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ПРОЦЕССУАЛЬНЫЙ ПОРЯДОК ПРИНЯТИЯ МЕР ОБЕСПЕЧЕНИЯ ГРАЖДАНСКОГО ИСКА: ОТДЕЛЬНЫЕ АСПЕКТЫ

В статье исследован вопрос принятия мер обеспечения гражданского иска. Автором статьи проанализированы возможности применения данных мер в судах первой, апелляционной, кассационной инстанций. Указано субъектов, которые могут обращаться с заявлением о применении указанных мер. Автором отмечено требования по оформлению заявления об обеспечении иска, проанализированы срок рассмотрения заявления и необходимость уведомления лиц, участвующих в деле. Также проанализированы необходимость отправки постановления об обеспечении иска заявителю, ответчику, другим лицам, участвующим в деле. Автором статьи рассмотрены мнения ученых и предлагается внесение изменений в действующее законодательство Украины.

Ключевые слова: *гражданский иск, обеспечение иска, меры, решение, судебное разбирательство, заявитель, ответчик, срок.*

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PROCEDURAL ORDER OF TAKING MEASURES TO ENSURE A CIVIL CLAIM: SOME ASPECTS

In the article the question of taking measures to ensure a civil claim is investigated. The author of the article has analyzed the applicability of these measures in the courts of first, appellate, cassation instances. Subjects, who may apply for the use of these measures, are specified. The author defined the requirements for such application, analysed the period of the hearing and the need to inform the persons involved in the case. The need to send the decision on the claim to the applicant, the defendant and other persons, who are involved in the case, is also analysed. The author of the article considered the views of scientists and proposed amendments to the current legislation of Ukraine.

Keywords: *civil claim, securing a claim, measures, court order, hearing, applicant, defendant, term.*

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EXAMINATION OF COMPLAINTS IN CIVIL MATTERS AS ONE OF THE FORMS OF ACCESS TO THE SUPREME COURT IN POLAND

There are different functions of the Supreme Court in Poland such as the control of legality and correctness of an issued ruling, and the examination of, above all the extraordinary means of appeal, which are: cassation complaints, complaints to declare a legally binding decision unlawful. Placement of the complaint to the Supreme Court within the regulations of the chapter on the appeal, and not, as previously, in the chapter devoted to the cassation, is significant in terms of the construction. The complaint proceedings in the Supreme Court creates a mechanism within the framework of which the Supreme Court not only examines the matter but controls the 2nd instance court whether a decision by which the proceedings are terminated does not infringe the law, and in the case of finding such infringement, generally, it "cancels" such decision. It is, therefore, worth being better acquainted with when the complaint to the Supreme Court can be filed and to what extent the Supreme Court can be allowed to intervene on the merits in an issued decision.

Key words: *complaint in civil matters, the Supreme Court in Poland, the admissibility of filing a complaint, the scope of control by complaint.*

The Supreme Court in Poland, because of its functions, i.e., the control of legality and correctness of an issued ruling, examines, above all, the extraordinary means of appeal, which are: cassation complaints, complaints to declare a legally binding decision unlawful. In civil procedure, an appeal to the Supreme Court has always been an exception to the rule, and by 2 July 2000 it was available exclusively when lodged against a 2nd instance court decision rejecting a cassa-

tion. The essence of the complaint, as any other means of appeal , is to render effective the right of a party (appellant) to implement an appropriate means of control [1]. At present, a complaint to the Supreme Court in Poland serves to control the non-final decisions not on merits, i.e. neither judgments nor orders for payment as a means of appeal against the 2nd instance court decisions which can be appealed in the light of art. 394^1 *of the Civil Proceedings Code, hereinafter the "CPC"*. Such decisions which conclude a matter are, among others: decisions rejecting a lawsuit on procedural grounds, appeals discontinuing proceedings [2]. An exception to a situation in which a decision on merits can be appealed is provided in Art. 394^1 § 1^1 of CPC which is "an appeal against a judgment". The institution of the complaint in civil proceedings after the amendment of the civil procedure code dated 16 September 2011 [3] is therefore not uniform, viewing the appeal, at least, from the perspective of a horizontal complaint or a complaint against a cassation decision [4].

