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Substantive legal meaning of procedural behaviour of the person participating in the case

Scientific speciality 5.1.3. Private law (civilistic) sciences

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Introduction

Relevance of research. It is generally believed that non-administrative procedural actions are committed by persons participating in a case with an intention to affect a civil case in court, and to ultimately achieve victory in a dispute. Being legal facts of procedural law, actions committed by litigators in court can only cause procedural consequences.

In turn, legal facts of substantive law are basis for emergence of civil relations. These, among others, include various actions of subjects of law. However, non-administrative procedural acts are usually not included in grounds for emergence, change and termination of civil legal relations. The main reason for this is the idea of a civil process being an secondary, side activity: performing a side, serving function to substantive right, a civil process does not provide litigators with any other opportunity than to establish and protect a civil right that arose before and out of process. Therefore, it is impossible to assume that a change in substantive civil rights may be due to procedural activity of litigators, and their actions can be seen as legal facts of substantive law.

At the same time certain provisions of the current civil legislation are direct evidence of impact of procedural actions on substantive legal relations between litigators. Moreover, case law approves an approach according to which a procedural action can be aimed at the emergence, change and termination of civil rights and obligations.

Existence of a number of legislative structures according to which substantive consequences depend on procedural actions, as well as precedents, which state the existence of civil consequences of litigants' procedural behavior, predetermines the question of existence of a substantive effect of litigants' procedural activity in Russian law.

The lack of theoretical studies on this issue and, as a result, unresolved theoretical and practical problems associated with substantive consequences of procedural activities, justifies relevance of this study.

The extent of prior research of the topic of the thesis

The problem of the substantive effect of a non-administrative litigant's procedural action is new to Russian doctrine. Certain issues related to the topic of PhD Dissertation, such as: about procedural legal facts, about procedural legal relations, about the substantive legal consequences of administrative procedural actions of the parties, about the mutual influence of judicial acts and legal facts of substantive law, have been studied in the science of civil procedure. Often the subject of research in civil science has been problems of general tort, liability for eviction, and the theory of transactions.. However, in accordance with the Russian doctrine, there are no works devoted to the substantive effect of a non-administrative procedural action.

An **object** of the research is the problem of the influence of litigant's non-administrative procedural actions on material civil legal relations.

A **subject of research** is the civil, civil proceeding and arbitration procedural law, practice of Supreme Court of the Russian Federation, practice of courts of general jurisdiction and arbitration courts, as well as foreign court practice.

Goals and objectives of the study. The goal of this work is to identify cases of the substantive legal effect of non-administrative procedural actions of a person participating in the case, to determine the conditions and grounds for its occurrence.

The specified goal of this dissertation research predetermined specific tasks of the study:

– to determine whether litigators' actions are legal facts of substantive law;

– to assess the hypothesis that a procedural action can be aimed at establishing, changing, terminating civil rights and obligations, in other words, can be a transaction;

– to find out significance of the procedural form of actions for development of substantive relations, to answer the question of whether procedural and legal flaws in actions are important for ensuing of substantive consequences;

– on the basis of a theoretical analysis of civil law provisions that establish an obligation for a participant in a legal relationship to "take part in a case", to determine whether performing a procedural action can be a content of a civil obligation;

– using the results obtained from completing the previous task, to resolve the question of what actions a seller brought by a buyer into a case on seizure of goods by a third party, should take;

– to study whether procedural activity of a person participating in a case can cause loss of property to another participant and, as a result, be a basis for emergence of a tort obligation;

– to determine the nature of relations between a complainant and a defendant in case of an unfair filing n unfounded claim by the latter.

The methodological basis of the research are general scientific methods (system-structural method, analogy method, general logical techniques: analysis and synthesis, induction and deduction), as well as special methods of legal research (comparative method, extrapolation method, formal legal method).

The theoretical basis of the study are pre-revolutionary, Soviet and modern works on the general theory of law, the theory of civil law, the theory of arbitration procedural and civil procedural law, which is due to interdisciplinary nature of this research.

The theoretical part of this study is based on achievements of Russian legal science, which are expressed in works of such scientists as: D.B. Abushenko, M.M. Agarkov, S.S. Alekseev, K.N. Annenkov, V.A. Belov, M.I. Braginsky, V.V. Butnev, Y.V. Vaskovsky, V.V. Vitryansky, A.K. Holmsten, V.P. Gribanov, D.D.

Grimm, M.A. Gurvich, I.Y. Deryagin, G.F. Dormidontov, P.F. Eliseikin, V.S. Yem, N.B. Zeider, O.S. Ioffe, A.F. Kleinman, O.A. Krasavchikov, E.A. Krasheninnikov, N.S. Malein, K.I. Malyshev, D.I. Meyer, A.K. Mityukov, E.Y. Motovilovker, V.A. Musin, I.B. Novitsky, K.P. Pobedonostsev, I.A. Pokrovsky, V.K. Raicher, S.V. Sarbash, Z.I. Sedova, A.P. Sergeev, K.I. Sklovsky, E.A. Sukhanov, M.K. Treushnikov, D.O. Tuzov, I.M. Tyutryumov, E.A. Fleischitz, N.A. Chechina, D.M. Chechot, A.V. Yudin, T.M. Yablochkov, V.V. Yarkov.

The empirical base of the study are materials of judicial practice of the Russian Federation (courts of general jurisdiction, arbitration courts, the Supreme Court of the Russian Federation, the Constitutional Court of the Russian Federation), as well as of foreign judicial practice.

A scientific novelty of the thesis lies in a complex research, based on legislation and judicial practice, of the problems of the substantive and legal significance of the litigant's procedural actions and examination of the issues regarding: (a) the possibility of completing a civil transaction through a non-administrative procedural action; (b) the existence of right to compensation for harm caused by the litigant's procedural actions; (c) the content and properties of the civil legal relationship arising regarding the obligation of a party to perform a procedural action.

Theoretical significance of the work is expressed in the fact that the new research results obtained by the author provide an opportunity to solve a number of theoretical problems in the science of civil, civil and civil procedural law; can be used as the basis for further research into the legal consequences of the procedural activities of persons participating in the case.

Practical significance. Conclusions drawn from the results of the study can be applied to resolve a wide range of practical problems related to determination of legal consequences of litigators' procedural activity, in particular: (a) when determining negative consequences of litigator's procedural activity aimed at causing harm to other persons; (b) when substantiating possibility of making a substantive expression of will through a procedural action; (c) to determine

consequences of violating an obligation of a party to civil relationship to intervene in a case.

Theoretical approaches proposed in the research can be included in the following courses: "Civil Procedure", "Arbitration Process", or become the basis of a special course.

Approbation of research results. The dissertation was prepared at the Department of Civil Procedure, Faculty of Law, St. Petersburg State University, where it was discussed. The main provisions of the dissertation were set out in published scientific articles, used by the author during lectures on the discipline of "Procedural Law", during practical classes on the discipline of "Civil and Arbitration Procedure".

The structure of the work is determined by the need to consistently study various manifestations of substantive significance of litigators' procedural activities. The dissertation consists of an introduction, five chapters (seventeen paragraphs in total), a conclusion and a list of references.

Main scientific results of the dissertation research:

1. It is revealed that a procedural action of a party to a case to be a legal fact of substantive law - a basis for emergence, change or termination of a civil legal relationship[1].

2. It is proven that procedural actions can be considered to be aimed at establishing, changing, terminating civil rights and obligations and recognized as a civil transaction[2].

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[1] N.V. Platonova. On issue of substantive significance of procedural behavior (commentary to the Decision of the Supreme Court of the Russian Federation from May 30, 2017 in case № 307-ES17-1144) // Arbitration and civil process. 2018. N 4. P. 36; N.V.Platonova. Compensation for damage caused by filing an unfounded claim: on the issue of substantive significance of procedural behavior // Economic Justice of the Russian Federation Herald. 2018. N 6. P. 116.

[2] N.V. Platonova. On issue of substantive significance of procedural behavior (commentary to the Decision of the Supreme Court of the Russian Federation from May 30, 2017 in case № 307-ES17-1144) // Arbitration and civil process. 2018. N 4. P. 40

3. It is established that a procedural form directly affects possibility and conditions for occurrence of substantive legal effects of actions of parties to a case[3].

4. Possibility of causing property damage by actions of a party to a case is established[4].

5. It is substantiated that actions of a party to a case, even if it is performed in full accordance with requirements of the procedural law, may be illegal from the norms of substantive civil law point of view[5].

6. Legal nature of an obligation to bring a counterparty to court is revealed, consequences of failure to fulfill this obligation are determined[6].

Provisions submitted to defense:

1. A litigator's procedural action, while maintaining its procedural and legal properties unchanged, can be a legal fact of substantive law - a basis for emergence, change or termination of a civil legal relationship. Actions of participants in a process, along with other legal acts, are elements of the system of substantive legal facts. The traditional doctrinal classification of grounds for emergence, change and termination of civil legal relations is incomplete: its elements should include procedural actions of persons involved in a case. The foregoing simultaneously means that an independent private interest may stand

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[3] N.V. Platonova. On issue of substantive significance of procedural behavior (commentary to the Decision of the Supreme Court of the Russian Federation from May 30, 2017 in case № 307-ES17-1144) // Arbitration and civil process. 2018. N 4. P. 37, 38.

[4] N.V.Platonova. Compensation for damage caused by filing an unfounded claim: on the issue of substantive significance of procedural behavior // Economic Justice of the Russian Federation Herald. 2018. N 6. P. 99, 101, 102; N.V. Platonova. Concealment of actual circumstances by a trial participant as basis for commencement of tort liability: problem statement // Law. 2022. N 7. P. 73, 74.

[5] N.V.Platonova. Compensation for damage caused by filing an unfounded claim: on the issue of substantive significance of procedural behavior // Economic Justice of the Russian Federation Herald. 2018. N 6. P. 113; N.V. Platonova. Concealment of actual circumstances by a trial participant as basis for commencement of tort liability: problem statement // Law. 2022. N 7. P. 77.

[6] N.V. Platonova. Some reflections on involvement of non-party interveners into the proceedings // Law, 2023. N 1. The supplement to the issue. P. 34, 35, 37.

behind performing a separate procedural action, and litigator's behavior can have a direct economic effect expressed in decreasing or increasing the value of property.

2. The fact that procedural actions have the properties of finality, ability to influence a court decision, coupled with the fact that they are performed on the basis of self-responsibility principle - with more deliberation and seriousness than non-procedural actions, and are aimed at victor in a dispute - allows us to conclude that procedural actions can be considered aimed at establishing, changing, terminating civil rights and obligations, that is, they can be recognized as a civil law transaction.

3. A procedural form has a direct impact on possibility and conditions for occurrence of substantive and legal consequences of litigators' actions: a procedural action acquires effects of a substantive transaction only if it is fully procedurally valid and procedural consequences, at which the action was aimed, are achieved. As long as litigator's actions contradict the norms of procedural law, they do not lead to procedural and legal effects, they do not produce an effect of a civil law transaction.

4. A procedural action can influence a substantive legal relationship that is subject to a dispute. Incompleteness of legal set of facts, which is a condition for satisfying a claim, can be compensated by performing procedural actions. This thesis is not refuted by the idea of a process being a cognitive activity, as well as the idea that the purpose of a process is to establish civil rights existing in reality, before and out of process.

5. A litigator's procedural action may cause harm both to property of another participant (for example, contradictory procedural activity of an improper defendant can cause harm expressed in a decrease in value of complainant's right of claim), and non-material values (for example, by filing a claim, defendant's business reputation may be damaged). The foregoing determines the following conclusion: a litigator's action, even if it is committed in full accordance with requirements of procedural law, can be illegal from the point of view of substantive law. Illegality of a procedural action is based on a special goal pursued

by a litigator - to use the trial for the sake of realizing a secondary interest, not related to winning the case, such as: causing harm to the opposite party, obstructing consideration of the case. The special purpose of a procedural action is a forming element of its wrongfulness: only such a procedural action is unlawful, which is committed with a designated purpose.

6. The idea of unacceptability of initiating any procedural activity (both criminal and civil) in absence of basis for this, suggests that filing a claim, despite the fact that this action implements a right for judicial protection, and in opposition to the thesis about any appeal to court being lawful, may be considered as a civil offence.

7. A civil obligation may be expressed in authorized person's obligation to perform a procedural action and a corresponding right to claim. Despite the position common in civil science, a seller's obligation, established by Article 462 of the Civil Code of the Russian Federation, to intervene in a case on a claim of a third party for seizure of goods and to protect a buyer is not an integral part of the seller's obligation to "transfer property", but is an independent civil obligation, arising from a contract of sale. Failure to perform (improper performance) this obligation is the basis for emergence of an liability to compensate for losses caused by such behavior.

Chapter 1. Substantive and legal meaning of non-administrative procedural action: problem statement

In Russian doctrine, the idea of service role of a civil process, the incident nature of the relations arising in the course of the procedural action, the secondary nature of the procedural possibilities is widely recognized. While the substantive rights and relations, for implementation and protection of which the civil process is intended, are recognized as primary. E.g., M.K. Treushnikov notes that "...civil procedural law would be aimless without regulatory law, since the service role of civil procedural law is to protect existing rights"[7].

S.N. Abramov emphasizes that civil procedural law without civil law is "unthinkable and pointless"[8]. According to V.N. Shcheglov, a process is determined by the nature of law and has a service role to the substantive law[9]. "Judicial protection of civil rights, performed in the course of a civil process, or simply a civil process, is a form of judicial exercise of civil rights," - points out M.A. Gurvich[10].

There are several considerations underlying these views. Firstly, as a rule, subjective substantive rights arise before and outside a process, and most often are realized outside of it. Participants of civil-law relations usually voluntarily, independently from public authorities, perform their duties. Judicial proceedings are an optional stage for exercise of rights, it is necessary only if there has been a violation of rights of one of the parties to the substantive relationship. In this sense, a process has a secondary meaning: as such, it is not necessary for motion of material goods and relations. Secondly, in the absence of substantive rights, a civil process is unthinkable, as it has no other goal than their establishment and

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[7] Civil Procedure: Textbook / Ed. M. K. Treushnikov. M., 2014. P. 34 – 35.
[8] S. N. Abramov. Soviet civil process. M., 1952. P. 10.
[9] V. N. Shcheglov. Questions of correlation of substantive law and process // Actual problems of state and law. Tomsk V.V. Kuibyshev's State University. Faculty of Law. Volume 228. - Tomsk: Tomsk University Press, 1972. - P. 51.
[10] M. A.Gurvich. Right of action. - M. USSR Academy of Sciences Press, 1949. - P. 145.

protection. Judicial activity is determined by existence of substantive relations arisen before and outside the a process: without them, it is subjectless. Finally, researchers explain service role of the civil process with the fact that procedural relations stay outside of production, distribution and exchange of material goods[11], therefore a process is a "superstructure category". Judicial activity cannot lead to any result in the field of movement of material goods; it does not have independent significance in the field of substantive civil law.

It follows as a logical consequence to the thesis about secondary nature of a process in relation to substantive rights that all procedural actions have a side, serving character. So, if a process in broad terms is intended to protect substantive rights and cannot have any other meaning and consequences, then each single procedural action can only contribute to the implementation of a disputed substantive right, it is connected to a protected right and is conditioned upon it. With all this said, this position means that a single procedural action has no direct economic significance. We find a similar understanding of a procedural action in the following statement: "...no independently private law interest is carried out by a single procedural action; it has no independent value, but only a means to an end: to protection of law"[12].

Meanwhile, a number of provisions of the civil substantive law, as well as positions of judicial and arbitration practice, make us question the above mentioned thesis.

Let us, first of all, refer to the consequences established by Article 462 of the Civil Code of the Russian Federation[13], when a third party files a claim for seizure of goods from a buyer. In this case, the buyer is obliged to bring the seller into the proceedings, and the seller is obliged to intervene on the buyer's side. If the buyer fails to bring the seller into the proceedings, the seller is released from liability to the buyer if the seller proves that, if intervened, he could have prevented the

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[11] Id. P. 52; N. A. Chechina. Civil procedural relations. L., 1962. P. 66.

[12] T. M. Yablochkov. Judgment and litigious right (On cassation decisions 1915, №№. 33 and 38) // Herald of civil law. - 1916. - № 7. - P. 41.

[13] Civil Code of the Russian Federation (Part One), November 30, 1994 № 51-FZ. Available in the computer legal research system "ConsultantPlus".

seizure of the sold goods from the buyer. The seller, brought into the proceedings by the buyer, but who did not intervene in it, is deprived of the right to prove that the buyer processed a case incorrectly.

Let's find out what are the possible consequences of non-participation in a process for a seller brought in by a buyer, through an example. Persons A and B closed a contract of sale, in pursuance of which A transferred some goods to B, and B paid for it. After that, a certain C turned to B with a claim to reclaim these goods from illegal possession. B, according to Article 462 of the Civil Code, in this situation must bring A (the seller) into the proceedings, and the seller is obliged to intervene in the court case. Let's say B brought A in, but the latter did not intervene. He did not because he was sure he was the owner of the goods at the time of the sale and handed over all the evidence of his rights to B. Regardless, B loses the case. Later, B makes demands on A for damages, asking him to refund the cost of the goods. To which A replies that he was the owner and he can prove it. But according to Article 462 of the Civil Code, he can no longer prove that the buyer processed the case incorrectly. Therefore, B's claim succeeds, and A must refund the cost of the bought goods. At the time of the sale, A was the owner, and, accordingly, transferred the ownership to B. But then why is B awarded a refund?

The civilistic doctrine reveals a considerable number of views on the legal basis for compensation from the seller, most of which link (in one way or another) the seller's responsibility with the non-transfer of ownership of the goods[14]. At the same time, existing approaches to duty to compensate for eviction are formed by authors without taking into account the connection of this duty with the fact that the seller intervened or did not intervene into the case, while this rule is of crucial significance, because it means that the actual owner of the goods may be held accountable to compensate for losses if he did not intervene the case.

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[14] O. S. Ioffe. General doctrine of obligations / Selected works. Volume 3. - Publishing house "Legal Center Press", 2004. - P. 256; D. O. Tuzov. Sale of property by an unauthorized person and limitation period for applying consequences of invalidity of void transactions. Commentary to the Decisions of the Judicial Chamber for economic disputes of the Supreme Court of the Russian Federation, March 17, 2015 № 306-ES14-929 // Bulletin of Economic Justice of the Russian Federation. - 2015. - № 4. - P. 4 - 9.

Let us ask ourselves: what consequences ultimately will the seller-owner face, who, being brought into the case on the claim by a third party to seize the goods, does not actually participate in it? From the literal content of Article 462 of the Civil Code, it follows that such a seller, even if he was the owner of the goods at the time of the sale, will not be able to refer to those circumstances that would allow the buyer to win the process and to avoid seizing goods, which will allow the buyer to demand recovering losses caused by seizure from the seller. This means that the buyer's right to recover losses from the seller is directly related to whether the latter intervenes in the process if a third party claims to seize the goods. The seller-owner can avoid liability to the buyer only by intervening into the process and protecting the buyer.

Is it possible in this sense to say that seller's procedural actions are secondary, having no independent value and devoid of substantive legal interest? If we consider legal proceedings as serving the sole purpose of protecting rights, then the seller's procedural activity should be dictated only by justifying and protecting the buyer's right from the encroachment of the complainant demanding the goods. However, from the point of view of regulation established by Article 462 of the Civil Code, the seller's procedural actions are driven by another circumstance: threat of substantive liability to compensate for losses. As we can see, the seller has a direct financial interest in performing legal proceedings.[15]

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[15] Note that obligation to bring your counterparty into the case is also established by other provisions of the Civil Code. According to paragraph 3 of Article 399 of the Civil Code of the Russian Federation, a subsidiary liable person must notify the principal debtor before sustaining claims of the creditor, and if a suit is filed against such a person, they must bring the principal debtor into the case. Otherwise, the principal debtor has a right to raise against the recourse claim of the person subsidiary liable, objections he had against the creditor. This norm, as opposed to Article 462 of the Civil Code, does not define consequences of the non-joinder of the contractor (the main debtor) into a process, however, as stated in the literature, they "lose a right to object to the recourse claim made against him by a subsidiary debtor" (see: Commentary on the Civil Code of the Russian Federation, part one (article-by-article) / edited by S. P. Grishaev, A.M. Erdelevsky. Available in the computer legal research system "ConsultantPlus").
A similar obligation arises for a customer under a work contract for performing design and survey works: he must bring the contractor into the case on a claim brought against him by a third party in connection with problems in technical documentation or performed survey works (Article 762 of the Civil Code). It also does not define consequences for a contractor if he doesn't intervene in the case, and it is not even indicated what a customer, who did not bring his

The norm of Article 462 of the Civil Code is not the only example of paramount importance of a process in relation to substantive law. We find continuation of the thesis about the independent role of procedural action in the regulation established by Article 487 of the Civil Code, or rather, in the standing practice of its application.

Under paragraph 3 of Article 487 of the Civil Code, if a seller, who received an advance payment, fails to fulfill the obligation to transfer goods within the prescribed period, a buyer has a right to demand from the seller that he transfers the paid goods or returns the amount of the advance payment for the goods that were not transferred. As it is known, under a sale and purchase contract, a buyer has a right to demand the transfer of goods from a seller, and a seller has a corresponding obligation. At the same time, under Article 487 of the Civil Code, the seller's obligation to transfer goods subsequent to violation of contract terms committed by him is transformed into a monetary one, and such a transformation is not directly connected with the termination of a contract. At the same time, it is difficult to doubt that the acquisition of a right to return the amount paid under a contract is due to termination of contractual relationship. The regulation established by Article 487 of the Civil Code has raised the question: can termination of a contract be seen as a condition for satisfying a buyer's demand to return the advance paid? And if so, what terminates a contract?

On this subject, we can put forward a few easy assumptions. For example, we can answer this question with such an interpretation of Article 487 of the Civil Code, as if it implies a buyer's right to repudiation of a contract (although it does

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counterparty into the case, can expect. Meanwhile, researchers suppose, this norm implies consequences similar to those under Article 462: a customer's failure to comply with relevant obligation releases a contractor from recourse liability to the customer if the contractor proves that, by intervening in the case, he could have prevented third party's claim against the customer satisfaction. Accordingly, a contractor brought into the case, but not intervening in it, is deprived of opportunity to prove that a contractor processed a case incorrectly. (see: Commentary on the Civil Code of the Russian Federation, part one (article-by-article) / G. E. Avilov, M. I. Braginsky, V. V. Glyantsev. - M.: Contract, Infra-M, 2006. - 987 p.; M. I. Braginsky, V. V. Vitryansky. Contract law. Contracts for the performance of work and services. - M.: Statut, 2002. - 1055 p.

Be it noted that the thesis of substantive interest in committing a procedural action is also relevant for these legal relations.

not directly state it), and therefore, in order to satisfy a claim for return of the advance payment, a buyer must provide evidence of repudiation of a contract that took place before and out-of-court. Another approach is also possible, which to a lesser extent secures interests of a buyer, but is easily justified by general norms of the Civil Code; it implies that a buyer must juridically submit a request to terminate a contract. Only if the court establishes a selle's significant violation of delivery terms, the buyer's claim for termination of the sale and purchase contract and for recovery of an advance payment will be satisfied. All of the above mentioned approaches, however, have a disadvantage as they contradict the literal meaning of Article 487 of the Civil Code which does not oblige a buyer to perform any special action aimed at terminating a contract.

The Supreme Court of the Russian Federation solved the problem in a fundamentally different way, having addressed the case of up to what point a penalty for delay in delivery of goods should be charged[16]. The essence of the case considered by the Court was as follows. A supply contract was concluded between two parties, following its terms, the buyer transferred an advance payment to the seller, but did not receive the goods on time. The buyer turned to court to demand return of the advance and won the case. Later, the buyer initiated a new case, demanding a penalty for delay in delivery of goods. A question arose before the Court as to when and in connection to what the obligation to deliver goods ceased and another obligation arose - to return the advance payment. The Supreme Court has concluded that in this case the contract was terminated due to repudiation which was willingly expressed in a lawsuit, and "...from the moment the buyer filed a claim to return the advance payment, and not from the date the judgment became final, the contract terminates, and the seller has a monetary liability to the buyer, which, in terms of such a contract, does not imply being liable to a penalty. The given approach means that a procedural action - filing a claim - results in

[16] Decision of the Judicial Chamber for economic disputes of the Supreme Court of the Russian Federation in case №307-ES17-1144, May 30, 2017. Available in the computer legal research system "ConsultantPlus".

termination of substantive liability: by filing a claim, the buyer repudiated the contract.

Note that the idea is not new: if the paid goods are not transferred to a buyer, a sale and purchase contract can be terminated due to some kind of appeal from a buyer to a seller. In particular, S. V. Sarbash notes that a supplier's obligation is converted into a monetary one when a buyer claims return of paid funds. The author finds an explanation for such a transformation in the norm of positive law, a specific prescription of paragraph 3 of Article 487 of the Civil Code of the Russian Federation[17]. A. G. Karapetov upholds a similar view, in his opinion, "...the implementation of restorative in their legal nature measures to return the previously paid funds supposes termination of a contract. Thus, by making such a claim against a debtor, a creditor thereby declares repudiation of the violated contract..."[18]. At the same time, the authors of these approaches do not associate possibility of repudiation of a contract with filing a claim (although it is not directly denied, a broad term "buyer's demand" is used). The Supreme Court, in turn, made a firm conclusion: a contract may be terminated in connection with filing a claim.

A similar conclusion regarding significance of filing a claim was made by the Arbitration Court of the Volga District[19]. The court resolved a dispute under the following circumstances. The parties entered into a real estate lease contract for an indefinite period, the agreement was registered at the Russian State Register. Later, the tenant, having requested information from the Unified State Register of Immovable Property, found out that the lease agreement was terminated on the repudiation basis. But the tenant did not receive notice of the contract termination by the landlord. Referring to these circumstances, the tenant filed a suit to recognize the contract as valid. Discounting the complainant's argument about not

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[17] S.V. Sarbash. Refund of payment as a consequence of non-fulfillment of a contractual obligation // Economy and Law. - 2002. - № 6. - P. 80 - 91.

[18] A.G. Karapetov. Termination of a violated contract in Russian and foreign law. - M.: Statute, 2007. - P. 234.

[19] Resolution of the Arbitration Court of the Volga District № F06-23865/2015 of 04.06.2016 in case №A55-22930/2014. Available in the computer legal research system "ConsultantPlus".

receiving a notice of refusal, the Court stated that the law does not provide a specific form of warning a tenant about contract termination, and emphasized that "...it follows from the spirit of the law that repudiation can be expressed in various forms and in different ways, allowing to reliably establish the fact that a tenant received information about the corresponding will of the landlord. In this particular case the landlord's will to terminate lease relationship is expressed in his response to the claim, in the appeal petition…". The legal proceedings are also given an independent meaning here, they are understood as an expression of will aimed at a specific substantive result[20].

Here is another case considered by the Supreme Court of the Russian Federation. The dispute arose under the following circumstances[21]. The parties entered into a contract of debt without specifying a term for its repayment. In this case, in accordance with paragraph 1 of Article 810 of the Civil Code of the Russian Federation, the loan must be returned by a borrower within thirty days from the date a lender claims it. The lender, however, did not request a repayment, but filed a claim against the borrower for repayment of the loan. The courts of the first and appeal instances refused to satisfy the claim, stating that since the lender did not send a written demand for the repayment before going to court, at the time of filing the claim, he did not have a right to demand repayment. The Supreme Court did not agree with this decision, stating that "the mere filing of suit by the lender is already a demand for repayment under the contract of debt, and expiration of the period established by sub-paragraph 2 of paragraph 1 of Article 810 of the Civil Code of the Russian Federation is evidence to the borrower's improper performance of his obligations under the contract of debt ent and indisputably

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[20] It is of interest to note that the contractual meaning of a procedural action is recognized in England's law. For example, in "Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others" case (URL: https://www.bailii.org/uk/cases/UKHL/2001/1.html (Accessed 30/08/2023)) Lord Hobhouse noted: " I recognise that it is possible for something to be done in the litigation which may amount to a contractual act; the delivery of pleadings and similar documents are a form of communication. Such communication can have a contractual significance which can and will still be given effect to".

[21] Decisions of the Supreme Court in case № 69-KG19-11, 08.10.2019. Available in the computer legal research system "ConsultantPlus".

testifies to violation of the complainant's rights". According to the Supreme Court, filing a claim, being at the same time a demand for repayment, can be of crucial importance for development of substantive legal relations.

The Supreme Court's approach is also interesting in the following respect. Supporting the possibility of recognizing a claim as a demand for repayment, the Court noted that paragraph 1 of Article 810 of the Civil Code "does not oblige a lender to send a notice of collection to a borrower before filing a claim for repayment, and therefore is not a legal requirement for establishing a pre-trial procedure for settling a dispute". Literal interpretation of the Supreme Court's position provides basis to think that before and out-of-court, only those actions must be performed for which the out-of-court performance is required and explicitly stated by law (such as, for example, on fulfilment of the pre-trial procedure for settling disputes). However, those substantive actions in respect of which the law does not have such a statement may well be performed in a process.

Existence of procedural actions, in taking which an independent substantive goal is revealed, allows us to question existence of such actions of persons in dispute, which, while keeping their significance for a process development, create consequences in the field of substantive civil rights. The situation when a procedural action of a person in dispute directly affects a civil law relationship, is called substantive effect of procedural behavior.

It is known that the basis for emergence, change and termination of civil legal relations is the legal fact of civil substantive law[22]. In this sense, an assumption of existence of substantive legal effect to procedural activity can be considered satisfactory, only if we recognize that actions of a participant to process can in some cases be a legal fact of substantive law.

In civil studies, legal civil law facts are circumstances with which legal rules connect dynamics in civil law relations. E.g., O. A. Krasavchikov considers legal facts as certain life circumstances with which legal rules associate ensuing of legal consequences, namely, emergence, change or termination of legal relations, or, in

[22] O.A. Krasavchikov. Legal facts in Soviet civil law. M., 1958. P. 5.

other words, rights and obligations of individuals[23]. Y. K. Tolstoy defines legal facts as circumstances, with presence or absence of which legal rules associate emergence, change or termination of legal relations[24]. R.O. Khalfina sees a legal fact as a circumstance with which the legal rules connect dynamics of a legal relationship[25].

These definitions suggest the following signs of a legal fact of civil law, usually distinguished in literature: 1) such a fact really exists; 2) it has already taken place; 3) legal consequences are associated with it, namely, dynamics of a legal relationship (its emergence, change or termination)[26].

The first two features characterize the "material" side of a legal fact[27] and mean the following: a legal fact always exists objectively, regardless of human consciousness, and also took place in the past or continues in the present[28].

It is not difficult to conclude that a completed procedural action, like any other action, exists independently of a human consciousness, and took place in the past. Therefore, from the point of view of its “material” side, a procedural action can be a legal fact of substantive law.

Establishing legal consequences is an “ideal” (legal) sign of a legal fact, and it means that only those circumstances that are somehow recognized by the system of justice can be considered as such[29].

The above mentioned examples demonstrate that in the civil law, including interpretation given to it by judicial practice, there are norms linking dynamics of substantive relationships with execution of procedural actions. Therefore, a procedural action fully meets this criteria of a legal fact.

The very possibility of legal facts of a different branch of affiliation being able to influence civil legal relations was recognized in civil literature. Thus,

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[23] See above. P. 27.
[24] Y.K. Tolstoy. To the theory of legal relationship. L., 1959. P. 13
[25] R.O. Khalfina. General doctrine of legal relationship. M., 1974. P. 285
[26] S.Y. Filippova. Op.Cit. P. 35.
[27] See above.
[28] O.A. Krasavchikov. Op.Cit. P. 14 – 15.
[29] .Y. Filippova. Op.Cit. P. 38.

according to O. A. Krasavchikov, "...it would be incorrect to state thate civil relations arise only from civil transactions (and other civil legal facts) <...> the unity of Soviet socialist law leads to a fact that legal acts of obe branch can have an impact on dynamics of legal relations of another affiliation"[30].

Similar legal acts are also distinguished in classification of civil legal facts. The most well-known basis for distinguishing between legal facts of civil law is by expressed will. All legal facts, depending on expression of will in them, fall into two main groups: legal events and legal actions (some authors, for example, S. N. Bratus[31], also distinguish legal states). The latter, depending on accordance of the expressed will with regulations, are divided into lawful and unlawful legal actions. Lawful actions are divided according to will direction to legal consequences into legal acts and legal actions. Legal acts, in turn, are subdivided according to subjects of legal relations into administrative acts, contracts (civil acts), judicial acts[32].

Administrative acts on basis of which, along with administrative relation, a civil-law relation also arises are recognized as civil legal facts. Moreover, substantive legal consequences may also be caused by a court decision (as a rule, the substantive legal significance of decisions on modificatory actions is recognized), which is primarily a procedural act and leads to procedural consequences.

However, we do not find procedural actions in the classification of substantive legal facts[33]. As far as we know, non-administrative procedural actions

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[30] O.A. Krasavchikov. Op.Cit. P. 179 – 180.

[31] Some authors also distinguish legal states (S. N. Bratus. On correlation of civil legal capacity and subjective civil rights // Soviet state and law. - 1949. - №8. - P. 36).

[32] O.A. Krasavchikov. Legal facts in Soviet civil law. M., 1958. P. 82.

[33] Some attempts were made by researchers in civil studies to expand the traditional classification of legal facts by including administrative procedural actions in it. More specifically, S. Y. Filippova believes that simplified understanding of legal acts, which developed back in pre-revolutionary literature, leaves behind a number of legitimate legal actions, including admission of a claim, withdrawal of a claim, civil agreement (see S.Y. Filippova. Legal facts in civil law. - Moscow: Statut, 2020. P. 244 - 245).

have not been studied in civil science as legal facts of substantive civil law at all[34]. The situation is somewhat different in literature on procedural law. Here the problem of how a process impacts substantive rights and relations received some attention. Though in the science of procedural law, such impact is considered only from the point of view of procedural problems and institutions.

It is known that civil process is based on the principles of discretion and competition. As a rule, the principle of discretion is derived from the nature of substantive rights and is defined as a continuation of civil law principles in a process. "Citizens enjoy autonomy in the area of their private rights. <...> Everyone is free to exercise their private rights or not to exercise them, to reserve them or to relinquish them, to demand their recognition by obligated persons or to put up with their failure to fulfill obligations corresponding to these rights" notes E. V. Vaskovsky. From this thesis, in relation to a process, he concludes the following : "If a holder of a civil right can freely exercise it before a process and out-of-court, if he can even completely relinquish it, then there is no reason to deprive him of the same freedom during a process"[35]. In other words, discretion is preservation of "exercisability" of substantive law during a process.

Competition, in turn, is understood as parties' right to freely perform procedural actions, make free use of factual and evidentiary basis in a process: "...The court has no reason to look for actual circumstances of a process: it is only obliged to take into account those circumstances from which litigators themselves draw conclusions <... > having complete freedom to use procedural remedies, including evidence that confirms and establishes certain parts of procedural material, litigators can reduce or increase the amount of material at their own discretion"[36]. A competitive model of process organization implies a limited judicial finding of fact: the court has no right to go beyond factual circumstances

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[34] O.A. Krasavchikov has also noted the lack of research on this issue. However, statingthat there are no views on this issue, the author himself did not investigate this question. See: O.A. Krasavchikov. Legal facts in Soviet civil law. M., 1958. P. 130

[35] E.V. Vaskovsky. Civil procedure course: subjects and objects of a process, procedural relations and actions. - M.: Statut, 2016. - P. 367.

[36] See above. P. 381.

of the case declared by parties, as well as independently search for evidence. Thus, according to results of a process, the court may establish a different set of facts comparing to ones that actually happened before and out-of-court. For example, before and out-of-court, a defendant repaid a complainant a debt, but for his own reasons did not inform the court about this and did not provide evidence of payment. The complainant will win the dispute as if the defendant is still in deb, while, in fact, the latter is not.

