600,000-ILS. Subsequently, the new policy stipulated as a precondition to the insurer's liability for burglary and robbery risks, that an authorized person must perform an internal inspection of the place of business, in any case where there is an alert from 2 zones. Moreover, the manager of the insured was obliged to sign a commitment to do such search as a condition for continuation of coverage. On the night of the 18.12.2012, the business was burgled again. The authorized person arrived and patrolled the scene with a security guard (yet did not pursue an internal inspection), saw nothing suspicious and left the premises. Later on that night, the alarms went off again and 2 security guards surveyed the area, but the insured or its authorized persons were not informed at the time. The insured learned of the burglary on the morning of 19.12.2012.

**The Court Ruled as Follows:**

The Magistrate Court[[3]](#footnote-3) dismissed the insured's claim, and the latter's argument that such internal search of the premises might put lives in danger was declined. The court emphasized that the authorized person did not argue he feared for his safety. The court stated that even if applying the principles of good faith and public policy, it would at best limit the interpretative scope of the condition in the policy but would not cancel it. The insured was found to have acted in bad faith, in light of the compensation received for the first burglary, for consciously signing a personal and explicit commitment by a manager to meet the condition, and for later arguing against it. Moreover, the court accepted the testimonies of the insurer's underwriter and an expert on insurance risk and security surveys, which, according to both, the insurer would not have insured the business without the condition and that no other reasonable insurer would.

The insured appealed to the District Court[[4]](#footnote-4), on 2 grounds: 1. That the condition is unlawful, unreasonable and should be cancelled; 2. The insurer did not meet the burden of proof as required by the **Slutzky** ruling, and that there is no contributory negligence. The District Court dismissed the appeal, finding the insured's conduct to be in bad faith, and that he should be estopped from raising those arguments. Moreover, the court found that the condition is a common and well-accepted one, that there are no circumstances which justify cancellation on grounds of public policy and that the Insurer has met the burden of proof with the testimonies submitted.

The insured requested a leave to appeal, once again, to the Supreme Court, which dismissed the request. The court saw no reason to interfere with the Magistrate and District Courts judgements, concerning both the legality of the condition and the testimonies of the insurance professionals as being sufficient to satisfy the burden of proof. Moreover, the Supreme Court concurred with the Magistrate and District courts, that the condition could have been met also in a scenario of fear for personal safety by calling the police to the scene, and that the insured acted in bad faith.

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1. R.C.A 3260/10 **Lloyds Underwriters and others v. Eliyahu Slutzky** (2013) [↑](#footnote-ref-1)
2. R.C.A 2000/17 **Pollack Brothers Import Agencies Ltd. v. The Phoenix Insurance Co**. (2017) [↑](#footnote-ref-2)
3. C.C 36920-11-12 **Pollack Brothers Import Agencies Ltd. v. The Phoenix Insurance Co.** (2015) [↑](#footnote-ref-3)
4. C.A 9055-02-16 **Pollack Brothers Import Agencies Ltd. v. The Phoenix Insurance Co.** (2017) [↑](#footnote-ref-4)