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To our friends,

We are pleased to send to you hereunder a brief except of a recent decision by the Israel Supreme Court in the matter of Maccabi Health Services v. Dubek Ltd., and Clalit Health Services v. Dubek Ltd., Philip Morris et. al. In its 70 page judgment the Court resolved a decade old legal dispute whether sick funds providing health services to its members (who count about 85% of the population of Israel) are entitled to claim damage from cigarette manufacturers as a direct cause of action, without disclosing the name of the patients on providing details of the treatments accorded to them. The court dismissed the appeals and held in favor of the cigarette manufacturers.

The total amount of the claims (after linkage of the original sum and interest) is estimated to be in the area of NIS 20 billion. The present rate of exchange is US$ - NIS 3.40.

Dubek Ltd. was represented by Naschitz, Brandes & Co.

Yours sincerely,

P.G. Naschitz, Adv.

Signature sign

Tel-Aviv, July 17 2011

Israel Supreme Court rejects clams by Health Funds against tobacco manufacturers.

1. **The lawsuits**

In 1998 **Maccabi** Health Services ("**Maccabi**") filed a lawsuit against Dubek and Mr. Zorach Gehl, personally, in which it petitioned for a declaratory judgment stating that Dubek must compensate it for the costs that it expended in providing health services to its members who became ill from smoking cigarettes that were produced, imported or marketed by it. The costs which Maccabi asked for a declaration of the duty to compensate was NIS 233,000,000 annually for the seven years that preceded the lawsuit (a total of: NIS 1,631,000,000) at its value on the date of the filing of the lawsuit (1998) and compensation in the same amount from the date of the filing of the lawsuit onward.

Clalit Health Services ("**Clalit**") filed a lawsuit against Dubek, and a number of foreign cigarette makers, for the amount of NIS 7,600,000,000 (at the value at the time of the filing of the lawsuit in 1998 as compensation for money to be paid by the cigarette companies for the costs of treatment that it invested in the treatment, prevention and therapy of bodily damages that were incurred by the company due to smoking related illnesses between the years of 1998 – 1990 as well as compensatory penalties and a declaratory relief stating that the cigarette companies were jointly and severally responsible for all the damages that would be incurred by Clalit in the future for the damages to the company due to cigarette related illnesses, as well as a restraining order and a mandatory injunction prohibiting the adding of dangerous substances to cigarettes, the halt of the marketing of cigarettes containing harmful substances and other similar relief. The amounts of the lawsuits in their current value, equal, at a careful estimate over NIS 20 billion. Our office petitioned, in 1998, the dismissal *in limine* of the Maccabi lawsuit where the central arguments were:

A) A health fund like Maccabi cannot file an action for the treatment of injuries of members of the fund in its own name without specifying the names of all the members of the fund who received the alleged treatment and to disclose all of their medical records;

B) A "mass" action of this type, where the individual members of the fund are not parties to the case, violates the rights of the defendant (Dubek) since it has no way of investigating each and every case substantively to determine if the reason for the alleged illnesses are related to smoking, or if there were other factors, such as genetic factors, contributory negligence, awareness and willingly assuming a risk, etc, that were involved - where the manner in which the "collective" lawsuit was filed prevented Dubek from being able to properly defend itself.

C) Furthermore, it was argued that all of the smokers smoke while aware of the risks they were taking, and by such their behavior constitutes a voluntary assumption of a risk and a high degree of contributory negligence, and further that smoking is one of the corollaries of modern society which is available to everyone such as other hazardous products and substances such as unsaturated fats, cheeses, eggs, alcohol, etc.

2. **Ruling in Maccabi and Clalit cases**

The District Court (the late Judge Adi Azar) accepted the arguments in their entirety and dismissed the case *in limine* on 15.9.99.

In contrast, all the defendants in the Clalit case also asked for a dismissal *in limine*. In a hearing held on 16.2.04 Judge Yosef Shapira of the Jerusalem District Court dismissed the petition and held that the case cannot be dismissed *in limine* without first hearing evidence.

Maccabi appealed the ruling to the Supreme Court, and Dubek and the cigarette companies asked for leave to appeal the decision. The appeal and the motion for leave to appeal were consolidated in a hearing before the Supreme Court, and a hearing was held in which detailed arguments were submitted by all the parties. The oral hearing was held before a panel of Justices consisting of Ayala Proccacia, Miram Naor and Esther Hayut. The ruling on the appeal was issued on the last day on which Justice Ayala Proccacia was able to sign the ruling before leaving for retirement.

3. The arguments in the appeal in the Supreme Court

The main argument of Maccabi and Clalit was that the cigarette companies, in coordination with each other, are causing mass addiction of wide segments of the population including members of the health funds. According to the argument, the companies actions are designed to mislead the public and conceal information regarding the risks inherent in smoking cigarettes, by breaching the duty of disclosure to which they are obliged by law; and for this reason, so it was argued, the liability of the cigarette companies to the victims is joint and severable. Smoking causes serious physical damage to smoking addicts and the costs involved in treating and preventing those diseases – according to the argument, give the health funds a direct cause of action under tort law; as well as an action according to section 22 of the National Health Law. According to the argument, this cause of action is a direct action and not a subrogation claim. Therefore, according to allegations made by the health funds, the cigarette manufacturers do not have any defenses which might have been available to them against individual plaintiffs, such as contributory negligence and voluntary risk taking.

