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The Consumers' Rights Protection in Consultancy Services: the Problems of Theory and Judicial Practice in Russian Federation

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Abstract

The paper analyzes the existing legislative base, governing civil relations with consumers. The applied system-structural method of research helped to reveal the legal nature of the consultancy service and specifics of consumers' rights' protection on its provision and the existing problems in this sphere. The study found that by the general rule the means of civil rights and legal interest's protection are pre-trial order (claim filing) and judicial (lawsuit) procedure for settlement of disputes. It was found also that the existing legal base does not guarantee quality and effectiveness of consumers' rights protection in consultancy services. During the research, some civil legal problems in civilistic science have been revealed, along with the gaps in Act On protection of consumers' rights, which sufficiently influence the level of citizens' rights protection. The restoration of the financial situation of a customer of a consultancy service is also the way of protection and the consequence of civil liability. The performer could avoid such measures resorting to voluntary pre-trial settlement of the dispute.

Keywords: **Consumer; Consumers' Rights Protection; Consultancy Service; the ways of Consumers' Rights Protection; Pre-trial Claim Order for Settlements of Dispute; Judicial Order of Disputes' Settlement**

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INTRODUCTION

Introduction of the Problem

The socio-economic development of the Russian Federation is impossible without solving one of the urgent problems of the contemporary society – providing the population with the quality of life benefits [1,2]. Its practical solution is a strategic direction of development of our state. It determines in many ways, not only the level of real well-being of citizens, but also directly provides the necessary conditions for the existence of every person, thus, ensures social stability and national security of the state and society as a whole.

The protection of consumers' rights is the sphere of property turnover, which is of a great importance for the country, where civilized market relations are being formed [3,4]. Legal reforms in Russia, which began in the late 1980s - early 1990s, for the first time referred to one of the biggest groups of relations developing on the market of goods and services – relations with consumers. As indicated by Romanetz, the transition to a

market economy has caused an urgent need for a clear legal governance of relations arising between consumers and subjects of business [5].

After the adoption of Act “On Protection of Consumers' Rights” № 2300-1 on February 7, 1992, the citizens for the first time obtained the opportunity to use legal, civilized methods of protection of the violated rights. In the course of law enforcement the attitude of the state to ensure the rights of citizens on the market of goods and services has changed. Over the next twenty years, the development of legislation on protection of consumers’ rights was carried out by stages, giving citizens the opportunity to use its position to claim for social justice, as gross violations of the rights of consumers for a long time were virtually allowed by the state.

Securing the basic consumers’ rights on the legislative level, their execution procedure, creation a civil legal mechanism for civil protection, showed the strengthening of private law (civil law) in the governance of relations involving consumers. At the same time, as indicated by Raylan, “... the current level of protection of consumers’ rights in Russia is characterized by a large number of unsolved problems both of practical and theoretical character [6].

The existing legislative base, governing civil relations with consumers, does not guarantee the quality and the effectiveness of the consumers’ rights protection on the market of goods and services. At first, it concerns the existing civil legal problems in civilistic science and consequently the gaps in Act “On Protection of Consumers' Rights”, which seriously influence the level of citizens’ rights protection. Thus it hasn’t answered the basic questions (correctness of the legal definitions “consumer”, “fundamental defect of the good”), the main ways for protection of consumers’ rights (recovery of penalty, compensation for moral damage), certain issues did not find a legislative solution (principles of the consumers’ right protection, claim settlement of disputes, the responsibility of consumer).

Separate legal acts adopted in recent years, significantly impede consumers’ rights protection, in particular, the Regulation of Russian Government of November 10, 2011 NO 924 “On approving the list of technically sophisticated products” greatly expand the list of goods, returns and exchanges of which can only be made if there are fundamental defects.

Thus, despite more than twenty years of practical application of the legislation on consumer protection and the gained theoretical experience, the search for new scientific approaches to solving the problems of consumer rights’ protection is currently required. In particular, questions about the sphere of the application of the legislation on consumer rights’ protection, about the role of the contract in the governance of the considered relations remain debatable; the theoretical classification of the rights of consumers as an object of legal protection has not been developed.