The admissibility of being able to lodge an appeal a decision to the Supreme Court needs to be deemed an exception of a kind, despite the fact that issues subject to appeal examined by the Supreme Court occur in the course of the instance proceedings [5]. Placement of the complaint to the Supreme Court within the regulations of the chapter on the appeal, and not, as previously, in the chapter devoted to the cassation, is significant in terms of the construction [6]. It is, therefore, worth being better acquainted with when an appeal to the Supreme Court can be filed and to what extent the Supreme Court can be allowed to intervene on the merits in an issued decision.

1. The admissibility of filing a complaint to the Supreme Court

Pursuant to the Polish Civil Proceedings Code, a complaint to the Supreme Court can be filed against 2nd instance court decision by which a cassation is rejected and against a 2nd or 1st instance court decision by which a complaint of declaration of unlawfulness a legally binding decision. In the matters is which a cassation complaint can be filed, a complaint can be filed also against a 2nd instance court decision which concludes the proceedings, except for decisions rejecting the lawsuit on procedural grounds or discontinuing proceedings, and also decisions issued as a result of the examination of a complaint against a 1st instance court decision. A complaint to the Supreme Court can also be field against a 1st or 2nd instance court decision or against a 2nd instance court decision of the same court but sitting in a different panel. It must, however, be noted that a complaint filed with the Supreme Court does not constitute a specific means of appeal which is different from that filed with the 2nd instance court, and is characterized by being devolutive and suspensive. In such procedure, the Supreme Court controls appealable decisions and acts as the 2nd instance court, which overlaps with the model of an appeal filed with the 2nd instance court. In the majority of events, a complaint filed with the Supreme Court serves to challenge and verify the correctness of decisions with regard to procedural issues [7]. An exceptional character of the complaint to the Supreme Court is confirmed in a rather narrow catalogue of decisions which can be appealed under that procedure, even through the scope thereof, throughout recent years, has become extended. Due to the fact that the Supreme Court decisions are non-appealable, a complaint which can be filed against those decisions is final because a decision delivered as a result of examination thereof cannot be further appealed.

2. Reviewing complaints by the Supreme Court in Poland

The complaint filed with the Supreme Court is "exceptional" in its character. Art. 394^1 of CPC was introduced by the amending act dated 22 December 2004 [8] on the basis of which crucial changes were introduced in the system of the means of appeal which also relate to the change of the character of cassation appeal. In the present normative context a situation in which the Supreme Court reviews a complaint of the 2nd instance court decision is exceptionally conspicuous. The Supreme Court, but for one exception resulting from Art. 390 § 1 of CPC, is never a 2nd instance court. Art. 3941^1 of CPC constitutes an exception to the above described principle because it provides for a situation in which it is the Supreme Court that examines the complaint [9]. The provision expressly states that that court operates as a body which controls (to a limited extent) decisions which conclude the proceedings and which have been issued by the 2nd instance court. Those are decisions of regional or appeal courts which operate as the 2nd instance courts.

The Supreme Court which reviews a complaint does not operate as the 2nd instance court [10]. According to the established case-law and the legal doctrine, an instance in which the Supreme Court examines in civil proceedings as the 2nd instance court may be the circumstances resulting from Art. 390 of CPC (transferring the matter for reconsideration).

Those decisions of the 2nd instance court which relate to the proceedings can be appealed to the Supreme Court by a cassation complaint or a complaint only in the circumstances expressly described in the provisions (art. 398^1 § 1 and art. 394^1 § 1 and 2 CPC respectively). A complaint to the Supreme Court against other decisions does not apply.

Admissibility of a complaint against a decision other than that rejecting the a complaint on procedural grounds depends, in the first place, on whether the complaint was filed in a matter in which a cassation complaint is allowed. Therefore, even those decisions which meet the remaining requirements – the 2nd instance court decisions which conclude the proceedings – are not always appealable to the Supreme Court. In that view, admissibility of a complaint is assessed individually in each matter. If a complaint has been filed in the proceedings in which a cassation complaint cannot be filed, that means that the complaint fails to comply with the first requirement of admissibility.

