Competitive claims in civil law of Ukraine

Конкурентні претензії в цивільному праві України

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structure of subjective rights, right to protection, classification of methods of protection of rights, real and obligatory methods of protection of rights, competitive claims.

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Relevance of the topic. One of the basic principles of a civilized society is the existence and operation of the principles of the rule of law and legal certainty. According to these initial principles, any subject of law realizing the opportunities provided by the law should be able to foresee the consequences of his or her actions and behaviour with a reasonable degree of probability. Such a state of social relations ordering can be achieved, among other things, through sufficient elaboration at the level of the theory of essential legal categories that have a significant impact on the legal life of society. One example of the lack of unity in science and law enforcement practice is the problem of competitive claims.

The problem of competitive claims was the subject of research of such representatives of Ukrainian legal science as O.A. Belianevych, O.V. Dzera, O.O. Kot, N. S. Kuznetsova, I.V. Spasibo-Fateieva, A.H. Yarema, etc. However, most of the works state the presence of this problem and the lack of ways to solve it both at the level of science and at the level of law enforcement practice. The above confirms the relevance of the study.

The purpose of the article is to pose the problem of lack of theoretical studies and any conventional agreements among representatives of the science of civil law of Ukraine in solving the problem of competitive claims, as well as demonstrate fragmentary and not always successful attempts of judicial practice to overcome this problem.

Introduction. Subjective law, like any social phenomenon, is a structural phenomenon having the presence of components or elements, the existence and interaction of which determine the essential and functional purpose of such a phenomenon.

The concept and content of the subjective law structure is not overlooked by both the general theory of law and the branch legal sciences. So, according to O.F. Skakun, the structure of a subjective right is its structure, which is expressed in connection of the elements, i. e. legal possibilities (competences) belonging to the authorized subject. Competence is an integral part of the structure of a subjective right; it represents a specific legal opportunity that is provided to an authorized person in order to satisfy his or her interests. The essential elements of the structure of subjective rights are the following competences: 1) the competence to own positive actions, that is, the possibility of the actual and legally significant actions by the subject him- or herself; 2) action competence, that is, the ability of an authorized person to require the obligated subject to perform the duties assigned to him o her; 3) harassment competence, that is, the ability to apply for protection to the state in cases of violation of subjective rights by the legal person[1].

O.H. Murashyn expands the composition of the elements of subjective right, adding to the above three powers the opportunity to use the relevant social benefits, which we believe, depending on the specific circumstances of the subjective right, can be attributed either to the first or second element of the preliminary classification[2].

[1] O.F. Skakun. Theory of State and Law: textbook. Kiev : Pravova yednist, 2011. 220 p.

[2] O.H. Murashyn, M.S. Kelman. General Theory of Law : textbook. / Kiev : Kondor, 2002. 178 p.

L.I. Spiridonov takes a different view noting that ensuring the coercive power of a state is an internal quality of the subjective right itself and, therefore, is covered by its definition. Therefore, in his conviction, the specified compulsory opportunity does not exist in parallel with the other capabilities enshrined in the subjective right but is characteristic of them[3]. It should be noted the methodological importance of his other conclusion for this study. He notes that if the subject of the analysis becomes an absolute legal relationship (for example, the right of ownership or another real right), then it becomes obvious that the centre of gravity in it is transferred to the behaviour of the authorized subject, to his or her own actions and not to the obligation of legal person.

The main material presentation. The Ukrainian civil law science generally supports the three-part component of the civil law elements; however, some scientists justify a concept that is similar to the concept of L.I. Spiridonov. So, I.V. Spasibo-Fateieva notes that we should join the opinion of those scientists who argue that the possibility of applying state coercion is not a competence but a property of a subjective right. In addition, it is not necessary to reduce the right to protection in substantive terms only to the possibility of applying to the relevant governmental authorities. Competence of protection is also the possibility of stopping unlawful behaviour through the use of self-enforcement measures[4].

Despite the diversity of opinions and positions of representatives of legal science, yet the majority of such representatives attribute the right to protection, without the existence and maintenance of which particular subjective right turns into a ghost and the declaration of the legislator, to be integral elements of the structure of subjective right.