Due to the principle of competition, the court can establish not only those rights that existed before a trial, but also rights that have been changed and even those that have never existed before it. But if a subjective substantive right that existed before and out-f-court, and a right protected by such a decision, differ from each other, then, obviously, a subjective right has undergone changes during a process, or arose for the first time or ceased during it. But what is the basis for this change? Addressing this question, researchers put forward a thesis that the basis for changing substantive relationships is essentially procedural activity of parties.

Thus, K. I. Malyshev concluded that a process can play a significant role in dynamics of substantive relationships. "The period of judicial proceedings," the author notes, "is a phase in civil rights development that reveals an influence on their fate, a critical, painful phase that can end either in restoration of a right in all its strength, or with in its change and even destruction..."[37].

It should be noted that such a conclusion is possible if the competition principle is derived from the discretion principle, is a logical consequence of the latter, or, as many researches[38] believe, is opposite to discretion. K. I. Malyshev holds a similar view, noting: "...the competetive origin of civil proceedings, according to which various actions of the court during a process depend on requirements of the parties, on their initiative, and disputed relationships of the parties are discussed only according to facts reported to the court by the litigators

[37] K.I. Malyshev. Civil Litigation Course. Volume 1. - St. Petersburg: M M. Stasyulevich's Printing House, 1876. - P. 20.

[38] A.K. Holmsten. Russian civil proceedings textbook. - St. Petersburg: M. Merkushev's Printing House, 1913. - P. 404; E. A. Nefediev. Russian civil proceedings textbook. - M.: Printing house of the Imperial Moscow University, 1908. - P. 159.

<...> this origin arises from the essence of civil rights. These rights are of a person's private sphere and are usually at free disposal of the owner»[39]. According to this approach the ability to control the course of a process, evidence and facts is the same extending of civil law principles in a process, as, for example, a right to waive a claim. The competitive origin is due to the nature of substantive rights, it is a deflection of their inherent property of "exercisability" in a process. It is the right of a party to determine the further fate of their rights and property before and out-of-court that forms the basis of procedural dominance of the party over factual and evidentiary material.

If procedural possibilities of parties arise from their private rights, then all procedural actions follow private autonomy of subjects to civil relations. Then it becomes clear where the idea of possibile changes to substantive relationships during a process comes from: any procedural action is similar to an action performed before and out-of-court, and therefore can change substantive position of persons in dispute.

The described approach to competition leads us to a defined concept of a process, which can be called "material". A process here is understood as following realization of private rights, and therefore its rules comply with principles of substantive law. All actions performed by parties during consideration of a civil case are arising out of private will, and parties manage facts in a process in the same way they manage substantive rights before and out-of-court. The idea of a process being "substantive" was respresented, among other things, in recognizing existence of a special sub-branch of substantive law - actional law, defined by researchers as a set of legal rules that determine substantive rights in a process[40]. For us, separating actional law is of interest that authors defined a distinguished subject for this sub-branch, different from both subject of substantive law and

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[39] K.I. Malyshev. Civil Litigation Course. Volume 1. - St. Petersburg: M M. Stasyulevich's Printing House, 1876. - P. 357.

[40] A. K. Holmsten. On relation of civil proceedings to civil law: Introductory lecture given on October, 9, 1878 at the Imperial School of Justice Studies // Civil and Criminal Law Journal. - 1879. - Book 4 (July - August). - P. 61 - 80; K.I. Malyshev. Civil Litigation Course. Volume 1. - St. Petersburg: M M. Stasyulevich's Printing House, 1876. - P. 20.

procedural law; apparently, they believed that mechanism of how procedural actions affect substantive relations is different from how actions of the parties taken before and out-of-court affect them and dynamics of substantive legal relations.

In Russian doctrine, when considering certain evidence of the " substantive" concept of a process, a theory of German processualist M. Pagenstecher is often cited, who, in his work " Zur Lehre von der materiellen Rechtskraft" put forward an idea that each statement of litigators is a dispositive act of will[41]. The author believes, in making a procedural assertion there is necessarily a declaration of one's consent to the fact that, if this assertion is false, legal relations will be as they should have been if the assertion was true. In turn, a subject to research in a process is, among other things, those relations that arose through procedural actions during the process[42]. With his theory M. Pagenstecher endowed a process with material properties, assuming that all procedural actions are potentially acts of disposition. It should be noted though, that in his work the author mainly said that during a process parties conclude procedural factual agreements, which are of procedural nature and have procedural consequences. The author did not bestow material and legal significance to actions of litigators, for him a process is a chain of agreements about facts significant for this particular dispute and that affect judicial decision. This can be seen in the fact that M. Pagenstecher did not recognize any force behind procedural actions of parties if there was no decision in a given case, since they only "contribute to the goal of a process: to establish legal certainty"[43]. It should be noted though, that substantive effect of procedural activity takes place immediately after a procedural action, and therefore does not depend on whether there was a final decision in a case, and cannot be limited to a

[41] E.g., M.A. Gurvich turned to Pagenstecher's theory when considering right to sue (see: M.A. Gurvich. Right of action. - M.: USSR Academy of Sciences Press, 1949, 1949. - P. 29), T.M. Yablochkov - when considering legal nature of the court decision (see: T.M.Yablochkov. Judgment and litigious right // Herald of Civil Law. - 1916. - P. 29).

[42] M. Pagenstecher. Zur Lehre von der materiellen Rechtskraft. Berlin, 1905. P. 219. Cited: T.M. Yablochkov. Judgment and litigious right // Herald of civil law. - 1916. - P. 31 - 32.

[43] See above. P. 31 – 32.

specific process. Therefore, we can conclude that M. Pagenstecher did not put forward the idea of substantive significance of procedural activity.

However, the above view on the principle of competition essence is not the only one. According to another position, competitive origin of a process in no way due to nature of private rights. "It is absolutely unacceptable," notes T. M. Yablochkov, "to transfer civil law ideas into public law area of civil process <...> it is impossible to derive a "right" of parties to determine how true the decision would be from their eligibility to private law relations[44]. The principle of competition is understood as a " standards of conduct in the court"[45]: it forbids the court to independently collect evidentiary material. However, one should not deduce standards of conduct for litigators from this principle.

It is quite clear that from this point of view, a process cannot affect substantive law. Competitive possibilities of parties are understood as the best means of establishing actual circumstances of a case, because parties know these circumstances much better than anyone else, and are most interested in revealing as many facts and evidence as possible to prove their point. Of course, supporters of this theory do not deny that it is possible for a court to make a judgement, in which circumstances of a case are established not as they really were. However, such cases are exceptional, and, according to researchers, cannot be a basis for a general approach to the essence of civil process[46].

Discussion on impact of litigators' activities on substantive law, as follows from the above approaches, revolves around the principle of competition and the concept of process as a whole. The peculiarity of a " substantive" approach is that influence of a process on substantive law is understood as inevitable consequence of the principle of competition; the very idea of such influence arises as an attempt to reconcile parties' right to establish facts and evidence to achieve the main goal of a process - to establish and protect truly existing rights and relations. Simply put, substantive effect comes from parties' possibility to limit the court in

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[44] T.M. Yablochkov. To doctrine of basic principles of civil process. M., 1914. P. 44.
[45] See above.
[46] See above.

discovering true facts. This is what caused criticism of the "substantive" theory: a compromised situation of incorrect fact-setting is seen by it as a general rule and determines the nature of process as a whole.

Meanwhile, let us ask a question: are effects of parties' procedural activity that we saw in civil law derived from operating according to the principle of competition, from potential opportunity to hide true state of affairs from the court? Turning to seller's liability for eviction, we can see that it occurs not because parties misled the court by not reporting significant facts or by not presenting available evidence when considering a buyer's claim for recovery of losses from a seller. One could talk about effects of the principle of competition if a seller, say, deliberately concealed evidence in his favor so that a complainant would win the case. In the above given example a seller, on the contrary, is interested in using all procedural possibilities he has in order to avoid liability.

In another above considered case, filing a claim was seen as repudiation while a defendant objected to satisfaction of a claim, referring to the fact that the contract was valid. Not only the court was not misled, it directly received information that there had been no withdrawal from a contract before the proceedings. Therefore, here too we can't say that competitive origin of a process has any substantive effect.

Those effects of procedural activity of parties that we saw in civil law do not originate from the principle of competition and are not caused by it. In this regard, those views (as well as criticism of those views) cannot be applied to our study, which explain influence of a process on litigious substantive law by competitive origin of a process and by thesis about objective limitation of court's fact-finding.

The concept of A. K. Holmsten is closer to the phenomenon under study. Studying relations between litigious substantive law and process initiated according to it, the author concluded that "each of procedural actions, leading gradually to creating an actual state corresponding to its content, has a certain influence on it; basically, this influence mean that a right, approaching its last

implementation, strengthens its position in relation to a counterpart"[47]. A. K. Holmsten gives several examples of such influence. Firstly, with filing a claim, a right is on firm ground; if it was at the edge of doom, brush with termination, a procedural act of filing a claim for non-fulfillment of an obligation or taking possession of a property, if performed close to expiration of the limitation period, saves creditor and owner's right. Secondly, a right that has been proved, a right that has weakened an objection raised against it, is stronger than a right that has yet to have such effects; means of proving and weakening objections may disappear, be forgotten; but if they are once presented and had their effect, their disappearance will have no influence on a right. Thirdly, a right's position is finally strengthened by judicial decision[48].

A. K. Holmsten' views are not connected with the idea of court's inability to achieve substantive truth, moreover, they are much more specific than those described above. In his theory, some procedural actions that affect substantive rights are already defined: this is at least filing a claim and proving a right. Although A. K. Holmsten limits impact of a process to "strengthening substantive rights." However, if with filing a claim or in course of proving rights can be strengthened, can they be terminated or changed by a procedural action? The author, although postulating basics of the substantive effect of procedural activity theory, does not reveal its content, limiting it only to mentioning some effects.

Regarding individual procedural actions affecting sphere of private rights, it is necessary to turn to studies devoted to recognition of the fact. As for this action, doctrine of civil procedure discusses a question that is somewhat related to our study, namely, whether recognition of a fact "survives" the process during which it was made, whether it has any legal effect even without court decision on a dispute, and whether it is possible to refer to this recognition in any further proceedings.

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[47] A. K. Holmsten. On relation of civil proceedings to civil law: Introductory lecture given on October, 9, 1878 at the Imperial School of Justice Studies / A. K. Holmsten. // Civil and Criminal Law Journal. St. Petersburg, 1879. Book 4. P. 69.

[48] See above. P. 69 – 70.

Broadly speaking, the question is: does recognition of a fact bind a party outside a specific process, or is it legally indifferent after the end of a trial?

It would seem that the answer directly depends on which concept of recognition we adhere to: "procedural" or " substantive". Understanding recognition as an action of only procedural significance (whether it is proof[49], an act of disposing a right to object[50], or a unilateral procedural contract[51]) we must agree that recognition does not "survive" the process in which it is made. On the contrary, if we understand recognition as a substantive act affecting private rights, we must conclude that, once made, a judicial recognition forever binds a disputing party.

If we turn to works on binding power of recognition, we find out that authors who adhere to a so-called "substantive" concept of recognition[52] believe that recognition "survives" a process and, due to its private law nature, determines following relations of parties. Thus, I. Kohler stated that "some procedural actions are of purely substantive nature and result"[53], and "filing a claim, objections, withdrawal of a claim, out-of-court settlement, as well as recognition are private law actions that are valid outside of a process, and civil effect of which does not

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[49] K.S. Yudelson. Legal recognition as a basis for felief from proof in the Soviet civil process // Methodological materials. All-Union Extra-Mural Law Institute. - 1948. - [Issue] 2. - P. 62-78; S.V. Kurylev. Explanations of parties as evidence in the Soviet civil process - M .: Gosyurizdat, 1956. -P. 188.

[50] A. K. Holmsten. Russian civil proceedings textbook. - St. Petersburg: M. Merkushev's Printing House, 1913. - P. 197 - 200.

[51] E.V. Vaskovsky. Meaning of recognition in civil proceedings // Collection of articles on civil and commercial law. In memory of Professor Gabriel Feliksovich Shershenevich. - M.: Statut, 2005. - P. 113.

[52] It should be noted that we do not identify the "substantive" concept of recognition with the "volitional" one, since the latter also includes a number of views endowing legal recognition with exclusively procedural nature. In particular, the "substantive" concept of recognition should be distinguished from the concept of a unilateral procedural contract, whose supporters believe that recognition is a volitional, but exclusively procedural action and has no legal effects outside a specific process. (see: E.V. Vaskovsky. Meaning of recognition in civil proceedings // Collection of articles on civil and commercial law. In memory of Professor Gabriel Feliksovich Shershenevich. M .: Statut, 2005 - P. 110 - 135; E.V. Vaskovsky. To the question of of recognition in civil proceedings (Response to Prof. T.M. Yablochkov) // Law, Weekly legal newspaper, - Petrograd, 1915, - № 6, - P. 363)

[53] I. Kohler. Prozesshandlungen mit Civilrechtswirkung // Zeitschrift für deutschen Zivilprozeß. Bd. 29, 1901. S. 1 – 4, 34 – 39, 44 – 45.

depend on legal validity of a process"[54]. D. I. Polumordvinov stated that in some cases "recognition by a party is a substantive legal action with procedural consequences"[55]. To justify his approach, D. I. Polumordvinov gives the following example. A complainant filed a claim to arbitration court for a defendant to pay for shipped goods, which the defendant did not order and for which he rightfully refused to pay. The defendant, in his turn, admitted existence of such an agreement, which, according to the author, was seen as "an act of disposition, a new substantive sale and purchase contract..."[56]. Thus, we can conclude that such a substantive transaction, as well as a sale made out of court, will determine relationship of the parties outside a process. Therefore recognition is not limited to a particular judicial process. This view is held by supporters of the theory of "substantive" nature of fact recognition.

However, the question of a binding force of recognition is considered quite differently by supporters of the theory of "procedural" nature. Not being able to examine all currently existing "procedural" theories of judicial recognition, we will focus on those authors who see recognition as a kind of evidence[57].

The authors who see recognition as ordinary evidence (testifying the truth) note that, being a statement on circumstances of a case, it does not have a private

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[54] See above.

[55] The author believed in dual nature of recognition, supposing that recognition by a party can be either an act of disposing procedural and substantive rights, or a testimony of a party. According to the author, in some cases both options can exist simultaneously, but they can also exist separately. It should also be noted, that the author' theory was valid both for recognition of a fact and recognition of a claim, without drawing a line between these types of recognition. See: D. I. Polumordvinov. Recognition in civil proceedings: Autoabstract. PhD diss. M., 1940. P. 8 - 9.

[56] See above. P. 8 – 9.

[57] It is this view that is dominant in Soviet and modern procedural science. See: N.B. Zeyder. Legal nature of recognition in civil process // Soviet Justice bulletin. - 1926. - № 11. - P. 428 - 432; A.F. Kleinman. Basic questions to the evidence theory in Soviet civil process. – M.; L.: USSR Academy of Sciences Press, 1950. P. 1 - 15; S.N. Abramov. Soviet civil process. M., 1952. P. 198 - 200; K.S. Yudelson. Problem of proof in Soviet civil process. - M .: Gosyurizdat, 1951. - P. 190 - 200.

law effect beyond a particular process[58]. Just as party's explanation is only relevant to a particular dispute, recognition is limited to the process in which it is made.

Others [59] see fact recognition as a "formal evidence", meaning that recognition is always accepted by court as a statement of true circumstances of a case, regardless of actual state of things and without testing it. Giving recognition such a status is possible because in most cases facts that actually took place are recognized. But why is judicial recognition given such special trust? This question can be answered as follows. Firstly, because it is based on the principle of self-responsibility, according to which a party must blame itself if it worsens its position. And secondly, because trial is based on principles of procedural economy, requiring integrity for speeding-up legal proceedings. It follows as a logical consequence that since these principles operate exclusively in a process, assumption of recognition being true cannot be justified outside of it and thereby it loses its force.

Another theory put forth by T.M. Yablochkov is to some extent based on the two previous ones: on one hand, the author considers recognition to be an exclusively procedural action, a party's statement about the circumstances of the case. On the other hand, in his opinion it is unacceptable when recognition is made exclusively for one process. "...A litigator cannot say "what I recognize will be true in the present process, but will cease to be true in further possible processes," notes T.M. Yablochkov[60]. Moreover, according to the author, impossibility of such a situation follows from the principle of self-responsibility. Indeed, we cannot assume that an action in a process, committed with greater deliberation and gravity than an action outside a process, loses its legal significance after the process. And

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[58] V.A. Ryazanovsky. Unity of the process (In memory of A.A. Simolin). Irkutsk, 1920. P. 26. O.Bulow. Des Gestandnissrecht. Freiburg. 1899. P. 74 - 85, cited: T.M. Yablochkov. Formal features of the concept of judicial recognition in civil process. Yaroslavl, 1914. P. 473.

[59] L.Y. Tauber. Claim, accusation and principle of controversy // Civil Law bulletin. - 1917. - № 2. - P. 84 - 85.

[60] T.M. Yablochkov. Formal features of the concept of judicial recognition in civil process. Yaroslavl, 1914. P // Legal notes published by Demidov's School of Law. - Yaroslavl. - 1914. - P. 477.

therefore "...in a new process, an old legal recognition will retain its force in its evidentiary part. Court will always treat it as a legal recognition..."[61].

T.M. Yablochkov, supporting the evidence-based theory of recognition, considered it true that parties cannot do whatever they like in a process or admit any facts without undergoing further effects of their own activities. Wishing to reconcile these ideas, the author put forth a concept of procedural binding of a party with recognition made by it. From this point of view, a fact recognition has no substantive legal significance, but it can be used as evidence in further processes. Let us ask ourselves, how correct is this approach/

Let us give an example here. Say, a contractor's agreement was made between parties. A contractor, having applied a claim for payment for works performed under the contract to a customer, stated that the parties had agreed on phased acceptance and payment; a stage of work was completed, but the customer did not pay for it. The defendant, realizing that they had not agreed on such phased acceptance, nevertheless recognised existence of such an agreement. The court accepted the fact recognition. The decision on the case, however, did not take place; the claim was left without consideration, say, because the complainant was absent two times.

According to the theory of "procedural binding" by recognition, substantiverelations of the parties have not changed: the parties were not bound by phased acceptance and remained so; however, in any subsequent process, the complainant will be able to refer to solid evidence of existence of this condition - recognition by the defendant. Let us ask ourselves a question: what should parties do after the process in which the recognition took place is over? On one hand, there is still no agreement obliging the parties to accept work in a phased manner and to make payments the same way. Any of litigators may act accordingly to this circumstance. On the other hand, the customer acts under evidential force of recognition, realizing that, although there was no phased acceptance condition at all, the contractor will always be able to prove its existence.

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[61] See above. P. 480.

A different situation is also possible. Say, at the end of the process, the recognized fact ceased to be beneficial to the complainant, but became beneficial to the defendant. Can the latter take an effective procedural position by referring to his own recognition as evidence against the complainant's position? This is clearly illustrated by our example: having recognized that the work must be carried out in a phased manner, the defendant may be interested in demanding further performance in phases. It is quite clear that it is pointless to justify a now beneficial fact by one's own recognition. We could suggest that the defendant in such a case can refer to the complainant's statement recognized by the defendant as evidence of his position. However, in such a case, we should come to a conclusion that any procedural fact recognition has a binding effect, regardless of when and by whom it was made, and whether it was subsequently recognized by a party. But authors of the theory of "procedural binding" do not make such a conclusion: the theory is limited only by binding effect of recognition.

Ambiguity of this situation is explained by the fact that, while giving the complainant strong evidence of the agreement existence, the theory of "procedural binding" does not postulate existence of this agreement in reality. However, the "material" concept is deprived of such a flaw, according to it the litigators after making a recognition would be bound by substantive legal relationship of phased work execution, and any uncertainty in their non-procedural relations would disappear.

Here we go back to the fact that procedural action in some cases can and should be considered as a legal fact of substantive law.

It should be noted that in literature on procedural legal facts it is systemically recognized that civil law facts are capable of causing, changing or terminating a procedural relation[62]. There are many examples for this: a process is affected by civil law transactions connected to assigning a right to claim or a debt, alienation of a subject of dispute, as well as events (death of a participant in proceedings), etc. Some researchers believe that a substantive fact can directly lead

[62] V.V. Yarkov Legal facts in the civil process. M., 2012. P. 59 - 60.

to creation, change, termination of procedural legal relations[63], others that it is only an element of legal set of facts that changes dynamics of legal relationships, and only generates mentioned consequences if a party performs a procedural action[64]. However, the opposite situation, when a procedural legal fact have substantive consequences, is practically not examined in these works.

Thus, V.V. Yarkov, agreeing that "some legal facts in general have both substantive and procedural significance, are characterized by a dualistic nature and a wide variety of legal consequences"[65], does not indicate what facts are these, under what circumstances and what consequences they have. M.A. Rozhkova[66] believes that participants' actions in a process cannot affect the substantive sphere, since "the court is an obligatory subject of procedural relationship". M.A. Rozhkova's statement cannot be recognized as correct, since it is based on confusing categories of legal fact and legal relationship. The latter, although are in a causal interdependence and convergence, are essentially different and non-overlapping phenomena[67]. And if influence of a procedural legal fact on substantive legal sphere is being examined, then properties of procedural relation cannot be of crucial importance. The author, limiting herself to the above mentioned statement, no longer examines how a process affects substantive rights.

To sum up, it should be noted that in the science of procedural law, the question of substantive effect of procedural behavior was raised by researchers when studying a number of problems, but it did not receive sufficient attention. n some cases, authors considered a substantive effect as a consequence of the competition principle, in others they limited themselves to stating that process affects substantive rights, without going into details about its essence. In some

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[63] See above. P. 59 – 60.

[64] N.A.Chechina. Civil procedural relations. L., 1962. P. 46.

[65] V.V. Yarkov. Legal facts in the civil process. M., 2012. P.60. The author examines A.F. Cherdantsev's approach. A.F. Cherdantsev. System-forming relations of law // Soviet state and law. - 1974. – № 8. – P. 14 – 15.

[66] See: M.A. Rozhkova. Theories of legal facts of civil and procedural law: concepts, classifications, basic interactions: Dis. ... D.J.S. - M., 2010. - 418 p.; D. B. Abushenko. Problems of mutual influence of judicial acts and legal facts of substantive law in the civil process: Monograph. - Tver. Published by A.N. Kondratiev, 2013. - 319 p.

[67] P.S. Elkind. The essence of Soviet criminal procedure law. L., 1963. P. 28.

studies we find an idea of "binding" a party with procedural behavior, which ultimately should lead us to an idea of substantive effect of procedural behavior, however, in the doctrine, "binding" with procedural behavior is considered only as a procedural consequence of a litigator's activity. The question whether a procedural action can be a legal fact of substantive law, as we found, has not been specifically examined.

Meanwhile, let us move on to the next part of disclosing its content.

In great majority of civil studies it is recognized that civil relationship arise from both legitimate and illegal actions of subjects of law. This makes us question: if a procedural action in certain cases refers to lawful civil actions, perhaps, it can also trigger a tort obligation?

This problem was also not examined both in science of substantive law and in procedural works. Exception is selected studies considering possibility of compensation for property losses caused by party's abuse of its procedural rights. The authors, in particular, note that to protect a right from procedural abuses (say, presentation of a knowingly unfounded claim, preventing timely and correct consideration and resolution of a case) one can claim for compensation for harm according to Article 1064 of the Civil Code of the Russian Federation[68].

This situation is caused by a traditional approach to civil process, which is understood as an activity aimed at realization of rights, and in this sense disengaged from direct impact on material wealth. Indeed, in this context our assumption looks odd: how can another participant' property be damaged by performing a procedural action in a process? If a material object was destroyed or damaged during a process, then certainly not by a procedural action. On the contrary, an action performed in accordance with procedural law is not capable of causing harm, because its very performance is driven by a legal form.

At the same time, even supporters of a secondary, dependent role of a process recognize that in course of judicial activity, implementation and protection

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[68] Commentary on the Civil Procedure Code of the RSFSR / Ed. M.S. Shakarian. M., 2001. P. 253 - 254 (by R.E. Ghukasyan); D.G. Nokhrin. Public enforcement in civil proceedings: monograph. Available in the computer legal research system "ConsultantPlus".

of substantive rights takes place. E.g., V.N. Shcheglov defined a process as a form of judicial exercise of substantiverights[69], P.F. Eliseikin called violated or disputed rights an object of judicial protection[70], V.V. Butnev defined them as subject of judicial activity[71].

In turn, it is substantiated doctrinally[72] and reflected in the legislation[73] for substantive law, that subjective right of claim is an object of civil rights. In connection with possessing a subjective right of obligation, a creditor participates in legal relations of two kinds - internal and external. Internal legal relations connect a creditor with a debtor and with are recognized in the theory of law as relative legal relations. In these legal relations, the very content of obligation is realized: a creditor exercises his right to claim by obtaining performance on obligations from a debtor. However, within this relative connection, a claim's features are not seen as an object of civil rights: its independent market value (exchange value), its ability to be a mean of satisfying needs of a creditor (use value). These mentioned features are embodied in an absolute legal connection - a connection of a creditor as the owner of a right to claim and all third parties who are obliged not to prevent a creditor from rulig over his property[74].

An external legal relationship in which a claim is realized as an object of civil rights implies a possibility of not only violating this right by a debtor, but also its destruction or "damage" by any third party. This thesis has been on several

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[69] V.N. Shcheglov. Questions of correlation of substantive law and process. // Actual problems of state and law. V.V. Kuibyshev's Tomsk State University. Faculty of Law. Volume 228. - Tomsk: Tomsk University Press, 1972. - P. 51.

[70] P.F. Eliseikin. Subject of judicial activity in the Soviet civil process (its concept, place and meaning): Author's abstract ... D.J.S. L., 1974. P. 11.

[71] V.V. Butnev. Legal dispute and some trends in development of civil proceedings // Problems of subjective civil rights protection. - 2011. - № 11. - P. 3 - 19.

[72] See: V.K. Raicher. Absolute and relative rights (to the problem of dividing economic rights). Especilally in relation to Soviet law // Herald of civil law. - 2007. - № 2. - P. 144 - 204; V.V. Baibak. Obligatory requirement as an object of civil circulation. - M.: Statut, 2005. - 220 p.

[73] According to Article 128 of the Civil Code of the Russian Federation, objects of civil rights include property, cash and certificated securities, other categories including non-cash funds, uncertificated securities, property rights; results of work and provision of services; protected intellectual deliverables and equivalent means of individualization (intellectual property); intangible benefits.

[74] See: V.V. Baibak. Obligatory requirement as an object of civil circulation. - M.: Statut, 2005. - 220 p.

occasions indicated in literature. E.g, V. K. Raicher stated: "...liability has been established for harm caused to a person or to one's property <...> liability rights feature prominently in property assets of a person"[75]. E.A. Fleischitz came to a similar conclusion: "... liability right may be violated by a non-debtor if content of the law of obligations is such that a third party is able to prevent a creditor from exercising his right, is able to destroy or diminish the benefit to which creditor's liability right is directed, is able to terminate this liability right of a creditor"[76].

Legal right, being an object of civil rights, can also be an object of causing harm. This part of person's assets can be diminished, damaged, as well as a material object.

Let us ask ourselves a question: can something similar happen to a substantivesubjective right in course of a process? Let us recall A.K. Holmsten's position on how a process afects litigious substantive right. The latter, as the author states, "is on firmer ground with filing a claim," which prevents expiry of statute of limitations. A proven right, which has already akened an objection raised against it, is "stronger than a right that has yet to have such effects." If we look at A.K. Holmsten's statement from a point of view that subjective rights are objects of civil rights, we can easily conclude that actions of a defendant, described by A.K. Holmsten, are able to increase the value of a right to claim. For example, a right, for which possibility of protection is about to expire will, other factors equal, have a lower market value than the same right already presented for judicial protection. Filing a claim, therefore, will lead to a direct economic effect - increasing value of complainant's property. But if in result of a procedural action value of a right can increase, can it also decrease?

Let us imagine such a situation. A complainant unknowingly sued a wrong defendant. The latter did not declare that he was not a party to disputed substantive relationship, and processed the case as if he was the proper defendant. After some

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[75] V.K. Raicher. Absolute and relative rights. // Journal of the Economics Faculty of Leningrad Polytechnic Institute. 1928. Issue. XXV. P. 300.

[76] E.A. Fleischitz. Obligations from causing harm and unjust enrichment // Selected works on civil law: In 2 vol. M., 2015. V. 2. P. 359.

time, the defendant declares that he is an improper party, but it turns out that, firstly, ten-year limitation period for a claim to a proper defendant has already expired at that moment, and secondly, evidence which could be used by the complainant to file a claim against a proper defendant has been lost.

One could assume that in the above mentioned case actions of the improper defendant cause loss of the complainant's property, namely, reducing value of his right of claim, thus being a reason for substantive tort obligation.

It should be noted that even in Roman law it was justified that destructing a loan note allows a creditor to demand compensation for losses. Julius Paul, in his Commentary on the Praetorian Edict, says: "If I declare that my loan note was stolen from me, destroyed, and if there under conditions was written the amount of money that I was owed under a certain condition, and I can confirm this by testimony of those who could even be absent at the time of fulfillment of this condition, then, by the law of Aquilius, I should win the case"[77]. A loan note, in terms of its significance to a process, is a proof of debt existence, and if it was destroyed, then a creditor was harmed.

We will return to the hypothesis of possibility of causing harm by procedural activity in the following chapters of this work. For now, we should note that the idea of procedural action of one party may cause losses of property to another, can be extended to cases where a proper defendant participates in the case. Before we analyse of the substantiveconsequences of procedural activities for such a defendant, we will give his possible actions and will see in which case they can cause losses for a complainant.

Firstly, a defendant may raise ordinary objections to complainant's claims. Defendant's disagreement with complainant's claims may be expressed in a simple denial or in advancement of new facts that prevent satisfaction of stated claims. Such defendant's activity is considered lawful, because it represents realization of his right to defense against a claim. Procedural legislation provides possibility for a

[77] Commentary on the law of Aquilius (D.9.2.40) / The Digest Of Justinian. Translated from Latin. Vol. 2: Books 5-11. –M.: Statute, 2002. – P. 390-436.

party that won a case to recover court costs from a losing party, however, they are mainly considered as procedural consequences of litigators' behavior[78]. In this sense, "ordinary" objections generally do not serve as basis for recovery of losses.

Secondly, a defendant may knowingly groundlessly object to a claim, as well as preventing timely and correct consideration and resolution of a case. Procedural legislation establishes consequences of such activities: the court may recover compensation in favor of the other party for loss of time from the party that filed a vexatious dispute or systematically opposed timely and correct consideration and resolution of a case (Article 99 of the Civil Procedure Code of the Russian Federation[79]). According to the view prevailing in procedural science, liability established by Article 99 of the Civil Procedure Code of the Russian Federation "pursues the goal of compensating a party for its losses incurred by it during consideration of a civil case <...> this liability belongs to private-law relations"[80].

Thirdly, a defendant may present fabricated evidence, thereby committing a crime under Article 303 of the Criminal Code of the Russian Federation[81]. If a defendant presents false evidence that refutes complainant's right, the latter may lose a case and not receive timely satisfaction of his claim. Evidence falsification, established by a court verdict that became final, can result in canceling the court decision due to newly discovered circumstances (Paragraph 2 of Part 3 of Article 392 of CPC of the Russian Federation, Paragraph 2 of Part 2 of Article 311 of the

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[78] For more details, see: S.G. Pepelyaev. On legal nature of court costs institution // Law. - 2013. - № 11. - P. 106 - 112.

[79] Civil Procedure Code of the Russian Federation № 138-FZ of 14.11.2002 // Collection of Legislation of the Russian Federation. – 18.11.2002. – № 46. –Article 4532.
Article 99 of the Civil Procedure Code of the Russian Federation is of interest to us only as an example of a legislative structure. In this work we do not set a task of considering features of this norm, essentially nullifying its application. For more details, see: D.G. Nokhrin. Public enforcement in civil proceedings: monograph. Available in the computer legal research system "ConsultantPlus".

[80] Civil Procedure: Textbook / Ed. M.K. Treushnikov. M., 2014. P. 254.

[81] Criminal Code of the Russian Federation: Federal law of June 13, 1996 № 63-FZ. Available in the computer legal research system "ConsultantPlus".

Arbitration Procedure Code of the Russian Federation[82]). Thus, after decision of a criminal court was made, a complainant has a right to initiate case review and achieve enforcement of his right. It would seem that in this situation, losses caused to a complainant are due only to the fact that a defendant failed to fulfil his obligation for a long time, and presenting false evidence by him only led to a longer delay. At the same time falsification of evidence led to the fact that for some period, until review due to newly discovered circumstances, a court decision, that established that a complainantdid not have a disputed subjective right, was "valid". This circumstance could have caused losses to a complainant, due, for example, his impossibility to execute of his right to claim.

Consequences of evidence falsification by a defendant are also interesting in the sense that criminal procedure law provides a victim with a right to compensation for harm caused by the crime (Article 42 of the Criminal Procedure Code of the Russian Federation[83]). At the same time, the crime under Article 303 of the Criminal Code of the Russian Federation (falsification of evidence and results of law enforcement intelligence operations) is recognized as completed at a moment when relevant evidence is presented for inclusion in case file[84]. An objective side of this crime includes committing a procedural action. This means that a victim of the crime (evidence falsification) will be compensated for harm caused by procedural actions of his opponent. These provisions mean that actions of a litigator can lead to compensation for material and legal damage[85].

Continuing discussion about harm caused by a procedural action, it should be noted that the idea of defendant's procedural actions being basis for recovery of losses is based on the notion that a complainantfiled a valid claim, in other words,

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[82] Arbitration Procedural Code of the Russian Federation: Federal law of 24 July, 2002 № 95-FZ. Available in the computer legal research system "ConsultantPlus".

[83] Criminal Procedure Code of the Russian Federation: Federal law of 18 Deceber, 2001 № 174-FZ. Available in the computer legal research system "ConsultantPlus".

[84] Commentary on the Criminal Code of the Russian Federation. Special part. Sections X – XII: in 4 volumes (article-by-article) / A.V. Brilliantov, A.V. Galakhova, V.A. Davydov [and others]; ed.-in-chief V.M. Lebedev. – M.: Yurayt, 2017. V. 4. – 278 p.

[85] N.V. Platonova. Concealment of actual circumstances by a trial participant as basis for commencement of tort liability: problem statement // Law. 2022. N 7. P. 71 - 78.

he did have such a substantive right. However, an opposite situation is also possible: a complainant does not have such rights and files an unjustified complaint, and a defendant is forced to endure all the consequences of such a process. At the same time, a complainant who does not actually have a substantive right, can initiate a process for its defense both due to an innocent mistake and with malicious intent; can prove his "right" with either true or misleading facts or present false evidence to support a claim.

The problem of compensation by a defendant for damage caused by his improper procedural activities is inevitably projected onto a complainant, who, by his actions, can also create negative substantive consequences. The main question we must consider in connection with procedural activity of a complainant, of course, is as follows: can filing a claim itself become basis for creation a substantive tort obligation?

Let us give an example. Company A intends to close a profitable deal with company B. Company C, being a competitor of company A, wants to disrupt negotiations between A and B, for which it files an obviously unfounded claim against A to recover from A the subject of the proposed deal. In this regard, B refuses to purchase the subject at previously agreed price (now it is the subject of a dispute) - but is willing to purchase it from A at a discount. Let's answer a question: what happened to A's property after filing a clearly unfounded claim against it? Exchange value of the property has objectively decreased, because before B presented its demands, A could sell it at a higher price. Value of the property has decreased, firstly, by amount of court costs that the buyer will have to bear here and now, and secondly, its price now includes risks for the buyer associated with possible loss. From an economic point of view, in this situation there was a substantive decrease for the owner. Can A demand compensation from B for its property losses?

To begin with, we should note that filing unfounded claims is a completely ordinary phenomenon, not prohibited and even assumed by the system of justice. As known, the task of legal proceedings is to consider and resolve an issue on

right, which in most cases does not occure if all participants are sure of validity of a claim. Existence of a special procedure which is aimed to check validity of a claim also supposes legitimacy of filing unfounded claims.