The criterion of a decision which "concludes the proceedings" is general and refers to the entire

category of decisions [11]. The legal doctrine lacks a uniform definition of that notion and thus some claim that the court issues a decision which concludes the matter being viewed as a certain completeness to be assessed, when it rules on the entire proceedings, and there are no conditions to enable passing of a judgment, which means the resolution of the matter on merits [12], whereas the others point out that such decisions conclude the matter when the continuation of the proceedings after these decisions have been issued is not further possible [13]. The conditions by which a decision qualifies to conclude the proceedings have already been explained in a number of the Supreme Court decisio [14], there is, however, unanimity as regards the notion of a decisions concluding the proceedings [15]. According to the duality of these may be the following decisions: decisions which, if they become final, cannot be resolved on merits by the 2nd instance court if on the date of issuing such a decision the court is not required to further examine the matter; or decisions which ascertain that an event has occurred which causes non-admissibility to continue the proceedings aiming at resolution of the matter on the merits by the 2nd instance court [16].

The Supreme Court reviews a complaint against the 2nd instance court decisions in the panel composed of three judges in camera [17]. Concurrently, admittance by the Supreme Court of a complaint results in the appealed decision being overturned. In consequence, the Supreme Court can resolve on the merits of the matter or it can remand it to the 2nd instance court for reconsideration. In the remainder of instances, however, the Supreme Court sits in the panel of one judge. A proper application of this regulation means that the Supreme Court examines an appeal in panel of three judges, in other matters, however, it conducts appellate proceedings in the panel of one judge. Those other matters are the situations in which, e.g., a complaint is overturned, appellate proceedings are discontinued or suspended [18].

Formal requirements for a pleading and a complaint under Article 394 (3) of the CPC also apply to a complaint filed with the Supreme Court. Therefore, a complaint, similarly to every single pleading should contain, among others, designation of the court, names and surnames of the parties, of statutory representatives or attorneys, signatures (of the parties or the statutory representatives, or attorneys), and where the pleading is filed by an attorney – a power of attorney attached, a list of exhibits, citation of evidence to support a demand, text (content), subsequent pleadings in the matter and – a file reference number, an indication of a decision being appealed, a motion for change or reversal thereof , justification of the appeal together with an indication of new facts and evidence (optionally). New facts and evidence may be adduced even if they could have been filed in the 1st instance proceedings [19]. An obligation that a complaint filed with the Supreme Court be drafted by an advocate or a legal advisor is stipulated in Art. 87^1 of CPC and if it is drafted in breach of this regulation, it is to be rejected as inadmissible [20].

A complaint should be filed within a week from the date of service of a decision or announcement thereof. A deadline for a complaint to be filed will start on the date of announcing a decision and not on the date of service thereof [21]. In the case a means of appeal is filed to a wrong court or another body, a deadline to file an appeal against a decision is deemed observed only if the means of appeal is transferred to a court which issued the appealed decision prior to this deadline [22]. A deadline for filing an appeal shall not be interrupted or extended because of a motion to appoint a representative *ex officio*. Appointment of a representative *ex officio* by the court after the deadline for filing an appeal has elapsed; may, only, be a circumstance which justifies reinstatement of the deadline [23].

Due to the fact that a party filing a complaint with the Supreme Court must be assisted by a representative appointed in the proceedings, the deadline to file an appeal commences on the date of service of a decision on the representative, even if the party subsequently revokes a power of attorney granted to him [24]. If a copy of the decision was served under Art. 138 § 1 of CPC, for the effective service thereof the conditions provided in this article must be met. Therefore, if upon service a decision was collected by a person not being a household member, such service cannot be deemed to be effective, which means that the deadline for an appeal to be lodged starts from the date of the real service of a copy of the decision on the addressee [25].

The case file together with a necessary complaint are presented by the 1st instance court to the 2nd instance court. At the same time, there is a possibility to file a complaint to an appeal directly to the 2nd instance court within a week from the date of service of the appeal. Examination of a complaint by the 2nd instance court is in camera. The fact of being devolutive is a characteristic of a means of appeal (appeal, complaint). That means a possibility to examine the matter by a higher instance court after a prior filing of an appellate measure, i.e., an appeal. The reconsideration of the matter enables indication of new facts and evidence, which have not been known in the course of the 1st instance court proceedings.