4. The decision on the appeal

In the very detailed ruling, spread out over 70 pages, issued unanimously, the Supreme Court adopted all of our arguments and dismissed all of the claims that were raised by the health funds and held:

A) The statements of claim on their face do not show a cause of action since even if the plaintiffs could prove all of their allegations they did not have a legal basis for the claim since the health funds do not have a direct right of action or any legal or factual standing to sue the cigarette companies.

B) In light of the tremendous efforts and means that the parties invested in the preliminary proceedings in the District Courts it would not be proper to prevent a decision by the Supreme Court and return the deliberations to the District Court. For this purpose the Supreme Court acted out of the assumption that it was accepting all the factual assertions made by the health funds, including the fact that the cigarette companies misled the public about the dangers of smoking and that they foresaw that the health funds would need to invest enormous sums for treatment and therapy, and that the cigarette manufacturers, and the activities that they took to promote their sales to the public could cause harm to smokers and to the health funds as secondary victims who are forced to help smokers who are suffering from smoking related illnesses.

C) The health funds brought statistical data regarding cancer victims showing the degree to which smoking contributed to the outbreak of the disease during specific years; and detailed tables regarding the costs required for treatment and therapy.

D) As part of the detailed ruling the court also *inter alia* deliberated on the issue – what are the legal issues that arise regarding class damages and the method of dealing with them in comparative law and what are the lessons that could be learned from this within the desired legal framework.

E) As for the key question whether in light of the provisions of section 22 of the National Health Insurance Law do the health funds have a right to sue, by an independent lawsuit, on the basis of a cause of action that derives from other statutes – the court answered (section 33 of the ruling) that the legislature did

not intend to stop the health funds from suing for compensation of their damages. According to other reasons by virtue of the general law, insofar as these rationales are available in terms of their substance.

F) As part of the answer to this question the court asked itself if the health funds have any tort claims or unjust enrichment claims under the statements of claim. The court analyzed the complaints, both in respect to direct treatment of patients who are members of the funds, as well as "systemic damages" as part of the preventive medical services that are not identified especially with one specific victim (section 35). After a thorough analysis of the issue the court held (section 37) that **"from a theoretical standpoint, being that they are the providers of treatment for the damage, the health funds do not fall into the category of a "direct victim" of the wrongs that were allegedly committed by the cigarette companies against smokers. Their damages, which result from the smoking related illnesses of their members, are more within the framework of "circumstantial damage" or "secondary damage" that derives from the harm incurred by the members of the funds who suffer because of smoking cigarettes"**.

This led to the rule (section 41) that a lawsuit of a benefactor against the person who caused the injury (tortfeasor) for compensation of the help given is stipulated on proving the liability that the tortfeasor has to the victim, by investigating the scope of this liability, and examining the scope of the harm caused to the victim that bears a causal connection to the violation.

G) Insofar as we are talking about the right of the benefactor for reimbursement, the lawsuit of the benefactor for reimbursement of the benefit is subject to proving the existence of legal liability of the tortfeasor to the victim, and the duty of the tortfeasor to compensate the victim for the damage caused to him due to a violation of said liability, within the boundaries of the benefit that was given. Therefore the threshold needed in order to have a cause of action for a lawsuit by the benefactor against the tortfeasor, is the existence of a legal

liability of the tortfeasor towards the victim in respect to the damage that was treated.

In continuation, the court held that a fundamental principle in tort law is enabling a defendant to assert defenses against the victim (section 45) that would exempt it from liability or would minimize its scope. These defenses are available to the "tortfeasor" also against the benefactor.

The court (section 50) so summarized:

"The lawsuit of the benefactor against the tortfeasor is stipulated, therefore, as a rule, on proof of the legal liability that the tortfeasor has to the victim, on proof of the violation of such liability, and on proof of the damage caused as a result of the breach. In this context, the tortfeasor may raise defenses that it has against the victim, both as to the issue of liability and to the issue of the scope of the damage".

H) **Issue of direct liability**. The court held that **"there is no doubt that there is a conceptual and concrete duty of care that the cigarette companies have to the direct victims of smoking"**, subject to various defenses that the tortfeasors can assert against the victims (section 52). However, the issue that is raised is whether this liability exists also towards "distant parties, such as those who are healing the harm incurred by the smoking public? The court answers this question (section 54) by stating that **"due to the lack of sufficient proximity there is no direct duty of care by the cigarette companies to the health funds as the benefactors of the harm"**.