In addition, as noted by Baranov, “...the number of civil cases to protect the rights of

consumers before the regular courts, has been steadily increasing, there is a growth of share of court decisions dismissing the substantive legal requirements of consumers as a result of the elected wrong way of protection, incorrect allocation of the burden of proof, and others" [7] Therefore, the development of scientific problems of civil-law regulation of consumer rights' protection, according to Tuzhilova-Ordanskaya, has undoubtedly been important for today [8].

Exploration of the Importance of the Problem

As indicated by Romanetz, the transition to a market economy has caused an urgent need for a clear legal regulation of relations arising between consumers and business entities [5]. In this connection, a sufficient number of works is devoted to study of the issue of consumer protection in general and in particular.

Questions of the consumers' rights protection were researched in scientific works of Baranov [7]; Vavilin [9]; Valeev and Chelishev [10], Kelebay [11]; Kornilova, and Chelishev [12], Raylan [6], Tuzilova-Ordanskaya [8]; Makeeva, Kryukova, Atamanova, Shadskaya [13], Erdelevsky [14], Kirillova, Shergunova, Ustinovich, Nadezhin, Sitdikova [19] etc., also in some dissertational theses, prepared by Kirushina [15], Romanets [5].

Hypotheses and Their Correspondence to Research Design

- In the research the nature and the content of the right for protection were distinguished. The basis for the protection of the civil rights is the violated individual right itself, according to which the measures of civil liability are implemented. The notion of "protection" absorbs the category of "responsibility". Thus, the concept of "protection" of is associated by the legislator with the violation of the right.
- It was found that the greatest problems arise when the contract terms infringing the rights of consumers are deemed invalid, due to the complexity of the evidence in the provision of consultancy services.
- It was revealed that it is appropriate to establish a mandatory pre-trial procedure for settling disputes in all cases of the interaction of such parties as a performer (consultant) and the consumer (customer) for the full protection of the rights of the consumer of consultancy services.

METHOD

During the study the authors relied upon general and private methods of cognition: historical, legal, formal-legal, comparative legal, sociological and others. The main method is system-structural which helped to reveal the legal nature of the consultancy service and specifics of consumers' rights protection on its provision and the existing problems in this sphere.

The combination of historical and comparative-legal methods allowed us to identify the specific impact of the historical conditions on the development of relations on the protection of the consumers' rights in general and consultancy services in particular in Russia.

Formal legal method made it possible to analyze the legal norms regulating the relations on protection of the of consumers' rights in sphere of consulting services and the ways of protection of contracting parties from the improper performance.

On the basis of the sociological method, the conclusions, suggestions and recommendations based on specific information obtained from official sources, materials, periodicals, Internet resources, standards, legal-reference systems, and the media were made.

RESULTS

The study found that by the general rule the means of civil rights and legal interests' protection are pre-trial order (claim filing) and judicial (lawsuit) procedure for settlement of disputes.

Pre-trial order can be used both in the mandatory and voluntary way. The downside is the fact that the mandatory pre-trial order of disputes' settlement in the field of advisory services is not stipulated. We believe that it is necessary to introduce a mandatory pre-trial procedure for settling disputes in all cases of the interaction of the parties, as a performer (Consultant) and the consumer (customer).

If the pre-trial order is not provided for in the contract for consulting services, it will be advisable to start with the pre-trial claim in the interest of the consumer of services. The mediator might encourage such actions by assisting in negotiating and reaching a consensus would and giving recommendations to the parties on the best settlement of the dispute on a voluntary basis.

Besides, the restoration of the financial situation of the customer of the consultancy service is also the way of protection and the consequence of the implication of civil liability. The performer could avoid such measures resorting to voluntary pre-trial settlement of the dispute.

DISCUSSION

In civil legislation except the recognition of the individual rights, the protection of them is also provided for. Traditionally, in the legal literature, under the concept of "protection of civil rights", the whole set of measures (political, legal, economic, and including organizational) is understood which guarantees the normal exercise of the rights and provides the conditions for the exercise of subjective rights.

The defense of the rights in the narrow sense is called protection of civil rights. Thus, the protection of rights is the most important category of civil law. Protection of the right, in fact, is an activity, aimed at the suppression of actions violating the rights and at the restoration of rights already violated. In general sense, these activities can be defined as the application of measures of law enforcement character by an authorized person aimed to restore the violated or disputed rights [9].