One of the specific features of ancient Roman civil law was that the existence and presence of a subjective right was not associated with the law itself or its positive consolidation but with the possibility of its compulsory defence or, more precisely, with the existence of the right to claim. Hence, I. B. Novytskyi analysing this outstanding memo of private law, notes that among the numerous claims it is necessary to single out the following important types: actio in rem (property claim) and actio in personam (personal claim). Lawyer Pavlo contrasted the right of ownership to a thing on the one hand and the right to demand from another person the performance of certain actions; ownership can be violated by any person (as well as protected from any third party). Therefore, it is customary to say that for the protection of such a right a lawsuit is filed against any third party that violates this right of the claimant. In modern terminology, this is called absolute protection. In contrast, actio in personam is filed against a well-defined infringer, namely, an obliged subject of legal relations. According to modern terminology, this is the protection of relative law[5].

Using this conclusion, which has more than two thousand years of tradition, and also bearing in mind the position of the general theory of law that in absolute legal relations the centre of gravity is transferred to the behaviour of the authorized subject, as well as to his or her own actions, we can draw the following conclusion, which requires further justification. The owner of a real right exercises the corresponding competences in relation to the corresponding property by his or her own actions and can independently protect such real right with means of protection of an absolute (real) nature. An entity that does not have the relevant substantive competences is deprived of absolute (real) protection from any third parties regarding violations that affect such property.

The division of methods of protection into real and obligatory is also inherent in modern civil law science, including in Ukraine. O. V. Dzera points to the above division of property rights protection as traditional citing the following classification. The main substantive legal remedies are: 1) vindication claim; 2) negatory claim. The subsidiary substantive legal remedies are: 1) a claim for recognition of ownership; 2) a claim for exclusion of property from the inventory; 3) a claim for the protection of the rights of a co-owner in the event of the separation, division, and sale of common property. Mandatory legal means: 1) methods of protection in contractual relations (compensation for damages caused by improper performance or non-performance of the agreement, return of items provided for use under the agreement); 2) methods of protection of property rights in tort obligations; 3) return of unjustifiably received or retained property. Special mandatory legal means: 1) claims for invalidation of the transaction; 2) ways of protecting the property rights of deceased or missing persons; 3) methods of protection against unlawful or lawful actions of the public administration[6].

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[3] L.I. Spiridonov. Theory of State and Law: textbook. Moskva : Status LTD+, 2008. 144 p.

[4] I.V. Spasibo-Fateieva, M.N. Sibilev, V.L. Yarotskii, et al. Kharkiv Civil School : protection of subjective civil rights and interests: monograph / ed. I. V. Spasibo-Fateieva. Kharkiv : Pravo, 2014. 672 p.

[5] I.B. Novytskyi. Roman law: textbook / Moskva : TEIS, 1998. P. 87, 189.

[6] I. O. Dzera. Civil law remedies in Ukraine / Kiev : Yurinkom Inter, 2002. 126 p.

Given the preliminary conclusion about the peculiarity of absolute protection for subjects of rights, as well as the lack of opportunities for other persons, the following question should be asked: does this conclusion follow from the theoretical positions of legal science or the consequences of law enforcement? The lack of an answer to this question is associated with the so-called competitive claims, a little-studied in science.

So, according to the position of I.O. Dzera, the distinction between material and legal, as well as legal and obligation ways of property rights protection, is not only of theoretical interest but also has a purely practical significance, since Ukrainian civil law does not recognize the so-called competitive claims and requires the use of civil rights protection tools that are adequate to the legal relationship. However, in judicial practice, this problem arises one way or another. Nevertheless, in civil law science, there are still no unambiguous views on the list of specific ways to protect property rights, which should be included in one or another classification group[7].

As I.V. Spasibo-Fateieva notes, the issues of competitive claims were and remain one of the most debatable and little-studied in civil science and practice. Complex scientific works devoted to this issue are practically absent. At the same time, it is concluded that claims competitive (rights competitive) is an atypical legal situation, when several subjective civil rights identical in purpose belong to one person and are directed against the same violator[8].