At the same time, Russian legislation has norms that make it possible to question existence of liability for making unreasonable demands.

Firstly, procedural law gives a defendant a right to compensation for losses caused by measures to secure a claim, taken at the request of a complainant (Article 98 of the Arbitration Procedure Code of the Russian Federation, Article 146 of the Civil Procedure Code of the Russian Federation). Undoubtedly these articles refer specifically to substantive consequences of complainant's procedural activities who applied for securing an unreasonable claim. This conclusion is made both by doctrinal views[86] and by approaches of judicial practice[87]. In a broad sense, filing a claim, a petition for implementation of provisional measures, these are all appeals to the court in order to satisfy a certain material interest. Only for some reason in one case there appears a right to compensation for losses, while in others it does not. Surely, provisional measures contribute to loss of defendant's property more often than filing a claim, since the purpose of their adoption is to limit individual substantive rights of a defendant. As a rule, a claim does not have such a direct substantive impact. Meanwhile, we cannot exclude situations where harm is caused precisely by filing a claim. Then how can we distinguish responsibility for complainant's procedural actions? Why it incurs when a complainant asks for provisional measures, but does not if harm is caused by filing a claim?

Secondly, filing a claim can be an element of objective side of t legally defined crime, in particular, by Article 159 of the Criminal Code of the Russian

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[86] See: Arbitration process: Textbook / A.V. Absalyamov, D.B. Abushenko, K.L. Branovitsky [and others]; ed.-in-chief. V.V. Yarkov. 7th ed., revised and corrected - M.: Statut, 2017. - 752 p.; D. B. Abushenko. Problems of mutual influence of judicial acts and legal facts of substantive law in the civil process: Monograph. - Tver: Published by A.N. Kondratiev, 2013. - 319 p.

[87] Decisions of the Supreme Court of the Russian Federation from September 14, 2015 № 307-ES15-3663. Available in the computer legal research system "ConsultantPlus".

Federation (fraud)[88]. Say, a complainant filed a vindication claim against a defendant in order to steal his property, presented false evidence of his rights for a disputed property to the court, won the case and obtained the property by enforcement proceedings. If complainant's crime is established by a court verdict, a defendant (victim) has a right to recover damage caused to him by complainant's actions (Article 42 of the Criminal Procedure Code), caused, for example, by the fact that the defendant could not use his property for some period of time. Filing a claim, when it is wrongful, becomes basis for damage compensation. However, must it necessarily have such a high "degree of wrongfulness" to become a basis for compensation? Can we say that only wrongful claims give a right to compensate for property losses, while in any other case they remain on a defendant?

In Russian legislation liability for harm caused by unreasonable demands is regulated selectively, and possibility of compensation is limited by specific legal institutions. In some way, complainant's liability is a "private tort", and is formulated on this principle. According to literal meaning of the above mentioned legal provisions, a defendant can demand compensation for lost time, if an unfounded claim is brought against him, but he cannot demand anything beyond this. If by filing a claim a complainant committed a crime, a defendant can claim full compensation for harm, and such a delict is no longer connected with loss of time caused by an unfounded claim. In Russian doctrine, as far as we know, there is no systematic understanding of a right to compensation for harm caused by filing unreasonable claims. Therefore, let us turn to foreign systems of justice.

In English law, where responsibility of parties for their procedural activities is regulated in much better than in Russian legal system, compensation for harm caused by a civil claim was not supported until recently. A right to appropriate compensation existed only in cases of malicious prosecution by public authorities in criminal proceedings (the malicious prosecution doctrine). However, in 2016,

[88] E.g. Resolution of the Avtozavodsky District Court of Tolyatti № 1-501/2018 of September, 28, 2018 in case № 1-501/2018. URL: https://sudact.ru/regular/doc/kmp9oUCpv8lX/ (date of access: 30/08/2023).

the Supreme Court of the United Kingdom in the case of Willers v Joyce and another (Re: Gubay (deceased))[89] stated it possible for a defendant, who suffered from a knowingly unfounded claim, to sue for compensation for damage caused to him, extending the doctrine of malicious prosecution to civil claims. The court's logic is interesting in a sense that it is based on a unified understanding of a knowingly unfounded claim and unlawful criminal prosecution, at least when it comes to compensating for losses a victim suffered. It is known that in Russian law there are and are widely used rules on compensation for harm caused to a citizen by illegal criminal prosecution (Chapter 18 of the Criminal Procedure Code of the Russian Federation), therefore the English court approach is quite relevant for Russian law. In this regard, unacceptability of unreasonable initiation of procedural activity can be considered as a general legal principle, interpreted differently for certain types of legal activity.

The conclusion of the Supreme Court of Great Britain on existence of a right to compensation for harm caused by an unfounded claim is based on ideas of justice. According to judges, it is fair to believe that any person who has been harmed has a right to compensation. Therefore, any restrictions on this right, including existing prohibition on compensation for damage caused by filing a claim, must be sufficiently justified. In other words, the court makes a decision basing on the fact that a right to compensation exists, then answering a question - are there any terms for its restriction? In many respects, that was why judges in their decisions mainly considered arguments against possibility of compensation for harm, rather than gave arguments in its favor. For us, this logic is of much interest, because in Russian legal system there is the principle of general tort, which implies compensation for any harm, regardless of circumstances under which it was caused. Under this principle, a victim has a right to demand compensation from a complainant for his losses. In further reasoning, we, like an English court, would take as a premise the fact that opportunity to compensate for

[89] Willers v Joyce & Anor (Re: Gubay (deceased) No 1) [2016] UKSC 43 (20 July 2016). URL: http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2016/43.html (date of access: 30/08/2023).

damage caused by an unfounded claim initially exists, and its restriction requires finding a reason for this.

This factor along with: a) existence of legislative institutions, to some extent or another allowing to recover material losses caused by filing a claim; b) individual doctrinal views, according to which compensation for harm caused by filing an unreasonable claim is possible; c) approaches of judicial practice, - allows us to conclude that filing a claim, as well as procedural activity of a defendant, may be considered as a legal fact of substantive law - as basis for incurrence of a tort obligation.

As we see, a procedural action can incur a variety of substantive effects, can cause emergence, change and termination of civil relations. This idea is directly presented in some legislation provisions and underlies a number of institutions. Substantive effects of individual non-administrative procedural actions are recognized in Russian and foreign judicial practice. That having been stated, we must critically evaluate those views on nature of a process and actions of litigators which suggest a side, serving role of the civil process. Understanding procedural activity as a means of how participants of a process experience litigious rights and relations, which is not capable of changing the experienced object[90]; postulating the only goal of procedural activity as establishing actual circumstances of a case[91], it is impossible explanain objectively existing influence of litigators' actions on substantive law. In certain cases, procedural actions are performed not to establish the truth, but only for creating, changing or terminating substantiverights, or they have this effect regardless of whether a litigator had such an intention.

This idea, although mentioned in several doctrinal studies, has not received any holistic attention. Therefore, in this work, we will try to examine known examples of substantive effect of procedural activity and to form a general approach to this phenomenon.

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[90] B.Y. Motovilovker. Theory of regulatory and protective law. - Voronezh: Voronezh University Press, 1990. - P. 88.

[91] T. M. Yablochkov. Judgment and litigious right (On cassation decisions 1915, №№. 33 and 38) // Herald of civil law. - Petrograd,- 1916. - № 7. - P. 43 et seq.

Chapter 2. Substantive significance of procedural behavior in application of liability rules for eviction

§ 1. Legal nature of seller's responsibility for eviction: main approaches

Article 462 of the Civil Code of the Russian Federation defines consequences for filing a claim for seizure of goods from a buyer by a third party: the buyer is obliged to bring the seller into the proceedings, and the seller is obliged to intervene on the side of the buyer. In case when the buyer fails to bring the seller into the proceedings, the seller is released from liability for eviction if he proves that, by joining the case, he could have prevented seizure of the sold goods. The seller, who was brought into the proceedings by the buyer, but has not intervened in it, is deprived of the right to prove that the buyer processed a case incorrectly.

Regulation of liability has risen a question before the doctrine of civil law: what is the basis for liability of the seller, who was brought into the proceedings by the buyer, but did not intervene in it?

The construction of responsibility for eviction does not rule out two seemingly paradoxical conclusions. Firstly, obligation to compensate for damages may arise for the seller, who was the owner of the goods transferred to the buyer, but, by not intervening in the case, he loses the opportunity to object with reference to these facts. Secondly, the seller who was not the owner of the goods and did not transfer their title to the buyer will not be obliged to compensate for losses: if such a seller was not brought into the case by the buyer, he has the right to prove that he would have prevented seizure of the goods, and the law formally does not limit the range of objections available to him to references to property only.

Responsibility of a seller for seizure of goods from a buyer at the request of a third party was considered in the Roman law. At the same time, as A.K.

Mityukov states, according to a generally accepted opinion, in the Roman law a seller is obliged to establish not a right of possession, but only comfortable and undeniable possession ("ut emptori rem habere liceat"), therefore his responsibility to a buyer begins from the moment and if goods handed over to the buyer is recognized by a court decision as the property of a third party, and the basis for this liability is not in the lack of a right for the seller, but precisely in the buyer's loss of goods adjudged to a third party. All these provisions are borne in mind when speaking of seller's liability for eviction and opposing the Roman law to modern law, where the seller is considered obliged to transfer the right and is responsible for not transferring it[92].

It seems that researchers' attempts to answer the question of the basis for seller's liability are mostly related to the need to "reconcile" provisions on consequences of eviction based on seller's obligation to ensure possession and modern ideas about the contract of sale imposing on a seller an obligation to transfer the right of possession. The latter should be considered violated if the transfer of title did not take place, even if a seller has ensured possession for a buyer.

Here are some well-known concepts of the seller's liability for seizure of goods by a third party.

According to the so-called " guaranty theory", a seller is liable to a buyer for violation of a special guaranty of safety of the chain of alienations, which he gives to his counterparty by the very act of property alienation. The seller guarantees that there were no defects of title before the transfer of goods to the buyer, and all previous transfers were legal. This guaranty, once given by the seller, follows the goods and remains valid regardless of the number of subsequent alienations. The supporter of this concept M.B. Zhuzhzhalov states that responsibility for eviction is responsibility for safety of such a chain of alienations, which "...1) is given by the very act of alienation to all subsequent participants in the chain, constituting

[92] A.K. Mityukov. Responsibility of the seller for eviction in comparative-historical coverage. Kyiv: Printing house of the St. Vladimir's Imperial University, 1906. C.W. I.

direct relationship between the alienator and them, and 2) thereby becomes an ideal essential part (belonging) of the alienated property"[93]. Supporting the "guaranty theory", K.I. Sklovsky even proposes to separate responsibility for eviction from the fate of sale, to make it independent of a contract (abstract)[94]. According to the model proposed by K.I. Sklovsky, liability for eviction arises not from a sale transaction (which K.I. Sklovsky considers invalid), but from an independent, separate obligation: a conditional figure is introduced to separate liability for eviction and a sale and purchase contract. An explicitly or implicitly expressed in each sale declaration that a property belongs to a seller, is not pledged, etc., acquires a meaning of an independent promise, the violation of which the seller is liable, even if the sale turned out to be invalid[95].

The guaranty theory is mostly due to the need postulated by its authors to extend responsibility for eviction beyond limits of binding obligation between a seller and a buyer. According to supporters of the guaranty theory, it is unfair that claims for compensation in the event of eviction cannot be filed by a buyer against a person who started the chain of unlawful transfers, especially if the latest seller turned out to be bankrupt.

The guaranty theory indisputably allows to solve the problem of protecting interests of a buyer. However, this approach does not allow to answer the question about the basis for responsibility of a seller-owner if he does not intervene in the case. According to the guaranty theory, such liability is completely impossible, because the actual owner did not violate any guaranties given to a buyer (there was no defect of title). In turn, the question of significance of seller's intervention or non-intervention in the case, him providing adequate protection to a buyer, is not discussed by supporters of the guaranty theory.

Another approach, called "the cession theory", links the basis for satisfaction of buyer's demands with a transfer of property under a contract of sale, because it

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[93] M.B. Zhuzhzhalov. The nature of responsibility for eviction // Herald of Civil Law. - 2014. - № 6. Available in the computer legal research system "ConsultantPlus".
[94] K.I. Sklovsky. Property in civil law. M.: Statut, 2010. P. 367 - 368.
[95] See above. P. 367 – 368.

is assumed that the sale contract has some kind of alternative subject. The seller is obliged to transfer goods, however, if the transfer did not satisfy interests of the buyer due to their eviction, the subject of a sale contract is the right to claim the value of the goods[96]. If the alienator turns out to be a non-owner, the buyer acquires not the goods, but the right to claim. Subsequently, when the buyer himself sells these goods to someone, the subject of the sale are not the goods, but right to compensate their value.

It should be noted that the cession theory has little to do with modern legal provisions. Accepting it as true, one should ask, who is the proper defendant in the buyer's claim? For example, the buyer A, having lost the goods, files a claim against the seller B. The seller, in turn, will object, pointing out that although he transferred the right to claim instead of the goods, he is not obliged by this right, because he received it from another seller C, who is responsible for starting a chain of unlawful alienations. Since we are dealing with a transfer of rights, the buyer's claim must be directed to the actual debtor, that is, to C, who has the right to object in a similar way. Thus each alienator transfers his right to claim belonging to his predecessors, which means that the buyer must determine exactly who is guilty in defect of title that led to vindication in order to sue the proper defendant. It is quite clear that rules on eviction are different: the seller is liable before the buyer, and this liability is dependant on his actions. Supporters of the cession theory do not take into consideration the circumstances directly stated in Article 462 of the Civil Code - seller's intervention or non-intervention in the case, subsequent possibility or impossibility to refer to the wrongful conduct of the case by the buyer - and do not explain how to recover the value of goods from a seller, who was their actual owner.

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[96] This approach was formed already in the Roman law. "A right of ownership is acquired, and at the same time, in case the seller was not the owner, a claim based on the non-establishment of ownership", - Huschke stated in relation to specific Roman sources Huschke E. Ueber das Recht des nexum und das alte römische Schuldrecht : eine rechtshistorische Untersuchung. – Leipzig: Gebauer, 1846. – S. 171. See A.K. Mityukov. Responsibility of the seller for eviction in comparative-historical coverage. Kyiv: Printing house of the St. Vladimir's Imperial University, 1906. – P.45.

It should be noted that according to both mentioned theories, provisions of Article 462 of the Civil Code do not make any sense, because they assume that the first unentitled alienator is responsible, regardless of seller's participation in the dispute about seizure or his procedural activity. Both the guaranty theory and the cession theory cannot answer the question of why even the seller who was the owner of goods is obliged to compensate for damages. The question of how a person who did not violate the guaranties given to the buyer, was the owner at the time of the sale and lawfully transferred the title and not the right to claim for compensation, can be held responsible for eviction, is left open by these approaches.

This inconsistency is to a certain extent eliminated by the tort theory, whose supporters attempted to consider seller's liability for eviction as a consequence of his procedural inaction. Let us take a closer look at this approach.

Analyzing Roman sources, R. Jhering, as opposed to the theories that see the basis for the buyer's claim in the transfer of goods, notes that the transfer is only an assumption, and not the basis for the buyer's claim. Such a claim, according to R. Jhering, is of a tort nature. At the same time, the seller's tort consists in the fact that he transferrs to the buyer not his own, but someone else's goods. R. Jhering considered the buyer's claim against the seller as a kind of actio furti - a claim raised by theft[97]. According to this theory, the unlawful act of the seller consists in selling someone else's goods to the buyer, and his responsibility is based on receiving money from the buyer in payment for the goods he himself received unlawfully.

It is easy to see that R. Jhering's approach has the same draw backs as the above considered concepts. However, provisions of his theory were developed by Girard, who made some clarifications to it, pointing out that the seller's tort

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[97] Jhering R. von. Geist des romischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Leipzig, 1866. P. 170. V. III.
Quoted by: A.K. Mityukov. Responsibility of the seller for eviction in comparative-historical coverage. Kyiv: Printing house of the St. Vladimir's Imperial University, 1906. - P. 50-51.
Also see: S.A. Muromtsev. Civil Law in Ancient Rome: Lectures / Sergei Muromtsev, professor at Moscow University. - M .: A.I. Mamontov and Co. Printing house, 1883. - P. 95, 101, 164.

consists not in transferring of someone else's goods, but in failure to provide protection to the buyer. Girard's theory can be summarized by three main points: (1) the seller's obligation is to provide his counterparty with judicial protection in a dispute with third parties about seizure of the goods, (2) this obligation falls on the seller without a special promise to that, (3) failure to fulfill this obligation constitutes a tort that exposes the seller to liability[98].

This theory is more corresponding to modern regulation. It allows to explain why the seller is held liable when he was the owner of the sold goods, but, due to his non-participation in the dispute about seizure of it (or to his provision of ineffective assistance), the goods were nevertheless seized from the buyer. Despite the fact that the seller was in fact the owner of the goods, he could not protect the buyer, thereby causing harm to the latter. The unlawful action (inaction) of the seller is his failure to intervene in the case or his failure to provide effective objections to the claim. The harm is seizure of the disputed goods from assets of the buyer.

Against the tort theory, however, one can raise the objection that seller's obligation to intervene is a direct consequence of the contract of sale. Such an obligation does not arise before or outside the contractual relationship. As part of the sale contract, the seller transfers the goods to the buyer, at the same time agreeing to protect the buyer's possession from claims of third parties, and the buyer counts on seller's protection. The obligation to intervene on the side of the buyer is one of the sale conract effects, this is what, among other things, the buyer has a right to count on when acquiring some goods. Seller's liability is limited only by demands of his buyer, the seller is responsible to the one who was a party to the contract of sale, but not to any subsequent owner of the goods. The entire chain of alienators can be involved in the dispute about seizure, however, regardless of the process course, the seller is responsible to the buyer in the event of an eviction.

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[98] Girard. L'aetion auctoritatis (Nouv. rev. hist. d. droit) V.VI. P. 205-207. Quoted by: A.K. Mityukov. Responsibility of the seller for eviction in comparative-historical coverage. Kyiv: Printing house of the St. Vladimir's Imperial University, 1906. - P. 51.

The above stated indicates that relations associated with liability for eviction are relative by their nature, and therefore the tort theory, like any other theory assuming an absolute relationship as the basis of the seller's liability, cannot be considered correct.

It should be noted that in modern studies the tort theory is considered mainly in the context of invalidity of selling someone else's property. Those researchers who defend the idea of invalidity of selling someone else's goods are forced to look for an extra-contractual basis for the seller's liability, and they see a tort obligation as such. M.A. Tserkovnikov pointed out the possibility of developing a tort theory: "...it is possible to explain responsibility for eviction either through a special kind of consequence of invalidity of selling someone else's goods, where the seller returns the oney and compensates for losses, or through a kind of tort that he commits against the buyer, selling someone else's goods"[99]. At the same time, the very theory of invalidity of selling someone else's property is increasingly criticized in the doctrine and does not find confirmation in judicial practice[100].

Supporters of the "contractual theory" see the basis of liability for eviction differently: in their opinion, this liability is a consequence of the seller's failure to fulfill obligations that arose directly from the contract of sale.

In the civil literature, the commonly accepted nature of the contract theory has been often indicated: as researchers note, it is historically immanent to both Russian and many foreign systems of justice. Thus, D.O. Tuzov points out that

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[99] See M.A. Tserkovnikov. The basis of the seller's liability for seizure of goods from the buyer // Herald of the Supreme Arbitration Court of the Russian Federation. - 2013. - № 11. - P. 4 - 37.

[100] See D.O. Tuzov. Sale of property by an unauthorized person and limitation period for applying consequences of invalidity of void transactions. Commentary to the Decisions of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation from 17.03.2015 № 306-ES14-929 // Bulletin of Economic Justice of the Russian Federation. - 2015. - №4. - P. 4 - 9. According to paragraph 83 of the resolution of the plenum of the Supreme Court of the Russian Federation from 23.06.2015 № 25 "On application by courts of certain provisions of Section I Part One of the Civil Code of the Russian Federation" when considering a buyer's claim against a seller on return of the paid price and compensation for losses caused as a result of seizure of goods from the buyer by a third party on the basis that arose before execution of the contract of sale, Article 167 of the Civil Code of the Russian Federation cannot be applied. Such a demand of the buyer is considered according to rules of Articles 460 - 462 of the Civil Code of the Russian Federation (Available in the computer legal research system "ConsultantPlus").

norms of the current legislation construct a contract of sale as an exclusively binding one, giving rise only to binding relationship, due to which the alienator, in the event of seizure of goods from the buyer, must be liable to the buyer for non-fulfillment of the contract[101]. "The general view on seller's responsibility for seizure of goods from the buyer in domestic civil law of both pre-revolutionary and especially Soviet period does not differ greatly from that adopted in continental European systems of justice. The obligation to protect against eviction was understood as a generally necessary consequence of the sale contract, and, consequently, the basis of seller's liability in the event of eviction was traditionally seen in such an agreement," notes M.A. Tserkovnikov[102].

At the same time, the theory of breach of the contract of sale requires to determine which breach of contractual obligation gives rise to buyer's right to claim for compensation.

First of all, liability for eviction may be based on seller's failure to transfer the goods to the buyer. In the civil doctrine, we generally point out two main obligations of a seller: firstly, a seller must physically transfer the goods, and secondly, transfer it into buyer's ownership (transfer the title). "Along with the obligation to transfer goods to the buyer, the seller is also obliged to transfer the right of ownership (or other right in relation to state enterprises). The transfer of such a right was called the legal result of the contract of sale," states Z.I. Shkundin[103]. O.S. Ioffe notes that a seller, in addition to his obligation to transfer goods, has another very important obligation - to transfer the right to ownership of the sold goods to the buyer[104].

According to supporters of the theory of "responsibility for non-transfer of ownership", seizure of goods by a third party means that the buyer did not have the

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[101] See above. P. 4 – 9.

[102] M.A. Tserkovnikov. The basis of the seller's liability for seizure of goods from the buyer // Herald of the Supreme Arbitration Court of the Russian Federation. - 2013. - № 11. - P. 4 - 37.

[103] Soviet civil law / Ed. by prof. S.N. Bratus. - M .: State Publishing House of legal literature, 1951. (chapter by Z.I. Shkundin). P. 13 - 15.

[104] O. S. Ioffe. General doctrine of obligations / O. S. Ioffe. Selected works in 4 volumes. Volume 3. - Publishing house "Legal Center Press", 2004. - P. 255;

right of ownership to the goods, which means it was not transferred by the seller. If this is the case, the seller has not fulfilled his obligation and must compensate the buyer for losses[105].

Although this theory corresponds to the contractual nature of the seller's liability for eviction, it is not without flaws. The main one is that the theory of liability for non-transfer of v focuses exclusively on the substantive component of parties' relations, and is an attempt to find out the nature of liability for eviction without taking into account the procedural component. Having accepted this concept, it is necessary to conclude that any seller who is not the owner is liable for eviction. However, let us imagine the following situation. The buyer did not bring the seller in the case of seizure and lost it. At the buyer's claim for compensation of the seized goods, the seller, although he did not prove his right of ownership, was able to substantiate that the third party who seized the goods was not the owner either, and if the seller had taken part in the case, he could have proved it. According to the theory of liability for non-transfer of ownership, the seller is obliged to compensate for losses, while this directly contradicts Article 462 of the Civil Code.

The theory of liability for non-transfer of ownership fails to explain why it may be sufficient for the seller who is not involved into the case to prove his ability to win in the process, but he is not required to assert his ownership. The basis of liability of the actual owner also remains unclear, and such liability is possible at least when the seller was brought into the case, but did not intervene.

Therefore, it is necessary to define another basis for seller's liability, which belongs to the contractual theory, but is not related to seller's obligation to transfer ownership. This may be a violation of seller's special obligation from the contract of sale, namely, his obligation to intervene on the side of the buyer and effectively protect his rights. According this approach, refusing to intervene in the process on the claim of a third party against the buyer, the seller violates his obligation from the contract of sale, which creates the basis for compensation.

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[105] See above. P. 256.

This theory, as it is easy to see, fully corresponds to the construction of responsibility for eviction, because this approach takes into account, firstly, the contractual nature of buyer's claims for compensation, and, secondly, the conditionality of liability by the procedural behavior of the seller (the fact of his intervention into the case). The concept of the seller's liability for his procedural activities is devoid of the draw backs immanent to the above described theories, and therefore must be recognized as the only correct one.

The thesis that "the basis of seller's liability for eviction lies in violation of his contractual obligation to take part in the case" gives rise to the following question: is the named obligation independent?

In the pre-revolutionary literature, the seller's obligation to take part in the case was one of the so-called "covenants for title". Obligations of this kind were associated with performance of a contract and were defined as "its indirect actions, which, however, are not always manifested"[106]. In addition to obligation to prevent seizure of goods, they also included seller's obligations related to hidden defects in the goods, or to the fact that the right of ownership was transferred in a different form or extent than was agreed by the parties[107]. Modern rules on sale and purchase also provide for a variety of seller's obligations (buyer's rights) associated with the defects of the sold goods. For example, according to Article 475 of the Civil Code of the Russian Federation, a buyer who has discovered defects in quality of the goods sold to him has a right to demand a proportionate reduction in the price or a refund of his own expenses for eliminating the defects. The seller, accordingly, must reduce the price or compensate the buyer's expenses. This seller's obligation, as well as the obligation to intervene when a third party brings a claim for seizure of goods, is a part of covenants for title. Therefore, at first glance, a similar approach is possible to all such obligations.

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[106] D.I. Meyer. Russian civil law / Readings of D.I. Meyer's works, published according to the notes of listeners; ed. by A. Vitsyn. - St. Petersburg: Nikolai Tiblen's Publishing house, 1864. - P. 467.

[107] See above. P. 467.

Seller's obligations arising from violations of quality requirements are considered as independent contractual obligations[108]. Meanwhile, it is impossible not to note some controversy of this thesis. Two main obligations arise from a sale contract: to transfer goods and pay their price, in turn, seller's obligation to make covenants for title if the goods are of inadequate quality, is of a secondary, collateral character. In this regard, it is possible to assume that all those obligations that we called "collateral" constitute the content of either the obligation to transfer the goods or the obligation to pay for it, and are not elements of civil law obligations. A similar thesis is also found in some studies. In particular, according to V.P. Gribanov, "...it is necessary to note impossibility of existence of independent subjective duties, the content of which would be a requirement to perform an action in relation to quality of goods, their quantity (completeness, assortment), because it is objectively impossible to measure quality and quantity outside the goods, <...> the circumstance that in most cases violation of these conditions is punishable by law, cannot be seen as an establishment of independent obligations"[109].

It should be noted that an obligation ("duty") is, along with the right to claim, a structural element of a civil law liability[110]. At the same time, we can speak about an independent obligation when it reveals its own content or the basis for its emergence[111].

Violation of conditions on the quality of goods is not only "punishable by law", but creates for a buyer a right to claim against the seller. Moreover, a buyer does not have this right of demand at the time of concluding a contract of sale. When the parties have agreed on selling goods, a buyer does not have a right to demand a reduction in their purchase price. Such a right arises only upon detection

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[108] M.I. Braginsky. General doctrine of commercial contracts. Minsk, 1967. P. 147.

[109] V.P. Gribanov, V.S. Yem. Civil law duties: content and factors determining it // Problems of private law development: Collected Articles to the jubilee of Vladimir Saurseevich Yem. - M.: Statut, 2011. - P. 28 - 39.

[110] Here we will talk about simple obligations.

[111] M.M. Agarkov. Obligation in Soviet civil law. - M.: Yurisizdat, 1940. - P. 15. We do not take into account parties as an individualizing sign of an obligation, since in the considered cases they will obviously be identical.

of defects in the transferred goods and is based, at least, on the fact of transfer by the seller. In turn, the very existence of the right of claim, in absence of a corresponding civil obligation, is impossible: an independent right of claim is always caused by an independent obligation.

The buyer's rights related to quality defects also have their own content, different from the right to demand transfer of goods. I.e., the buyer has a right to compensate the money spent to eliminate the defects of the goods, which means that the seller must take completely different actions than transferring of goods. Therefore, it seems that seller's obligations related to transfer of goods of inadequate quality arise from an autonomous obligation relationship.

Can we, however, draw the same conclusion about seller's obligation to intervene into the case? Unlike cases of transfer of low-quality goods, when a buyer has a right to demand from a seller performing certain actions, in a situation where a third party brings a claim for seizure of goods, civil law does not give a buyer the right to demand seller's intervention. This circumstance is often cited in civil studies to justify the position that there is no such civil obligation to take part in the process[112]. Indeed, it is difficult to imagine that the buyer demanded seller's intervention, and in case the seller refused to, the buyer could file a claim for judicial protection of his right.

From this point of view, it can be assumed that seller's obligation to intervene differs from other obligations of covenants for title and yet is included in the content of his obligation to transfer goods to the buyer. It should be noted that this understanding of seller's obligation to intervene is dominant in the civil doctrine. If seizure of goods by a third party turned out to be possible, this means that the seller has not fulfilled his obligation to transfer ownership of the goods. Otherwise, the claim for seizure of the goods would be denied. Based on this, O.S. Ioffe notes: "...seller's violations of his obligation to transfer ownership to a buyer are of two kinds <...> in the second case the seller alienates to the buyer goods that

[112] M.A. Tserkovnikov. The basis of the seller's liability for seizure of goods from the buyer // Herald of the Supreme Arbitration Court of the Russian Federation. - 2013. - № 11. - P. 4 - 37.

do not belong to him. In this case, the actual owner has the right to bring a claim against the buyer for their seizure <...> If the goods are confiscated from the buyer, he has the right to bring a claim against the seller for compensation"[113]. According to the authors of this approach, seller's liability for non-transfer of ownership to the buyer arises as follows: if, after the transfer of goods, it turns out that there are rights and claims of third parties to it, the buyer has the right to demand a reduction in price or termination of the contract of sale according to Article 460 of the Civil Code, however, only until the moment when the goods are seized by a third party. After that the buyer has the right to claim for compensation only according to Article 461 of the Civil Code. The result of a systematic interpretation of Articles 460 and 461 of the Civil Code, according to researchers, testifies in favor of the theory of seller's liability for non-transfer of ownership[114].

Let us ask, however, a question: is the seller, according to this approach, obliged to intervene in the proceedings if has fulfilled his obligation to transfer ownership? It is quite clear that he is not, since this liability is conditioned by violation of seller's obligation to transfer the title. If this is the case, we should agree that the seller, who was brought by the buyer into the case, but did not intervene, will be released from his liability if he proves that at the time of the sale he was the owner, because his argument will mean that he was not obliged to intervene at all, and therefore he could not violate this obligation. Thus, we can conclude that seller's non-intervention does not exclude his right to prove that he transferred the title to the buyer and therefore should not compensate for the losses.

At the same time, such an approach contradicts the very essence of regulating consequences of eviction, because it means that the seller, when he is sure of his ownership at the time of the sale, may not participate in the process of seizure at all, or at least may not object with reference to the fact that he was the

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[113] O. S. Ioffe. General doctrine of obligations / O. S. Ioffe. Selected works in 4 volumes. Volume 3. - Publishing house "Legal Center Press", 2004. - P. 256;

[114] M.A. Tserkovnikov. The basis of the seller's liability for seizure of goods from the buyer // Herald of the Supreme Arbitration Court of the Russian Federation. - 2013. - № 11. - P. 4 - 37.

owner and transferred his right of ownership to the buyer. But why should the seller intervene, if not to prove that he transferred the title to the buyer?

Moreover, it is clear from the above given arguments that according to the "theory of ownership" the basis for seller's obligation to intervene cannot be determined. The contract of sale itself cannot be considered a basis: at the time of its conclusion, the seller did not have an obligation to intervene. Strictly speaking, it does not exist even at the time of contract execution, since it is impossible to intervene before a claim is filed. D.I. Meyer attempted to find a solution for this problem and concluded that the obligation to intervene arises at the moment the seller fulfills his obligation to transfer goods (and the rights to them), but it becomes actual at the time a claim is filed by a third party[115]. However, even this approach does not allow to explain why emergence of a component part (an obligation to intervene) requires a different set of facts than for emergence of the whole (an obligation to transfer title).

The internal inconsistency of the concept that sees seller's obligation to intervene as an element of his obligation to transfer ownership is contradictory, makes one conclude that the opposite concept is correct and that there is an independent obligation, the content of which is seller's obligation to intervene in the case of seizure of goods and buyer's corresponding right of demand[116].

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[115] D.I. Meyer. Russian civil law / Readings of D.I. Meyer's works, published according to the notes of listeners; ed. by A. Vitsyn. - St. Petersburg: Nikolai Tiblen's Publishing house, 1864. - P. 468 - 469.

[116] It should be noted that subjective civil law is found where its elements can be seen, namely the right to one's own actions, the right to other people's actions and the right to protection (V.P. Gribanov. Limits of exercise and protection of civil rights. M., 1972. P. 154 - 155; N.I. Matuzov. Subjective rights of citizens of the USSR. Saratov, 1966. P. 33). A buyer cannot protect his right, force a seller to intervene, using a claim form for protecting his right. Meanwhile, absence of claim protection does not mean absence of a right itself, natural obligations serve as an example of this. These may include seller's obligation to intervene in a process of seizure (A.K. Mityukov supports this position. See: A.K. Mityukov. Responsibility of the seller for eviction in comparative-historical coverage. Kyiv: Printing house of the St. Vladimir's Imperial University, 1906. P. 36). Moreover, if a seller fails to intervene, a buyer has the right to apply measures of a restorative nature to recover the losses caused by seller's inaction.

§ 2. Limits of seller's responsibility

Examining the issue of limits of seller's responsibility we should start with an analysis of provisions of paragraphs 1-2 of Article 462 of the Civil Code of the Russian Federation: "<...> the buyer is obliged to bring the seller into the proceedings, and the seller is obliged to intervene on the side of the buyer. In case when the buyer fails to bring the seller into the proceedings, the seller is released from liability for eviction if he proves that, by joining the case, he could have prevented seizure of the sold goods".

A claim filed by a third party for seizure of goods places an obligation not only on the seller (to protect his counterparty), but also on the buyer (to bring the seller into the case). Failure to fulfill this obligation may result in buyer's potential inability to recover losses from the seller.

Buyer's obligation to bring the seller into the proceedings has dogmatic features that make it possible to attribute it to the category of creditor duties (liabilities)[117]. Firstly, failure to fulfill it makes it impossible for a debtor to fulfill his own obligation. As long as a buyer does not bring a seller into the case, the latter objectively will not be able to protect him. Secondly, this obligation is secondary to the main purpose of the obligation - protection of a buyer against a claim of a third party for seizure of goods.

At first sight, a provision that a seller has the right to be released from liability if he was not brought by a buyer into the case is quite clear and indisputable. Norms of Article 462 of the Civil Code is a special case of the general rule on t creditor's delay, which is reflected in Article 406 of the Civil Code. Paragraph 1 of item 1 of this Article establishes that a creditor is considered in delay if he refused to accept proper performance proposed by a debtor or did not

[117]A.V. Egorov. Structure of obligation relationship: developments of the German doctrine and their applicability in Russia // Herald of civil law. 2011. № 3. P. 271 - 272; O.S. Ioffe. Obligation law. M., 1975. P. 65; M.M. Agarkov. Obligation in Soviet civil law. M., 1940. P. 62.

take actions provided by law, other legal acts or an agreement, or arising from customs or essence of the obligation, before which the debtor could not perform his obligation. At the same time, according to paragraph 3 of Article 406 of the Civil Code, a creditor is not considered in delay if a debtor was unable to fulfill his obligation, regardless of the fact that the creditor did not take actions mentioned in paragraph 1 of this Article. The rule of Article 462 of the Civil Code, according to which a seller is released from liability if he proves that by intervening he could have prevented seizure of the sold goods from a buyer, is nothing more than a special case of paragraph 3 of Article 406 of the Civil Code. To prove that by intervening a seller would have prevented seizure of goods is to prove that he was able to fulfill the obligation. And its non-fulfillment was the result of creditor's (buyer's) behavior.