The multidimensional nature and complexity of such really existing phenomena as the right for protection, which gives birth to different points of view regarding the notion should be noted. Often, the presence of the ambiguous terminological approaches is due to both objectives, which were set by the researcher, and the different interpretations of the same term.

There is no consensus among scientists in the debate on the nature and content of the right to defense to date. Opinions about the fact whether this right is an independent subjective right, or a right for protection is an element of a subjective civil right, divided. Gribanov believes that the right to protection is the content of any subjective civil law (its element) [16].

There is a point of view when the author interprets the right to protection almost as a subjective civil right: “Because the right for the protection is the element of the corresponding subjective right, it (the right for protection) should possess the same characteristics as the subjective right as a whole” [17]. In the literature there is another point of view, according to which “...the protection of rights is an independent legal definition, which is not included in the notions' range of other categories. Therefore, the right to defense cannot be recognized as an element of subjective right or as the independent subjective right. The right to protection is the basis, the condition for the protection [18]. Based on this, we can say that if the basis for the protection of civil rights is the violated subjective right, the violation of law is in most cases the basis for the application of measures of civil liability. It should be noted that the measures on responsibility for violations of the rights, including online, should be provided and guaranteed by the Constitution of the Russian Federation [19].

The scientific literature has repeatedly pointed to the close relationship of “protection” and “responsibility” [20,27]. So Degtyarev calls the civil liability as one of the means of civil rights' protection. This category of “protection” and “responsibility”, as indicated by a number of authors, is different in terms of the volume of content. A broader notion of “protection” absorbs the category of “responsibility” [11,15,21].

Let us analyze the above mentioned opinions. One of the reasons for the right's protection and the basis of liability is an offense. The aim of the rights' protection is to restore former property position of the creditor in the obligation. Apart from the rehabilitation, protection should neutralize the harmful consequences of the offense. To perform the functions of recovery and neutralization, protection of rights must have the means in form of the ways of protection.

As we found above, civil liability is also a special condition, which reflects the negative consequences that arise on the side of the creditor in the obligation, and it is focused on the aim of restoring creditor's former property. Civil liability performs restoration of the former property by the means, which are the accountability measures.

Thus, the restoration of the property position is both a method of protection for the entitled person and the consequence of the application of measures of civil liability. In cases of impossibility of restoration of the former position, the compensation for the damage caused is provided.

Analysis of the current legislation also shows that the concept “protection”, as a rule, is associated by the legislator with the violation of law. In particular, consumers get the real protection of the rights and legitimate interests once they are violated.

One of the traditional means of consumer protection is the possibility to admit the agreement conditions as infringing the rights of consumers – this condition is invalid and is a basis for bringing to liability, resulting in the litigation practice – much attention is given to this issue [11]. Consulting services, being a kind of “informational services”, do not have legal fixing [22], which leads not only to the complexity of the classification of these services, but also to the contestation of the terms of contracts for consultancy services.

The means of protecting civil rights and interests protected by law, as the general rule, are:

- Pre-trial settlement of disputes, providing for independent voluntary procedure for the settlement of disputes, which allows for a short time to restore the violated right;
- Judicial procedure for the settlement of disputes connected with the plaintiff‘s appeal to court demanding justice with the demands of the material character to the defendant on the fulfillment of contractual or non-contractual obligations.

The first option of the violated rights protection is pre-trial protection, otherwise named “claim procedure”, the second - the court protection or lawsuit protection.

The current civil law does not require mandatory pre-trial claim settlement of disputes for contracts in the field of consultancy services. In Erdelevsky opinion, the legislation on consumers' rights protection begins not with the Act “On Protection of Consumers' Rights”, but with the provisions of the Civil Code which covers the whole civil turnover, including the turnover between consumers and their counterparties. It is these relationships which make up legislation on consumer protection [14]. This approach of the legislator, in opinion of Bulatetsky, is inconsistent.

Because it allocates individual relationships with the consumer, to which the rules on

the mandatory pre-trial settlement should be applied [23]. A similar point of view is expressed by Volvach [24]. We believe that it's necessary to eliminate the gaps in legislation by provision the compulsory pre-trial procedure for settling disputes in all cases of the interaction of such parties as a performer (consultant) and the consumer (customer).

In practice there is often a question about the obligatoriness for making a claim to the consultant about the improper performance of consulting services before going to court. Act “On protection of consumers' rights” provides for the possibility of such claim, and involves the application of responsibility measures to the performer for non-fulfillment with the legitimate demands of the consumer.

