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# SYSTEM OF CLAIMS ARISING FROM THE INSURED EVENT OCCURS DUE TO THE UNLAWFUL BEHAVIOUR OF THIRD PARTIES

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**SUMMARY**

The article is concerned with problem of "coexistence" of contractual and tort claims under circumstances where a person is damaged as a result of the unlawful behaviour of third parties, which is also the insured event. The author analyzes the system of claims arising from this purpose, in a projection on various types of insurance contracts: property insurance, life and health insurance, insurance of civil liability. The article is defined: in which cases the competition of tort and contractual claims are permitted at the discretion of the authorized person, and in which – on the grounds of legal regulations.

**Key words:** policy holder, insurer, competition of claims, subrogation, legal recourse, compensation of damage, insurance compensation.

## СИСТЕМА ТРЕБОВАНИЙ, ВОЗНИКАЮЩИХ ПРИ НАСТУПЛЕНИИ СТРАХОВОГО СЛУЧАЯ ВСЛЕДСТВИЕ ПРОТИВОПРАВНОГО ПОВЕДЕНИЯ ТРЕТЬИХ ЛИЦ

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**АННОТАЦИЯ**

Статья посвящена проблеме «сосуществования» договорных и деликтных требований в условиях, когда лицу причиняется ущерб вследствие противоправного поведения третьих лиц, что одновременно является страховым случаем. Автор анализирует систему требований, возникающих при этом, в проекции на разные виды договоров страхования: страхование имущества, страхование жизни и здоровья, страхование гражданско-правовой ответственности. В статье определяется: в каких случаях конкуренция деликтных и договорных требований разрешается по усмотрению управомоченного лица, а в каких – на основании законодательных предписаний.

**Ключевые слова:** страхователь, страховщик, конкуренция требований, суброгация, регресс, возмещение ущерба, страховое возмещение.

**Statement of the problem.** At first glance, the situation is not difficult when the person is damaged as a result of the unlawful behaviour of third parties, which is also the insured event. However, because at that "mechanisms are included" of both insurance (contractual), and tort law, emerge some problems, both theoretical and practical nature.

**The relevance of the research topic.** In the current national legislation there are no general provisions on the "coexistence" of contractual and tort claims under circumstances, where a person is damaged as a result of the unlawful behaviour of third parties, which is also the insured event. Judicial practice also does not give an unambiguous answer to the question, in which cases the competition of tort and contractual claims are permitted at the discretion of the authorized person.

**Status of research.** This problem was not the subject of research by Ukrainian scientists. The few articles devoted to it concern, as a rule, only the amount of insurance payments and the subject composition of the legal relations of insurance.

**The object of the article** is the system of claims arising from this purpose, in a projection on various types of insurance contracts: property insurance, life

and health insurance, insurance of civil liability.

**The purpose of the article** is the answer to the question in which cases the competition of tort and contractual claims are permitted at the discretion of the authorized person, and in which – on the grounds of legal regulations.

**Presentation of the main material.** If the person **insured its property** from damage by a third party, then when the insured event occurs, in the victim arise two claims at the same time: on compensation of damage under the tort liability and on effecting of insurance payment within the insured amount under the insurance contract. In fact, we are dealing with competition of claims (better known in the scientific literature as "competition of complaints"). Often under the competition of claims is understood a situation when as a result of the same unlawful behaviour, occur and exist in parallel several legal rights which have the same purpose and are directed to the same subject (it is a competition in a narrow sense).

In certain situation the victim has two rights of claims, aimed at the satisfaction of the same interest (compensation of damage), but are directed to different debtors (the delinquent and the insurer). Realizing one of these rights leads to the termination of the other, if the interest, which is mediated them, and fully satisfies in the exercise of the first competing rights. So, here we are talking about the competition in the broadest sense. For example, soviet scientists, such as A.Yu. Kabalkin and V.P. Mozolin adhered such view on the phenomenon of competition of claims, defining it both through the selection of the most appropriate respondent (the consumer's right to choose between the producer and the seller in the trade of the goods of substandard quality), and through the choice of the most suitable for the presentation of the claim (contractual or tort claim against the manufacturer/seller in the case of damage to purchased goods of substandard quality) [1].