However, in our case, buyer's creditor obligation consists in the need to perform procedural actions, which are regulated by the procedural law. So we should ask a question: what exactly must a buyer do so that his obligation to bring a seller into the proceedings can be considered fulfilled?

Procedural codes define the following regulations for third parties to enter into the case if they do not declare independent claims regarding the subject to the dispute: they may enter the case on complainant's or defendant's side before the court of first instance rules out a judgment on the case, if it may affect their rights or obligations in relation to one of the parties; they also may be brought into the case at the request of parties participating in the case, or at the initiative of the court (Articles 43 of the Civil Procedure Code of the Russian Federation, 51 of the Arbitration Procedure Code of the Russian Federation).

There is no doubt that a buyer must, at least, file a request that meets requirements of the procedural law to bring a seller into the case. However, according to development of substantive relationship, buyer's fulfillment of his creditor obligation is a condition for a seller to fulfill his own obligation, which consists in protecting a buyer from demands by a third party. To protect a buyer (whatever this protection is), a seller needs a lawsuit, which means that a buyer

must not only file a request, but allow a seller to take part in the proceedings. This is the essence of buyer's obligation established by Article 462 of the Civil Code: to bring into the case is to allow to participate in it.

Let us illustrate this thesis with two examples.

1. Imagine that a person claiming the goods did not initiate a legal dispute, but turned to the buyer with a demand to voluntarily give them up. The buyer considered arguments and evidence confirming the right of the trird party justified and, to avoid a senseless litigation, gave up the goods. But no matter how justified the pre-trial claim may seem, the buyer is not entitled to satisfy it, because by doing so he will violate his obligation to provide an opportunity to participate in the trial to the seller. In the above case, the seller will be released from his liability by proving that he could have prevented seizure of the goods if he had been able to intervene (paragraph 2 of Article 462 of the Civil Code of the Russian Federation).

2. The dispute about seizure was initiated, the seller was brought into the case, but complainant's arguments were so convincing that the seller, expecting inevitable victory of his opponent, admitted the claim. Buyer's obligation to "provide process" would not be fulfilled in this case either, since seller's ability to win the dispute was limited by buyer's actions. This conclusion cannot be changed even by the fact that admission of the claim took place after a long time, numerous court hearings, etc., even if the seller during this period did not perform any actions that could lead to buyer's victory or even did not appear at all. To "provide the process" means to provide it to the very end, to "provide" the court decision, which will be ruled out based on results of seller's procedural activity. This conclusion is supported by researchers of the substantive law, who state: to claim for compensation, a buyer must certainly conduct a process, even if it is absolutely hopeless[118].

The next question about limits of seller's responsibility can be formulated as follows: is it true that a seller is responsible for seizure of goods by a third party (in

[118]I.B. Novitsky. Obligation to make covenants for title in civil code // Herald of Civil Law, published by M.M. Vinaver. - 1914. - № 3 - P. 113 - 114.

other words, loss of a case), regardless of procedural behavior of a buyer? Does a buyer have to be active in order to prevent seizure of goods, or is all that is required from him is to provide the process to a seller?

Formulation of legislation does not allow to determine actions that a seller must take: only his obligation to intervene is textually expressed. Apparently, a seller has to not only attend the court session, but assist a buyer in defending against a claim of a third party. Actions expected from a seller are procedural, but what exactly should he do? What is the content of his obligation?

The first assumption that needs to be exained is the following. A seller is obliged to a buyer to prevent seizure of goods, in other words, to obtain a court decision to dismiss a claim by a third party. To achieve this, the seller must be provided with all means of conducting a case that are permitted by the procedural law and do not contradict the substantive law. But risks of losing the case are borne by the seller: if the claim by a third party is satisfied, the seller will not be able to avoid liability to the buyer.

This approach is based on grounds arising from the very essence of the legislative requirement to bring the seller into the case on seizure of goods. The civil law doctrine usually states the following reasons why seller's intervention is necessary: a) two processes on the same issue should not be allowed; b) the seller is better informed about circumstances of the case and has evidence for disputed facts, his participation makes procedural defense of the buyer easier; c) seller's intervention allows declaring the buyer the owner[119].

If the idea of seller's intervention in the case of seizure of goods is based on unacceptability of two processes on the same issue, then the seller in the dispute on a claim by a third party must raise all possible objections. Otherwise, when resolving a dispute about compensation for the buyer from the seller, the court is at risk of revising the decision ruled out in the case of seizure. For example, neither

[119] K.P. Pobedonostsev. Civil law course. First part: Patrimonial rights. - M.: Statut, 2002. URL: http://civil.consultant.ru/elib/books/15/page_54.html (date of access: 30/08/2023). Judicial Statutes of 1864, November 20, reciting reasonings on which they are based. Part one. - St. Petersburg, 1866. P. 307.

the seller nor the buyer, in a dispute about seizure, filed an objection about expiration of a limitation period. In a subsequent case for compensation, the seller may state: "The buyer could have raised this objection, which means the case was lost not by my, but by his actions". To which he will receive the following answer: "It maybe so, but in this case we will not examine the issue of limitation period expiration on the claim for seizure, here we will establish only one fact: eviction took place, which means the case was lost". In this sense, seller's obligation to protect the buyer in a dispute about seizure of goods is a consequence of the res judicata principle.

If the seller needs to enter into a dispute about seizure of goods because he knows much more about the case than the buyer, has evidence necessary to win, then it is the seller who knows best what objections need to be used to win the process. For example, the seller understands that the third party claiming seizure is indeed the owner, but the limitation period has expired, therefore it is necessary to immediately raise this objection. It may be the other way around: the seller understands that he can easily dispose complainant's evidence, the case can be won after resolving the issue of ownership and there is no need to raise other objections. Since the seller is involved in the case as a carrier of information and owner of evidence, he must make all decisions about its progress and be responsible for their consequences.

If the seller is brought into the proceedings so that the buyer would be declared the owner by court decision, then his responsibility occurs in any case of losing, because the case would not be lost if the seller managed to prove that the buyer was the owner. Then any subsequent seller's objections about conducting the process are crashed by the thesis: "If the right of ownership had been proven, eviction would not have taken place".

Accepting the hypothesis of seller's responsibility for the process outcome will, however, lead to the following situation: interests of the parties will cease to correspond to their procedural status. When the seller is responsible for any loss of the case, he economically, and not the defendant, becomes a person who has to

bear the consequences of seizure. For the buyer, the outcome does not matter, he, by bringing the seller into the case, can completely withdraw from the proceedings, because the law protects the buyer in any outcome of the dispute. Having lost the process, the buyer will receive compensation from the seller, having won it, he will remain the owner of the acquired goods.

Since disadvantages of the process are lying solely on the seller, the latter must completely dominate the course of proceedings. For it is quite obvious that it is impossible to make a person liable if he was not able to fulfill his obligation. Complete dominance over the proceedings implies that the seller, being in the status of a third party, conducts the case, thereby performing all the functions of the defendant, but does not replace him. And then we must conclude that if seller's and buyer's positions regarding any procedural action differ, advantage should be given to seller's position.

The latest conclusion finds some justification. Losses, which the seller who has lost the case has to compensate, include court expenses incurred by the defendant during the proceedings on seizure. K.P. Pobedonostsev describes one of the disadvantages for the seller who evaded participation in the process: "Whatever actions, whatever omissions this party had made to protect the right, nowhatever costs had he borne - all this is becomes an obligation for a third party"[120]. Since procedural expenses will ultimately be attributed to the seller, the latter should be able to determine necessary expenses, and therefore measure of procedural activity of the defendant.

However, it is easy to imagine situations that illustrate practical inconsistency of the thesis about seller's complete dominance over the proceedings.

For example, a vindication demand is considered. The buyer claims that limitation period has expired, while the seller refuses to use this objection. Having concluded that responsibility for the process outcome lies on the seller, it must be

[120] K.P. Pobedonostsev. Civil law course. First part: Patrimonial rights. - M.: Statut, 2002. URL: http://civil.consultant.ru/elib/books/15/page_54.html

stated that the court should not accept buyer's (defendant's) objection and consider the case as if no expiration of limitation period was declared.

Another example. In a similar case, the seller is inactive: does not present his position on the case, does not come to hearings, etc. The buyer believes that evidence provided by the complainant is fabricated and considers it necessary to declare this. But it turns out (if we follow the above mentioned concept) that the buyer is not entitled to do this, since he will only increase legal costs by doing, while the seller is confident in losing the case and tries to reduce procedural costs with his passive behavior.

Such a situation cannot be recognized as correct, which crashes the idea of seller's full responsibility for the outcome.

In fact initial suppositions for the mentioned concept are false.

Firstly, the buyer (defendant), and not the seller, is most interested in winning the case, since satisfaction of a third-party claim will deprive him of his goods, and leave him only the right for compensation. If the buyer has the goods right now, then the prospect of recovery for losses is distant, moreover, is associated with need to involve buyer's additional resources (at least for legal costs for a new process). The buyer who is mostly interested in performing all the procedural actions available to him, to declare all the objections known to him, and thus win the case of seizure. To deprive the buyer of this opportunity, in essence, to make him a "hostage" of seller's procedural behavior, means to ignore his interest in maintaining ownership, which is incorrect.

Secondly, the procedural law does not provide such a mechanism that would allow a third party to fully dominate the process, to take upon oneself all procedural rights and obligations of the defendant, without occupying this formal position. Thus, third parties are not entitled to perform administrative actions, which means that the seller in any case cannot minimize legal costs by recognizing the claim, as well as he cannot try to achieve the best possible outcome through a civil agreement.

Thirdly, seller's obligation to take part in the case and to defend the buyer corresponds to the subjective right of the latter. And if this is the right to such actions of the seller, which completely replace procedural activity of the buyer, then the subjective right of the buyer ceases to be a good and becomes a burden. It would be disadvantageous for the buyer to bring the seller into the case, if the seller is fully responsible for seizure of the goods, since he, acting against buyer's will, is able to actually deprive the latter of the acquired goods.

The given reasoning leads to the following conclusion: seller's obligation is not to win the case, and he is considered liable only in some cases of satisfying a third party's claim. This means that the buyer cannot take a passive position in the proceedings, he should perform some actions aimed at winning the case. But what exactly is required from the seller and from the buyer?

Firstly, it should be noted that the seller cannot be held liable for those actions he is not entitled to perform due to normative restrictions. As mentioned above, these actions include procedural actions which are not available to a third party. In addition, the seller is not entitled to use those objections through which material second (transformative) rights the buyer has are realized.

Next, we will return to doctrinal views on reasons why seller's participation in the dispute on seizure is required and will pay attention to the fact that the main reason is him having information and evidence. All other ones (undesirable resolution of the solved dispute, preservation of buyer's ownership) are derived from the fact that the seller knows circumstances of acquisition of ownership. Thus, the function of seller's participation in the case is to reveal these circumstances to the court, to prove that he has the right of ownership and transfered it to the buyer. The obligation to perform procedural actions necessary for this function should be assigned to the seller and cannot be attributed to the buyer. Loss due to inability to prove these circumstances cannot be seen as buyer's fault.

However, there are objections that are equally available both to seller and to the buyer, but are not related to acquisition of ownership rights. For example, an objection on limitation period expiration.

It would seem that the approach of the Supreme Court[121], which gives the right to object limitation period expiration to a third party, directly allows us to see its declaration as seller's obligation. For why else did the Supreme Court provide a third party with an opportunity to declare limitation period expiration, if not to free him from subsequent claims from the defendant?

It should be noted that other objections are equally available to the seller and the buyer, which are ordinary for the process: related to procedural dynamics, to properties of evidence, etc. Who should declare them?

The issue of including these actions in the content of seller's responsibility must be considered with bearing the following in mind.

The principle of dispositivity, which implies freedom of using procedural means of defense and attack[122], applies to actions of the defendant to full extent. According to this principle, the defendant has a right to independently and freely determine tour of objections which will become subject to judicial study. Charging the seller with an obligation to protect the buyer limits the principle of dispositivity. The defendant usually has the right to choose: to defend against the claim or to be passive, hoping that the complainant will not cope with his burden of proving, to present evidence or to "hide" it from the court; to refer to a fact that denies complainant's position or to limit oneself to a simple denial. When a third party comes into case, which, under threat of civil liability, has an obligation to

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[121] Paragraph 10 of the resolution of the Plenum of the Supreme Court of the Russian Federation from 29.09.2015 № 43 "On some issues related to application of norms on the limitation of the Civil Code of the Russian Federation" (Available in the computer legal research system "ConsultantPlus"). It should be noted that position of the Supreme Court on possibility of a third party to declare expiration of limitation period was critisized in doctrinal studies. See T.E.Abova. Norms on freedom of a contract remains fundamental for all of our obligatory law // Herald of the Arbitration Court of the Moscow District. 2017. N 2. P. 12; V.V. Vitryansky. Reform of Russian civil law: interim results. M., 2016. Available in the computer legal research system "ConsultantPlus".

[122] E.V. Vaskovsky. Civil procedure course. Volume 1: subjects and objects of a process, procedural relations and actions. - M.: Br. Bashmakov's Printing House, 1913. P. 346 - 347.

defend the buyer, the latter does not choose procedural means at his will, because now the third party makes relevant decisions, in full or to some extent[123].

At the same time, the defendant has an interest, protected by the principle of dispositivity, to win (or lose) the case on his own terms. So, the defendant may be interested in the court to establish some facts regadring the case, and not to limit itselft to passing a judgment on the basis of limitation period[124]. The defendant cares about the basis of refusal, because the court decision has the property of prejudice.

Since seller's obligation to protect the buyer is a restriction of dispositivity, when determining the content of this obligation, a restrictive approach should be applied: it should be determined in such a way as to allow the seller to fulfill the function for which the law establishes his obligation to intervene, but not more than that.

Guided by this concept, we determine the content of seller's obligation to intervene as follows: the seller must raise objections related to circumstances of acquisition of ownership rights and transfer of title to the buyer (his own objections to the claim) and prove them.

This thesis, meanwhile, returns us to previous concepts, for it is able to make us conclude that the seller is responsible for any loss of the case. Satisfaction of third party's claim is impossible if the seller has fulfilled his obligation - to prove existence of the right of ownership at the time of the sale and successful transfer of this right to the buyer. This means that seller's responsibility does not depend on procedural behavior of the buyer. At the same time, the approach that postulates full seller's responsibility for the process outcome was rejected by us above.

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[123] N.V. Platonova. Some reflections on involvement of non-party interveners into the proceedings // Law, 2023. N 1. The supplement to the issue. P. 33-39.

[124] According to paragraph 10 of the resolution of the Plenum of the Supreme Court of the Russian Federation from 29.09.2015 № 43 "On some issues related to application of norms on the limitation of the Civil Code of the Russian Federation" (available in the computer legal research system "ConsultantPlus") the court, having established that a party passed limitation period, has the right to refuse to satisfy demands only for these motives, without studying other circumstances of the case.

The solution seems to lie in applying rules on not taking reasonable measures to reduce amount of losses (Article 404 of the Civil Code of the Russian Federation) to relationship between the seller and the buyer[125].

Paragraph 1 of Article 404 of the Civil Code states: if failure to perform or improper performance of an obligation occurred through fault of both parties, the court accordingly reduces amount of debtor's liability. The court also can reduce the amount of debtor's liability if the creditor intentionally or negligently contributed to an increase in the amount of losses caused by non-performance or improper performance, or did not take reasonable measures to reduce them.

As you know, this provision states two circumstances that are the basis for reducing the amount of recoverable damages. Which is, firstly, mixed fault of the debtor and the creditor for breaching an obligation. Secondly, guilty actions of the creditor, which led to an increase in the amount of losses, or creditor's failure to take reasonable measures to reduce losses[126].

Limitation of debtor's liability when the creditor fails to take reasonable measures to reduce losses is justified by researchers in different ways: according to the principle of good faith and prohibition of contradictory behavior[127], considerations of economic rationality[128], requirement to apply a fair sanction to the debtor[129]. For this study, the most significant approach is the one whose supporters justify limitation of debtor's liability in terms of a causal relationship. The essence of this position is that property losses of the creditor, due to his own

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[125] Note that classifying the obligation to take part as a civil contractual obligation makes it possible to apply the provisions of the general part of the law of obligations (Section III of the Civil Code of the Russian Federation) to the relationship between the seller and the buyer regarding the participation of the seller in the process of seizing the thing by a third party.

[126] Contractual and obligation law (general part): article-by-article commentary on articles 307 - 453 of the Civil Code of the Russian Federation / ed. By A.G. Karapetov. M-Logos, 2017 (comment by V.V. Baibak). Available in the computer legal research system "ConsultantPlus".

[127] S.V. Sarbash. Elementary dogmatics of obligations: textbook. M.: Statut, 2016. P. 294.

[128] McKendrick E. Contract Law: Text, Cases, and Materials. 5th ed. Oxford University Press, 2012. P. 414

[129] I.I. Akimova. Mixed guilt and reduction of losses in case of breach of a contract // Experiences of civil research: collection of articles. Moscow: Statut, 2019. Issue. 3: special issue for the jubilee of Professor Evgeny Alekseevich Sukhanov. Available in the computer legal research system "ConsultantPlus".

inaction (failure to take measures to reduce losses), are not in a legally significant causal relationship with violation committed by the debtor, and therefore are not subject to compensation.

This approach is widely discussed in foreign works, in particular in English legal doctrine[130]. A similar approach to reduction in losses as a result of the absence of a causal relationship is also found in domestic studies. E.g., V.V. Baibak argues as follows: "If the failure to take measures to reduce losses does not have a causative force, it is difficult to explain why only those losses that were or could have been prevented by reasonable behavior of the creditor are excluded from the amount of compensation. In our opinion, the only answer to this question is recognition that these losses are not in legally significant causal connection with breach of a contract. More precisely, another fact intervened in the causal chain linking the breach of a contract and losses - failure to take measures available to the creditor to reduce losses, which directly affected the final amount of losses"[131]. Next, the author states that " to refer to a causal relationship, it is necessary to state that creditor's failure to take measures to reduce losses is unlawful <...> this, in turn, requires to establish creditor's obligation, which can be considered violated"[132], and eventually concludes that "taking measures to reduce losses can be considered a manifestation an obligation for good faith and fair dealing in terms of contractual legal relations, and a corresponding obligation can be classified as a creditor's one"[133].

Understood in this way, provisions on consequences of creditor's failure to take measures to minimize losses can be applied to the relationship between the seller and the buyer in a situation where a third party files a claim for seizure of goods. If the seller did not state his own objections and did not prove them, he really did not fulfill his obligation to intervene in the case. This led to losses for the

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[130] See, e.g., McKendrick E. Contract Law: Text, Cases, and Materials. 5th ed. Oxford University Press, 2012. 1053 P.

[131] V.V. Baibak. Reducing losses in case of breach of a contract (mitigation) // Herald of the Supreme Arbitration Court of the Russian Federation. 2012. № 7. P. 65 - 80.

[132] See above.

[133] See above. See also: O.S. Ioffe. Liability in Soviet civil law. L., 1955. P. 161 - 162.

buyer. However, if the buyer had an opportunity to win the case by raising an objection available to him (for example, about expiration of the limitation period), seizure as well as losses becomes the result of buyer's inaction to the same extent as seller's. If the buyer had raised an objection, the case would have been won and there would have been no loss at all. There are two reasons for losses at the same time: seller's inaction and buyer's inaction.

Since a) seller's liability arises for violation of contractual obligation to raise (and prove) objections related to circumstances of acquiring the right of ownership and transferring the title to the buyer in the process on seizure; b) provisions of Article 462 of the Civil Code of the Russian Federation should be applied according to rules set by Article 404 of the Civil Code of the Russian Federation, paragraph 3 of Article 462 of the Civil Code of the Russian Federation should be interpreted as follows. The seller, brought by the buyer into the proceedings, but who did not take part in it, cannot raise the same objections against the buyer's claim that he had against the claim of a third party, because he had to raise them in a dispute about seizure. Meanwhile, the seller is not deprived of the right to object with reference to the fact that the buyer had his own objections to claims of a third party and their timely raising would have made it possible to win the case.

Chapter 3. Procedural action as a civil transaction

§ 1. Debatable questions of recognizing a civil transaction as a procedural action

In the science of civil procedural law, the thesis is widely supported that emergence, change or termination of substantive rights during a process, if possible at all, is only due to performing an administrative action[134]. At the same time, Article 153 of the Civil Code, which defines a transaction as an action between a citizen and a legal entity aimed at emergence, change or termination of civil rights and obligations, does not deny a possibility of its commission by a non-administrative procedural action, because it requires only an expression of will aimed at certain legal consequences.

In the first chapter of this study, we gave several examples when a transaction effect occurs as a result of a non-administrative procedural act. So, filing a claim for refund of an advance payment is seen by the Supreme Court as a basis for termination of obligations emerging from a contract of sale[135]. A similar position, however, regarding defendant's actions, was expressed by the Arbitration Court of the Volga District, which stated that the will to withdraw from a rental contract was expressed by a defendant in his response to the claim, in his appeal[136].

In another case, the Supreme Court concluded that filing a claim for recovery of a loan sum is at the same time a demand for its return, when such a demand, according to Article 810 of the Civil Code of the Russian Federation,

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[134] Civil process: textbook for students of law schools / D.B. Abushenko, K.L. Branovitsky, V.P. Volozhanin and others; ed.-in-chief V.V. Yarkov. - M.: Statut, 2017. - 702 p.; Civil process: textbook / V.V. Argunov, E.A. Borisova, N.S. Bocharova and others; ed. M.K. Treushnikov. - M.: Statut, 2014. - 960 p.

[135] Decisions of the Judicial Chamber for economic disputes of the Supreme Court of the Russian Federation, in case №307-ES17-1144 of 30.05.2017. Available in the computer legal research system "ConsultantPlus".

[136] Decisions of the Judicial Chamber for economic disputes of the Supreme Court of the Russian Federation of the Arbitration Court of the Volga District № F06-23865/2015 from 04.06.2016 in case №A55-22930/2014. Available in the computer legal research system "ConsultantPlus".

marks a beginning of the thirty-day period for[137]. Filing a claim is again called an action aimed at changing a substantive status of interested parties[138].

These approaches determine formulation of the following question of this study: is it true that a substantive transaction can emerge from a procedural action?[139]

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[137] Decisions of the Judicial Chamber for economic disputes of the Supreme Court of the Russian Federation, in case №9-KG19-11 from 08.10.2019. Available in the computer legal research system "ConsultantPlus".

[138] It should be noted that there is a certain discussion on the issue of legal nature of legally significant messages (Article 165.1 of the Civil Code of the Russian Federation). Some authors consider it possible to see such messages as transactions of secindary nature (see E.A. Fleischitz. Obligations from causing harm and unjust enrichment - M .: Gosyurizdat, 1951. - P. 217; T.N.Ivanova, O. V. Monchenko. Legally significant message as a quasi-deal in Russian civil law // Law and Economics. - 2016. - № 1. - P. 38 - 44), others see them as legal actions (see O.M. Rodionova. On the issue of civil nature of legally significant messages // Yurist. - 2015. - № 14. - P. 4 - 8). There is also a third position, whose supporters see legally significant messages as transaction-like actions (see T.N.Ivanova, O.V. Monchenko. Legally significant message as a quasi-deal in Russian civil law // Law and Economics. - 2016. - № 1. - P. 38 - 44).
However, we will consider these actions in this chapter of the study, given that, firstly, legally significant messages are aimed at establishing, changing, terminating civil rights and obligations (this circumstance is recognized even by those authors who do not see legally significant messages as a category of transactions - See above, p. 38 - 44), and secondly, most concepts imply applying transaction regulations to legally significant messages on the basis of analogy (see: Transactions, representation, limitation period: item-by-item commentary on articles 153 - 208 of the Civil Code of the Russian Federation / V. V. Baibak, R. S. Bevzenko, S. L. Budylin and others; editor-in-chief A. G. Karapetov. - M .: M-Logos, 2018. [Electronic Edition 1.0] – 1264 p.).

[139] Note that the question stated can be considered in the context of exercising secondary (transformative) rights by a procedural action. Secondary rights are exercised through a unilateral declaration of will (deal). However, in some cases, an action of an authorized person is not enough for implementation of a transformation; performance of a judicial act (transformative decision) is also required. (See E. Zekkel. Secondary rights in civil law // Herald of Civil Law. 2007. № 2. P. 204 - 252.) A will to exercise rights that require a decision can only be expressed through a procedural action, because no other behavior aimed at transforming them can lead to performance of a judicial act. The above mentioned approaches of courts can be considered as an attempt to expand the range of secondary rights that can be exercised through a procedural action: now those rights that do not require a court decision for their final effect can be exercised in the process. It seems that the trend towards expanding the range of secondary rights available for procedural exercise is confirmed by the approach of the Plenum of the Supreme Court on the issue of possible forms of set-off application. According to the Court's position, if a claim is filed on one of the demands, a party, at its discretion, has a right to declare set-off both in a counterclaim and in its defense to a claim, the legal and factual grounds of which are examined by the court in the same way. (Item 19 of the Decree of the Plenum of the Supreme Court of the Russian Federation from 11.06.2020 №6 "On some issues of applying provisions of the Civil Code of the Russian Federation to termination of obligations". Available in the computer legal research system "ConsultantPlus".

Starting to study it, we should note that substantive effect of a procedural activity, which we studied in the previous chapter and is caused by entry or non-entry of an obliged under a contract person into the case - fundamentally differs from a "transaction effect", which we are to analyze now. If in the first case procedural behavior did not directly affect a disputed legal relationship (when a seller improperly protected a buyer, the latter has a right to recover damages, but during a separate process), in the second case a procedural action had a direct impact on legal relationship that is subject to a dispute (refusal from a contract of sale by filing a claim directly affects the outcome of the process initiated by this claim). Thus, in one case, the court does not resolve the question of whether a substantive effect of parties' procedural actions in the case where this action was perfromend is present or absent, while in the other, it assesses the impact of parties' procedural actions in this particular dispute on precisely that substantive right, which is protected by a filed claim.

This difference leads us to necessity to analyze those scientific views that postulate that a procedural action is fundamentally inable to influence a substantive relationship that is subject to judicial examination[140]. It should be noted that possibility of making a transaction by a procedural action was not discussed in these works. Meanwhile, quite definite conceptions of the process are formed there, preventing (at least at first glance) recognizing the existence of a "transaction effect".

Such, first of all, is the concept of a process being a cognitive activity. The essence of this approach is as follows. During consideration of a dispute, its participants become acquainted with disputed rights and relations. In turn, the act of examination under no circumstances can change the examined object: "if some objective phenomenon becomes an object to examination, then its essence, quality, features do not change from this. The object of examination is invariably objective,

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[140] T.M. Yablochkov. Judgment and litigious right (On the Cassation Decisions of 1915, №№ 33 and 38) // Herald of Civil Law. - Petrograd, 1916. -№ 7. - P. 26 - 62; E.Y. Motovilovker. Theory of regulatory and protective law. - Voronezh: Voronezh University Press, 1990. - 137 p.; N.B.Zeider. Disputable matter of civil procedure (On admissibility of transformative claims in Soviet law) // Soviet state and law. - M., 1947. - № 4. - P. 36 - 44.

because subject's cognitive activity, directed at the object, does not modify it, does not destroy or construct, but is reflected by it and returns to the subject in the form of knowledge about this object"[141].

However, if a process is a cognitive activity, then, obviously, a cognizing subject in it is the court only. Participants to a process, as a rule, are sufficiently aware of substantive facts and relations that are subject to a dispute, and the process is usually initiated and supported by them not to obtain any new information. The only subject of procedural relationship that becomes acquainted with new information is the court, but, as a rule, it does not change a cognized object, which is disputed rights and obligations of parties. In this sense, understanding a process as a cognitive activity does not deny possibility of parties to the proceedings to change their substantiverelationship.

Other researchers[142], criticizing the theory of substantive regulations in the process, refer to its contravention of the " process goal". As long as it consists in clarifying, examining and confirming legal relationships, in resolving a dispute or protecting complainant's rights, procedural activity cannot, by definition, become the basis for establishing, changing or terminating civil rights and obligations. "The goal of a process is protection, establishment and exercise of civil rights, but by no means creation of civil rights," and therefore "parties cannot regulate substantive rights," notes T.M. Yablochkov[143].

At the same time, the concept of " process goal", on which researchers rely, is very ambiguous. On one hand, one might think that when we talk about the goal of a process, we mean its purpose. The civil process was created for resolving disputes, and this is the only function performed by procedural activity. These arguments, however, are a continuation of the argument stated in the first chapter

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[141] B.Y. Motovilovker. Theory of regulatory and protective law. - Voronezh: Voronezh University Press, 1990. - P. 88.

[142] T. M. Yablochkov. Judgment and litigious right (On cassation decisions 1915, №№. 33 and 38) // Herald of civil law. - 1916. - № 7. - P. 26 - 62.

[143] T. M. Yablochkov. Judgment and litigious right (On cassation decisions 1915, №№. 33 and 38) // Herald of civil law. - 1916. - № 7. - P. 44 - 45.

of this study: the process is secondary, service, conditioned and bound by substantive relations that arose before initiation of a dispute. Wherever this argument is given[144], it is always considered as a kind of axiom (as a rule, there is no evidence to it), and sometimes the service role of a process is seen as both a cause and a consequence of its impossibility to change substantive rights claimed for a dispute. Meanwhile, validity of this judgment is far from unambiguous. At least because provisions of the civil law imply for some forms of influence of procedural activity on dynamics of civil relations.

It is interesting to note that the concept of a service role of a process was one of the key arguments given by processualists who postulated the idea of inadmissibility of a transformative claim and, accordingly, a decision[145]. Authors who support this view believed that the goal of a civil process is excluding any development of a controversial legal connection during the period of consideration of a dispute[146]. With initiation of judicial activity, a substantive relationship stops, legal facts of civil law are no longer formed, and a judicial decision is not such, because a civil process does not have its purpose to establish substantive rights. For example, N.B. Zeider stated: "It would be correct to answer the question of whether <…> claims for creation of new legal relations or termination or change of existing legal relations are permissible in our process <…> only by having defined functions of the Soviet court and objectives of decision it makes. <…> The court, as a state organ, performs a function of protecting civil rights <...> administration of justice <...> and is limited only to resolving a dispute over a legal

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[144] S.N. Abramov. Soviet civil process. M., 1952. P. 10; V.N. Shcheglov. Questions of correlation between substantive law and process // Actual problems of state and law: Works of V.V. Kuibyshev's Tomsk State University. Faculty of Law. Volume 228. - Tomsk: Tomsk University Press, 1972. - P. 51.

[145] A.F.Kleinman. Soviet civil process. Textbook. M., 1954. P. 86 - 87; K.S. Yudelson. Soviet civil process. Textbook. M., 1956. P. 210 et seq. N.B. Zeider. Disputable matter of civil procedure (On admissibility of transformative claims in Soviet law) // Soviet state and law. - M., 1947. - № 4. - P. 36 - 44.

[146] A detailed analysis of transformative claims and decisions is not included in the tasks of this study: for us, it is only important to demonstrate consistency of the argument line based on functions of the civil process.

relationship that already exists, only to protecting a right of a given interested person..."[147].

However, this argument - about the goal of a civil process - did not exclude a reverse concept, which indicated fundamental admissibility of a transformative claim and decision[148]. Existence of such claims and decisions is supported by most modern researchers[149]. Moreover, recognition of transformative procedural possibilities sometimes resulted in certain adjustments of the approach to the court's role and of a process. Thus, M.A. Gurvich stated that "the court is also called upon to actively participate in formation and transformation of individual specific rights and obligations, controlling implementation of law-forming acts by citizens and organizations or independently regulating a number of civil legal relations"[150].

The described discussion demonstrates that the argument about secondary nature of a process does not have a decisive and self-sufficient importance: when recognition of a certain phenomenon (like, for example, transformative claims) is an objective and logical necessity, there are no obstacles to such recognition in areas of the "process goal".

On the other hand, the " process goal " can be defined as a goal of a certain kind of activity, and, since a process is an activity of a court and persons participating in a case, as a common goal of all these subjects. Understood in this way, the "process goal" argument is of some interest in relation to the "transaction effect". For it turns out that litigators, acting in a court, do not intend to establish, change or terminate civil rights and obligations - their goal is something fundamentally different, which means that their actions do not form a transaction.

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[147] Zeider. Disputable matter of civil procedure (On admissibility of transformative claims in Soviet law) // Soviet state and law. - M., 1947. - № 4. - P. 37 - 38.

[148] The doctrine of a claim (elements, types). Textbook / M.A.Gurvich; ed.-in-chief: M.S. Shakaryan. M., 1981. P. 21.

[149] See D. B. Abushenko. Problems of mutual influence of judicial acts and legal facts of substantive law in the civil process: Monograph. - Tver. Published by A.N. Kondratiev, 2013. - 319 p.

[150] M.A. Gurvich. Types of claims under Soviet civil procedural law // Izvestia of the Academy of Sciences of the USSR. Department of Economics and Law. - 1945. - № 2. - P. 5.

However, let us ask ourselves a question: do all participants to a process - the court, a complainant and a defendant, third parties, etc. - pursue the same goal, want to see the same result of consideration of the case?

For example, let us take one of the possible goals of a judicial procedure - resolution of a dispute. Although consideration of a case objectively ends in such a result, parties do not act in the process for the sake of any resolution of a case, for it to end in any way: each of them aims at resolving a case in their own favor. Otherwise, why does a participant in a process insist on his position, why does he present evidence that confirms only his correctness and does not immediately recognize all the facts presented by the opposite side?

The idea that a process is aimed at clarifying, exaining a disputed legal relationship brings us back to the previous argument. As we noted above, parties initiate and maintain a litigation not to obtain information about the facts of their past, nor because they cannot independently determine the rule of law governing relations that have developed between them. It is possible that a person participating in a case may not know about some fact or rule of law important for the case, and possibly might have an wrong idea about it. Meanwhile, it can hardly be considered that such a person will direct all his procedural activities to obtaining this information.

In this regard, it is wrong to equate a process goal and goals of participants in a process. The latter are also cannot be equated, because a complainant is not interested in the same result as a defendant.

We will return to examining possible intentions of participants to a dispute. For now, it should be noted that process goals consisting in “dispute resolution”, “clarification, examining controversial relationships”, can be considered the main and decisive goal only for one subject - for a court. Therefore, existence of certain specific goals of a process in no way contradicts the idea of possibility of making a substantive transaction during consideration of a case.

Here we must raise another question. Even if a participant to a process does not intend to examine previous relations or achieve any resolution for the case, but

he does not pursue the goal of establishing, changing or terminating civil rights and obligations (such a conclusion is implied, at least on the surface of the considered issue). Firstly, litigator's actions can be performed with an intention of producing exclusively procedural consequences: since the primary result of any action of a participant to a dispute is dynamics of a procedural relationship, then, perhaps, subject's actions are aimed at only such consequences. Secondly, procedural actions are performed in the context of a dispute, a conflict between participants to proceedings. However, a transaction is a "conciliative" act, and it would be strange to see it where litigators' interests are obviously opposite. And thirdly, a certain procedural action is often aimed at victory in a particular case, and not at creating sustainable legal consequences. A participant to a dispute may say: "My action was dictated by the sole purpose of winning the case, I did not intend to make any substantive legal changes, and all the more I did not want to extend legal effects of my actions beyond this dispute."

All these theses essentially refer to a civil problem of will and its expression; internal and external sides of an action (transaction). We will turn to substantive legal research[151]. But we should note that the question of whether a procedural action can be seen as a transaction, as far as we know, was not raised in classical works of civil scientists. Most of the studies about will and its expression were based on the need to solve other questions than those raised by us, and therefore it is not always possible to apply them for purposes of this study.

§ 2. Procedural action as an act of will

It is known that a transaction can take place when both of its elements are present: will and its expression. Let us turn to a statement by E.V. Vaskovsky:

[151] Is should be noted that examining all the variety of approaches to the problem of will and its expression is impossible within this work. Therefore, we will turn to those provisions that claim to be fundamental in civil science.