Thus, the obligation of the performer (consultant) is a voluntary satisfaction of the reasonable requirements of the consumer. Meantime, filing pre-trial claims on protection of violated rights to the performer (consultant) is the right of the consumer. Therefore the consumer at its discretion decides whether to use the pre-trial or court settlement method. Certainly, the submission of claims to the performer (the consultant) does not deprive the consumer of the right to file lawsuit in court, provided that the performer (consultant) has not satisfied the consumer's demand voluntarily. It is of no importance, to what extent the demands have not been fulfilled - in whole or in part.

The traditional form of protection of violated consumer rights is to appeal to the court with the appropriate lawsuit (Art. 11 of the Civil Code). However, in some cases, in the contract on consultancy services is provided for that is necessary to pass the stage of pre-trial settlement before going to court. This procedure is not applied to consumer's requirements for non-pecuniary damage under Art. 15 of the Act “On protection of consumers' rights”. Compensation is due only for harm in case of fault of the tortfeasor. But the amount of compensation for moral damage is determined by the court. Particularly the point 45 of the Resolution of the Plenum of the Supreme Court of Russia “On the practice of considering cases on the protection of consumers' rights by the courts” shows the problem of the moral damage compensation – when the demands on the compensation are satisfied by the courts quite often but in a minimum amount [25].

Let us consider in more detail the procedure for pre-trial settlement of disputes. As mentioned, this procedure has the purpose to encourage the parties to settle their own claims, and thus in a short time restore the violated right. This dispute settlement procedure can be carried out with the help of a mediator chosen by the parties, or appointed by them in a consistent manner, which assists in negotiating and reaching consensus. The mediator may operate both individually and with the involvement of other intermediaries. The Conclusion of the mediator will be advisory in nature and is executed by the parties voluntarily.

The basis of the pre-trial settlement of disputes is the “claim” method of its’ settlement. The complaint contains the essence of the demands (failure to fulfill its obligations by consultants on the date specified in the contract; the refusal to refund prepayment or

document when delaying execution of services, violation of consumers' rights to the unilateral termination of the contract, etc.), also references to regulations, contract or other legal documents are mentioned. The complaint must also include the requirement of voluntary satisfaction of consumer consultancy services. The claimant signs the surname, first name, address of the consumer, the name of the performer (the consultant), to whom the claim is submitted, the date of filing, the claim amount and the reasoned calculation, if the claim is subject to pecuniary valuation.

An analysis of the activity of the authorities on consumer protection shows that it is often enough to invite this organization to resolving the dispute between the consumer and its counterparty, and the dispute will be settled on the voluntary basis. Positive moment is that it will be unnecessary to go to court for the parties.

It should be noted that even in cases where a contract for consulting services does not provide for pre-trial claim order, the consumer is still advisable to start with the pre-trial claim. First of all, it will be necessary in the interests of the consumer of the services, if the claims to the consultant for breach of contract are of non-obvious character. Thus, sending of the pre-trial claim, in our opinion, should be mandatory for off- court settlement of the dispute in the contract with the consumer, including in the contract for consulting services.

The order of proceedings in cases of consumer protection in the Russian Federation is determined by the provisions of the Civil Procedure Code of the Russian Federation. Consumer protection, in accordance with paragraph 1, art. 17 of the Act On consumers' rights protection is provided for by the courts. The provision of Art. 46 of the Constitution is implemented in this norm - the right of everyone to judicial protection. In addition to the Act On consumer rights' protection the work of the courts on protection of consumers' rights is governed by articles 11 and 12 of the Civil Code and the Civil Procedure Code of the Russian Federation. In situations specified in the Act On consumer protection, court cases involving consumer protection, can be considered by arbitration courts.

The prerogative of the courts of arbitration includes hearing cases in administrative proceedings fixed in paragraph. 4 of Art. 29 of the Arbitration Procedure Code of the Russian Federation. Such cases include, in particular, court cases on the recovery from the said persons of penalties and fines, imposed by the federal executive bodies for the failure to perform their lawful orders to stop violations of consumers' rights.

An important role in explanation of these rules was played by above-mentioned Plenum of the Supreme Court of Russia “On the practice of considering cases on the protection of consumers' rights by the courts”. Thus in order to provide effective judicial protection of consumers' rights in the legislation of the Russian Federation the reliable legal framework has been entirely built.