Thus, in civil law science, there are still no unambiguous views on the list of specific means of protection of property rights, as well as other real rights. However, this state of science has a very negative effect on law enforcement, on judicial practice and, finally, on the state of the realization of the rights of participants in legal relations. In generalizations of judicial practice in the consideration of specific legal disputes only fragmentary and for a specific situation, conclusions are drawn on how to overcome competitive claims and apply a proper method of protection of rights.

So, until recently, there was a problematic competition between the restitutionary requirements for invalidation of transactions and the vindication claim. Only by the Resolution of the Plenum of the Supreme Court of Ukraine as of November 6, 2009 No. 9 "On the Judicial Practice of Consideration of Civil Cases on the Recognition of Competences as Invalid"[9] this problem has been resolved. Thus, clause 10 of this Resolution specifically states that *restitution* as a way of protecting civil law (part one of Article 216 of the Civil Code) applies only if there is a concluded agreement between the parties, which is void or invalid. In this regard, the requirement to return the property transferred in pursuance of an invalid transaction, according to the rules of restitution, can be made only to the party of the invalid transaction. The norm of the first part of Article 216 of the Civil Code cannot be used as a basis for a claim for the return of property transferred in pursuance of an invalid transaction that was alienated to a third party. Claims of property owners for annulling subsequent transactions on the alienation of this property made after an invalid transaction are not subject to satisfaction. In this case, the property may be claimed from a person who is not a party to the void transaction by filing a vindication claim, in particular from a bona fide purchaser – from the grounds provided for in the first part of Article 388 of the Civil Code.

Competitive claims for invalidation of a transaction on the assignment of a share in the right of common ownership in violation of the pre-emptive right and the claim for transfer of rights and obligations of the buyer was also resolved through a synthesis of judicial practice. Thus, the Plenum of the Supreme Court of Ukraine in Resolution No. 9 noted that failure to comply with the requirements of Article 362 of the Civil Code in the event that a participant sells common ownership of his or her share to another person is not a reason to recognize the transaction invalid. In this case, other co-owners have the right to require the transfer of the rights and obligations of the buyer to them.

The competitive between contractual rights protection and the so-called short-term claim, that is, the claim regarding unjust enrichment, is also not resolved either at the level of the doctrine or in the practice of law enforcement. In the Resolution as of February 25, 2015 in the case of No. 910/1913/14, the Supreme Court of Ukraine overcame this conflict but only for one particular case noting in particular the following: Article 1212 of the Civil Code of Ukraine applies only in cases where the unjust enrichment of one person at the expense of another cannot be eliminated using other, special means of protection. In particular, in the event of a dispute

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[7] I. O. Dzera. Civil law remedies in Ukraine / Kiev : Yurinkom Inter, 2002. 126 p.

[8] I.V. Spasibo-Fateieva, M.N. Sibilev, V.L. Yarotskii, et al. Kharkiv Civil School : protection of subjective civil rights and interests: monograph / ed. I.V. Spasibo-Fateieva. Kharkiv : Pravo, 2014. 672 p.

[9] Resolution of the Plenum of the Supreme Court of Ukraine as of November 6, 2009 No. 9 "On the Judicial Practice of Consideration of Civil Cases on the Recognition of Competences as Invalid" / Bulletin of the Supreme Court of Ukraine, 2009. 00. No. 12.

regarding the acquisition of property or its preservation without sufficient legal grounds, the contractual nature of legal relations excludes the possibility of applying to them the provisions of Article 1212 of the Civil Code of Ukraine[10] by the court.

The so-called residual principle of the application of a lawsuit claim or a legal construction of protection provided for by Article 1212–1214 of the Civil Code of Ukraine is supported by A.H. Yarema[11].