"each transaction expresses an intention or will of one or more persons. Thus, will is the center, the core of a transaction; without it a transaction is invalid, even if all external formalities are present. <...> Intention alone is not enough to form a transaction; this intent must be detected in some way; it is necessary, as they say, for one's will to be expressed. Such expression can occur in many ways and take many forms"[152].

Next, will and its expression must be in a certain relationship - correspondence[153], agreement[154]. "Under the expressions of will or legal transactions, those legal facts should be understood, ... in which will of an acting person is directly aimed at emergence or termination of a legal relationship ... Three points are to be considered here: will itself, its expression and correspondence between will and its expression," notes F. K. von Savigny[155].

Since correspondence between will and its expression is not always present, it is necessary to find out which of these elements is of outmost importance, and, accordingly, to state cases where nonconcurrence between will and its expression has legal significance. On one hand, one can give priority to will (the inner side), declare it the only important and creative civil beginning, and see a transaction only in an action due to one's desire for legal consequences. On the other hand, one can recognize an action itself as most important, because it can be recognized by all third parties as an act of will, and therefore has legal consequences. It is known that this question goes back to conflict between personal arbitrary behavior and the idea of strength of rights, public interests[156]. Considerations of necessity to achieve stable civil circulation made Russian civil lawyers support correctness of the doctrine postulating priority of will (though sometimes in its "softened"

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[152] E.V. Vaskovsky. Textbook of civil law. Issue I: Introduction and general part. - St. Petersburg: Printing house of the Railways Counteragency, 1894. - P. 113, 122.
[153] F.K. von Savigny. System of modern Roman law: In 8 volumes - M .; Odessa, 2012. V. 2. - P. 266.
[154] E.V. Vaskovsky. Textbook of civil law. Issue I: Introduction and general part. - St. Petersburg: Printing house of the Railways Counteragency, 1894. - P. 125.
[155] F.K. von Savigny. System of modern Roman law: In 8 volumes - M .; Odessa, 2012. V. 2. - P. 266.
[156] I.A. Pokrovsky. The main problems of civil law. M., 1998. P. 98 - 99.

version, suggesting that in some cases specified by law, interested parties have a right to prove nonconcurrence between will and its expression, aiming at legal consequences established by law)[157].

It is interesting to refer here to a famous discussion. Laying down the concept of a transaction, researchers asked themselves: is it true that any person performing a transaction actually directs his actions to achieving some legal effect? It is quite reasonable to assume that in a number of cases a party to a transaction has no idea about legal significance of his behavior: for example, when purchasing some retail goods, a buyer does not intend to "establish a legal relation of purchase and sale". At the same time, it is definite that legal consequences will occur even in absence of such an intention. But it is "direction of an action" that civil law requires for emergence of legal effects.

I.B. Novitsky in this connection noted that "transactions are often made in life in such a context when not only there is no direct expressed will to establish or terminate a legal relationship, but it can even be assumed that actors did not expect that such consequences would be associated with their actions"[158]. Next, the author suggests to transform the concept of a transaction and to consider it as "an action by which a person determines occurrence of legal consequences corresponding to an economic effect that this person wants to achieve"[159].

M.M. Agarkov, disagreeing with this approach, states that "for a transaction, it is enough that one's will is objectively aimed at establishing, changing or terminating legal relationships, when it is possible to reasonably conclude that this was the meaning of one's action". It is not required for an actor to be aware that he is expressing his will, especially that he is expressing will to achieve a certain legal effect. The Civil Code requires only that a person performs

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[157]For more details on this discussion, see I.B. Novitsky. Invalid transactions // Issues of Soviet civil law. - M., L.: USSR Academy of Sciences Press, 1945. - Coll. 1. - P. 56 - 58.

[158] I.B. Novitsky. Obligations from contracts. Establishment of a contract. Deed of gift. Bilateral contracts. Contracts for the benefit of a third party. Commentary on Articles 130, 140 and 144 - 146 of the Civil Code. M., 1924. P. 4.

[159] See above. P. 5.

an action aimed at a goal specified in Article 26"[160]. Later, I.B. Novitsky came to similar conclusions[161].

It should be noted that "direction of action", established by civil law as a definitional criterion of a transaction, is understood by M.M. Agarkov as an external indicator of an action. "An action aimed at..." is an action that objectively, due to its external features, looks as if it is aimed at achievingcorresponding legal effects. In turn, will is always to some extent "imputed" to an actor, because even if its true direction did not correspond to a performed action, legal effects (even those undesirable for the actor) will take place.

Since an external side of an action is a forming element of a transaction, possibility of its emergence due to a procedural action depends on how all third parties perceive the procedural action of a litigator. If activity of a participant to a dispute looks like a basis for sustainable legal consequences, we can state existence of a transaction. Questions about what the actor really wanted, what he planned and what result he was willing to achieve, are secondary in this sense, and this is not important; the main question is how his behavior should be perceived by third parties.

What actions can be defined by all third parties as aimed at emergence, change or termination of rights and obligations?

In civil literature, this feature of a transaction being aimed to achieve legal consequences is often studied as a characteristic that distinguishes a transaction from other legal facts. Thus, I.B. Novitsky, stating that "an action is recognized as a transaction when it is aimed at establishing, changing or terminating civil law relations"[162], then says: "Direction of an action allows to distinguish a transaction

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[160] M.M. Agarkov. The concept of transaction in Soviet civil law // Soviet state and law. - M., 1946. - № 3 - 4. - P. 48. According to Article 26 of the Civil Code of the RSFSR of 1922, transactions, i.e. actions aimed at establishing, changing or terminating civil legal relations can be unilateral and mutual (contracts).

[161] I.B. Novitsky. Deals. Limitation of action. - M.: State publishing house of legal literature, 1954. - P. 15.

[162] See above. P. 11.

from an offense or infliction of harm"[163], as well as "from other lawful actions committed without a direct intention to achieve a certain legal result, <…> which, independently from actor's intention, nevertheless lead to such a legal result"[164]. The very concept of a transaction is formed "from the contrary", by determining signs that distinguish a transaction from other legal facts of substantive law[165]. This approach, however, does not allow to determin whether a procedural action itself can be seen as a transaction. Because, having concluded that in the given examples a procedural action is certainly not a civil act, nor a tort, we cannot answer the question of whether it is a basis for emergence, change, termination of substantiverights and obligations, or whether it remains a cause for occurrence of only procedural changes.

There is a well-known approach according to which an action can be considered aimed at achieving legal consequences when it is of typical, repeatable nature[166]. When a certain action is multiple times performed by agents, allowing to achieve legal results of a certain type, it can be recognized by third parties as a transaction. A procedural action does not seem to fulfill a requirement of a typical direction at substantive legal changes: as a rule, parties to a process act not for the sake of creating, changing and terminating civil relations; such consequences are not ordinary for procedural activities. However, it cannot be denied that a transaction can be made not solely by a typical action. Typicality is not a quality of an action aimed at a legal effect, but one of the means of determining this direction. Its absence does not mean absence of a transaction as such, and therefore "typicality" of an action cannot be considered a determining criterion for distinguishing a transaction from actions that do not establish any substantive consequences.

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[163] See above. P. 11.
[164] See above. P. 14.
[165] In a similar way properties of a transaction are studied by M.M. Agarkov (see M.M.Agarkov. The concept of transaction in Soviet civil law // Soviet state and law. - M., 1946. - № 3 - 4. - P. 41 - 55).
[166] See D.D. Grimm. The basis of the teachings on a legal transaction in the modern German doctrine of the Pandek law: prolegomenons to the general theory of civil law. Volume I. - St. Petersburg: M.M. Stasyulevich's Typography, 1900. - P. 209.

Another view is based on the fact that to determine direction on certain legal effects means to make a conclusion about actor's will. In turn, such an action, about which it can be reasonably concluded that it was performed due to complainant's internal desire to cause emergence, change, termination of civil rights and obligations, is a transaction. A supporter of this approach, D.D. Grimm, described it as follows. According to the theory of will expression priority, "it is only important to establish what an opposing party should have seen as will of an interested person, regardless of whether this corresponds or not to actual intentions of the person"[167]. At the same time, "...it is overlooked that those approximative conclusions that the opposing party has come to, regardless of whether they correspond or not to actual intentions of the person, are based on known ... assumptions, on an analogy drawn between true expression of one's own and others' acts of will"[168].

From this point of view, to determine whether we are speaking about a transaction or an action that does not have substantivesignificance, it is necessary to establish which intention is most consistent with one's actions. And if this intention is to establish, change or terminate civil rights and obligations, then it is a substantive transaction. In a similar way, it is necessary to discuss litigator's actions, and, accordingly, to find out whether it is possible that behind performing a procedural action there is a will to achieve substantive changes?

To begin with, let us ask the most general question: what final result does a person performing a procedural action usually want to achieve? What is the main goal of a person involved in a case?

In studies on procedural law, a question of the purpose of all actions taken by parties to a dispute is not usually considered. However, they do examine thoroughly a problem of a goal pursued by perfoming a specific action - filing a claim. At the same time, approaches to a purpose of this action may well be

[167] See above. P. 97.
[168] See above. P. 97.

extended to other procedural activities of a complainant, because he usually continues a dispute with the same intentions as with which he initiated it.

The main purpose of a claim, according to V.M. Gordon, is a judicial decision, because it "is a judicial action, which should have realization of complainant's substantive goal as its consequence"[169]. Somewhat different from the above one is a point of view, supporters of which believe that "by filing a claim, a complainant pursues a dual goal: firstly, to obtain a court decision (a procedural purpose of a claim), secondly, to achieve fulfillment of defendant's obligations (to perform a certain action, to transfer property, etc.) or court recognition (confirmation) of presence or absence of certain legal relations between a complainant and a defendant (a substantive purpose of a claim)"[170]. Differences between views, expressed, as we see, in presence or absence of a substantive purpose of a claim, are of no fundamental importance to us. It is important that by filing a claim and acting during a process, a complainant seeks to obtain a court decision to satisfy his claim. A defendant, as his interests regarding the outcome of a dispute are usually opposed to interests of a complainant, by performing procedural actions intends to prevent satisfaction of demands made on him. Each party wants to win the case.

It would seem that if a litigator wishes to win a process, he coordinates all his activities solely with this circumstance, not expecting to establish substantive changes. The goal of "winning a case" is incompatible with aiming at emergence, change, termination of civil rights and obligations.

At the same time, as we have seen from the given examples, that legal and factual basis that was present at the time a dispute was initiated may not be sufficient to satisfy a demand or refuse to do so; and sometimes only a unilateral

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[169] V.M. Gordon. Claims for recognition. - Yaroslavl: Printing house of the provincial government, 1906. - P. 3 - 4.

[170] S.N. Abramov. Civil Procedure: Textbook for Law Schools. - M.: Publishing house for legal literature of the Ministry of Justice of the USSR, 1946. - P. 58; A similar position is held by V.P. Chapursky (see Civil process. Textbook / S.N. Abramov, V.N. Beldyugin, V.G. Granberg, A.F. Kleinman [and others]; ed.: A.F. Kleinman - M.: Publishing house for legal literature of the People's Commissariat of Justice , 1940. - P. 116 (the chapter by V.P. Chapursky)).

expression of one's will is missing. In this case, does a participant to a process intend to achieve legal consequences of a unilateral expression of his will - the consequences that are a condition for resolving the case in his favor? A negative answer to this question will lead us to concluding that it is fundamentally admissible for internally contradictory expressions of will to exist. For it turns out that a participant to a process performs actions to achieve victory as the ultimate result, but does not want to establish conditions for it. Is it really possible then to assume that he aims at obtaining a court decision in his favor?

Such an internally contradictory expression of will is not allowed by law. This is confirmed, firstly, by provisions of the civil law which prohibit a person from refuting effect of a contract under which he performed. For example, according to Item 3 of Article 432 of the Civil Code of the Russian Federation, a party that has accepted from the other party full or partial performance under an agreement or otherwise confirmed validity of the agreement cannot demand recognition of this agreement as void. Indeed, is it possible that a party wishes to accept performance promised under an agreement, but objects to recognize the agreement itself? It seems that fundamental impossibility of accepting performance being simultaneously conditioned by two conflicting intentions underlies this rule[171].

Secondly, evidence of inadmissibility of contradictory expression of will is recognition of legal significance of implicative actions. As you know, implicative actions are such that have their own independent goal, but one can conclude that there is a will for some other consequence underlying them; in addition to will

[171] It is similar for Item 5 of Article 450.1, according to which, if there are grounds for repudiation of a contract (performance of the contract), a party entitled to such repudiation confirms validity of the contract, including by accepting performance of other party's obligations, subsequent repudiation on the same grounds is not allowed; as well as a rule established by Item 2 of Article 431.1: "a party that has accepted counterparty's performance under an agreement related to implementation of entrepreneurial activities, and at the same time has not fully or partially fulfilled their obligation, is not entitled to demand recognizing this agreement as void".

realized or expressed in them, they imply another, unexpressed, will[172]. The legal significance of implicative facts is that in some cases subject's actions necessarily mean presence of an intention to achieve related legal consequences. For example, it is not possible, in general, to enter into possession or administration of an inheritance property without intending to accept the inheritance[173].

Procedural activities of parties should also be considered from the point of view of consistency of will: if a litigator acts to win the case, then at the same time he intends to achieve all those results that are a condition for his victory. In this sense, a goal pursued by participants to a process to obtain a court decision in their favor not only does not exclude, but sometimes directly determines their intention to establish substantive rights and obligations.

Since satisfaction of stated requirements is an ordinary, alleged goal of a complainant, and refusal to do so is a normal goal of a defendant, then all third parties should perceive procedural actions of the parties as aimed at substantive changes necessary to win the dispute. Behind a procedural action, any third party can recognize one's substantive will.

Let us examine this conclusion in one of the examples given. A complainant filed a claim, a condition for satisfaction of which is a unilateral repudiation of a contract. If it is recognized that his claim did not contain an intention to terminate the contractual relationship, then it should be concluded that, having filed the claim, he, firstly, counted on survival of the contract, and secondly, did not pursue the goal of achieving satisfaction of his claims. It means that the complainant's actions were unreasonable and senseless. But it is impossible to assume that, giving a legal assessment of someone's behavior. Therefore, the opposite conclusion is true: the complainant did not want the contract to survive, he counted

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[172] See G.F. Dormidontov. Classification of phenomena of legal life, attributed to cases of using of fictions. Part one. Legal fictions and presumptions // Herald of Civil Law. - 2011. № 1. - P. 217 - 269; № 3. - P. 168 - 240.

[173] According to Item 2 of Article 1153 of the Civil Code, until proven otherwise, it is recognized that an heir accepted an inheritance if he performed actions indicating actual acceptance of the inheritance, in particular if the heir came into possession or administration of the inheritance property.

on winning the process, and by filing a claim, he expressed his will for a unilateral repudiation. There is no such legitimate interest that should be protected by saving the complainant from consequences of his will expressed through this procedural action.

Another argument canbe put forward against the idea of possibility of a transaction being made by a procedural action. It is known that all actions of parties to a dispute are performed in accordance with requirements of a procedural form, and the latter is not intended to provide an opportunity to make civil transactions. Features of procedural activity are such that they significantly distinguish it from parties' activity before and out of court, and therefore it is simply impossible to establish substantive rights and relations by procedural actions.

In this regard, let us consider more precisely features of procedural activity and find out how they actually affect possible substantive consequences. In studies on procedural law, such properties of procedural actions as irrevocability, the ability to influence a court decision, as well as performance based on the principle of self-responsibility, are distinguished[174].

The property of irrevocability implies that a procedural action, from the moment it has reached its immediate legal consequences, cannot be revoked by a person who performed it. "The limits of revocability of procedural actions, in general, are determined by terms of their possible implementation, established by law or by court, as well as by occurrence of the legal result for which the action was committed," states A.V. Yudin[175]. The property of irrevocability of a procedural action is aimed at ensuring legal security of the opposite party[176]. This property refers to the sphere of proceedings in a sense that impossibility of

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[174] E.V. Vaskovsky. Civil process course. Volume 1: Subjects and objects of a process, procedural relations and actions. - M .: Publishing house of brothers Bashmakov, 1913. - P. 653 et seq.; T.M. Yablochkov. To doctrine of basic principles of civil process. M., 1914. P. 15 - 16.

[175] A.V. Yudin. Category of risk in civil proceedings // Herald of civil process. - 2014. - № 5. - P. 11 - 53.

[176] I.I. Chernykh. Estoppel in civil proceedings // Laws of Russia: experience, analysis, practice. - 2015. - № 12. - P. 81 - 88.

revoking a procedural action starts when it has caused immediate procedural consequences. However, irrevocability of a procedural action also means that a litigator has to undergo all the legal consequences associated with it, both immediate, predictable, and long-distance, sometimes undesirable for him.

Indisputably a procedural action objectively affects a court decision. Even agreeing with the concept, according to which litigators by their actions only provide a court with material for making a decision, but do not dispose of facts or evidence,[177] it is impossible to deny objective influence of parties' activities on the court decision: the principle ofcompetition implies that the level of procedural activity will affect the outcome of a dispute. In turn, a court decision is a "refraction" of a process in the sphere of substantive law. Properties of the decision's legal force suggest that parties in their relationship will have to abide the facts established by court.

Considered properties of a procedural action determine that when performing it, a litigator must exercise increased caution, because it is final, and its consequences may eventually spread to the substantive sphere through a court decision. Therefore, in addition to the considered properties, procedural actions have another important characteristic - they are performed on the basis of the self-responsibility principle. Its essence can be expressed as follows: "procedural actions bear a more clearly expressed stamp of deliberation and seriousness than non-procedural actions"[178]. It seems in the current legislation this principle is embodied in the provision that parties bear the risk of performing or not performing procedural actions (Article 9 of the Arbitration Procedure Code of the Russian Federation).

A process, in which any action taken can affect the court decision, and such an action is irrevocable and is performed with more "deliberation and seriousness" than a substantive action, is such a sphere of parties' activity where it is not more difficult to create substantive consequences, on the contrary , it is even easier than

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[177] For more details on this discussion, see Chapter 1.

[178] T.M. Yablochkov. Formal signs of the concept of judicial recognition in civil proceedings // Legal notes published by Demidov Legal Lyceum. - Yaroslavl, 1914. - Issue III (XXI). – P. 472

before and out of it. Procedural activity is activity in conditions of "increased risk" of substantive consequences.

The described understanding of a process is one of preconditions for a substantive effect of procedural behavior. A procedural action can be a civil transaction because the whole process is expectation of a substantive result. Properties of procedural actions, therefore, do not prevent us from recognizing possibility of making a transaction in the course of dispute. On the contrary, features immanent to actions of participants to a process: irrevocability, risk nature, ability to affect the court decision, - contribute to such a conclusion.

Let us briefly summarize the above said. A procedural action can be aimed both at achieving purely procedural results, and at establishing, changing or terminating civil rights and obligations. In the latter case, it is a civil transaction. This idea correlates with civil ideas about a transaction as an expressed intention to establish, change or terminate civil rights and obligations, and with views on properties of procedural actions as such. In turn, approaches developed in procedural science to properties of the civil process, its goals and purpose, as well as ideas about special nature of a procedural action, do not contradict this conclusion and are not a strong argument against the "transaction effect".

§ 3. Procedural form of substantive expression of will

Justifying possibility of making a transaction through a non-administrative procedural action raises the question of rules of law applied in assessing validity of this civil act.

Behavior of a person participating in a case is regulated by procedural law, which determines which action gives rise to legal consequences, affecting procedural relations, and which does not. If a procedural action is performed with violation of formal requirements, it suffers a sanction of nullity, it is not capable of

producing those effects during legal proceedings at which it was aimed. In turn, a civil transaction is valid and gives rise to legal consequences when it meets norms of substantive law.

In considered cases, a transaction is made through a procedural action, which creates a certain difficulty, because such a civil act falls under regulation of both substantive and procedural legislation. Therefore, we should ask a question: which of the named norms should a litigator's action correspond to in order to be the basis for establishing, changing, terminating civil relations?

Let us return to the case considered by the Supreme Court of the Russian Federation, when the buyer, having filed a claim to return the advance payment, refused from the contract of sale. Let us say, that the claim was filed with violation of the requirements stated in Articles 125, 126 of the Arbitration Procedure Code of the Russian Federation, for example, the complainant did not attach a document confirming his payment of the state duty (Item 2 of Part 1 of Article 126 of the Arbitration Procedure Code of the Russian Federation). Litigation will not be initiated based on such a claim, but will the contract be withdrawn?

As established by Article 450.1 of the Civil Code of the Russian Federation, a right to unilaterally withdraw from a contract may be exercised by an entitled party by notifying the other party of it (execution of contract). The contract, as a general rule, is terminated from the moment the other party receives this notification. It would seem that to answer the question of substantive consequences of filing a claim, it is enough to establish the fact of filing a claim against the defendant and of the latter receiving this statement. If these facts are true, withdrawal from a contract took place, and substantive consequences occurred despite procedural violations committed during filing the claim. Thus, autonomous substantive legal consequences are assumed, completele separate from procedural consequences. An action may be baseless from the point of view of process, may not lead to those legal consequences at which it was aimed, but as soon as this circumstance is indifferent to the civil law, it will affect substantive relationships.

This view, nevertheless, must be criticized. It is impossible to exclude application of procedural law provisions to a transaction made in a procedural form, and rules established by the Civil Code of the Russian Federation for "extra-procedural" withdrawal from a contract are not fully applicable to cases where one's will is expressed by a procedural action[179].

The conclusion that substantive consequences occur regardless of an action corresponding to requirements of the procedural form will require agreeing with one of the following theses: 1) a procedural action in the field of substantive law can be considered as a "fact of reality"; 2) a procedural document (for example, a claim) may simultaneously contain two acts: a procedural and a substantive one.

Let us assess correctness of the given judgments.

1. In the general theory of law, legal facts are traditionally seen as specific life circumstances, with presence or absence of which rules of law associate emergence, change or termination of legal[180]. The science of civil law sees legal facts in a similar way. E.g., O.A. Krasavchikov states that any legal fact of substantive law is, first of all, a phenomenon of reality[181], in other words, just a fact. Being provided by the hypothesis of the rule of law, such a fact acquires properties of a legal one. From these points of view a fact, as some objective reality, is primary, and consequences caused by this fact are secondary and are regulated by the state in accordance with the current needs in regulating specific actions and events. But the same fact can be indicated in the hypotheses of several norms of law (including those of various branches), then it is the basis for several independent legal consequences.

If we declare a procedural action as a fact of reality, we can conclude that, being provided by norms hypotheses of two branches of law, this fact

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[179] N.V. Platonova. On issue of substantive significance of procedural behavior (commentary to the Decision of the Supreme Court of the Russian Federation from May 30, 2017 in case № 307-ES17-1144) // Arbitration and civil process. 2018. № 4. P. 35 – 40.

[180] S.S.Alekseev. General theory of law. In 2 volumes. Volume 2. M.: Legal Literature, 1982. P. 164 - 165; A.F. Cherdantsev. Theory of state and law: textbook for universities. M.: Yurayt-M, 2002. P. 301.

[181] O.A. Krasavchikov. Legal facts in Soviet civil law. M.: Gosjurizdat, 1958. P. 14.

simultaneously leads to two types of legal consequences: substantive and procedural. For the first, only the fact that it took place in reality matters, which means that its procedural and legal "defects" are completely indifferent.

However, recognizing a procedural action as “just a fact” for purposes of applying norms of civil law will lead to an artificial separation of its integral property - the legal nature. Unlike legal facts of civil law, procedural acts are performed only in legal form. There is no variety of "factual procedural acts" able to lead to the same legal result. “All lawful actions that can be performed during the period of judicial activity by its participants are of a procedural nature, that is, rules of procedural law associate certain procedural consequences with them,” states N.A. Chechina[182]. Therefore, a procedural action cannot be considered as “just a fact” and be subject to assessment that ignores procedural form of its performance.

It must be noted that legal facts of civil law include, among others, acts of a others branches (judgment, administrative acts)[183]. They cause substantive effects along with other legal consequences. At the same time, as far as we know, the science of civil law does not support the conclusion that these acts are subject to assessment solely from the point of view of their correspondence to civil law[184]. A court decision, an administrative act must meet requirements of those branches, according to rules of which they were made. For example, a court decision will not cause any substantive changes if it is canceled due to court’s violation of procedural rules.

Certainly, this approach regarding administrative acts and judicial decisions cannot be mechanically applied to a transaction, because a transaction is a specific legal fact of civil law, it is usually “established” according to rules of civil law. However, there are exceptions to this rule, for example, a civil agreement. In the doctrine of procedural law, a point of view is widely supported, according to which

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[182] N.A. Chechina. Civil procedural relations. L., 1962, P. 56

[183] See Chapter 1 of the study.

[184] See e.g. O.A. Krasavchikov. Legal facts in Soviet civil law. M., 1958. P. 128, 129.

a civil agreement is a civil transaction made in a procedural form[185]. Although this agreement is a transaction, it cannot be seen as "just a fact" to which only rules of civil law should be applied. On the contrary, validity of a civil agreement is conditioned by being subject to the provisions of procedural law.

Summarizing the above said let us note that we have not found any basis for recognizing a procedural act as a fact of reality causing several autonomous legal consequences.

2. To check correctness of the second conclusion, it is necessary to answer the paradoxical question: how many actions does a litigator perform when, for example, he withdraws from a contract by filing a claim? It is possible to think about preservation of a substantive legal result of a litigator's action if it was caused by an independent act that is not cancelled by applying a procedural law.

It is possible to imagine a situation when a procedural document, for example, a claim, simultaneously contains both a petition addressed to the court to satisfy a substantive demand and a notification for a defendant about complainant's withdrawal from a contract. For example, a complainant includes in the text the phrase: "I give notice of withdrawal from the contract", so that his will would be accepted by the defendant when he receives of a copy of the claim. In such a case, the complainant perfprms two completely independent actions, combined in one document. These actions are subject to norms of different branches of law - substantive and procedural, - in accordance to which validity of each of them is determined.

However, the very assumption of possible existence of two actions united by one procedural document is questionable. This approach assumes that procedural statements can include a "correspondence between parties" that is not addressed to the court and may not even relate to a current process. The described assumption is

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[185] Soviet civil process / Ed. M.A. Gurvich. - M.: Vysshaya Shkola, 1975. - P. 125; M.A. Rozhkova. Amicable transaction: use in commerce. URL: https://rozhkova.com/books_text/MSIKO.pdf (date of access: 30.08.2023); E.S. Smagina. Participation of the state in the modern civil process: monograph. - M.: Statut, 2021. Available in the computer legal research system "ConsultantPlus".

unnatural, it does not correspond to ideas about the goal of pleadings[186]. Anyhow, approaches of the Supreme Court studied in this work were formulated in absence of such additional expressions of will.

When a procedural document contains only an appeal to the court, an authorized subject performs one action. All the expected legal consequences of this action (dynamics of a procedural relationship, emergence, change, termination of civil rights and obligations) depend on its legality. The latter is determined by norms of the branch, according to rules of which the action was performed, i.e. according to rules of procedural law.

Another argument states in favor of the thesis about dependence of substantive effect on correlation with requirements of a procedural form.

We have concluded that a procedural action can be recognized a substantive transaction even in cases when one's will is not expressed directly, but is established through a deduction: "if a party requires an adjudgement (objects to such), a condition to which is one's unilateral expression of will, the latter is also performed by the party". This conclusion is impossible if by stating a requirement (objection) the party cannot achieve any procedural result. For it is impossible to "impute" a complainant of an intention to file a claim, and a defendant of an intention to object, if they did not perform an action required by procedural law, if their act is ineffective for achieving the goal at which it was aimed. When a complainant files a claim violating requirements established by procedural law, he does not yet demand an adjudgement, and therefore does not seek to establish rights and obligations that are a condition for winning the case.

The above stated allows us to conclude that a procedural form, abidance by which is a necessary condition for a procedural action to be valid, also determines validity of substantive expression of will. As long as a litigator's action contradicts norms of procedural law, is not capable of giving rise to procedural effects, it does not have an effect in the sphere of substantive rights either.

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[186] A detailed analysis of such situations seems to lack theoretical significance.

Chapter 4. Procedural behavior of a defendant as a basis for tort obligation incurrence

§ 1. Substantive effect of procedural behavior of an improper defendant

An undeniable right of a person participating in a case is the right to bring their position to the court, present arguments and objections. These opportunities, as a rule, are implemented by a defendant to protect their rights and interests, to achieve desired result of a process. Therefore, consequences of defendant's activities usually stay within a particular court case.

However, some procedural rights can be executed by a defendant in such a way that they will lead to negative consequences complainant's proprietary sphere. An example of this is the situation described in the first chapter of the study. Let us briefly revise it. A complainant filed a claim against a defendant, who in fact was not a party to disputed substantive relationship. The defendant did not claim that he was improper and acted as if he wasa proper one. And only when ten-year limitation period for a claim against an actual debtor expired, the defendant participating in the case decided to raise an objection about him being improper.

To begin with, let us question what should the court do in such a case? On one hand, the defendant chosen by the complainant was not a debtor in the disputed substantive obligation. Without a doubt a demand addressed to a wrong defendant cannot be satisfied. On the other hand, refusing to satisfy the claim will result in complainant losing any opportunity to recover his debt: the improper defendant is not obligated to the complainant, and at the same time a claim against a proper defendant will most likely be denied due to expiration of the limitation period.

A situation, in some way similar to the example given, was considered by the Supreme Court of the Russian Federation[187].

The heart of the matter was as follows. A shipping company applied a claim to a Corporation in order to recover compensation for a rescue operation it carried out for the ship "Bereg Nadezhdy". During consideration of the case by a court of first instance, the Corporation stated that it was an improper defendant to the case, since the territory where the vessel was located was an emergency zone, therefore, costs for a rescue operation are an expense obligation of the Russian Federation. The court agreed that the defendant was improper and dismissed the claim. The court of appeal upheld the decision of the court of first instance. The court of cassation, not agreeing with dismissal of the claim against the Corporation, canceled the decision of the court of cppeal and sent the case for a retrial. When considering the case in the court of appeal for the second time, the Corporation stated there was another reason to consider it an improper defendant, namely, it was neither an owner nor a shipowner of the vessel "Bereg Nadezhdy" during the period of its rescue, since it transferred it under a demise charter agreement to another company. The court dismisses the claim against the Corporation due because the latter was an improper defendant.

As we can see, the defendant declared that he was not the owner of the vessel and therefore was improper after a significant period of time had passed from the moment the complainant filed his claim. The Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation, noticing circumstance, stated: "...in order to characterize corporation's status and its actions, it is also important to take into account that the corporation stated its status of not being a defendant under this claim only during new hearing, which indicates its improper procedural behavior (Article 65 of the Code) and can result <...> in loss of its right to object (estoppel principle)". In addition, the Chamber concluded that the Corporation "exercised legal and effective control over the vessel", and

[187] Decisions of Judicial Chamber on Economic Disputes in case № 303-ES14-31, 09.10.2014. Available in the computer legal research system "ConsultantPlus".

canceling decisions of courts of all lower instances, sent the case for a new trial to the court of first instance.

Surely, the decision of the Chamber was mostly predetermined by a fact that the Corporation was in fact a proper defendant. Despite that, court-determined consequence of untimely filing a improper objection of being an improper party - loss of the right to such an objection - makes us wonder how this case would be resolved if the Corporation was in fact (from the point of view of substantive law) an improper defendant.

Let us ask ourselves: how reasonable would it be to apply the estoppel principle be in such a situation? Application of the doctrine of estoppel, as a rule, is caused by inconsistent behavior of a litigator. Such behavior means that a participant to a process, having clearly and unambiguously indicated his position regarding a fact or a right, then changes it[188]. What is exactly this contradiction of defendant's procedural statements?

In studies on procedural law, parties are traditionally defined as alleged subjects of a disputed substantive legal relationship[189]. Therefore, stating his being improper, a defendant says that he is not a party to a substantive relationship. There can be many reasons for this, and all of them are of a substantive nature. From this, firstly, we can conclude that a statement about an improper party is an objection, identical in its content and meaning to those objections with which a party disputes validity of stated claims. Then there is no contradiction defendant's behavior: all his arguments, including the objection about being an improper party, deny substantive claims of a complainant.

However, the considered objection has some peculiarities. Declaring that he is an improper party, the defendant simultaneously states other facts constituting

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[188] D.B.Volodarsky, I.N.Kashkarova. Procedural estoppel in practice of Russian courts (empirical analysis) // Herald of Civil Procedure. - 2019. - №5. - P. 61-111.

[189] N. A. Chechina. Civil procedural relations. // Selected works on civil procedure. SPb., 2004. P. 30, 43; V.A. Krasnokutsky. Essays on civil procedural law, experience of systematizing legislation of the RSFSR and the USSR on their judicial systems. Kineshma, 1924, P. 44; A.K. Holmsten. Russian civil litigation program. Pg., 1915, P. 67; A.F. Kleinman. Soviet civil process. M., 1954. P. 277, 279, 281.

grounds for a claim will not be subject of a dispute with him, subject of his objections. The defendant does not know at all whether events referred to by the complainant took place and whether they led to consequences indicated by the. This objection is a reference to defendant's lack of knowledge of facts underlying the claim, his refusal to explain them. Therefore, such an objection is incompatible with any activity of the defendant to rebut the facts stated by the complainant. Defendant's objections on stated claims make the complainant reasonably confident that the dispute is being run against the proper party, and satisfaction of the claim is a matter of proving other facts, but not of choosing another party to the dispute. Thus, in the giveb example there was a contradictory behavior of the defendant: with his actions he made the complainant believe he was the proper party.

Therefore, the Judicial Chamber's decision to applying the doctrine of estoppel in this case is in a certain sense justified.

Let us now turn to consequences of using the doctrine of "estoppel" in case of defendant's untimely filing an objection about him being an improper party. In a strict sense the position of the Supreme Court means that the defendant will lose a right to state being an improper party, in other words, he will no longer be able to refer to the fact that he is not a party to the disputed material relationship. What will absence of an argument about being an improper party lead to in context of claims and objections examined by the court? We can conclude that it will lead to satisfying claims of the complainant, stated - that should be stressed - against a wrong defendant. As it is known, an improper defendant is such because he is not a party to disputed substantive relationship. From the point of view of substantive law, he owes nothing to a complainant. However, the complainant's claim still will be satisfied, as a result of applying the doctrine of estoppel.

In this regard, several questions arise. First, how fair is it to satisfy the complainant's claim against an improper defendant, depriving the latter of his right to object, if the complainant did not bear any losses? Of course, complainant's legal costs will be higher than those that he would have had if the defendant had

objected at the beginning of the process, but legal costs issue should be resolved by redistributing them in accordance with rules of procedural codes. But if the complainanthas not bear any negative consequences, will he be able to recover the full amount of the claim from the defendant?[190] An affirmative answer to this question will lead us to a conclusion that confidence in permanent position taken by a procedural opponent is a value that requires protection. In studies on the principle of estoppel, however, this conclusion is not supported: the only condition for applying procedural estoppel is damage caused to a participant in the process by inconsistent behavior of his opponent[191]. Let us suppose that in the situation considered by the Supreme Court, the complainant did bear some substantive losses through the fault of the defendant. But if the defendant by his actions caused damage to the complainant, then why should the doctrine of "estoppel" be applied to protect rights of the latter and not the provisions of the Civil Code of the Russian Federation on compensation?

And, secondly, what is the substantive basis for adjudgement the victory to the complainant? It should be noted once again, in sense of substantive rights, the defendant was not a complainant's debtor. If using procedural estoppel protects litigator's confidence in stability of other participants' position, should it not be recognized that the basis for satisfying complainant's claims against an improper defendant are not the facts that the complainant initially took as the basis for his claim, but an independent procedural condition, namely, inconsistent behavior of the improper defendant?