First of all, it is necessary to determine whether has the victim right (the policy holder) to choose to whom go with the claim in case of damage to his property: to the delinquent or to the insurer. Because we are talking about the implementation of the subjective civil rights (the right of claim to the insurer and the right of claim to the delinquent), then is triggered the principle of autonomy of will of the authorized person. In accordance with this principle, subjects of civil-law relationships exercise vested civil rights at their discretion. In other words, nobody except the holder of the right can resolve the problem about implementation or non-implementation of subjective civil rights, and about the time when this right should be exercised. Thus, in the abovementioned case, the following behaviours of the authorized person are possible: 1) the policy holder refers only to delinquent and he does not implement the right which arising under an insurance contract; 2) the policy holder puts a contractual claim for payment of insurance compensation. After such payment in the insurer arises right of subrogation with respect to causer (the subrogation, as we know, is called the transfer from the policy holder to the insurer, who has paid insurance compensation within amount paid of the right to claim that the policy holder has to the person, who caused the damage); 3) in the case of failure of the insurance compensation (it is limited by the size of the insured amount) the policy holder in the future refers also to the delinquent and receives the difference between the amount of damage and the amount of insurance compensation. In the insurer arises the right to refer to the causer by way of subrogation.

Of course, specified list of behaviours is not exhaustive, but whichever option will be choose by authorized person, always comply with such rules of "concentration" in his respective contractual and tort claims: 1) the policy holder himself determines which right to implement; 2) if the policy holder realizes both the rights to the extent that the sequence of such realization is defined by him; 3) in the insurer in the case of payment of insurance compensation occurs the right to subrogation against the causer in the amount of insurance payment; 4) the exercise of rights by the policy holder cannot bring to his unjust enrichment, and thus – to increase the volume of delinquent's liability.

However, the abovementioned rules of "coexistence" of contractual and tort claims concern only to property insurance contracts. **Life and health insurance (private insurance)** is based on different principles. In the case of damage to life and health also parallel exist two obligations: contractual and tort, but in this case the competition of claims does not arise. Insurance payment under a contract of personal insurance is made regardless of compensation of damage. In other words, if the individual insured life and health from damage, then when the insured event occurs, the victim is not free of the possibility to obtaining of insurance payments and compensation from the guilty person. Accordingly, the subrogation in personal insurance is excluded.

In favour of the last statement in the literature two arguments are given, which you should accept. First of all, attention is directed to the fact that the change of the creditor is not allowed in the obligations, which are closely associated with identity of the creditor, but such obligations arise in causing of damage to life and health. Secondly, under the contract of personal insurance the insurer's obligation to pay the insured amount is not aimed to compensation of damage, if is the case in property insurance. The size of the payment is irrespective to the real expenses of the victim to the recovery, such as his health, and depends on the size of the insured amount specified in the contract [2].

As for the system of claims that arise in cases where there are **liability insurance contracts**, it differs both from life and health insurance and property insurance. Here between the policy holder and the third party (the victim) arise tort relationship (at that the creditor is not the policy holder, and a third person – the victim), as well as there are contractual relations between the policy holder and the insurer (the creditor – the insurer).

The first question that should be determined: what place is given to the victim in a contractual relationship (the person who was damaged by the policy holder). The answer depends on can we qualify the liability insurance contract as a contract for benefit of third person. In the literature has not developed a unified point of view on the matter. For example, some scientists stand their ground that a liability insurance contract under any circumstances cannot be considered as the contract for benefit of third person, because beneficiary in such contract is assigned not by the will of the parties, as in the classic structure, but mandatory by law [3]. Other researchers, on the contrary, believe that

the liability insurance contract should be recognized as a contract for benefit of third person, pointing to inexpediency restriction of victim in their ability to appeal to the insurer of delinquent [4].

There is a third point of view, which is supported by the majority of scientists and that is the most reasonable. It lies in the fact that it is necessary to separate two models of the liability insurance contract: simple and complex [5]. In a simple model involves only two persons – the insurer and the policy holder. The victim remains outside the framework of insurance relations and have no right to demand from the insurer's payment of compensation. In a complex model there are: the insurer, the policy holder and the beneficiary, which is always a victim. In this case the insurance contract is a contract for benefit of third person: the victim is entitled to demand on the insurer of the delinquent.

The first model is proposed to apply in cases of voluntary liability insurance when the insurance contract is a private matter of its parties, and the victim has any rights under this contract. Such contract does not pursue socially significant goals. Its conclusion is due to the personal need of the policy holder to protect their interests in case of causing of damage to another person. The second model of contract is intended to guarantee the compensation of damage to the victim. Under such conditions the state represented by the legislator considers that it necessary to assert more guarantees to the victim than he has in comparison to the normal mode. Here, of course, the question is about the compulsory liability insurance. Enforcement of the beneficiary in all insurance contracts of tort liability, without exception (in other words recognition of all such contracts as contracts for benefit of third person) leads to a narrowing of the principle of contractual freedom without reasonable foundation, and is represented an unwarranted intrusion of government into the private affairs of parties to business transactions [6].

Thus, it turns out that in the case of damage by the person whose liability is insured under a contract of compulsory insurance, the victim at the same time has two claims: for compensation of damage under the tort liability and for payment of compensation within the insured amount on the content of the contractual obligation. However, the parallel existence of these rights is not excluded in cases of voluntary insurance responsibility, when the parties, which are guided by the principles of contractual freedom, expressly provide in it the victim's right to demand compensation directly from the insurer and thus use the model of contract for benefit of third person.