On April 1, 2014, the Supreme Court of Ukraine adopted a document entitled "Analysis of the Practice of Application by the Courts of Article 16 of the Civil Code of Ukraine"[12]. Conclusions based on the results of generalization of court practice may have doctrinal status; however, even in such a substantive document, the Supreme Court of Ukraine did not attempt to solve the problem of competitive claims. At the same time, it was stated that a person, who has a legitimate interest or whose right has been violated, can use the method of protection that is expressly provided for by the substantive law norm or can use the choice between several ways of protection, if this is not prohibited by law. If special rules do not establish specific measures, then the person has the right to choose a method from among those provided by Article 16 of the Civil Code, taking into account the specifics of the violated rights and the nature of the offence. That is, instead of solving the problem, the situation of competitive claims was even more difficult, since the choice between measures of protection of an absolute or relative nature cannot be arbitrary.

A similar approach was also applied by the Plenum of the Higher Specialized Court of Ukraine to consider civil and criminal cases in the Resolution "On Judicial Practice in the Protection of Property Rights and other Real Rights"[13], where in paragraph 3 the following was stated: the right to choose the method of judicial protection belongs exclusively to the plaintiff (part one of Article 20 of the Civil Code, Articles 3 and 4 of the Civil Code).

Moreover, according to paragraph 6.3. of the Information Letter of the Supreme Arbitration Court of Ukraine as of January 31, 2001[14], if a person owned property on a legal basis, which subsequently disappeared (for example, in case of expiration of the agreement), then such a person is an illegal owner, and a vindication claim may be filed against it. This legal position, which still remains in force and is not revoked, ignores the principle of competitive claims, provides unreasonable use of vindication in the presence of contractual relations, that is, absolute protection in relative legal relations. Such generalizations of law enforcement disorient judicial practice, and the reason for their appearance is the lack of relevant theoretical developments.

Nevertheless, in the document titled "Analysis of Some Issues of Application of Property Law by Courts in Civil Cases"[15], which does not have the status of an official document, the Supreme Court of Ukraine noted that the issue of competition of vindication and obligatory claims is relevant. The presence of liability relations between the parties excludes the possibility of filing a claim for recovery of property from another's unlawful possession, since the transfer of property for use to a person, who has pledged to return this property at the end of the period for which it was transferred but who does not fulfil this obligation, is based on the terms of the agreement concluded between the parties and regulated in accordance with section III of book 5 of the Civil Code. The property transferred by the owner to another person in possession or use under an agreement between them cannot be considered to be retired from the possession of the owner not by his or her will. Consequently, in this case, there has been developed a clear legal position on the impossibility of mixing means of protection of rights of an absolute and relative nature. However, as noted above, this legal position has no official character.

The competition between such methods of protection of rights of an absolute and relative nature as an actio negatoria and contractual means of protection of rights also has no solution either in the doctrine or at

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[10] Resolution of the Supreme Court of Ukraine as of February 25, 2015 / Case No. 910/1913/14 / URL:reyestr.court.gov.ua/Review/42986211.

[11] A.H. Yarema, V.Ya. Karaban, V.V. Kryvenko, V.H. Rotan. Scientific and practical commentary to the civil legislation of Ukraine : in 4 vol. / Kiev : A. S. K.; Sevastopol : Institute of Legal Studies, 2004, 863 p.

[12] Letter of the Supreme Court of Ukraine "Analysis of the practice of application by the courts of Article 16 of the Civil Code of Ukraine" as of April 1, 2014 / Bulletin of the Supreme Court of Ukraine, 2014. 00. No. 8, 9.

[13] The Resolution of the Plenum of the High Specialized Court of Ukraine on the consideration of civil and criminal cases in the resolution "On Judicial Practice in Cases of Protection of Property rights and other Real Rights" as of February 7, 2014 No. 5 / Journal of Civil and Criminal Justice, 2014. 00. No. 2.

[14] Information Letter of the Supreme Arbitration Court of Ukraine "On Some Prescriptions of Legislation Regulating the Issues of Exercising Property Rights and Protecting it" as of January 31, 2001 / Legal Journal of Ukraine, 2001. 03. No. 12.