All these questions arise because applying procedural estoppel in the situation we have described separates procedural reality from substantive. On one

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[190] It should be noted that an answer to this question will turn out to be affirmative if we decide that by applying of the estoppel principle we protect some public value, for example, authority of the court. In this sense, contradictory behavior must be prohibited not because it is necessary to allow other litigators to maintain a legal position on which they relied, but because changing one's position in court is offending its authority. This approach, however, does not explain why application of the estoppel doctrine requires taking into account legitimate expectations of a party to the case and whether they were violated by his opponent's actions.

[191] See K.A. Roor. Concept and essence of estoppel // Actual problems of Russian law. - 2018. - No. 7. - P. 71 - 81.

hand, we can see deprivation of a right to object and satisfaction of claims against the improper defendant to the process, on the other hand, the defendant has no civil obligation at the time of the court decision, and in this sense it is not clear what are substantive grounds for satisfying the complainant's claim. The procedural mechanism (deprivation of a right to object) is in this sense a kind of substantive changes surrogate, and its application leads the parties into a state of uncertainty regarding their substantive rights and obligations.

In this regard, let us ask the question: what, from the point of civil law, happened in the relations between the litigators, when the defendant did not timely raise an objection about being an improper party?

As a result of the defendant's actions, the complainant was deprived of an opportunity to excersise his right to claim, which means his substantive right (authority) to defence was affected.

There is a well-known discussion on how the right to protection relates to subjective law. Some authors believe that the right to protection in its substantive meaning is one of the legal authorities of subjective law. According to this approach, subjective civil law consists of three elements (opportunities): a right to one's own actions, a right to other people's actions and a right to defence[192]. For example, V.P. Gribanov considered a right to defence in its substantive sense as "one of the legal authorities of subjective law, which is essentially a possibility of applying compulsory measures against an offender"[193]. As M.M. Agarkov stated, "every civil right includes an authority to exercise it <...> by force"[194].

According to other researchers, the right to protection is an independent subjective protective right and is not an element of regulatory civil law. "Security of regulatory civil rights," notes E.A. Krasheninnikov, "is expressed in the fact that at the moment when circumstances occur that cause interference with their implementation, an authorized person receives a new, previously non-existing

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[192] See, for example: V.P. Gribanov. Limits of exercising and protecting civil rights. M., 1972. P. 154 - 155; N.I. Matuzov. Subjective rights of citizens of the USSR. Saratov, 1966, P. 33; N.S. Malein. Civil law and individual rights in the USSR. M., 1981. P. 93.

[193] V.P. Gribanov. Limits of exercising and protecting civil rights. M., 1972. P. 154 - 155

[194] Civil Law: In 2 vols. / Ed. by M. M. Agarkov, D.M. Genkin. M., 1944. V. I. P. 109

protective subjective civil right to their protection"[195]. E.Y. Motovilovker holds a similar view on this issue. He believes, that "a civil right to protection is a right to claim arising when one's legitimate interests were violated"[196].

There is also the third approach, according to which a right to defence (a right of action) is a subjective right "in a combat mode". So, according to the M.A. Gurvich's theory, a right of action is a civil subjective right in such a state when it is capable of being enforced against an obligated person[197]. Agreeing with the M.A. Gurvich's approach, B.B. Cherepakhin notes that "a right of action is the most subjective civil right at a certain stage of its development"[198].

A question about what consequences for subjective right brings expiration of a limitation period is investigated within concepts of which place does a right to defence take in relation to subjective civil law. To establish how does behavior of an improper defendant afect substantive position of a complainant, let us turn to these approaches.

M.M. Agarkov, being a supporter of distinguishing authority to enforce a subjective civil right in its structure, believed that expiration of a limitation period leads to termination of a substantive subjective right as a whole. "An obligation has ceased," the author states, "and a creditor no longer has a right to claim <...> obligations devoid of claim protection (natural obligations) can't be seen as obligations"[199]. Supporters of the theory of an independent right to defence come to a similar conclusion, caused, however, by different suppositions. E.Y. Motovilovker, for example, makes the following conclusion: "it is because creditor's having a certain civil right to claim in its legal essence means that he has a real opportunity to satisfy his legally protected interest in relation to another person, loss of such an opportunity due to termination of a limitation period means

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[195] E.Y. Krasheninnikov. To the theory of right of action. Yaroslavl, 1995. P. 4-5.
[196] E.Y. Motovilovker. Civil right to defence as a right to adjudgement or a right to claim against an offender (The myth of a unified subjective right) // Lex russica. - 2016. - № 11. - P. 9 - 21.
[197] M. A.Gurvich. Right of action. - M. USSR Academy of Sciences Press, 1949. - P. 145.
[198] B.B. Cherepakhin. Debatable question to the concept and execution of limitation period // Soviet state and law. –1957. - № 7. - P. 62 - 70.
[199] M.M. Agarkov. Obligation in Soviet civil law. M., 1940. P. 58 - 59. For a similar conclusion, see: O.S. Ioffe. Soviet civil law. M., 1967. P. 352 - 354.

complete disappearance of this subjective right to claim and termination of legal connection between a creditor and a debtor"[200].

It is not difficult to determine what are the consequences of procedural activity of an improper defendant according to this approach. If a defendant has not timely declared that he was not a party to the disputed legal relationship, he completely "destroyed" an object of complainant's civil rights, because with limitation period expiration, a creditor's right to claim ceased.

Let us turn to another view on material consequences of limitation period expiration. I.B. Novitsky, supporting the idea of non-independent nature of a right to defence, believes that effect of a limitation period consists only in settlement of a right to claim. At the same time, the author notes that "...although, as a rule, obligation of civil law <...> is expressed in the form of enforceability, however <...> a weaker form of sanction is also possible, namely, recognition of legal force for execution made on this debt"[201]. In other words, "...an obligation has not completely ceased: it was deprived of its claim protection, but retained some legal force and some protection"[202]. E.A. Sukhanov supports a similar view, he believes that "limitation period expiration deprives an authorized person only of an opportunity to resort to enforcement of his violated right, i.e. deprives him of a right to claim in its substantive sense"[203].

According to this approach, improper defendant's activity leads to the fact that a complainant loses one of his legal authorities that were among the elements of his right to claim - a right to defence (a right to action in its substantive sense). Regulatory legal authorities remain unchanged. However, deprivation of an opportunity to exercise a right to claim by force cannot but affect the value of a right to claim: it will obviously significantly lose its market value, because its

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[200] E.Y. Motovilovker. Civil right to defence as a right to adjudgement or a right to claim against an offender (The myth of a unified subjective right) // Lex russica. - 2016. - № 11. - P. 9 - 21.
[201] I.B. Novitsky. Deals. Limitation of action. – M.: Legal literature, 1954. - P. 227.
[202] See above. P. 226.
[203] Russian civil law: textbook: in 2 volumes / V.S. Em, I.A. Zenin, N.V. Kozlova [and others]; ed.-in-chief E.A. Sukhanov. - M.: Statut, 2011. V. 1. General part. Property law. Inheritance law. Intellectual rights. Personal non-property rights. – 958 p.

execution becomes dependent on the free will of a debtor. Therefore, the idea of deprivation of an authority as part of a subjective right, just like the previous approach, leads to the conclusion that actions of a defendant may cause property damage to a complainant.

Let us turn to the third concept of consequences of limitation period expiration, associated with the approach by which a right to defence (a right to claim in its substantive sense) is seen as a special state of subjective civil law. It would seem that since a right to claim is a special "enforcement" state of right, then depriving a debtor of opportunity to fulfill his obligation also means setllement of this right, because it can no longer exist in a state enforcement (due to absence of the very possibility to enforce it). However, a supporter of this view on law of action - B.B. Cherepakhin - comes to a different conclusion: " limitation period expiration does not terminate existence of a civil subjective right, but deprives it of ability to be enforced against the will of an obligated person"[204]. The author believes, it would be wrong to think that "a legal relationship, including an obligations legal relationship, inevitably ceases with a temporary, and under certain circumstances with a permanent deprivation of a possibility to enforce fulfillment of a legal obligation"[205].

Accepting this position, we should come to a conclusion that procedural activity of an improper defendant did not affect a substantive right itself: the latter remained in the same form as before limitation period expiration. However, defendant's behavior led to depriving a substantive right its ability which was present before limitation period expiration, which is to be executed with the help of public authority by force. Such consequences certainly lead to a decrease in cost of a right to claim. Therefore, froaccording the concept of "depriving an ability inherent in a right", a defendant has a tort effect on complainant's obligation right.

Thus, described diversity of views (both on relationship between subjective right and right to defence, and on substantive legal consequences of limitation

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[204] B.B. Cherepakhin. Debatable question to the concept and execution of limitation period // Soviet state and law. –1957. - № 7. - P. 62 - 70.
[205] See above. P. 62 – 70.

period expiration) does not prevent us from concluding that any right to claim, by losing ists possibility of being enforced, also decreases in its market price. Note that in most cases market value of such a substantive right will be zero, since there is little demand for rights that cannot be enforced. Here we can see a derogation in complainant's property, expressed in "damage" caused to his right to claim as a result of defendant's procedural inaction.

In turn, paragraph 1 of Article 1064 of the Civil Code of the Russian Federation states the principle of general tort, which implies that any harm caused to a person or his property, to property of a legal entity must be compensated in full by a person who caused it[206]. This principle supposes that any behavior causing harm is illegal[207]. Malicious procedural actions of persons participating in a case are also not an exception. Therefore, substantive losses caused by procedural activities of a defendant are a basis for emergence of a tort obligation and are subject to compensation[208].

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[206] See Civil Law / Ed. Y.K. Tolstoy, A.P. Sergeev. SPb., 1996. Part 1. P. 491.

[207] Note that there is another approach that represents unlawfulness of an action as a violation of objective law rules (see: M.M. Agarkov. Obligation in Soviet civil law. M., 1940. P. 141). Its supporters believe that illegal behavior may consist in taking an illegal or in failing to take a mandatory action prescribed by law. In order to confirm its illegality, it is required to correlate one's behavior with a prohibitive or prescriptive rule of law. When a contradiction is found, the action can be considered illegal. If unlawfulness is understood in such a narrow sense, then actions of an improper defendant are not illegal, since there is no rule of law that prohibits conducting a case in one way or another. At the same time, this approach can be criticized as requiring regulation of each separate wrongfulness, which leads directly to the thesis of private tort existing in a system of Russian law. Such a tort is typical for English-American law, where a variety of special tort obligations have been developed through precedents that arise under various conditions. Moreover, a requirement to ban every act that the system of justice considers illegal is an extreme degree of particularity, uncharacteristic even for systems that recognize private torts.

[208] Note that a tort obligation arises when harm caused is existent. If property damage is expressed in "pressing down" a claim, this poses a question when a complainant's right to compensation for damage arises: does it actually arise at the time of limitation period expiration or is due to proper defendant's statement about limitation period expiration and dismissal of a claim on this ground? The answer to this question is beyond the scope of this study.
However, even recognizing that substantive effects of limitation period expiration are associated exclusively with a defendant's objection or even with a decision of the court to dismiss a claim on the basis of limitation period expiration, one cannot deny that a tort obligation can arise from it (even if it does not arise at the moment when the limitation period has expired, but when this was declared by a defendant or the fact of limitation period expiration was established by the court).

It follows from the above that complainant's right to compensation for substantive losses (which in some cases may be equal to the amount of recoverable debt) arises only when there is a loss of his property due to an untimely statement of objection by a defendant. In this case, a victim has a right to apply for compensation for losses to a tortfeasor. In turn, a complainant's claim filed against an improper defendant cannot be satisfied, because the latter was not a party to an obligation underlying the claim.

From this, a broader conclusion can be drawn: a negative consequence of procedural actions is not only an undesirable court decision, but also emergence of a protective substantive legal relationship. It is known that a participant in a process always independently determines a level of his procedural activity: no one can be forced to perform this or that procedural action, to conduct proceedings in a certain way. The only sanction for choosing some variant of behavior is a court decision that can be unfavorable for the participant[209]. Meanwhile, we found out that range of negative consequences of procedural activity is much wider: a litigator's action can cause substantiveharm and become a basis for a tort obligation. Procedural actions can lead to a direct economic effect, leading to an increase or decrease in property value for litigators.

§ 2. Substantive effect of procedural behavior of a proper defendant

As we have established above, a defendant participating in a case may, by his procedural actions, cause harm a complainant's subjective right. This conclusion, however, seems justified insofar as the mentioned defendant was inappropriate, and therefore was not bound by a relative substantive relationship with a complainant. The complainantand the improper defendant are in absolute

[209]See, for example: I.V. Reshetnikova. Reflecting on judicial proceedings: Selected Works. - M.: Statut, 2019. - 510 p.; I.I. Chernykh. Estoppel in civil proceedings // Laws of Russia: experience, analysis, practice. - 2015. - № 12. - P. 81 - 88.

legal bond regarding the disputed claim, therefore there is no doubt that the negative impact of the defendant's actions on the complainant's right is a basis for emergence of a tort obligation.

Meanwhile, a proper defendant is usually involved in a process, and a situation like the one described above, most commonly does not arise. In this sense, the above given example can be seen as an exception, insufficient for putting forth a theory. Procedural behavior of a defendant really gives rise to a substantive obligation to compensate for complainant's substantive losses, but it happens only in one case - when a complainant incorrectly identified a person against whom the claim should be filed.

Developing our theory of causing damages by procedural actions, we will go further and ask the question: is it possible that procedural actions of a proper defendant, who is, moreover, a valid debtor in an obligation that is subject to the dispute, will cause substantive losses to a complainant? Can procedural activity of a proper defendant be a basis for compensation for damages?

Let us answer this question turning to an example of recovery of expenses on financing a process with borrowed funds[210], incurred by a complainant in connection with improper procedural activities of a defendant.

Let us give an example. Persons A and B entered into a supply contract, under terms of which A is obliged to deliver the goods, and B is to pay for them. Having delivered the goods, but not having received payment within a period established by the contract, A filed a claim against B to recover the payment. At the same time, A, having no funds to pay court costs at the time of filing a claim, entered into a loan agreement with a third party, under which he received funds for conducting the process, and was obliged to return them at the end of the trial (from

[210] The Supreme Court of the Russian Federation, having considered the issue recovering expenses for a representative, if they were paid from borrowed funds and transferred directly by a lender to a representative, came to a conclusion that there are no grounds for refusing to refund assets of a party by applying rules for recovering court costs in this case. (Decision of the Supreme Court of the Russian Federation of 03.06.2019 № 305-ES14-7285 in case № A40-56428/2012, available in the computer legal research system "ConsultantPlus"). However, the question of possibility of collecting interest for using borrowed funds was not raised in this case.

repayment received from the defendant) and to pay interest stated in the agreement for using the loan amount. Defendant B, knowing that the complainant had a disputed substantive right and assuming quick satisfaction of the claim, raised obviously unfounded objections, presented fabricated evidence of payment, and by all means delayed consideration of the case. The complainant continued to bear cost of paying interest for the loan funds.

Is A entitled to demand from B refund for interest paid by A to the third party for using the loan funds? And what are the conditions for such compensation?[211]

Firstly, it should be noted that the described complainant's costs cannot be classified as court costs. It is staded, firstly, by rules of procedural codes (Article 88 of the Civil Procedure Code of the Russian Federation, Article 101 of the Arbitration Procedure Code of the Russian Federation, Article 103 of the Code of Administrative Court Procedure of the Russian Federation), which do not include costs of financing a process (or similar ones) to court costs. Secondly, complainant's payment of interest for using of loan funds is not a necessary condition for the process[212], especially in a situation where additional costs are provoked by defendant's unreasonable actions.

Since disputed complainant's costs do not belong to costs "for the process", the question naturally arises if it is possible to attribute them to substantive losses and recover under rules of Article 15 of the Civil Code of the Russian Federation:

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[211] It should be noted that the issue of consequences of failure to fulfill an obligation to compensate court costs by a party that lost the case, was a subject of consideration by the Supreme Court of the Russian Federation (Decisions of Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation of 12.10.2017 № 309-ES17-7211 in case № A76-9414/2016, available in the computer legal research system "ConsultantPlus").
According to the position of the Supreme Court, interest may be charged on the amount of court costs awarded but not paid in accordance with Article 395 of the Civil Code of the Russian Federation. In this study, however, a different situation is considered: when losses associated with using loan funds were incurred by the party before the court made a decision on distribution of court costs, and therefore are not caused by defendant's violating his obligation to compensate them.

[212] Traditionally, court costs include only those costs for litigators that are "necessary for administration of justice." See Arbitration process: textbook / ed.-in-chief V.V. Yarkov. M., 2014. P. 210 (the author of the paragraph is V.V. Yarkov).

this legal provision states that any substantive losses must be compensated by a person acted illegally. Losses resulting from procedural activities of a defendant are no exception (at least at first sight). So, it would seem that losses in a form of expenses for financing the process are subject to compensation the same way as other substantive losses not related to the process.

This thesis, however, must be questioned in the following sense. Recovery for losses in accordance with provisions of civil law is possible only if there has been a violation of a subjective right (and a corresponding obligation). Only by determining what defendant's violation is, it is possible to decide whether it is possible to compensate damages and under what conditions.

The first possible solution is plain to see: procedural activity of a defendant basically does not have any effect on substantive civil rights of a complainant. When a litigator performs an unacceptable action, for example, aimed at delaying consideration of a case, he thereby commits a procedural violation: he violates a statute-established prohibition on abusing procedural rights. Consequences of this kind of behavior are regulated by procedural law[213], are public-law by their nature and do not imply compensation for any substantive losses.

This conclusion, however, raises objections. Firstly, it is strange to imagine that losses caused by some illegal action (even if regulated by rules of public law) "remain" on a victim due to public-law nature of the action. This approach seems to be an unjustified limitation of compensatory function of losses. Secondly, the thesis about impossibility of recovering losses incurred due to procedural activity is rebuted by provisions of Article 99 of the Civil Procedure Code of the Russian Federation[214], which establishes a right for a complainant who has endured unfair procedural behavior of a defendant, to compensation for substantive losses (at least those related to "loss of time"). Therefore, a question raises: is it indeed possible to recover compensation for loss of time, but losses associated with payment of

[213] According to Part 2 of Article 41 of the Arbitration Procedure Code of the Russian Federation, litigators must fairly use all the procedural rights belonging to them. Abusing procedural rights by them incurs unfavorable consequences stated by the Code.

[214] We cite this norm as an example of a legislative structure, taking into account almost complete lack of its actual application.

interest for a long period of time a case was considered cannot be compensated? We find no foundation for an assertive answer to this question.

There is a different assumption that a complainant's violated right and a corresponding obligation are substantive in their nature. In the civilistic doctrine, violation of a right is defined as a legal action directed by its performer to constrain another person in exercising their rights. "Speaking of violation of a right, we imagine a right as an integrity, while its violation is a damage caused to this integrity ...", notes D.I. Meyer[215]. According to E.A. Fleischitz, "violation of a subjective right can be expressed in interfering with exercising of this right or in perfoming actions that cause termination of the right"[216]. So what right cannot be exercised by a complainant, what his right loses its integrity when a defendant raises an unreasonable objection?

It should be noted that violation of law committed by a defendant differs from ordinary non-fulfillment of an obligation that took place before and out-of-court and continues during the trial. Let us examine these differences in detail.

Firstly (and obviously), an unreasonable procedural action can only take place in context of initiated judicial activity, while failure to timely provide what is due is possible (and usually takes place) before a complainant seeks judicial protection.

Secondly, when a debtor does not fulfill his obligation that arose before and out-of-court, he thereby brings a creditor's regulatory right into a state of "being violated", while a complainant's regulatory right is not affected by an unreasonable objection: its violation has already taken place, and procedural behavior doesn not usually affect this circumstance. Defendant's actions make it difficult to exercise other legal authorities of a complainant, those related to forwarding protection of his rights. Opposing resolution of a case in one way or another, a defendant prevents a complainant from obtaining authoritative confirmation of his rights, as

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[215] D.I. Meyer. Russian civil law: in 2 parts. Part 1. M.: Statut, 2003. 831 p. URL: https://civil.consultant.ru/elib/books/45 (date of access: 13.05.2023).

[216] E.A. Fleischitz. Obligations from causing harm and unjust enrichment // Selected works on civil law: In 2 vol. M., 2015. V. 2. P. 355.

well as their enforcement; he prevents public authorities from assisting a complainant in excersising his rights.

In turn, ability of an authorized person to force a debtor to fulfill his obligation is usually classified as a right to defence, or rather, a right to claim. This raises another question: can stating a knowingly unfounded objection be seen as a violation of a substantive right to claim? Is it possible that some obligation corresponds to a right to claim?

The answer to the questions posed is determined by content of substantive protective relationship between a complainant and a defendant, by what rights and obligations arise (and are actualized) for a creditor and a debtor at the time when the latter violates a regulatory obligation.

As we noted, theoretical studies devoted to the structure of obligatory relationships between a creditor and a debtor usually postulate existence of an independent protective right (as part of a subjective right) - a right to defence. Distinguishing such a right (authority) naturally led researchers to a need to determine debtor's obligations corresponding to the named creditor's right.

Let us turn to some of the developed theories[217].

S.S. Alekseev, calling a claim a power that is a part to subjective law and consists in ability to set in motion apparatus of state enforcement against an obligated person, stated in regard of a duty corresponding to a claim: "If we consider a general concept of a legal obligation, i.e. obligations in general, then it is necessary to indicate <...> an obligation to answer, i.e. undergo state enforcement for a committed ciolation, which, like a claim, is of a potential nature"[218].

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[217] It should be noted that the concepts under study were formulated with authors taking into account the fact that a right to defence cannot be reduced to a right to claim, because it also covers other protection means available to an authorized subject (measures of enforcement, measures of self-defense, etc.). See V.V. Butnev. Mechanism of protecting subjective rights // Lex russica. 2014. № 3. P. 274 - 283.

[218] S.S. Alekseev. General theory of law: In 2 volumes, V. 2. M .: "Legal Literature", 1981. P. 131

V. I. Leushin also defined a claim as powers of a subjective right and singled out such a form of legal obligation as "undergoing restrictions of personal, substantive or organizational rights (measures of legal responsibility)"[219].

According to Y.N. Andreev, a right to defence includes demanding proper behavior from an offender, using self-defense and other protective means, file claims (complaints) to judicial and other jurisdictional bodies. A right to defence, as the author points out, corresponds to the duty: "to perform certain actions (active, passive), to undergo means of state-compulsory protection (impact)"[220].

V.V. Gruzdev finds among elements of a civil law regulatory obligation "...a facultative element represented by protective obligations to eliminate a violation or contestation over a right and to endure consequences of unilateral protective actions of an authorized subject"[221].

As we can see, a debtor's obligation opposing a creditor's right to defence is a certain obligation to "endure" enforcement measures and restrictions applied by a creditor in connection with non-performance of an obligation. In this regard one can assume that, by performing unreasonable procedural actions, a defendant violates his obligation to "endure" actions of public authority initiated by a complainant to protect his subjective right. It is this violation that is a basis for compensation.

Accepting a concept of "enduring" raises a number of questions.

Firstly, what is an obligation to "endure" measures of state enfrocement protection? What behavior is expected from a person who bears such an obligation?

Let us turn here to a well-known civil science of classifying obligations depending on their content. In particular, it distinguishes obligations that require to perform some action (facere), and ones that require to refrain from performing a certain action (non facere). In separate studies, along with the above mentioned

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[219] V.I. Leushin. Legal Relations // Theory of State and Law / Ed. V.M. Korelsky and V.D. Perevalov. M., 1998. P. 340.

[220] U.N. Andreev. The mechanism of civil legal protection. M.: Norma, Infra-M, 2010. 464 p.

[221] V.V. Gruzdev. Structure of subjective civil rights and civil obligations // Actual problems of Russian law. 2018. N 5. P. 95 – 104.

forms of obligations, an obligation to endure (pati) is also distinguished[222]. Supporters of this approach state that simple refraining from an action (for example, an author who has entered into a publishing contract must refrain from publishing his work) differs from an obligation to endure certain behavior of another person (for example, a landlord must endure certain actions on his property a the tenant), and therefore, endurance (pati) is an independent form of civil law obligation [223] . E.A. Krasheninnikov gives the following explanation to distinguishing a "pati" obligation: "...exercise of any protective right to one's behavior occurs through expression of will of an authorized person addressed to an obligated person, which an obligated person is not able to prevent. <…> Inability of an obligated person to interfere with exercising a protective right to their behavior indicates that a "pati" obligation corresponding to this right cannot be qualified as a "non facere" obligation"[224].

Considering the obligation corresponding to the right to defence as an obligation to "endure" (pati), we can conclude that no action (as well as refraining from an action) is expected from an obligated person. Moreover, since an obligated person cannot in any way prevent a creditor from exercising his protective right, it is impossible to imagine debtor's failure to fulfill an obligation to "endure", as well as violation of his right to defence. Then what justifies existence of an obligation corresponding to a right to defence?

Secondly, is an obligation to "endure" enforcement measures of substantive nature or does it belong to public, procedural relations? Such a question arises because the essence of the obligation corresponding to a right to defence is seen by researchers as a need not to interfere with state enforcement. Since the mentioned

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[222] E.A. Krasheninnikov. Regulatory and protective subjective civil rights. // Essays on commercial law. Issue 14, Yaroslavl. 2007. P. 12 - 13.

[223] M.M. Agarkov. Obligation in Soviet civil law. M., 1940. P. 32. The author supports an opposite approach: in his opinion, any o"pati" bligation can be considered as "non facere" (see above).

[224] E.A. Krasheninnikov. Regulatory and protective subjective civil rights. // Essays on commercial law. Issue 14, Yaroslavl. 2007. P. 12-13

enforcement is provided by the state, and not by an authorized subject, the obligation to "endure" should connect a debtor with a public subject[225].

Taking into account contradictions that arise when trying to define an obligation that opposes a right to defence, researchers of the right to claim have come to the conclusion that it is impossible to construct a substantive legal obligation that corresponds to the right to claim. For example, M.A. Gurvich, criticizing theoretical constructions that recognize the right to claim as an independent substantive right, different from a subjective right, noted that such ideas necessitate determination of debtor's counter obligation. Asking what such an obligation might be, the author states: "...if we assume that it consists in refraining from resisting enforcement, then such an answer would not satisfy anyone, since this obligation is sufficiently justified by subordination of a defendant to enforcement authorities"[226].

E.Y. Motovilovker, supporting the opposite view - about independence of the right to claim from regulatory civil law - nevertheless concludes: "A person to whom possibility of enforcement is directed is not obliged to anything. They have benn, but violated their obligation, and in a new legal relationship are a subject to enforcement. This subjective right is protective, and it does not have a corresponding obligation"[227].

Can we agree with the above statements?

To determine whether a holder of the right to claim can expect certain behavior from an obligated person, what this behavior consists of and who is an obligated person, we should refer to content of the right of claim itself, for "the

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[225] S.S. Alekseev makes an attempt to take this circumstance into account and notes that a claim by a direct addressee can provide state enforcement influence, therefore he attributes a claim to public legal relations (See S.S. Alekseev. General theory of law: In 2 vols, V. 2. - M .: "Legal Literature", 1981. P. 124-125). At the same time, both a claim and an obligation to endure are present, according to the author, in the structure of subjective law in a form of an opportunity, and are of a potential nature.

[226] M.A. Gurvich. Right of action. V.1. - M .: USSR Academy of Sciences Press, 1949. - P. 141

[227] B.Y. Motovilovker. Theory of regulatory and protective law. - Voronezh: Voronezh University Press, 1990. - P. 66

definition of what authorized parties can do at the same time determines what obligated parties cannot do"[228].

The question of content of the right to claim has arosen a wide discussion; many theories have been formulated about it. We will refer to them only to the extent as is important for asnswering the posed question. As we noted, defendant's unfounded objection does not violate complainant's right to enforcement, but prevents a complainant from obtaining a timely defense for his claim. Therefore, we will mainly be interested in the question of a so called "right to enforcement" - an opportunity given to a holder of a subjective substantive right to seek assistance of public authorities, to exercise a right with the help of the state; on correlation relationship between the right to enforcement and the right to claim; on relationship to which it is an element. From this point of view, we will consider some approaches to the right to claim.

Some authors believe that the right to claim consists of those possibilities that can be realized outside a process. For example, when a debtor does not timely repay the debt, the right to claim is essentially an ability to demand its payment; if property of a complainant is in unlawful possession of a defendant, the owner has a right to demand its return, and this is his right to claim. According to this concept, no "right to enforcement" is found in content of the right of claim.

According to the theory of M.A. Gurvich, the right to claim in its substantive sense is a subjective right in a state when it is capable of enforcement against an obligated person[229]. At the same time, according to the author, " development of the right to claim ... does not cause any change or transformation in content and legal nature of the right; the latter retains its identity in everything"[230]. In turn, inherent ability of substantive right to be implemented by force is only an attribute of a subjective right, which manifests itself under certain conditions. Enforcement

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[228] S.N. Bratus. Legal entities in Soviet civil law. M., 1947. P. 33.
[229] M.A. Gurvich. Right of action. V.1. - M .: USSR Academy of Sciences Press, 1949. - P. 145
[230] See above. P. 142 – 143.

is a certain ability of a right[231], but under no circumstances is it its content: the right to claim remains identical to the right to demand in its unviolated state.

Here we should cite the concept of E.A. Krasheninnikov, who defined the right to claim as a protective right to demand, obliging a certain person to perform a certain action and having an ability to be subject to enforcement by a jurisdictional body[232]. And, although the author believes that at the moment of violation of a subjective civil right, a new protective right emerges, which is not identical in its content to the regulatory one, he also states that enforcement "is not the content, but one of possible ways of executing claims"[233].

Upholding the idea of impossibility of including enforcement in the content of the right to claim, E.A. Krasheninnikov puts forward the following arguments. The only form of enforcement is the state activity represented by the court. Therefore, it acts as the holder of a legal obligation "to exercise civil law against a certain person against the will of the latter" corresponding to the right to claim[234]. But if enforcement understood in this way is included in the content of the substantive right to claim, this right will inevitably be recognized as procedural (because the court is the holder of a corresponding obligation), and the very concept of the substantive right to sue would make no sense.

The described approach to the content of right to claim leads to a very definite conclusion: defendant's procedural actions cannot violate the substantive right to claim. For, as we have noted, an unreasonable objection does not violate such complainant's rights that can be satisfied before and out of court, and the authors of the above theory state that the content of the right to claim is limited by them. Then what is violated by actions of a defendant? It is quite clear that the only option remains: when a defendant raises an unfounded objection, he violates procedural rights of a complainant. We have studied disadvantages of this conclusion above.

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[231] See above. P. 142.
[232] E.Y. Krasheninnikov. To the theory of right of action. Yaroslavl, 1995. P. 9
[233] See above. P. 15.
[234] E.A. Krasheninnikov. Formation of the doctrine of the right to action in Soviet civil law // Historical in the theory of Law: Works on Jurisprudence III. – Tartu, 1989. – P. 203.

Let us now turn to the opposite theory, according to which possibility of applying enforcement measures to an obligated person is included in the content of the right to claim. M. M. Agarkov gives the following interpretation of the right of claim: "the power to exercise civil law in relation to a certain person against the will of the latter <...> is called the right to claim in the sense of civil law or the right to claim in substantive sense (as opposed to the right to claim in procedural sense, i.e. the right to judicial protection)"[235]. According to A.A. Dobrovolsky, "the right to claim in its substantive sense carries weight only if the right to claim is understood not just as the right to satisfy one's claim against a defendant, but also the right to enforce one's claim by the court or other body authorized to consider declared substantive legal claim in a process, i.e., and the right to file a claim"[236]. S.V. Kurylev shared a similar view, noting that "complainant's right to judicial defence consists of two independent authorities - the right to claim in procedural sense (the right to file a claim) and the right to claim in substantive sense (the right to satisfy a claim)"[237].

From these positions, a possibility of enforcing an obligated person constitutes a meaningful, forming moment of the right to claim. However, there is some contradiction here. If we uphold the thesis that enforcement is exercised within legal relationship with the court, then we should agree that by definition it cannot be the content of any substantive right. The need to resolve this contradiction has led researchers who saw enforcement as a substantive element of the right to claim to two opposite conclusions. Some of them decided that the right to claim is a procedural one, because both the right to file a claim and the right to satisfy it are rights addressed to the court[238]. Other cocluded that a complainant's demand to the court to deliver a necessary judgment, on the contrary, is

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[235]Civil Law: In 2 vols. / Ed. by M.M. Agarkov, D.M. Genkin. M., 1944. V. I. P. 109.
[236]A. A. Dobrovolsky, S. A. Ivanova. Main problems of the claim form of rights protection. - M., 1979. P. 90 - 92.
[237] S. V. Kurylev. Forms of protection and enforcement of subjective rights and the right to claim // Works of the Irkutsk university, legal series. - 1957. - № 3. - P. 198, 203.
[238] See above. P. 203.

substantive, and the court, therefore, is a participant in disputed civil relationships[239].

Such conclusions are quite consistent. Recognizing that enforcement is a substantive characteristic of the right to claim, we must either declare the right to claim procedural, or "include" the court in substantive legal relationships between a complainant and a defendant. These conclusions, however, arise from the idea that enforcement is a power that binds a complainantexclusively to the court.

At the same time, the right to enforcement can be considered differently: as a substantive right addressed to a defendant[240].

At the moment when a right is violated, an authorized subject of substantive relations gets an ability to enforce a debtor. Indeed, it cannot be recognized that a defendant has any active obligation corresponding to the named right before a complainant: independently, without participation of a jurisdictional body, a defendant is not able to satisfy complainant's interest. At the same time, a defendant by his actions may create obstacles for a complainant to exercise his right to enforcement, as it happens when a defendant raises knowingly unfounded objections to a claim. In this case, a complainant is deprived of an opportunity to timely receive authoritative confirmation of the disputed right, in connection with which, as we have noticed, he bears losses. The state (the court) at the same time does not affect this fact: losses are caused within legal relationships between a complainant and a defendant and are compensated according to rules of civil law. So what is a result of defendant's actions, if not a violation of a substantive right to claim?

From the point of view of material legal relations that develop between a complainant and a defendant, a complainant's right to enforcement is, in some

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[239] B.Y. Motovilovker. Theory of regulatory and protective law. - Voronezh: Voronezh University Press, 1990. - P. 99.

[240] Putting forth this thesis, we certainly do not mean that the right to enforcement (whether substantive or procedural) is limited only by rights addressed to a defendant. It also should be noted that this study does not set a task of formulating an independent theory for the content of the right to claim, or of justifying any of the existing approaches. We focus only on the right to enforcement in the narrow context of substantive legal relationships between a complainant and a defendant in regard to procedural actions of the latter.

way, a right to "one's own action." In turn, a defendant's obligation corresponding to this right is passive (non facere) and consists in not preventing a complainant from exercising his right to enforcement[241].

At the same time, "ordinary" procedural activities of a defendant, activities not related to raising unreasonable objections, delaying a process, etc., cannot be considered as a violation of the right to claim. Otherwise, it should be recognized that defendant's obligation "not to interfere" consists in recognizing any claim that has the slightest chance of satisfaction, or at least not to raise any objections regarding complainant's rights in dispute. Such a conclusion is contradicting basic foundations of civil process.

According to the described approach, we will draw a conclusion regarding the raised question: whether it is possible for a complainant to compensate interest on the amount of loan funds he borrowed to finance the process. Such a compensation is possible when and insofar as a defendant violates a substantive legal obligation - to refrain from actions preventing a complainant from "endowing" his right wit an enforcement authority, an obligation corresponding to the right to claim in its substantive[242]. The named violation occurs when a defendant raises a knowingly unfounded objecton regarding a claim, takes actions aimed at delaying consideration of a case, and interferes with timely and correct resolution of a dispute.

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[241] From this we can draw a conclusion about the concept of the right to claim in its substantive sense. Enforcement is included in the right to claim, at least to an extense to which a complainant's substantive right to enforce is corresponded by a defendant's obligation to refrain from actions that unreasonably interfere with this enforcement.

[242] N.V. Platonova. Compensation for expenses on financing a process: to the question of substantive consequences of defendant's procedural activities // Arbitration disputes. 2021. N 2. P. 105 – 116.