It frequently occurs that the issues of admissibility of an appeal to the Supreme Court are examined incidentally. And pursuant to a decision dated October 12, 2007 [26], a complaint against the 2st instance court decision on the award of costs in the proceedings cannot be filed with the Supreme Court (Art. 394^1 § 2 of CPC).

In judicial decisions of the Supreme Court the following are deemed inadmissible appeals filed with the Supreme Court: preliminary injunction orders [27], a decision included in the appeal court judgment on the costs incurred in the 1st instance court proceedings [28], the 2nd instance court decision on the costs of non-paid legal assistance [29], a decision on the refusal of a waiver from court costs [30], a decision on the dismissal of a motion to have a deadline reinstated to file a motion to draft the justification of the 2nd instance court judgment and service of the copy thereof together with

justification [31], contrary to a decision dismissing a motion to serve a judgment together with justification which is subject to an appeal [32], the 2nd instance court decision on the return of the court fee [33], the 2ns instance court decision dismissing a motion to suspend enforcement of a binding decision by filing a cassation, by the time of termination of the cassation proceedings[34], the 2nd instance court decision on the rejection of a motion to restore the deadline for filing a cassation – such decision can be controlled within the examination of an appeal of a decision to reject a cassation [35], a 2nd instance court decision dismissing an appeal of a first instance decision dismissing an appeal [36], a 2nd instance court decision dismissing a motion to correct or interpret a judgment [37] or a 2nd instance court decision in the matter of award to the State Treasury of the costs of unpaid *ex officio* legal assistance in appeal proceedings [38].

3. Conclusions .

It must be stated that in the proceedings in the Supreme Court which have been instituted by a complaint of the 2nd instance court decision (similarly to the cassation proceedings), Art. 380 which provides for a possibility of examining by the 2nd instance court of the decisions which were non-appealable, can be widely applied. It needs to be emphasized that in the appeal proceedings initiated by a complaint of a decision to reject the cassation, the cognition of the Supreme Court is limited exclusively to the subject of the appeal, thus, the issue of a possible invalidity of the proceedings in the 2nd instance court remains beyond the control of that court [39].

The appeal proceedings in the Supreme Court creates a mechanism within the framework of which the Supreme Court not only examines the matter but controls the 2nd instance court whether a decision by which the proceedings are terminated does not infringe the law, and in the case of finding such infringement, generally, it "cancels" such decision.

Therefore, the right to file a complaint to the Supreme Court cannot be absolute and cannot be deemed to be similar to the right to trial. In the case of decisions which do not terminate the proceedings (the secondary decisions) a complaint can be filed only when a provision expressly states so.

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Джоанна Студзинска

РАССМОТРЕНИЕ ЖАЛОБ В ГРАЖДАНСКИХ ДЕЛАХ КАК ОДНА ИЗ ФОРМ ДОСТУПА К ВЕРХОВНОМУ СУДУ В ПОЛЬШЕ

Существуют различные функции Верховного Суда в Польше, такие как контроль за законностью и правильностью принятого решения и рассмотрения, прежде всего чрезвычайные средства правовой защиты, а именно: кассационное обжалование, признание решения незаконным. Размещение норм об обжаловании в Верховный Суд в рамках положений главы об апелляционном обжаловании, а не, как раньше, в разделе, посвященном кассации, имеет большое значение с точки зрения структуры. Процедура обжалования в Верховный Суд создает механизм, в рамках которого Верховный Суд не только рассматривает этот вопрос, но управляет второй инстанцией, где решение, которым было приостановлено процесс, не затрагивает закон, и в случае выявления такого нарушения, как правило, это «отменяет» такое решение. В таком случае, будет проще знакомиться с тем, когда жалоба в Верховный Суд может быть подано и в какой мере Верховному Суду может быть разрешено вмешиваться в сущность принятого решения.