I) The court noted (section 59) that the statements of claim are lacking any reference of the liability of the cigarette companies to the individual victims; therefore, the compensation requested for treating the damage bears no connection to the specific damage that was caused by the companies, while this data is essential for defining the correct scope of the lawsuits for

compensation of the benefactors. Therefore **"the health fund lawsuits lack essential components required in order to ground them".**

J) For the purpose of the liability under section 22 of the National Health Insurance Law the court (section 60) stated that the relief that is available to the health funds is basically a subrogation claim and that **"indemnification claims based on section 22 are conditioned on the existence of the legal responsibility of the tortfeasor towards the victim and the scope of this liability"**. The meaning is that the defense claims that the tortfeasor has against the victim serves him as well against the benefactor". This rule in fact comes from the road accident compensation law, but the court held that **"there is a clear connection between the standing of the benefactor under the physical injury compensation law and that of the benefactor under section 22 of the National Health Insurance Law".**

K) The final outcome (section 66) is that **"the outcome is that according to practical law, both lawsuits of the health funds must be dismissed *in limine* due to the lack of a cause of action**".

In continuation in the chapter "desirable law – a look to the future" Justice Proccacia discusses the need for **"upgrading the existing legal molds and creating new legal molds"** in order to deal with mass damages where it is hard to pinpoint the exact persons responsible and the causal connection – such as victims of smoking, asbestos, climate change, etc. For this purpose the court recommended statutory intervention in order to achieve the objectives of the tort laws regarding administration of justice on the one hand and preventing disproportionate harm by the ability to prevent and minimize the damage (section 70) on the other. The court stated (section 74) that **"these are clear questions of statutory policy, that are best left to the broad perspective of the legislature and a comprehensive resolution by it"**. And that (section 85) **"the dilemma cannot be resolved by judicial means without the intervention of the legislature",** and that (section 86) **"due to**

its importance, it is important to give this topic the priority it deserves in the legislative arena".

L) Justice Miram Naor (who is a candidate to serve as the next President of the Supreme Court, unless the judicial appointment committee ignores the practice of appointing the President of the Supreme Court on the basis of seniority) joined the ruling by Judge Proccacia while stating that part of the grounds for the health fund lawsuits are proper but the method for submitting them did not meet the criteria set by law said (section 7 of her ruling) that even a class action cannot be filed in smoking cases:

"The class action is not available for the victims, in this case victims of smoking". After the filing of these lawsuits the Class Action Law 5766 – 2006 was enacted which provides a closed list of issues which could be dealt with in the context of a class action. As a rule, physical injuries are not among them". Nonetheless there are exceptions to this rule, such as class actions for environmental hazards, and in specific circumstances – under the Consumer Protection Law, even these exceptions are rejected in respect to the issue of smoking. The court recalled that when lawsuits involving smoking were first initiated, a collective lawsuit was filed, in Weisberg[1] and the District Court allowed this procedural method; a motion for leave to appeal the decision of the District Court was dismissed, and at the end a settlement was reached with the plaintiffs, whose names were listed, which left a narrow opening for the possibility of adding other plaintiffs. Even in respect to these additional plaintiffs, it appears, there is no longer any option to reinstitute this proceeding.

M) Further in respect to reinstituting the proceeding in other ways Judge Naor implied that "**the plaintiffs must make a new evaluation and decide themselves how to proceed. . . the dismissal of the actions as drafted does not in my opinion constitute a shutting of the doors. The plaintiffs should**

[1] Motion for leave to appeal 2291/99 Dubek v. Weisberg

act in their judgment, should weigh the risks and chances, as they did in the present case. . . <u>the plaintiffs</u> wanted to take an impossible shortcut, <u>a shortcut that violated the rights of the defendants to raise defense claims such as voluntary risk taking or contributory negligence</u>".

N) Justice Naor also joined the holding that there is no possibility, under the present state of law, to file a class action for personal injuries (section 15 of the ruling).

4. Summary and conclusions

This is a ruling with unrivaled widespread and precedent setting implications and rightfully the ruling is described as the most important ruling handed down in the laws of personal injury for a long time. The ruling has far reaching implications not only in the field of torts but also in the rules of civil procedure and law of evidence, public law and jurisprudence. There is no doubt that the ruling will serve as a cornerstone for many rulings in the future. The many fundamental issues dealt with in the ruling are – that a subrogation claim cannot be made for sums that were expended by any bodies (and not just health funds) helping repair the injuries of others, as a direct lawsuit, or without giving all of the details of the beneficiaries or without allowing the defendants to raise defenses that are available to them if the action would have been filed by each and every one of the beneficiaries; such as contributory negligence, voluntary assuming of the risk, genetics, and expiration of statute of limitations. The Supreme Court accepted each of the arguments that we raised both before the District Courts (Tel Aviv and Jerusalem) and before the Supreme Court.

5. The Future

The court hinted very broadly, and even more so, that the legislature must consider a statutory amendment of the situation and it can be assumed that the legislature will in fact do so, whether as governmental bill or as a private proposed law. It can also be assumed that social pressure will contribute towards this cause. However it cannot be

assumed that this type of legislation, if and when enacted, will change the outcome of the ruling in respect to the past. The possibility also exists that the health funds will take their chances at filing a further hearing.

The ruling is a historic achievement that will leave its mark both in respect to the direct participants and also on the broader aspect of the general law for years to come, not to speak about the enormous savings gained by the insurance companies and Dubek by not having to pay monstrous and devastating sums of tens of billions of shekels, if the outcome would have been different.

Signature sign