Chapter 5. Filing an unfounded claim as a basis for a tort obligation

§ 1. Liability for filing an unfounded claim in Russian and foreign law

The main purpose of filing a claim is to launch a process of protecting a violated right. In order to enforce a defendant to fulfill his obligation to a complainant, the latter turns to the court. Meanwhile, consequences of filing a claim can be completely different. E.g., any vindication claim affects the value of a claimed property, reducing it at least by the amount of court costs that any new owner will have to bear due to participating in the process; a major claim against a company can lead to a decrease in its capitalization as the market is waiting for satisfaction of the claim. Filing a claim sometimes leads to reduction of the defendant's property. Moreover, causing damage to an opponent is sometimes the only goal pursued by the complainant when applying for judicial protection.

Any abridgment of rights must be followed by their restoration, which means there is reason for incurrence of complainant's obligation to compensate for the damage caused. Is procedural behavior a basis for a substantive tort obligation? Or is the damage caused not refundable?

In Russian doctrine the problem of defendant's exposure to the extra-procedural consequences of filing a claim is barely studied. This issue is addressed in a number of studies, but only in the context of consequences of abusing procedural rights, which does not allow the authors to come to any meaningful conclusion[243]. A similar approach is found in judicial practice. When it comes to a knowingly unfounded claim, courts define it as an act of abusing procedural rights, but without applying consequences of abuse[244].

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[243] E.g., I.V. Rekhtina and M.A. Bolovnev study the issue of causing harm to business reputation of a legal entity by a lawsuit and note that a defendant should have a right to compensation for such losses (see: I.V. Rekhtina, M.A. Bolovnev. Certain aspects of liability for abusing procedural rights // Arbitration and civil procedure, 2014, № 9, pp. 53–57).

[244] See, for example: Decision of the Eighteenth Arbitration Court of Appeal from 05.09.2011 in case № A47-5394/2010. Available in the computer legal research system "ConsultantPlus".

Much more widely than in continental systems of justice, the problem of compensation for damage caused by filing a claim is revealed in English judicial practice. The law of England has developed a doctrine of a so-called malicious prosecution, which is an integral part of general tort law of the country. It essentially states that a victim has a right to compensation for damage when an accusation was brought against him maliciously and without proper reason, which was then dismissed in favor of the victim of such a malicious prosecution. Until recently, the doctrine of malicious prosecution was applied to victims of unjustified criminal prosecution. However, in July 2016, the Supreme Court of Great Britain decided in the case of Willers v. Joyce and another (Re: Gubay (deceased)) to extend it to civil lawsuits[245].

Factual circumstances of the case examined by the Supreme Court were as follows: a defendant (Gubay) ran the Langstone company. A complainant (Willers) was a director of this company, but was later fired. The Langstone Company sued Willers for dereliction of his obligations as a head of the company. Willers effectively defended himself against the claim, proving that he carried out all his activities as a head of the company in accordance with Gubay's instructions. After that Willers sued Gubay for damage caused by malicious prosecution, stating that the claim brought against him by Langstone was part of Gubay's campaign to cause damage to him. Damage was caused to reputation and health of Willers and was expressed in lost profits.

The question before the Court was: can a claim arising from malicious prosecution be filed by one party to a civil case against the other?

By a majority of votes (5 out of 9), the Supreme Court decided that a claim for malicious prosecution could be filed in civil proceedings. Judges in favor of such a decision supposed that there was no reasonable basis for accepting that there was liability for a malicious incrimination, but not for a civil process. Lord Toulson cited a case Savile v. Roberts: "...if this injury be occasioned by a

[245] See.: Willers v. Joyce & Anor (Re: Gubay (deceased) No 1) [2016] UKSC 43 (20 July 2016). URL: http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2016/43.html (access date: 30.08.2023).

malicious prosecution, it is reason and justice that he should have an action to repair him the injury". He further states: "...It seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation".

As we can see, the idea of justice formed a basis for establishing a tort obligation for malicious prosecution. Justice, according to Lord Toulson, is an absolute value, and very strong reasons are needed to limit it. But what is the idea of justice that Lord Toulson thinks will be implemented by establishing a tort obligation for malicious prosecution? Will the approach adopted in the case Willers v. Joyce be applicable in Russian law?

It should be noted that Lord Toulson's position is, first of all, based on the idea of corrective justice, according to which the task of tort law is to restore balance existing before a tort[246]. A tort obligation corrects an injustice, allowing to receive full compensation for losses from a liable party - it starts a reverse transfer, a reverse redistribution of resources. This is how most Russian researchers see the nature of tort liability. For example, O.A. Krasavchikov states that tort obligations are a form of relations for redistribution of material goods, when a tortfeasor compensates for damage caused without any counter provision from a victim[247]. Corrective justice involves objective restitution of one's position that existed before a tort. In many ways, this idea is reflected in item 1 of Article 1064 of the Civil Code of the Russian Federation and can be expressed by in thesis: "any damage is subject for compensation".

At the same time, the doctrine of malicious prosecution is based not only on corrective justice. Even the most general understanding of good and evil lead to the conclusion that one's deliberate malicious action against another person, which led to negative consequences for the latter, cannot remain without punishment. Law must have a mechanism to bring a violator to justice, thereby preventing such acts in the future. Requirement of retribution for a committed tort is the essence of the

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[246] See: D.E. Bogdanov. Triune essence of justice in sphere of tort liability // Russian Law Journal. - 2013. - № 7. - P. 49–62.

[247] See: Soviet civil law / ed. O.A. Krasavchikov. V. 2. M., 1985. P. 349.

idea of so-called retributive justice. M.A. Kotler states that "to a large extent, development of the doctrine of tort liability can be understood in terms of liability as an attempt to prevent behavior infringing fundamental values"[248]. In Russian law this idea is implemented primarily in the principle of fault-based liability (item 2, article 1064 of the Civil Code of the Russian Federation).

The principle of justice implies that fault-based infliction of damage must be followed by compensation. On one hand, because a victim must receive compensation for the lost property, on the other hand, because fault-based harmful actions cannot be ignored. If the system of justice does not allow a person to demand compensation for the damage caused to him in a particular case (for example, damage caused by procedural activity), then this is a limitation of the principle of justice, and it must be justified by a strong reason. In Willers v. Joyce case, judges, who disagreed with the decision of the majority, suggested that such reasons are present when it comes to damage caused by a knowingly unfounded claim. To determine whether there is such a reason to limit compensations in Russian law, we will study objections of judges who were against applying the doctrine of malicious prosecution and see how relevant they are to Russian law.

§ 2. Potential limitations for applying liability for filing an unfounded claim

§ 2.1. Problem of a "subjective side"

The first possible argument against recognizing a right to compensation for damage for a victim of an unfounded claim comes down to an argument that it is unacceptable to hold liable complainants who filed an unfounded claim by accident

[248] Kotler M.A. Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine // University Cincinnati Law Review. – 1990. – Vol. 58. – P. 1231, 1248 – 1254. Cited in: D.E. Bogdanov. Triune essence of justice in sphere of tort liability // Russian Law Journal. - 2013. - № 7. - P. 49–62.

(due to a mistake, ignorance) or hoping that a defendant during a process does not implement his rights to the fullest and loses the case. It is difficult to disagree that establishing liability for any unfounded claim would be such a radical decision that it would cast doubt on the very right of access to a court, since for persons whose rights were allegedly violated, a risk of suffering negative consequences of losing a case would outweigh possible positive effects of winning. Complainants would then apply to court not for resolution of an aroused dispute, but only for enforcing a defendant if they had absolutely confirmed rights to do so.

This circumstance seems to be the reason why English judges, when forming the doctrine of liability for an unfounded claim, took the path of maximum limitation of cases of tort compensation. One of the ways to implement such a limitation was establishing liability conditions, which we (in Russian law) would attribute to a subjective side of violation.

Lord Toulson states that an obligatory condition of liability for filing a claim is complainant's malice. In English law, malice is a kind of intention, purpose. By taking some action characterized as malicious, a person aims at harming someone and acts solely for the sake of achieving this goal. In terms of compensation, requirement of malice means that simply filing an unfounded claim is not enough to hold a complainantliable, it must also be established that the main, decisive purpose of his actions was to damage a defendant.

Certainly, this approach makes it possible to protect complainants who did not have any malicious intentions towards a defendant from claims for damages in the event of their loss. However, a possibility of using the criterion of malicious intent in civil cases raised doubts among judges who disagreed with the decision. In English law "malice" refers to criminal law categories and is usually a sign of a crime. Malice is present in a criminal act when there is either an actual intent cause a particular type of damage (that was ultimately caused), or an indifference to whether such damage may be caused (the tortfeasor knew that a particular type of damage could be caused, and yet took the risk). Lord Toulson proposed to

extrapolate this traditionally criminal doctrine to relationship of compensation for civil damage.

Back in Crawford Adjusters v. Sagicor General Insurance case[249], where it had been decided that there could be no liability for a civil claim, judges stated that criminal nature of one's goal as an argument against applying the doctrine of malicious prosecution in civil proceedings. Thus, according to Lord Neuberger, "Malice is as a general rule irrelevant to liability in tort. Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong"[250]. It might seem that Lord Neuberger's argument is inconsistent and raises a question: is he suggesting a broad understanding of liability for unfounded claims? And if not, then what doctrine, limiting liability according to a subjective criterion, can be considered more applicable? It seems, however, that Lord Neuberger sees the lack of proper liability criteria in civil law as an argument against its application in general. Since such a liability is not subject to ordinary regulations and requires additional conditions, borrowings or analogies, its applying, according to Lord Neuberger, cannot be considered a right decesion.

This argument is very relevant to Russian tort law, where the category of purpose is also recognized as indifferent: the main condition for liability for

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[249] See: Crawford Adjusters & Ors v. Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands) [2013] UKPC 17 (13 June 2013). URL: http://www.bailii.org/uk/cases/UKPC/2013/17.html (access date: 30.08.2023).

[250] Let us pay attention to the following. In English decisions on the problem of liability for malicious filing a claim (cases Crawford v. Sagicor, Willers v. Joyce), two terms are used simultaneously to define the concept of malice - "motive" and "intention". In other words, malice is defined as both a motive and a purpose at the same time.

However, in the English doctrine of elements of a crime, the categories of motive and purpose are not considered equivalent. E. Dangel defines the relationship between a motive and a purpose as follows: "Motive is not a goal, although it leads to setting a goal. It precedes criminal behavior, while a goal accompanies it ... It [a motive] tempts a mind to commit a crime - it forces it to perform an action in order to achieve a certain result. (Dangel E.M. Criminal law. Boston, 1951, P. 92 – 93). Using the concepts of "motive" and "purpose" as equivalent may be due to the fact that judges do not find the difference between a motive and a purpose important, impying that they relate to criminal law and are not applicable to civil law. Meanwhile, it should be stressed that malice is an actual purpose, a characteristic of an action (orientation towards a certain result), and not an internally motivating feeling. It is important that a complainant was aimed at causing damage; and what was his beginning point - greed, hatred or something else, - is of no importance.

causing damage is tortfeasor's fault, but his motives and purposes are considered irrelevant[251]. It should be noted that in some studies on tort obligations, conditions for compensation are considered similarly to elements of a crime, distinguishing respectively a subject, an object, subjective and objective sides of causing damage[252]. Meanwhile, even here authors do not discuss a possibility of extending categories of purpose and motive to tort relationships.

As in English law, in Russia the category of purpose is studied under terms of criminal law in relation to a subjective side of elements of a crime. A purpose of a crime is a mental model of a desired result, which a person seeks to achieve through committing a crime[253]. Including a special purpose in the subjective side of specific elements of a crime indicates direct intent[254].

However, if in English law to hold a complainant liable for damage caused by an unfounded claim, it is enough to establish malice, covering all significant circumstances of intellectual and volitional activity of a subject, for Russian law the question falls into two parts: should liability be fault-based, and if so, is a special purpose required? As we will see, it is not obvious that liability for filing a claim in Russian law should be fault-based, because legislation and regulatory enforcement provide grounds for stating its risky nature.

As it was noted above, recognition fault-based nature of compensation for damage caused by an unfounded claim will from liability those complainants who filed such claims to obtain judicial protection, not intending and not wishing to harm a defendant.

At the same time, requirement of presence of guilt will lead to the fact that in many cases defendants who have suffered from an unfounded claim will not compensate for property losses (since they will not be able prove complainant's

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[251] E.A. Fleischitz. Obligations from causing harm and unjust enrichment // Selected works on civil law: In 2 vol. M., 2015. V. 2. P. 329.

[252] See, for example: Ruzanova V.D., Ruzanova E.V. The harm to the health of the children caused by parents (persons replacing them) as an independent delict // Laws of Russia: experience, analysis, practice. 2022. № 4. P. 36-39.

[253] See: Russian criminal law. General part: textbook / ed. V.V. Lukyanov, V.S. Prokhorov, V.F. Shchepelkov. SPb., 2013. P. 215 (the chapter by N.I. Pryakhina).

[254] See above.

guilt). A seemingly positive effect of recognizing guilt-based nature of liability can also be questioned in terms of the need to prevent claims aimed at causing damage, since the task of preventing such claims is most effectively solved by establishing liability for a case. The idea of risk-related liability for damage caused can be summarized as follows: if someone files a claim, he must be sure of its foundedness or that involvement in a process will not cause damage to a defendant, since, having filed an unfounded claim, a complainant will be obliged to compensate damage caused by this action.

Let us turn here to an analysis of compensation for damage caused by procedural activity known in Russian law. Namely, to Article 98 of the Arbitration Procedure Code of the Russian Federation, which allows a defendant, whose rights and/or legitimate interests are violated by securing a claim, to demand from a complainant, at whose request provisional measures were taken, compensation for losses if a decision of the arbitration court refuses to satisfy the claim. This rule connects emergence of a tort obligation with two circumstances: taking provisional measures at complainant's request and subsequent refusal to satisfy a claim; tortfeasor's guilt is not stated directly among conditions for compensation. Does this mean that liability is risk-related? Or a general rule of compensation for damage "on a basis of guilt" should be applied?[255]

Resolving a question of significance of tortfeasor's actions subjective directivity, the Supreme Court of the Russian Federation in its decision of September 14, 2015 № 307-ES15-3663[256] stated that a subject of proof in a claim for compensation for damages caused due to securing a claim does not include proving guilt of a person who initiated taking provisional measures. The court's position leads us to a conclusion that a complainant, who has requested provisional measures solely to protect his rights and interests, sure in foundedness of his claim,

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[255] According to item 2 of Article 1064 of the Civil Code of the Russian Federation, a person who caused damage is excused from compensation if he proves that the damage was caused through no fault of his.

[256] In this case, a complainant referred to the fact that filing a petition for provisional measures by defendants deprived him for a long time of an opportunity to register ownership of real estate and to dispose of it.

acts in the same way as a complainant, who acted solely for the sake of harming a defendant.

Supporting this thesis, the Supreme Court cited the provision of Part 2 of Article 9 of the Arbitration Procedure Code of the Russian Federation, according to which persons participating in a case bear a risk of consequences for their procedural actions, and stated that "a right to compensation for corresponding losses is based on provisions of item 3 of Article 1064 of the Civil Code of the Russian Federation[257] and emerges by a direct indication of the law (Article 98 of the Arbitration Procedure Code)". As we can to see, an argument that damage resulting from procedural actions is compensated on a basis of rules on compensation for damage caused by lawful activity is far from indisputable. At the same time, appeal of the Supreme Court to provisions of Article 9 of the Arbitration Procedure Code of the Russian Federation is also of interest. Applying of this rule, firstly, means that risks of procedural actions include not only procedural, but also substantive consequences of litigators' activities. Secondly, arguments of the Court allow us to conclude that this article deals with risk in terms of liability for guilt and for accident in civil law: if a law indicates a risk, then consequences for a tortfeasor occur even in absence of his guilt. In this sense, Article 9 of the Arbitration Procedure Code of the Russian Federation gives an possibility for ascertaining an existence of strict civil liability for procedural activities.

It should be noted that earlier in judicial practice there dominated a thesis about impossibility of compensation for damage caused by provisional measures, when it was not proved that a complainant pursued a goal of causing damage. In particular, the Supreme Arbitration Court of the Russian Federation in its decision from 25.02.2013 in case № A27-8964/2012 stated that "a condition necessary for bringing a person to civil liability is unlawful behavior on his part (action or inaction of one person, violating rights of the other) <...> if refusal to satisfy a claim is not related to the fact that the claim was knowingly unfounded and filed

[257] "Damage caused by lawful actions is subject to compensation in cases provided for by law".

solely for causing damage, then complainant's request for provisional measures for claims that were subsequently not satisfied cannot be regarded as unlawful behavior"[258]. It is clear that the approach proposed by the Supreme Arbitration Court of the Russian Federation significantly limited (or completely excluded) possibility of compensation for damage caused by provisional measures, since it assumed that deliberate unfoundedness of a claim should be established in a refusal to satisfy it, and not in a subsequent dispute on compensation. At the same time, deliberate unfoundedness of a claim is not a condition to refuse to satisfy it (it is enough for a claim to simply be unfounded, it is not required to establish whether it was deliberate), and therefore, as a rule, it is not examined by the court for making a decision.

In turn, the above mentioned approach of the Supreme Court is dictated by an urgent need to prevent filing claims for the sole purpose of taking provisional measures, which, according to the Court, would have been impossible if one of the conditions for satisfying defendant's claim was guilt of a complainant who asked for provisional measures. Arguing in favor of this approach, the Supreme Court in decision № 307-ES15-3663 from 14.09.2015 stated: "Dismissal of a claim for compensation for damage caused by provisional measures in an unfounded claim would mean absence of necessary preventive impact on litigators who file such claims, asking for provisional measures. However, the system of justice should not encourage either filing of such claims, or release from liability for persons who filed them". It should be noted that when the Court states that a claim cannot be filed for the sake of provision, it considers it necessary to prevent a special purpose of filing a claim - "solely for the sake of provisional measures".

Arguments of the Supreme Court allow us to draw an analogy with a very interesting view on obligations to compensate for contractual losses, which is held by A.S. Krivtsov. The author states that in all cases of obligation for causing

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[258] The Supreme Arbitration Court of the Russian Federation uses the category of purpose as major characteristic of illegality of an action, which, in our opinion, is not entirely correct, since a purpose of causing damage (if it is recognized as significant), along with guilt, is an independent condition for civil liability.

losses, there is a moment of purpose, understood as an interest, a benefit of a person committing harmful activities[259]. In other words, a goal is ultimately the good for which wrongful acts were committed. Why, for example, does a person fail to fulfill a monetary obligation timely? To use these funds. Such an economic, personal interest is the moment of purpose in obligation for causing losses.

Resolving an issue of damage caused by provisionalmeasures, the Supreme Court of the Russian Federation was guided by similar considerations. Liability for causing damage arises because the system of justice does not allow filing a claim for purposes other than resolving a dispute. Public necessity requires establishing preventive measures in order to prevent a special purpose of filing a claim, implementation of one's own economic interests through legal actions. At the same time, the Supreme Court believes that the system of justice effectively prevents claims being filed for the sole sake of provision, when liability for damage caused to a defendant occurs regardless of a purpose (and even guilt) of a complainant. Another point of view, which is partly supported by the Supreme Arbitration Court of the Russian Federation, is also applicable: as long as a goal is of defining importance (if a person did not pursue a special goal, there would be no social need to prevent an action), then its presence is a constitutive condition for compensation.

Let us pay attention to one more important circumstance. Arguments of the Supreme Courts are devoted, of course, only to losses caused by provisional measures. But if an unfounded claim cannot be filed for the sake of provision (the system of justice is reacting against such actions), then it is also necessary to prevent filing claims aimed at causing damage in another way. In fact, what is the difference between filing a claim to cause damage by provisionalmeasures and filing a claim to cause damage by involving someone in a process? It is unlikely that we find a significant difference here. Practice of courts applying Article 98 of the Arbitration Procedure Code of the Russian Federation demonstrates that the

[259] See: A.S. Krivtsov. General doctrine of losses // Herald of civil law. 2015. № 6. P. 139–184.

English doctrine of liability for a knowingly unfounded claim is quite compatible with Russian legal system.

The considered positions lead us to a conclusion that difference in approaches to a subjective element of liability is based on nothing more than political and legal considerations. When it is necessary to most effectively prevent filing a claim aimed at an improper purpose (whether it is asking for provisional measures or causing damage to a defendant by involving him in a process), as well as to compensate damage caused by such actions, the risk-based liability for a tortfeasor is established. Liability for a case predetermines high requirements to substantive foundedness of a claim, because, if not sure in its satisfaction, a complainant must refrain from filing it. In turn, liability for a wrongful act and acts committed to cause damage leads to more lenient requirements to foundedness of a procedural action, at the same time not excluding a situation when a process becomes a means of causing damage to a defendant and this damage is not compensated.

In other words, if public necessity requires a cautious attitude to filing a claim, and a process is professional and predictable, then risk-based liability for a complainant causing damage is established. However, when the decisive role is given to granting participants in a process a right to make a mistake, liability arises if complainant's guilt and a purpose have been proved.

Concluding consideration of the problem of subjective directivity of tortfeasor's actions, let us turn to the question that inevitably arises when studying subjective directivity of procedural activities. In Russian legal system, where litigation is built on the principle of competition, predetermination of a court's decision is excluded. Are there deliberately unfounded claims in these terms? By filing an absolutely unfounded claim, a complainant might hope that a defendant will recognize the claim, or, if there is a minimum of evidence, will make a mistake, will ignore the process, or have already lost his own evidence, etc. Moreover, no complainant can foresee how the court will ultimately evaluate the evidence.

Answering the question posed, we stress that it is impossible to absolutize unpredictability of a case outcome. By filing an unfounded claim, a complainant can make certain assumptions about the outcome, but his consideration in no way can be connected with expectating a defendant to be his own enemy. Similarly, the principle of evidence free evaluation does not give a complainant reasons to think that an unfounded claim will suddenly become fully justified in the eyes of the court.

§ 2.2. Absence of complainant's obligation to take care of a defendant as an argument "against"

Accepting the doctrine of liability for damage caused by an unfounded claim naturally raises questions: can filing a claim essentially be unlawful? Is it possible that by filing a claim, a person violates his substantive obligation? Having considered them, English judges, who did not agree with the decision of the majority in the case of Willers v. Joyce, concluded that there was no general legal requirement to refrain from filing a claim under some circumstances. Lord Mance, in particular, stated among arguments against the position of the majority an argument that potential complainants are not obliged to care about possible defendants.

In English civil law, a duty of care is a duty of a person to take steps to protect others from possible damage that may be caused by his actions. It occurs when an individual or a group of people engage in some activity that, by a reasonable assumption, can harm another person. For example, driving can cause physical injury, specialized activities such as economic consulting can lead to financial losses. We stress once again that liability for violating a duty of care exists only if there is a special activity requiring its establishment. If a person did not create a situation in which damage could be caused, he is not obliged to take care of others.

To determine presence of a duty of care a test developed in case Caparo v. Dickman is used[260]. The House of Lords determined that the court has to answer three questions: 1) could a defendant, if reasonable demands were made to him, foresee that actions (inactions) taken by him might have harmful consequences; 2) whether there was a sufficiently close relationship between a defendant and a complainant; 3) is it fair and reasonable in given circumstances to oblige a defendant to take into account rights and interests of a complainant?

Given the nature of a duty of care, let us answer the question of whether a person intending to file a claim is obliged with it.

Obligation of a potential complainant to a potential defendant is a mutual duty, for if it exists, it should exist before filing a claim, when everyone can become a complainant and everyone can become a defendant. In turn, a duty of care arises when a person's special, limited activity begins, it encourages deliberation and requires, among other things, a close relationship between a tortfeasor and a victim. A duty of care is not an obligation of everyone to everyone, it is limited to a special attitude resulting from certain dangerous activities. From this point of view, indeed, we can agree with English judges who believe that a complainant is not expected to care about a chosen defendant.

However, let us return to the known Russian right aloowing compensation for damage caused by provisional measures. How, if not by a requirement to show care and deliberation when filing a claim for provisional measures, can complainant's strict liability be justified? When applying for provisional measures, a complainant is able to foresee dangerous consequences of his actions (complainant's actions during a process are potentially harmful), and relationships between a complainant and a defendant can be considered so close that this is enough to hold a complainant liable, even if he was not guilty. We see that

[260] See: Caparo Industries Plc v. Dickman [1990] UKHL 2 (8 February 1990). URL: http://www.bailii.org/uk/cases/UKHL/1990/2.html (access date: 30.08.2023).

unlawfulness of applying for provision results from violating a duty of care of a defendant[261].

Discussing hypothetical absence of wrongfulness in complainant's actions, Lord Toulson agrees with Lord Mance and states that a complainant is not under a duty of care of a defendant, while noting that "there is a great difference between imposing a duty of care and imposing a liability for maliciously instituting proceedings without reasonable or probable cause". Thus, we are talking about two completely different torts - a tort based on violation of a duty of care and a tort based on malice. The same distinction, according to Lord Toulson, can be seen in criminal proceedings: the police are not obliged to care for a suspect (Calveley v. Chief Constable of Merseyside Police), but this does not mean that a police officer is immune to claims on malicious prosecution. Criticism of the approach taken in the Willers v. Joyce case by Lord Toulson, was raised earlier in Crawford v. Sagicor case, where judges stated that "the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due".

It is of interest that in Crawford v. Sagicor case judges discussed the issue of total absence of any duty of a complainant in respect to a possible defendant (apart from a duty of care). Thus, Lord Neuberger stated: "For my part I can see no sensible basis for accepting that the tort of malicious prosecution of a crime exists in English law, whereas the tort of malicious prosecution of a civil action does not". In the present case, however, judges did not bring up this thesis, limiting the discussion to the issue of a duty of care. It was only Lord Clarke (who agreed with Lord Toulson) who drew attention to the problem quite accurately, saying that it does not matter whether a complainant is obliged to take care of a defendant in this case, the main question is whether there is such an offense as filing a claim.

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[261] A duty of care can also be found when it comes to procedural behavior of a defendant. When he raises objections to a claim in a certain way, which a complainant relies on, one should conclude that these activities require increased care and deliberation. A subsequent abrupt change of position, if there is any, would be seen as violation of a duty of care.

That is the question for Russian law. Appeal to court is considered to be a legitimate activity, unable to give rise to a substantive tort legal relationship, and deliberate legality of a procedural action becomes an argument against applying liability for damage caused by an unfounded claim.

One side of this problem (purely civilistic) is search for wrongfulness of filing a claim as a necessary condition for a tort obligation. Here it must be stressed that the principle of general tort, on which our system of compensation is based[262], is a ground for any doctrine that presupposes compensation for property losses. The idea of malicious prosecution is nothing more than a claim for compensation for any damage, including caused by legal proceedings, and where English judges saw basic justice, we can see the principle of general tort.

At the same time, the idea of general tort gives the broadest possible, abstract understanding of wrongfulness of an action. Imagine, for example, that a complainant filed a justified claim (and the claim was satisfied by the court), while a defendant suffered property losses because of the prosecution itself. According to the principle of general tort, damage caused by a justified claim must be compensated as well. However, according to the doctrine of malicious prosecution, as formulated by English judges, liability for causing damage does not occur, because this contradicts the very idea of its establishment. Lord Toulson formulated criteria for emergence of liability for an unfounded claim, which, in addition to a special purpose, included absence of a reasonable and probable reason for filing a claim and refusal to satisfy it. Establishing these criteria, while limiting the principle of general tort, deserves every support.

The other side of the problem is related to understanding a right to claim and, subsequently, assessing validity of its restriction. It is reasonable to assume that filing a claim is an action that can never be illegal, since, firstly, it is aimed at exercising a right to claim, and secondly, it always takes place under control and

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[262] See: Russian civil law: textbook: in 2 volumes. Vol. 2: Law of Obligations / V.V. Vitryansky, V.S. Em, N.V. Kozlova and others; ed.-in-chief E.A. Sukhanov. M.: Statute, 2011. 1208 p. Available in the computer legal research system "ConsultantPlus".

authorised a public entity - a court. The law deliberately does not establish prohibitions and restrictions on filing an unfounded claim, because such an action is essentially lawful, even if it affects someone's rights and interests. Can there be arguments against such reasoning?

As we have already noted in the previous chapters of this study, a right to claim is traditionally considered in two senses: material (a right to claim as a state of subjective right) and procedural (a right to claim as a right to initiate and carry out a process addressed to a court).

The first meaning of a right to claim implies that filing a claim implements a subjective substantive right itself (authority relevant to it), or an independent subjective right to defence that arose as a result of an offense. A right to claim in its substantive sense is addressed to a defendant. Is it possible to establish unlawfulness of complainant's actions in a claim against a defendant? It would seem impossible, because otherwise it would mean that subjective rights are meaningless. At the same time, we must not forget that when talking about unlawfulness of filing a claim, we mean only unfounded claims, i.e. claims, where in fact a complainant has no substantive right. Implementation of a subjective right (when this right does exist) does not cause liability for its owner (a complainant), since there is no condition for such liability - no unfoundedness of a claim, expressed at least in refusal to satisfy it.

According to the second, procedural, meaning, a right to claim is appealling to a court. Thus, a court is expected to react on a claim. Assuming that filing an unfounded claim is an unlawful action, we can conclude that sanctions should also come from a court (apparently, it should consist in declining such a claim) and be limited to relationship between a court and a complainant. But damage caused is compensated within relationship between a complainant and a defendant, which arose when causing inconvenience to the latter, but not within relationship between a complainant and a court associated with allowing a claim for proceedings, initiation of proceedings, etc. Implementation of a right to claim in its procedural sense has little in common with relationship between a complainant and a

defendant rising from causing damage, and it doesn't imply unlawfulness of complainant's actions.

If we consider a right to claim in these two meanings, then filing a claim cannot possibly be unlawful.

We stress, however, that a right to claim is not only a state of subjective right and a requirement to a court to initiate proceedings. It is also a complainant's right to make any legally capable subject a defendant at his own request, a right to accuse. It can no longer be absolute, predetermining legality of any such action.

To support our thesis, let us turn to criminal law, according to which a knowingly false denouncement is a crime (Article 306 of the Criminal Code of the Russian Federation). Let us suppose that a result of knowingly false accusing a person of a crime was causing him damage (for example, damage to business reputation). Will a person who falsely denounced a defendant be obliged to compensate for damage caused by this crime? Defenitely yes. But is it possible to say that damage caused by a knowingly unfounded accusation of a crime is subject to compensation, while damage caused by an equally unfounded claim is not? It should be noted straight away that public danger as a forming quality of a crime cannot serve as a criterion for distinction, because we are not talking about harmfulness in terms of violating interests of justice or about risk of unreasonable prosecution. For a tort obligation, only the fact that an unlawful act took place is relevant: an accusation of a person and damage was caused as a result of this. Of course, a criminal charge can do more damage than a civil charge. But this is a question of amount of compensation, not a criterion for distinguishing illegal actions from lawful ones. It would be wrong to believe that there is such a big difference between various forms of charges (whether it be a crime or a civil one), when in one case an action is illegal, while in the other it is always lawful.

Where one person makes another a defendant at his claim without minimal reasons for this (we should stress once again, this is argumentation for wrongfulness of filing a claim), we find a need for compensation.

In conclusion of consideratingof the question of wrongfulness of filing a claim, let us turn to a thesis of Lord Neuberger, stated in the case of Willers v. Joyce ("the tort of malicious prosecution of a civil action does not exist"), and point out another aspect of the problem (partly related to procedural significance of a right to claim). An argument that a complainant has no obligations to a defendant implies, among other things, that parties to proceedings are not liable to each other, but only to a court. Obligations during a process are public. This means that if violation of an obligation not to file an unfounded claim has legal consequences, they lie exclusively in the sphere of public law. Perhaps it is public procedural instruments that make it possible to protect a defendant from possible property losses, and if any happen, to compensate them. In this respect, a thesis that a complainant is not liable to a defendant is closely connected to the following argument.

§ 2.3. Problem of substantive protection admissibility

Emergence of a tort obligation from filing a claim suggests that a procedural action is followed by a substantive relationship, or rather, the former is a basis for emergence of the later. But by giving rise to substantive rights and obligations, a procedural action (filing an unfounded claim) simultaneously leads to procedural consequences (at least, to an obligation to compensate court costs). This raises a question: is it correct to assume that filing an unfounded claim causes damage compensated by civil regulations, if consequences of recognizing a claim as unfounded are established by procedural law? How providing substantive protection relates to procedural effects of parties' actions?

This problem has been repeatedly considered in English decisions: whenever judges examined possibility and necessity of compensation for damage caused by procedural activity, they turned to the argument about unacceptability of substantive protection against opponent's procedural actions. For example, in case

Jain v. The Trent Strategic Health Authority[263] is was stated: "…a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care", but that the solution "must depend on the control of the litigation by the court or tribunal in charge of it". The general idea was formulated by judges in case Manifest Shipping Co., Ltd v. Uni-Polaris Insurance Co., Ltd[264], stating that "once the parties are in litigation it is the procedural rules which govern the extent of the disclosure which should be given in the litigation". In Willers v. Joyce case Lord Scott paid attention to this issue by referring to the precedents mentioned.

It is characteristic for Russian law to see filing a claim as a legal fact of procedural law (legal action)[265]. Procedural legal facts give rise to procedural consequences, which in turn gives rise to denying substantive effects of filing a claim.

What are the procedural consequences of filing a claim and are they sufficient to satisfy interests of a defendant who suffered from a knowingly unfounded claim? Filing a claim leads to legal consequences of two types: 1) procedural - those related to court's obligation to respond to a received claim (to check if there are background causes and conditions for filing a claim, to initiate judicial activity); 2) a kind of economic effects, consisting in emergence of defendant's right to compensate court costs.

As for procedural consequences, they can be considered of as a full alternative to compensation for damage only when a court has power to decline a knowingly unfounded claim. English courts dohave such a right, that is why Lord Scott drew attention to existence of procedural means to prevent damage. "Why is it necessary to give a defendant an opportunity to compensate damages if the judicial system is arranged in such a way that unfounded claims are declined by

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[263] See: Trent Strategic Health Authority v. Jain & Anor [2009] UKHL 4 (21 January 2009). Cited: Willers v. Joyce & Anor (Re: Gubay (deceased) № 1) [2016] UKSC 43 (20 July 2016). URL: http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2016/43.html (access date: 30.08.2023).

[264] See: Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others [2001] UKHL 1; [2001] 1 All ER 743; [2001] 2 WLR 170 (18 January 2001). URL: http://www.bailii.org/uk/cases/UKHL/2001/1.html (access date: 30.08.2023).

[265] See: V.V. Yarkov. Legal facts in the civil process. M., 2012.

court in advance?" - such is question posed by him in general. However, despite the fact that English court has numerous opportunities to regulate a process, it allows and considers obviously unfounded claims - an example are the cases cited in this study. Even English court, with all its possibilities, does not decline every unfounded claim, and as a result such claims cause damage to defendants, and therefore such a prevention cannot fully replace a right to compensation.

Moreover, a logical continuation of Lord Scott's argument would be to assign liability for any damage caused by an unfounded claim on the state, which through its judicial authorities did not fulfill an obligation to prevent consideration of such a claim. Such a conclusion questions both the prima facie method used by a court when allowing a claim for consideration (existence of grounds for a claim is examined only cursorily, in the most general way), and securing a right to access to justice in general, because public authority under threat of liability will seek to decline any ill-founded claim.

Another procedural consequence for filing an unfounded claim (and allowing it) is a right to compensation for court costs[266]. By compensating court costs, a goal of restoring a property status of a party unlawfully involved in legal proceedings is achieved. As we can see, from the economic point of view, distribution of court costs and compensation for damage are aimed at the same thing - compensation for property losses. Perhaps simultaneous existence of rights to compensation for court costs and to compensation for damage caused by an unfounded claim will lead to a duplication of defendant's means of legal defence? This refers to an assumption that property losses caused by a claim, in their essence, should be attributed to court costs, as they represent economic consequences of procedural activity. If procedural law does not establish a possibility of recovering all losses caused by an unfounded claim, this is a problem of constitutionality of legislative regulation.