Ключевые слова: *обжалование по гражданским делам, Верховный Суд в Польше, допустимость обжалования, пределы обжалования.*

Джоанна Студзінська

РОЗГЛЯД СКАРГ В ЦИВІЛЬНИХ СПРАВАХ ЯК ОДНА ІЗ ФОРМ ДОСТУПУ ДО ВЕРХОВНОГО СУДУ В ПОЛЬЩІ

Існують різні функції Верховного Суду в Польщі, такі як контроль за законністю та правильністю ухваленого рішення і розгляду, перш за все надзвичайні засоби юридичного захисту, а саме: касаційне оскарження, визнання рішення незаконним. Розміщення норм про оскарження

до Верховного Суду в рамках положень глави про апеляційне оскарження, а не, як раніше, в розділі, присвяченому касації, має велике значення з точки зору структури. Процедура оскарження до Верховного Суду створює механізм, в рамках якого Верховний Суд не тільки розглядає це питання, але управляє другою інстанцією, де рішення, яким було припинено процесс, не порушує закон, і в разі виявлення такого порушення, як правило, це «скасовує» таке рішення. В такому випадку, буде простіше ознайомлюватись з тим, коли скарга до Верховного Суду може бути подана і в якій мірі Верховному Суду може бути дозволено втручатися в суть ухваленого рішення.

Ключові слова: *оскарження у цивільних справах, Верховний Суд в Польщі, допустимість оскарження, межі оскарження.*

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ОБ'ЄКТИ СУДОВОГО ЗАХИСТУ У ЦИВІЛЬНОМУ ПРОЦЕСІ

У даній статті проведений порівняльний аналіз та розкрита сутність понять «порушене, оспорюване, невизнане право, свобода чи інтерес». Акцент зроблено на поняттях «об'єкт» та «предмет» судового захисту та їх співвідношення із такими самими поняттями, які мають застосування у нормах матеріального права. Внесено ряд пропозицій з удосконалення норм ЦК, ЦПК.

Ключові слова: *судовий захист, цивільний процес, об'єкт, предмет, порушене, оспорюване, невизнане право, свобода, інтерес.*

В цивільному процесі право на звернення до суду за судовим захистом і вирішення справи судом, традиційно, розглядаються вченими у контексті нормативно закріплених понять: ст. 1 Цивільного процесуального кодексу України (надалі-ЦПК) – «порушені, невизнані або оспорювані права, свободи чи інтереси фізичних осіб, права та інтереси юридичних осіб, інтереси держави та згідно ст. 3 ЦПК – «порушені, невизнані або оспорювані права, свободи чи інтереси».

З великою долею ймовірності можна припустити, що ці поняття й повинні складати предмет або об'єкт судового захисту.

Але щодо сутності «предмету» або «об'єкту» судового захисту у науці цивільного процесу існують спірні точки зору вчених. Так, звертають увагу на предмет науки цивільного процесуального права не визначається його об'єкт [1]. Інші вчені визначаючи об'єкт правовідносин (цивільного процесу), не визначають сутність його предмету [2], М.К. Треушніков визначає предмет цивільного процесуального права, але не об'єкт цивільних процесуальних правовідносин [3, с. 10, 26, 93] і такий перелік можна значно продовжувати. Тобто виникає дискусійне питання щодо того, а чи потрібно взагалі диференціювати інформацію про об'єкт і предмет правовідносин і що важливіше і вагоміше та коли необхідно визначати предмет, а коли об'єкт.

Так, М.Й.Штефан зазначав: «Цивільні процесуальні правовідносини виникають у процесі правоохоронної діяльності суду, в зв'язку з чим їх об'єкт тісно пов'язаний з об'єктом матеріальних правовідносин, з приводу якого виникає цивільне судочинство, і це ускладнює його визначення. В теорії цивільного процесу ним називаються: дії суб'єктів правовідносин або тільки діяльність суду; матеріально-правові відносини, які захищаються судом; спір про право між учасниками матеріально-правових відносин, переданий на розгляд суду; передбачені законом наслідки процесуальних дій, які виступають як мета цивільного судочинства (загальний об'єкт), захист матеріальних прав і законних інтересів сторін й третіх осіб (спеціальний об'єкт), конкретна справа та ін. Висловлювалися також міркування, що процесуальні правовідносини взагалі не мають об'єкта» [2].

Хоча далі М.Й.Штефан вказує на те, що об'єктом цивільних процесуальних правовідносин не виступають і матеріально-правові відносини, які захищаються судом, оскільки ними охоплюються тільки відносини позовного