The disputes on consumers' rights protection in the majority of cases are of the property

nature. The object of protection is the violated or disputed right. With the cost of the lawsuit not exceeding 50,000 rubles the disputes are considered by the magistrate courts (paragraph 5 clause 1, Art. 23, the Civil Procedure Code of Russian Federation). If the consumer with the property demands simultaneously requests the damages caused, for example, by the shortcomings of the advisory services provided, or compensation for the moral injury caused to him/her, all the demands will be in the jurisdiction of district court.

The consumer should define the particular demands out of the violated rights, which were given to him by the law and have been violated by the defendant.

Thus, the lawsuit of the consumer may contain as the demands for the recovery of sums of money (penalty, damages, including compensation of the moral injuries incurred, the amount paid, etc.), as the demands for the correction in accordance with the regulations on the violations of consumer rights, committed by the defendant.

The Act on Protection of consumers' rights, as well as procedural law does not establish special rules on the admissibility of certain evidence in cases involving the violation of the consumers' rights [11].

The contract concluded between the customer and the performer (the consultant), also cannot limit the parties in ways and means of proving the circumstances of the case. However, non-compliance with the order of fixation of the shortcomings of consultancy services, fixed in the agreement, could in future complicate evidence of the fact of improper performance of the contract.

Let's consider the example of judicial practice, when the consumer had some complaints about the quality of consulting services, i.e. there were shortcomings in their provision. In this case, by virtue of paragraph 1, art. 29 of the Act On protection of consumers' rights, the consumer has the right to reduce the price of the service rendered, and if third parties are involved in the elimination of defects, it will demand the reimbursement of costs incurred.

Certain shortcomings can be substantial, or do not comply with the terms of the contract for consultancy services. The defects of service can be understood as the incompliance with the mandatory requirements prescribed by law or the terms of the contract, as well as to the purposes for which such services are usually used and about which the executor was advised by the consumer in the contract. The significant drawback of the service is a fatal drawback or such drawback, which cannot be eliminated without disproportionate expense or time-consuming. In this case, the legislator gives the consumer the right to cancel the agreement and demand full compensation for damages [26].

Let's look at the following example of the violations of consumers' rights in the provision of consultancy services. Agency LLC “Consulting” concludes the contract with the client

on advising on the issue of buying an apartment (including follow-up of the transaction) and takes some money as an advance. Then it does not perform its obligations in connection with the registration of necessary documents. The consumer loses time and therefore incurs a loss due to the fact that real estate is increasing in value. The client asked the agency “Consulting” to terminate the contract and refund the advance. However, the latter refuses to refund the advance payment on the grounds that the agency spent money on informational and consulting services, advertising, preparation and verification of documents, etc.

In the situation described above in the case of delay in fulfillment of the obligations under Art. 28 of the Act “On protection of consumers' rights” the consumer is empowered with the right not only to demand the return of the amount paid, and the payment of a penalty, as well as full compensation for losses. In particular it can demand the payment of the difference in price of the property, which formed over the past period of time. And the contractor is not entitled to demand compensation for their costs and fees for services rendered except in cases when the consumer received the consultancy services provided.

It should be noted that in recent years there has been growing the number of court cases, which involved territorial local governments (Federal Service for Supervision of Consumer Rights Protection, or Rospotrebnadzor) by the initiative of the court. Territorial organs of Rospotrebnadzor (Resolution of the Government of the Russian Federation 2013) are often involved in cases of consumer protection for counseling, preparation of lawsuits, appeals, appeals etc. Such assistance is needed for consumers which do not have the necessary education and knowledge of the law for reasoning their claims.

Rospotrebnadzor is also involved in matters of public health protection [28], as a complex subjective right covering much wider range of public relations, because the system of guarantees for ensuring the implementation and protection of this right covers practically all branches of law, both private and public.

CONCLUSIONS

All of the above indicates the judicial protection of the rights of consumers in the provision of consultancy services. Lawsuits arising from the contract for consultancy services are quite rare, that does not allow timely to study and analyze judicial practice and identify typical violations of consumer rights in this area. However, this fact itself does not diminish the importance of information about the ways of the judicial protection of the rights of the consumer and the peculiarities of courts hearing of cases in this category.

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