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[266] It should be noted that the doctrine has not developed a unified approach to legal nature of court costs: some authors believe that court costs are a procedural consequence of parties' behavior (procedural concept), while others see court costs as civil law losses (substantive concept). For more details, see: S.G. Pepelyaev. On legal nature of the institution of court costs // Law. - 2013. -№ 11. - P. 106 - 112.

However, property relations arising from filing an unfounded claim are not limited to court costs. Court costs are only those expenses that were incurred to continue a process[267]. They represent a financial condition of a process, limited to a particular dispute about some right. In turn, filing a claim results not only in costs "for a process", but also in consequences that are beyond current procedural activity, constituting a subject of an independent dispute about civil rights. We can find confirmation for this in Russian procedural legislation, which does not, for example, imply compensation for reputational damage in a manner established for court costs compensation.

Influence of parties' procedural activities on relations that are beyond a dispute cannot be compensated by court costs. Therefore, legal nature of damage caused by filing an unfounded claim differs from nature of procedural costs, and the former cannot be included in the latter.

Let us go back to Manifest Shipping Co., Ltd v. Uni-Polaris Insurance Co., Ltd where the argument that parties' activities in litigation are subject only to procedural rules, and rules on non-procedural obligations cease to be applicable. In relation to Russian doctrine, this argument can be considered not only in a sense that there are procedural rules that sufficiently replace a tort, but also from in terms that substantive rules are simply never applied to a process. In some studies, you can find the idea that any mixing, mutual influence of procedural activities on a substantive sphere is unacceptable. For substantive law, a process is invisible, actions performed furing it are a basis for emergence, change or termination of substantive relations only in exceptional cases.

The described argument, with all its seeming validity, raises a question: what is defended by such a strict distinction between the substantive and the procedural? Recognition of a right to compensation for damage caused by filing a claim is valuable because it allows to provide a remedy for legal defence of property. But

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[267] Traditionally, in the doctrine of civil procedural law, court costs are understood as "sums paid by participants to the process during consideration of the case by the arbitration court and aimed at full or partial coverage of funds necessary to administrate justice" (Arbitration process: textbook / ed.-in-chief V. V. Yarkov, M., 2014, P. 210 (paragraph by V.V. Yarkov)).

why it is necessary to maintain a strict distinction betwenn substantive and procedural law, which could take precedence over the possibility of just compensation for the damage caused? We do not find an answer to this question.

§ 2.4. Problem of liability limits for malicious filing of a claim

As we have examined, the doctrine of malicious prosecution is based on fundamental assumption that a substantive tort obligation can emerge from parties' procedural activities. Reflecting on consequences of this assumption, some judges in Willers v. Joyce case expressed concern that liability for malicious prosecution will be applied not only to cases of filing an unfounded claim, but also to other procedural actions of litigators.

This problem is more typical for legal systems where there is a private tort: when an obligation for causing damage is established in relation to separate situations (or groups of situations), an accurate limitation of a tort is required. At the same time, the problem of limits of liability for filing a claim should also be considered as applied to Russian law, in which it is a consequence of a broader approach to determining wrongfulness of an action. The essence of the dispute is that if any harmful action is unlawful, then nothing prevents administrating liability even where there are defendant's objections a or other (than filing a claim) procedural actions of a complainant. But is it possible that any procedural action is a potential basis for a tort obligation?

Let us examine two examples of probable extensions of liability limits for an unfounded claim stated in Willers v. Joyce case.

The first describes a situation when a complainant filed a seemingly justified claim, but during a process it became obvious that there were no grounds for satisfying it. Lord Mance defines the problem as follows: "nothing in the proposed extension of the tort of malicious prosecution, to limit it to circumstances where the claim was at the outset unfounded or malicious. It would be open to a defendant throughout the course of civil proceedings to tax the claimant with the

emergence of new evidence, or the suggested failure of a witness to come up to proof, and to suggest that from then on the claim must be regarded as unfounded and could only be being pursued for malicious reasons". In other words, a process is initiated without any malicious intent, but at some point malicious intent is seen in its defending. Can maintaining a claim give rise to a tort obligation? And is there any liability for refusal to withdraw a claim?

The criterion for malicious action is absence of a reasonable and probable reason for initiating proceedings. Therefore, one can speak of malicious defending of a claim when the claim ceased to be justified during the process, when a reason for its filing turned out to be untenable. In what cases can a claim lose its minimal validity? This is possible, firstly, when a defendant provides evidence rebuting facts that constituted a reasonable and probable cause of the claim. The complainant sees that the defendant has proven wrongfulness of the claim against him, but still continues the process. It should be noted that liability for malicious behavior in this case will not come. The evidence provided by the defendant cannot discredit the reason for filing the claim (and continuing the process), since they still have to be evaluated by the court. When it comes to assessing actions of the parties for establishing a tort, it is not possible to oblige the complainant to predict how the court will evaluate the evidence. The complainant cannot be obliged to make an firm conclusion: "Yes, the defendant's evidence is so good that it will definitely be seen by the court as reliable, and there is no sense in continuing the process".

The second probable situation is related to "destruction" of the evidence provided by the complainant as a basis of his claims. For example, the complainant based his claim on only one document, which, after defendant's request, was recognized as fabricated and was excluded from the evidence base. The complainant's claim has lost all its foundedness and reasonable and probable cause. In such a case, the complainant should indeed be held liable, but for malicious filing of a claim, because he most likely knew in advance there were no reasons for its filing.

The judges were also concerned about probable extension of liability to defendant's procedural activities. Lord Mance, in particular, stated: "it must also be open to a claimant to tax a defendant with pursuing a malicious defence <...> Logically again, any such general tort should extend to any individual application or step in the course of a civil action, which could be said to be unfounded and maliciously motivated, eg to gain time or avoid execution, rather than for genuine litigational purposes».

Lord Mance believes that the defendant's behaviour cannot be a basis for compensation, and that mere possibility of extending the doctrine of malicious prosecution to actions of the defendant is an argument against its application. At the same time, he does not disclose suppositions for his reasoning, leaving behind the reasons for supporting firm non-admission of liability for malicious defense against a claim. This attitude towards the defendant's actions may be due to the fact that Lord Mance sees a right to defend oneself against a claim as an absolute possibility. Yes, the defendant can and should cause damage with his objections, because to achieve dismissal of the claim by any means is a completely legitimate goal of his procedural activity.

At the same time, as we have seen, there are many opportunities for the defendant to cause damage: delaying a trial, presenting a false line of defense, which can lead to loss of complainant's evidence and subsequent impossibility of exercising his right to claim by force. Therefore, Lord Mance's approach to defendant's activities seems to unjustified. It should be noted that even a right to protection from criminal prosecution is not considered unlimited. In particular, in the case Brandstetter v. Austria European Human Rights Court concluded that "Article 6 item 3c of the Convention[268] does not provide an unlimited right to use any means of defence"[269].

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[268] According to item 3 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome, 04.11.1950), every person accused of a criminal offense has a right to defence by himself or by other an officer authorised by law.

[269] § 52 of the judgment of the ECtHR of 28.08.1991 in Brandstetter v. Austria case. The case dealt with the question of one's right to defend himself by falsely accusing another person of a crime. The ECtHR stated: "It would be overstraining the concept of the right of defence of those

The risk of extending liability for malicious prosecution to defendant's procedural activities is not a valid argument against application of the doctrine of malicious prosecution because holding a defendant liable for damages caused in the process is quite acceptable. One must, however, agree with Lord Mance that a tort itself cannot be extended from filing a claim to defendant's behavior, because its wrongfulness follows from different factors. Wrongfulness of filing a claim consists in involving a defendant in a process, in his unfounded accusation, while the defendant cannot fully accuse a complainant of anything by his objections and thereby cause damage to him.

It worth being noted that Lord Toulson does not legally analize the argument of extending application of the doctrine of malicious prosecution. The judge refers to the previous 400-year practice of using this doctrine in criminal procedure practice, where the criteria of malice were used quite successfully and where the problem of extending was not stated. Lord Mance, in his opinion, only states his concern, but does not refer to any refuting teaching.

§ 2.5. Problem of increasing of related disputes

The problem of emergence of new disputes on a basis of an already resolved one should be considered in two aspects. The first consist in the fact that, when considering a case for compensation, there is a risk of revising the court's decision on the original case and re-examination of grounds for the claim. The second aspect of the problem is a possible violation of the rule "Every dispute must be finite." Assuming that any defendant who won a case is entitled to claim for malicious prosecution, disputes between the parties will be infinite.

Both aspects of the problem arise from unacceptability of violating the principle of res judicata, which, on one hand, prevents retrials on the same claim or

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charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings..." (Judgment of the ECtHR in the case Brandstetter v. Austria of August 28, 1991. Available in the computer legal research system "ConsultantPlus").

dispute between the same parties, and on the other hand, suggests that any dispute must be finite, and a defendant should be protected from endless lawsuits[270].

Lord Mance refers to possible resolving the original case, considering it a strong argument against applying the doctrine of malicious prosecution. "The recognition of a general tort in respect of civil proceedings would be carrying the law into uncharted waters, inviting fresh litigation about prior litigation, the soundness of its basis, its motivation and its consequences", – the jusge noted. Indeed, since the basis for satisfying the claim for compensation is absence of a reasonable and probable cause of the claim, then in the process it will be necessary to examine whether the original claim was justified at the time of its filing. Might it lead to a revision of the legal force of the original decision outside of a procedural form established for this?

Let us suppose that in deciding the original case, the court found that the facts underlying the claim were false. When considering the claim for damages, the court concluded that these facts were not sufficient even to file a claim. Obviously, in such a situation, there will be no re-judgeent.

A question arises when, in a case on compensation, the court comes to the conclusion that there were grounds for filing a claim, but the court nevertheless refused to satisfy it. However, the dispute will not resolved in this case either due to the following. It is necessary to distinguish between facts constituting a basis for satisfying a claim and facts that are a reasonable cause for filing it. The latter may be a small part of the former and may not even overlap. For example, a complainant filed a claim for performance of a contractual obligation, but during consideration of the case it was found out that the contract was not signed. There are no grounds for satisfying the contractual claim, and if the complainant's demands are satisfied, then only according to the condiction rules. However, there was a reasonable and probable reason for filind this claim - confidence in existence of the contract. This distinction was referred to by judges in Glinski v. McIver

[270] See: S.G. Bower. The Doctrine of Res Judicata. London, 1924. P. 3–4; N. Andrews. The system of civil procedure in England: litigation, mediation and arbitration / translated from English; ed. By R.M. Khodykin. M., 2012. P. 224.

case, which dealt compensation for damages caused by criminal prosecution. "To have a reasonable and probable cause, the plaintiff must not be sure that the outcome of the proceedings will be in his favor. It is sufficient that it would be clear from the materials on which the plaintiff acted that the case was proper to stand trial," Lord Denning said. So, when resolving a claim for compensation, a court must establish whether a complainant had reasons to file the claim, but not whether the court correctly assessed his arguments when making a decision.

In this sense we must agree with Lord Toulson, who believed that "an action for malicious prosecution does not amount to a collateral attack on the outcome of the first proceedings".

Lord Mance draws attention to the second aspect of the problem - emergence of an infinite number of new disputes. He states that: "It would lead to forming an industry of satellite litigation". Let us suppose that a defendant who wins the initial dispute sues for damages caused by an unfounded claim. At the same time, his claim will be filed without any reasonable and probable reason, with the sole purpose of causing damage to the complainant in the original dispute. So as a result of this secondary process, a next dispute about damage is possible, and so on, and each subsequent dispute arises in connection with procedural activities in the previous one and is derivative to it. This does not correspond to the principle of res judicata in terms of finiteness of any trial.

Lord Toulson responds in the following way: "There is unquestionably a public interest in avoiding unnecessary satellite litigation, whether in criminal or civil matters, but that has not been considered a sufficient reason for disallowing a claim for malicious prosecution of criminal proceedings". This argument cannot be sonsidered a good one. When, according to the doctrine of malicious prosecution, only the damage caused by unjustified criminal prosecution was compensated, it was protecting a private person from abuse of public authorities. If a claim of a private person turned out to be malicious and unfounded, public authorities did not have an opportunity to compensate for damage caused by them, because they did not need protection from a private person. The problem of infinit disputes appeared

along with a new approach to the doctrine of malicious prosecution, allowing its application in relations between individuals.

It should be noted that the example we have given on extending of processes is an extreme option, preventing which is an insufficient motive for abandoning the doctrine as a whole. As a rule, parties do not file knowingly unfounded claims to each other without any special considerations, at a risk of holding liability. We should not forget that on the other hand we have a violated property right of a defendant, property damage, which will not be compensated in favor of the idea of limiting a number of proceedings. Lord Toulson's thesis seems unquestionably correct: «The argument that a good claim should not be allowed because it may lead to someone else pursuing a bad one is not generally attractive». You cannot deprive all defendants of a right to compensation just because one of them may file an unreasonable claim and give rise to a chain of endless disputes.

§ 2.6. Problem of the deterrent effect

One of the dangers of adopting the doctrine of malicious prosecution is the deterrent effect, when good participants in proceedings will not go to court, assuming that if their claim is denied, they will need to defend a claim for causing damage.

The deterrent effect was mentioned as early as in Crawford v. Sagicor case, where Lord Neuberger emphasized that: “The spectre of being sued for malicious prosecution in the event of failure would inhibit litigants from bringing cases with merit and in good faith. Ugly threats by prospective defendants with long pockets would drive prospective claimants from the seat of justice”. In Willers v. Joyce case the problem of deterrent effect wasconsidered even more broadly. Lord Neuberger states as follows: “The existence of the tort could have a chilling effect on the bringing, prosecuting or defending of civil proceedings. The notion that a person should not have to face malicious proceedings brought by a ruthless party is said to justify the existence of this tort; but the existence of the tort severely risks

creating what would be at least an equally undesirable new weapon in the hands of a ruthless party, namely intimidation through the unjustified, but worrying, threat of a malicious prosecution claim to deter bona fide proceedings. In other words, the creation of a remedy for one wrong is likely to lead to another wrong". According to the judge, complainant's fear of liability is a problem not only at the stage of filing a claim, but also at stages of subsequent procedural activity. The existence of the tort from prosecution will force the complainant to control each his movement not to harm the defendant, each time wondering if it would be better to waive a claim.

Analyzing this argument, let us turn to the nature of the tort obligation and note that one of its functions is preventing actions that are undesirable for the system of justice. In this sense, the deterrence of some claims is a positive effect of the doctrine, this is what it is needed for. However, it is also natural that prevention should not turn the tort into an instrument of intimidation, forcing everyone to think twice before going to court.

Let us ask a question: deterring which potential complainants is of such importance that it is an argument against subsequent prosecution for a knowingly unfounded claim? Those are complainants who actually have a protected right to claim and are able to prove it. In other words, those are the complainants who can win a case. In what cases would such a potential complainant not initiate proceedings fearing subsequent liability for prosecution? Firstly, if he is not sure in his subjective right or in his ability to prove it. Secondly, if he fears that filing a claim will be then declared a voluntary act aimed at causing damage, which is possible only as a result of an incorrect factual establishment (otherwise he would have no reasons to initiate the process).

Let us return here to our examining fault-based and risk-based liability for a complainant and note that the deterrent effect problem has a different content depending on a basis on which the tort will be established.

In the context of fault-based liability, deterrence argument is irrelevant, since a good complainant must make a lot of assumptions (and assume an error) to waive

a claim when having a subjective right to it. An ordinary participant does not expect so many procedural failures and does not take them into account. Therefore, the fear that potential complainants will not claim for judicial protection is unreasonable. Indeed, anyone can unintentionally cause damage and risk being found guilty of causing damage unless they can prove that it happened by accident. However, subjects of law are not afraid to enter into contact with other individuals for the fear of accidentally causing damage to them or their property and subsequently bear responsibility for failing to prove their innocence.

In turn, if compensation for damage is risk-based, those complainants who simply doubt validity of their claims will refuse to file them. The deterrent effect will affect a large number of potential complainants, while the task of prevention will be solved as efficiently as possible.

It should be stressed that the degree of deterrence varies depending on recognition of a risk- and fault-based nature, and this level is a matter of social necessity, law policy.

Summing up the consideration of the possibility of compensation for damage caused by filing an unfounded claim, the following should be noted. Damage caused by filing an unfounded claim is subject to compensation[271]. This conclusion is a direct consequence of the general tort principle. In turn, no good reasons are found that remove harmful procedural actions of a complainant from operation of this principle., Neither the argument about a priori legitimacy of any procedural action, nor the argument about impossibility of finding adequate limits for liability for an unfounded claim, nor the problem of increasing number of satellite disputes, nor the fear associated with undesirable "deterrent effect" prevent the recognition of a right to compensation for damage caused by an unfounded claim.

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[271] N.V.Platonova. Compensation for damage caused by filing an unfounded claim: on the issue of substantive significance of procedural behavior // Economic Justice of the Russian Federation Herald. 2018. N 6. P. 98 – 123.

Conclusion

The issue we have to solve in the final part of the study is to determine a general approach to non-administrative procedural action in respect of substantive rights and to establish ways and limits of its influence on civil relations.

Examination of individual legislative structures, as well as examples from judicial practice, carried out in this work, allowed us to find out that procedural actions of parties to a dispute can affect substantive rights, be the basis for emergence, change or termination of civil relations.

Since substantive relations arise due to legal facts of civil law, we naturally attribute litigators' actions to the latter. Thus, we postulate the most general conclusion of our study: a procedural action can be a legal fact of substantive law. This thesis, however, is extremely broad and needs to be elucidated and specified: firstly, according to traditional civil law ideas about a civil action, and secondly, taking into account features and properties of procedural acts themselves.

According to the system of legal facts of substantive law a litigator's action belongs to the category of actions, it cannot be an event, because procedural facts always depend on will of th litigators. In turn, any substantive action can be considered as a unity of its two sides - external and internal. Describing its inner side we answer the question about how a subject is related to his act and its consequences. Will and fault belong to this side of an action.

The external side of an action is a manifestation of the internal side, in this sense it appears as an act visible to third parties, an objectively expressed act. The internal and external sides are always in unity, because a visible action is always an expression of some inner, hidden intention, which, in turn, can only be judged by its external expression. A litigator's action is no exception, which, like other legal acts, is an external expression of some internal intention. Therefore, it is necessary to exaine a procedural action as the unity of its two above mentioned sides.

Turning to the intenal side of a procedural action, let us ask ourselves: how does an actor himself see it, why is it performed, and what consequences of his activity does a litigator expect?

Acting in a process, a complainant and a defendant, as a rule, pursue opposite goals. A complainant intends to enforce his right by obtaining a judgment in his favor, a defendant usually tries to prevent satisfaction of complainant's claims. In other words, each side wants to win a case.

Such an intention, like any other goal of human activity, presupposes a desire to achieve all those intermediate results that are condition for the final result, that is, in this case, victory in a process. First of all, this means that a litigator seeks to ensure that his actions produce expected procedural consequences and lead to court establishment of facts testifying in his favor. Meanwhile, procedural effectiveness of litigator's activity is not always the only necessary condition for winning a case. Many situations when at the time of filing a claim, substantive and factual content is insufficient to win a case have become subject of our examination in the previous chapters. For example, an above discussed case, where the complainant lacks the fact of termination of contractual obligations to refund an advance paid under a sale contract. In such cases, a litigator tries not only to present to the court facts confirming his claims and objections, but also to create substantive grounds necessary for winning a case. If a party wants to win a case, then its will is aimed not only at presenting, but also at forming a legal and factual content, which is a condition for victory. Therefore, the internal side of a procedural action may consist in actor's intention to create, change or terminate civil rights and obligations, that is, to make a substantive transaction.

A litigator's intention to create, change or terminate civil rights and obligations is predetermined by his desire to win a case, that is, by a normal, ordinary goal. At the same time, a litigator may act not for the sake of winning a case, he can pursue a different goal - to harm his opponent. Driven by this intention, a litigator may perform actions that in no way lead to resolving a dispute in his favor, or may remain inactive without any justified benefit. As we have seen,

even filing a claim may be conditioned by intention to harm a defendant. The procedural action aimed at causing harm, from its inner side, is a wrongful civil law action.

It is known that fault as an internal property of an action matters only when the latter is unlawful. We will return to the question of whether a litigator's action can be a violation of law. For now, it is important for us to conclude that a procedural action described from the internal side can be both an act of will aimed at establishing, changing or terminating civil rights and obligations, and a wrongful act aimed at causing harm.

Let us proceed to examining the external side of a litigator's action. All judicial activities are carried out exclusively in a legal form - according to provisions of the procedural law. At first thought, this thesis means that, firstly, a litigator's action cannot be seen as a transaction (because a procedural action is never seen by third parties as a substantive expression of will), and secondly, a procedural act is always lawful if it is performed according to formal requirements of the law.

Meanwhile, we have not found sufficient arguments testifying to impossibility of third parties to see a procedural action as a substantive transaction. We should critically assess a point of view, according to which absence of litigator's obligation to inform someone of true intentions of his actions results in impossibility of performing a transaction by a procedural action. Indeed, litigators, as a rule, do not directly state their intention to create, change or terminate civil rights and obligations. At the same time, a verbal statement of intentions sometimes does not occur even when a transaction is made before and out of court. In fact, a verbal expression of will is an optional requirement for an action that is a substantive transaction.

The fact that a process takes place in the context of a dispute, a conflict of parties does not prevent recognition of "contract effect" existence. It would seem that litigators' opposite interests do not allow us to see their actions as a conciliative civil law act aimed at emergence, continuation, termination of a

substantive relationship, as a "regulatory" action. However, from the above considered examples, it is clear that only a unilateral transaction can be made by a non-administrative procedural action. A bilateral contract about substantive rights and obligations is possible only in special procedural forms - it requires administrative actions, or at least recognition of the fact (if we agree with the substantive concept of the nature of this action). The reason for this situation is that a process is always a state of dispute, conflict, and the internal will required for a bilateral transaction is usually not seen here. Any agreement with opponent's claims is contrary to the goal usually pursued by a party, which, as we stated above, is to win a case. That is why a substantive contract always requires a special form: a "conciliative" act is so contrary to a litigator's usual goal that his will to make it must be expressed especially clearly.

It is known that civil actions in terms of their accordance to objective law are divided into lawful and unlawful actions. A procedural action may be seen as a lawful civil act - as a transaction. However, there is no reason to believe that it is always lawful according to substantive law. Like extrajudicial activities of participants in civil transactions, procedural behavior can be unlawful and be the basis for emergence of a tort obligation.

Unlawfulness of actions of subjects to civil transactions is determined by the principle of general tort, stated in Article 1064 of the Civil Code of the Russian Federation. This provision is a universal rule, stating that any harm caused is subject to compensation. It also determines unlawfulness of litigator's actions.

At the same time, the civil process is arranged in such a way that litigators' interests are obviously opposite, and those of actions that are due to intention to achieve opponent's loss are quite normal, as even approved by the system of justice. In the context of a dispute, a conflict, many actions performed during the process will turn out to be harmful and, since we extend an obligation to compensate for any harm caused to the whole process, they will become the basis for emergence of tort obligations. While generally litigators' actions represent realization of their procedural rights, serve the purpose of considering and

resolving a case. Can they be considered unlawful if they were not caused by an intention to cause harm, but were committed by a litigator only to protect his own rights and interests?

The essence of procedural activity requires, at least at first thought, to significantly limit cases of compensation for harm caused by it. Foreign doctrine and jurisprudence widely support the approach, according to which liability for harm caused by procedural activity occurs only if a litigator pursued a special goal - to cause harm, and acted only to achieve it. Some domestic researchers hold to an opinion that liability for a procedural action is limited by the condition of actor's fault. In other words, compensation for harm is determined by internal properties of a procedural action.

Indeed, if we agree that liability is possible only on the basis of fault, those litigators that caused harm, but acted to resolve the case, will not be obliged to compensate it. Moreover, Article 1064 of the Civil Code of the Russian Federation establishes a general rule: fault is a condition for tortfeasor's liability. This rule testifies to need of recognition of fault-based liability for harm caused by procedural activity: the substantive law does not establish any exceptions for cases of harm caused during judicial consideration of a case.

Accepting this thesis as true, it is also required to determine what significance fault should have for tort liability of a person who performed a procedural action. According to classical civil views, fault, along with wrongfulness of an action, harm that was caused and causal relationship between them, is one of conditions for tort liability. It belongs to the internal side of an action and is distinguished from wrongfulness. The latter, as is commonly believed, belongs to the external side of an action. When determining wrongfulness, it is not necessary to take into account an internal act, only its external expression should be assessed, revealing compliance of the committed action with requirements of legal norms. In this sense, an action can be performed faultless and therefore not give rise to an obligation to compensate for harm, but be

wrongful, since although it was not a result of an intent or negligence, such an action is undesirable for the system of justice.

Considering the question of the internal side of a procedural act, we stated that litigator's fault appears where he seeks to achieve goals unusual for ordinary procedural activity, if a litigator acts to harm another party, and not to win a case. If liability is limited by the condition of fault, harm is compensated when and insofar as an actor pursues some unapproved goals - this, and nothing else, becomes the governing factor for emergence of a tort obligation. In this sense, the very liability for harm caused by procedural activity derives from the internal side of an action. It is applied not due to the fact that someone perfors a harmful procedural act, but for one's intention to "use the process" to cause harm, for purposes not appropriate of procedural activity as such.

Since it is true, an action performed for the sake of winning a case, not associated with an intention to cause harm, is quite permissible - from its external side it is lawful. However, the special purpose of a procedural action that we have mentioned is the forming factor of its unlawfulness. Saying that compensation for harm caused by a procedural action should be made on the basis of fault, we thereby not only define a condition for liability, but outline a shepre of unlawful procedural actions: only those that are faulty are wrongful. Thus, it is perfectly permissible to file an unfounded claim, but it is unlawful to file a claim for the sake of causing harm to the other party, as well as it is permissible to raise groundless objections to a claim, but only as long as such actions are committed for the purpose of procedural protection.

In a broad sense, the thesis we propose can be formulated as follows: legal assessment of the internal side of an action predetermines legal qualification of its external side. It should be noted that this idea can be to some extent applied to transactions. As noted in literature, absence of flaws on the internal side of such an action (will) predetermines lawfulness (validity) of an action (transaction) itself; and vice versa - a flaw of will can lead to invalidity of this legal act.

An approach according to which liability derives from wrongful behavior of a tortfeasor may be termed restrictive. Requirement of fault as a condition of wrongfulness narrows the scope of tort compensation, and thereby allows to prevent the so-called deterrent effect, which averts bona fide litigators from procedural activity.

Meanwhile, properties of procedural activity are such that a directly opposite approach can be recognized as correct. As we noted, litigators act in the context of disagreement, of a conflict, which in itself results in a higher risk of causing harm in the process than before and out of it. Procedural activity recons on the fact that a litigator will act to prevent such an outcome of a case, which is desirable for his opponent. It is quite natural that actions taken to resolve a conflict in one's own favor are potentially more harmful than those performed by parties in absence of disagreement between them.

In this sense, a process can be seen as an activity that creates an increased risk of causing harm, and therefore requires participants to show concern for the opposite side, to act with even more deliberation and seriousness than before and out of it. This, in turn, predetermines the risk-related nature of liability for harm caused by procedural behavior. The very possibility of faultless liability for a judicial action is indicated by the provision of the procedural law on the right for compensation for harm caused by provisional measures taken at complainant's request - it, in its interpretation by judicial practice, implies complainant's responsibility even in absence of his fault.

Therefore, it should be noted that unlawfulness of a litigator's action can arise from two different sources. On one hand, only such procedural action that is perfromed to cause harm and not to protect one's own rights and interests, can be considered unlawful. According to this approach, it should be concluded that unlawfulness of an action is due to tortfeasor's fault, and the internal properties of the action determine the external ones. On the other hand, procedural activity is such that it creates an increased risk of causing harm, and therefore requires a litigator to take special care of his opponent not to cause harm to him. And then we

can conclude that unlawfulness of litigator's actions is in no way connected with his fault, the latter is not required to hold a litigator liable for harm caused by him.

The problem of fault of an action as a condition for litigator's liability is, ultimately, a matter of policy of the law. When solving it, a balance must be achieved between the need to compensate for any harm caused and the deterrent effect, which is an inevitable consequence of establishing any kind of liablity. If we see prevention of actions that cause harm, as well as satisfaction of property interests of a victim, as the main objective of the tort, we should establish risk-related liability for a procedural action. At the same time, it cannot be ruled out that this will force those who are not sure of their rightness or their harmlessness to refrain from performing legal actions. In turn, establishing liability for a faulty action will mean more lenient requirements for actions performed during a process, but will allow existence of harm caused, but not subject to compensation.

Let us summarize the above said. A litigator's action, while maintaining all its procedural and legal properties unchanged, can be a substantive act of will. From the point of view of compliance of expressed will with norms of the objective law, a litigator's action can be both a lawful action - a transaction, and unlawful. Therefore, a procedural action is both the basis for emergence, change, termination of civil rights and obligations, and the basis for emergence of a tort obligation.

Existence of the described consequences of procedural activity means that litigator's actions can result in a direct economic effect, leading to an increase or a decrease in property value. An illustrative example of such a result is a situation when defendant's actions destroy complainant's right of defense, and this leads to a decrease in value of the right to claim.

Presence of the economic effect of procedural behavior requires us to go further in our consideration and ask ourselves: can performance of a procedural action be the useful result that one party of a civil relationship expects from the other?

We answer this question in the affirmative and conclude that an obligation to perform a procedural action and a corresponding right to demand of an authorized person may be the content of a civil obligation. Failure to meet (improper performance of) an obligation to take a procedural action is the basis for emergence of an obligation to compensate for harm caused by such behavior.

We find confirmation of this conclusion in the civil law. Most particularly, we are talking about seller's obligation, established by Article 462 of the Civil Code, to intervene on a claim of a third party for seizure of goods and to protect a buyer. If in such a case the seller ignores the process, or, having intervened in it, does not take actions necessary for the buyer to win the case, and as a result the claim for seizure is satisfied, the seller must compensate buyer's losses.

Analyzing the legal nature of seller's obligation to intervene led us to the conclusion that performance of procedural actions aimed at protecting the buyer is the content of an independent civil obligation, not reducible to his obligation to "transfer goods". This obligation derives from the contract of sale. In turn, seller's liability for seizure of goods by a third party is based on his failure to meet an obligation to protect the buyer, that is, his procedural activity.

The above mentioned approach is perhaps the only explanation why the seller, who in fact was the owner of the sold goods, but did not intervene in the case, is obliged to compensate losses. This circumstance, as we have been able to see, is completely ignored by authors of most theories of responsibility for eviction (in particular, by supporters of the "abstract guaranty" theory, the "transfer of title" theory). The proposed concept complies with the essence of legal relationship between the seller and the buyer, relative nature of which is not taken into account by apologists of the theory of seller's tort liability for improper protection of the buyer.

Regulation established by Article 462 of the Civil Code is just one example of how an obligation to perform a procedural action derives from a civil contract. The proposed ideas can be applied, mutatis mutandis, to other cases when the civil law establishes an obligation to bring third parties into the proceedings, and non-

intervention of the latter has certain negative consequences (for example, provisions of Articles 399, 762 of the Civil Code).

Therefore, litigator's action being among the number of lawful volitional actions is a precondition for our next conclusion: a procedural action can be the content of a substantive obligation. In this case, procedural inaction (improper procedural activity) is the basis for creditor's recovery of incurred losses.

It is plain to see that the above discussed substantive effects in some way differ from each other. All the cases of substantive significance of litigators' actions can be divided into two types, depending on which relationship is influenced by a performed action: a relationship that is subject to the proceedings where the procedural action is performed, or that is out of already initiated judicial activity. We mentioned this difference when we compared consequences of seller's failure to intervene to protect the buyer from seizure by a third party and transactions made by litigators to terminate (change) disputed contractual relationship. In the first case a substantive effect of procedural inaction consisted in establishment of a new protective relationship, which should not be considered during the case about seizure, but in the second case, the parties changed their disputed rights and obligations during the proceedings, and the result of such a change should be (since we are speaking about a substantive transaction) reflected in the court decision.

It should be emphasized that both variants of substantive effects are quite acceptable. We have not found sufficient arguments refuting possibility of impact of procedural behavior on disputed substantive relationships. Thus, we cannot see as an argument against the proposed concept the thesis that a process is a cognitive activity; and cognition a priori is not able to have impact on a studied object; that the aim of process is to establish civil rights that actually exist, before and out of it, and not to create them. These approaches are based on a mixture of goals and properties of process as a whole and individual procedural actions. The latter are not performed to learn and establish facts of the past, one's own rights and obligations, because if this was true, it would be necessary to admit that, entering

into a case, litigators know nothing about circumstances that became the basis of the dispute, and continue the proceedings only to get this information. This is far from true. Therefore, the concepts of the "cognitive" nature of a process, contrary to positions of their authors, do not lead to a denial of influence of litigators' actions on disputed legal relationships.

The idea that a court decision is a response to a claim and not to procedural material collected during a case, also does not disavow the idea of influence of a process on disputed rights. For court's obligation to answer a claim does not mean that the court should ignore changes in substantive relationship that occurred after filing a claim. If a procedural action leads to substantive consequences, judicial decision becomes a response to ordinary substantive, and not procedural, material.

In turn, possibility of influence of procedural activity on disputed rights determines correctness of a conclusion, which is often denied in literature, - that set of legal facts, which is a condition for satisfying a claim or its dismissal, can be formed through litigators' procedural activity.

Difference in substantive effects of procedural activity is also predetermined by variety of legal facts of the substantive law. Some consequences of litigators' actions (a transaction effect, a tort, etc.) have independent, unique features that derive from prescriptions of civil law norms. This thesis, however, is quite obvious and does not require a separate justification.

It should be noted that according to the civil law, a substantive effect of procedural activity is the same legal effect that occurs after all other actions, if such are provided for by the hypothesis on the substantive law norm. In this sense, conditions for establishing and limits of a substantive effect of litigators' actions are determined in a general way - according to norms of the civil law. For example, a tort obligation arises if actions of one party caused damage to property of the other party, and it does not matter whether the harmful action was committed during the process or out of it.

At the same time there are features of a substantive effect of procedural behavior that are conditioned by specifics of litigators' activities. Although the

procedural and legal nature of such actions does not allow us to deny occurrence of civil consequences for their performance, it still affects possibility and conditions for substantive effects, and therefore cannot be factored out.

Firstly, the procedural form can determine conditions for onset of effects in the sphere of private rights. E.g., when a transaction is made during the process, compliance with procedural requirements becomes a criterion of validity of substantive declaration of will. If litigator's actions contradicts provisions of the procedural law, it cannot lead to emergence, change or termination of civil rights and obligations.

The procedural form acquires a similar meaning when an obligation to perform certain actions during a procees is established directly by the civil law, as, for example, in Article 462 of the Civil Code of the Russian Federation. It is quite clear that actions that contradict the procedural codes will not allow a seller to perform adequate defense of a buyer against a claim by a third party, and therefore to fulfill his contractual obligation.

Secondly, the procedural nature of studied actions requires to form a special approach to certain substantive categories. Thus, specific features of the process become the basis for accepting fault as an element of unlawfulness of litigator's action, or, moreover, the risk-related nature of liability for harm caused by procedural activity. Here, conditions for ensuing of legal consequences, as they are described by the civil law, are refracted in properties of a procedural action (as well as the process as a whole) and appear in a modified form.

In conclusion, we should emphasize that despite seeming contradictions, the concept of a substantive effect of litigators' actions is consistent with both the essence of procedural activity and the nature of substantive rights. Procedural actions are a kind of communication, interaction between parties; being performed exclusively in a procedural form, they at the same time do not lose ability to affect subjective rights; they are characterized by greater deliberation and seriousness than non-procedural actions - these are only some signs of procedural actions that we have stated, and which indicates there is a potential for procedural activity to

generate sustainable legal consequences, substantive by nature. Substantive effects of procedural activity result in legal certainty of parties' positions, when both parties and all third parties can rely on strength of litigators' activities effects; ensures preventing harmful activity and determines an essentially fair possibility to compensate for caused harm.

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