[15] The letter of the Supreme Court of Ukraine "Analysis of Some Issues of the Application of the Legislation on Property Rights in Civil Cases by the Courts" as of July 1, 2013 / Bulletin of the Supreme Court of Ukraine, 2014. 00. No. 3, 4, 6.

the level of generalizations of the judicial practice of the highest courts. Only in the consideration of individual cases, the courts express legal positions, which should find an established reflection in the theory as soon as possible. Thus, in case No. 6-92цс15, which was in the proceedings of the Supreme Court of Ukraine, the courts of previous instances denied the claim of the owner of the premises acquired under the agreement of sale to the tenant who concluded an agreement with the previous owner. It was noted that the plaintiff chose an inappropriate way to protect his or her rights and filed a claim against the defendant, as only the Dubno consumer society (the previous owner) is entitled to demand from OSOBA_10 (the previous tenant) return of the real estate leased out due to dissolution or termination of the lease agreement, and only the specified company is obliged to transfer the goods, for which he or she received the appropriate fee, to the claimant. In this case, in the decision as May 27, 2015,[16], the Supreme Court of Ukraine noted that according to the first part of Article 317 of the Civil Code of Ukraine, the owner has the right to possess, use, and dispose of his or her property. In accordance with Article 319 of the Civil Code of Ukraine, the owner owns, uses, and disposes of his or her property at his or her own discretion, has the right to perform any actions in relation to his or her property that do not contradict the law. In case of violation of his or her rights, the owner, in accordance with Article 391 of the Civil Code of Ukraine, has the right, in particular, to demand the elimination of obstacles in the exercise by him or her of the right to use and dispose of his or her property. In this case, the provisions of Article 391 of the Civil Code of Ukraine shall be applicable *only in cases where there is no contractual relationship between the parties* and the property is in the use of the defendant on the basis of the agreement with the claimant. Guided by this legal position, the Supreme Court of Ukraine satisfied the claims thereby protecting the right of the owner through a method of protection, which by a long tradition is called negatoria, with a preference for this method over contractual means of protection of rights. Moreover, according to the author, the lack of understanding of the problem of competitive claims led in this case to an unjustified refusal to protect the rights by the courts of previous instances, including the Supreme Economic Court of Ukraine.

Conclusions. Summarizing the above legal positions of judicial practice and legal science we can formulate the following conclusions:

– competitive claims does not have an unequivocal solution in Ukraine's law either at the doctrine level or at the level of law enforcement practice;
– the lack of a solution to this problem has negative consequences in the practice of law enforcement, including the judicial protection of rights;
– this problem solving is the task of legal science;
– in law enforcement practice, there are single attempts to solve the problem of competitive claims;
– the problem of competition between the restitutionary and vindication claims, as well as the claim for invalidation of the transaction and the claim for transferring the rights and obligations of the buyer of a share in the right of common share ownership was resolved in favour of the latter's priority with the adoption of Resolution of the Plenum of the Supreme Court of Ukraine as of November 6, 2009 No. 9;
– priority in the application of contractual means of protection of rights before the short-term claim takes place only in certain court decisions and is not settled;
– the relationship and the procedure for applying contractual remedies on the one hand, and the vindication and negatoria claims, on the other hand, in the presence or absence of binding legal relations between the parties are enshrined only in the unofficial positions of the Supreme Court of Ukraine.

Анотація

Розглянуто структуру та сутність абсолютних та відносних суб'єктивних прав у контексті такої компетенції, як право на захист, аналіз матеріальних та обов'язкових методів захисту прав, питання конкурентних претензій, які теоретично є мало відомими. Обґрунтовано висновок, що відсутність відповідних теоретичних доктрин щодо конкурентних претензій має негативні наслідки для правоохоронних органів.

[16] Resolution of the Supreme Court of Ukraine as of May 27, 2015 / Case No. 6-183цс14/. URL: www.reyestr.court.gov.ua/Review/41849921.

Summary

The article examines the structure and essence of absolute and relative subjective rights in the context of such competence as the right to protection, analyses material and obligatory methods of protection of rights, deals with the issue of competitive claims, which is little known in theory, and substantiates the conclusion that the lack of relevant theoretical doctrines on competitive claims has negative consequences for law enforcement.

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