On the basis of the foregoing, naturally another question arises: can the victim, when he is endowed with both rights of claims, independently determine which of them he carried out, and thus satisfy the interest in compensation of damage? In other words, how should be solved competition of victim's rights in this case?

Unfortunately, the current legislation of Ukraine does not give a clear answer to this question. The Article 1194 of the Civil Code of Ukraine [7] (hereinafter – CC) contains only a general statement that the person, who has insured its civil liability in the event of deficiency of insurance payment (insurance compensation) for full compensation for the damage to them is obliged to pay to the victim the difference between the actual size of damage and the insurance payment (insurance compensation).

As one can see, at the legislative level the standard situation is regulated, when after causing of damage (for example, occurrence of the insured event by M.V.A.) the victim makes a claim for payment of insurance compensation to the insurer, and then in the event of insufficient amount of the insurance compensation pushes claim against the direct delinquent, based on the provisions of Article 1166 of the Civil Code. There are many similar examples in the jurisprudence.

At the same time, it cannot be exclude the situation, where the victim immediately addresses their claims for delinquent. Motives can be different, for which the victim waives the right to receive of insurance compensation: the desire to "punish the delinquent", an enviable property position of the delinquent and so on.

Consider that the victim has a choice under a contract of voluntary liability insurance, which was built on a construction "for benefit of third person". In other words, the competition of rules is allowed at the discretion of its own. Any legal restrictions or theoretical remarks on this subject are not available.

As for the cases of compulsory insurance of civil liability in accordance with the decision of plenary assembly of the High Specialized Court of Ukraine for Civil and Criminal Cases "On some issues of application of the law by the courts in resolving disputes about compensation of damage caused by a source of increased danger" [8, p. 16] on presentation of claims about compensation of damage resulting from M.V.A., directly to the face, who carrying out activities, which is a source of increased danger, the court is entitled to involve in insurance company (insurer), which insured the civil liability of the vehicle owner only in the manner prescribed by Article 33 of the Civil Procedure Code of Ukraine. Here the basis for refusal in the claim to the delinquent in the appropriate amount is non-claims against the insurer under the conditions for the recovery of damage from him.

The highest court also noted, that the issue of compensation of damage by the insurer decided depending on the consent expressed by him on such compensation, and performance or failure to perform under Article 33 of the Law of Ukraine "On compulsory insurance of civil liability of owners of vehicles" [9] the obligations to provide in written to insurer with whom the relevant contract is concluded, news about M.V.A. of a standard form. In the absence of such consent, caused damage to the victim shall be compensated by the insurer within the stipulated insured amount in the insurance contract. The court of first instance found out the presence of such consent of the policy holder and the fulfilment of the obligation upon notification by the insurer, in this connection to the case can be attracted the insurer.

In turn, the Supreme Court of Ukraine expressed a position in the process of review of judicial decisions based on the unequal substantive enforcement, according to which by virtue of the principle of the free exercise of the rights and in cases of compulsory liability insurance the victim decides how his interest should be satisfied: by addressing claims exclusively to the person, who caused the damage, about his compensation; or by recourse to the insurer, in which the person, who caused the damage, insured its civil liability with a demand for payment of insurance compensation; or by addressing to the insurer and in the future to the person, who caused the damage, if eligible by Article 1194 of the Civil Code of Ukraine [10].

In our opinion, the approach of Superior Specialized Court of Ukraine is deemed warranted as it provides required balance between the legitimate interests of participants in civil law relations. In the case of satisfaction of claims against delinquent in the presence of foundations of compensation of damage through the insurer, the property interests of the policy holder are significantly violated, to whom the law imperatively obliges to insure their responsibility.

And the last question, which requires determine under the outlined topic: Does insurer have the right of subrogation in the case of the performance of insurance payments to the victim by him? The answer of it also does not found clear legislative consolidation. On this subject there are opposite opinions in the literature. However, it should support the position of those scientists, who believe that under condition of arising subrogation claims in the insurer subject to the policy holder, the insurable interest is absent in the policy holder – he still must pay. In other words, if such transition was – it would be contrary to the essence of insurance liability, the policy holder would have to pay insurance payments, to reimburse the victim's damage, which are not covered by insurance compensation, make subrogation payments to the insurer [11].

Separately, it should be noted that the prevention of subrogation in liability insurance does not mean inability to use a different construction – right of legal recourse. The main difference between legal recourse and subrogation is that the right of claim to the delinquent occurs in the new relationship and a replacement of the authorized party in the already existing liability occurs at the subrogation.

The right of legal recourse should arise with the compulsory liability insurance in cases prescribed in terms of legislation and related to violation of the policy holder or insured generally accepted behavioural values (for example, a particularly dangerous violations in road traffic: causing of damage under the influence of alcohol). In other words, the legal recourse should be an exception from the general principle of compulsory liability insurance, according to which the purpose of the insurance relationship – protection of interests of both the victim and the policy holder or insured, who were the delinquent. At the legal recourse the legislator refuses to protect the latter providing it only to the victim [12]. The legal recourse performs here kind of penalty function in relation to the delinquent [13].

The legal recourse in the field of compulsory insurance of civil liability differs from similar institutions operating in other civil law relations and, as a rule, not having any restrictions. Here the right of legal recourse is clearly outlined very specific legal facts, the legislative list of which is confidential [12] (for example, the Article 38 of the Law of Ukraine "On compulsory insurance of civil liability of owners of vehicles" [9]).

**Conclusions.** Based on the foregoing, it can be concluded that the system of claims that arise when the insured event occur due to the unlawful behaviour of third parties, depending on what interests are insured. Contractual and tort claims are in all types of insurance under outlined conditions. In property insurance such claims are competing with each other and the creditor (same as the policy holder) chooses – the order in which they will be carry out (at his sole discretion permits competition of such claims). In the case of payment of insurance compensation to the policy holder by way of subrogation the right of claim transfers to the delinquent. The competition of contractual and tort claims do not arise under life and health insurance, each of them can be satisfied regardless of the second; the subrogation here is excluded. In case of voluntary liability insurance with the application of construction of contract for benefit of third person, the competition of claims is permitted at the discretion of the victim. In the case of compulsory liability insurance in the first place should be a claim to the insurance company. The subrogation under liability insurance is not valid, that does not mean the impossibility of using a different construction – the right of legal recourse to the compulsory liability insurance in statutorily prescribed cases. Many of discussion matters are not clearly resolved at the regulatory and legal level; therefore, the relevant rules must find their direct consolidation in the current legislation of Ukraine.

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# СОВЕРШЕНСТВОВАНИЕ ПРАВОВЫХ ОСНОВ БОРЬБЫ С ТЕРРОРИЗМОМ В УКРАИНЕ

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**АННОТАЦИЯ**

Статья посвящена изучению правовых основ борьбы с терроризмом в Украине. Обосновано, что эффективность деятельности относительно предотвращения, выявления, прекращения и минимизации последствий террористической деятельности в Украине находится в прямой зависимости от нормативно-правового обеспечения такой деятельности, которое, в свою очередь, необходимо усовершенствовать. Предложены направления совершенствования правовых основ борьбы с терроризмом в Украине, среди которых: приведение положений Закона Украины «О борьбе с терроризмом» в соответствие с требованиями ратифицированных Украиной международных нормативно-правовых актов; необходимость четкого определения содержания таких понятий, как терроризм, террористическая деятельность, террористический акт; проведение унификации положений Закона Украины «О борьбе с терроризмом» с Законом Украины об уголовной ответственности и другими законами Украины; включение уголовной ответственности за терроризм во всех его формах и проявлениях, определённых международным сообществом, в Уголовный кодекс Украины и т. п.

**Ключевые слова:** терроризм, террористический акт, террористическая деятельность, нормативно-правовое обеспечение, усовершенствование правовых основ, борьба с терроризмом.

## IMPROVING THE LEGAL FRAMEWORK FOR FIGHT AGAINST TERRORISM IN UKRAINE

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**SUMMARY**

The article is dedicated to the study of the legal foundations of the fight against terrorism in Ukraine. It has been substantiated that the efficiency of the activities aimed at preventing, detecting, terminating and minimizing the consequences of terrorist activity in Ukraine directly depends on the normative and legal provision of such activity, which in its turn needs to be improved. Directions of improvement of the legal basis of the fight against terrorism in Ukraine have been proposed, among them there are the following: bringing the provisions of the Law of Ukraine "On Fight against Terrorism" in line with the requirements of international normative legal acts ratified by Ukraine; the need for clear definition of the concepts terrorism, terrorist activity, terrorist act; unification of the provisions of the Law of Ukraine "On Fight against Terrorism" with the Law of Ukraine on Criminal Liability and other laws of Ukraine; the inclusion of criminal responsibility for terrorism in all its forms and manifestations defined by the international community to the Criminal Code, etc.

**Key words:** terrorism, terrorist act, terrorist activity, regulatory support, improving the legal framework, fight against terrorism.

**Постановка проблемы.** Проблема борьбы с терроризмом все чаще становится предметом обсуждения среди политиков, практиков, теоретиков как на международном, так и на национальном уровнях. В частности, ещё в марте 2016 года глава Европола Роб Уэйнрайт на встрече министров юстиции стран-членов Европейского Союза в Брюсселе заявил, что Европа оказалась перед