DOI: https://doi.org/10.17816/RJLS64265

Protection of the Rights of Obligations

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ABSTRACT: The article is devoted to the study of protecting the rights of obligations. The study aims to resolve the question of whether the possibility of protection is provided for in Article 302 of the Civil Code of the Russian Federation to the rights of obligations. In addition, the author examines the question of whether it is advisable to introduce the protection of a bona fide acquirer of the right of obligations in the framework of an assignment similar to the protection in the form of a vindication. The analysis of judicial practice illustrates that at present the acquirer of the right of obligation under an assignment agreement does not have access to the entire scope of protection provided by law to the acquirer of the thing itself. To answer these questions, the author turns to the theory of binding rights as objects of civil rights. The author concludes that the obstacle to claiming the rights of obligations is the absence of the concepts of ownership of the right and a bona fide acquirer of the right for the turnover of the rights of obligations, both at the level of the law and in the doctrine. The author addresses whether it is possible to own the law of obligations. In connection with his consideration of this issue, the author touches upon the theory of the visibility of law. Based on the analysis of the relevant theory and practice of law enforcement, the author concludes that the category of domination is unsuitable for binding rights, as well as that possession, in its classical sense, is not applicable for binding rights. The author emphasizes that, in the absence of direct legislative regulation, it is not possible to resolve the issue of applying a vindication claim to the rights of obligations. The paper presents arguments in favor of the conclusion that it is now necessary to introduce the protection of the law of obligations (including the right of claim) in a manner similar to the protection provided for in Article 302 of the Civil Code of the Russian Federation. The author anticipates the development of an appropriate mechanism, considering the peculiarities of the rights of obligations as an object of civil rights, and the inapplicability of the theory of the appearance of law for such a mechanism, as a perspective for resolving this issue.

Keywords: law of obligations; property law; property; object of civil rights; contract of assignment of the right of claim; vindication; reclamation of property; protection of rights; possession.

To cite this article:
Zhmaeva ES. Protection of the rights of obligations. *Russian journal of legal studies*. 2021;8(4):17–22. DOI: https://doi.org/10.17816/RJLS64265

Received: 28.03.2021 **Accepted:** 18.08.2021 **Published:** 20.12.2021

УДК 347.4
DOI: https://doi.org/10.17816/RJLS64265

К вопросу о защите обязательственных прав

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Аннотация. Целью исследования является разрешение вопроса о том, возможна ли защита добросовестного приобретателя обязательственного права в порядке, предусмотренном статьей 302 Гражданского кодекса РФ, а также вопроса о том, целесообразно ли введение защиты добросовестного приобретателя обязательственного права в рамках договора уступки аналогично защите добросовестного приобретателя вещи. Приведен анализ судебной практики, который позволил прийти к выводу о том, что в настоящее время приобретателю обязательственного права по договору уступки не доступен весь объем защиты, предоставленный законом приобретателю вещи. Для ответа на поставленные вопросы автор обращается к теории обязательственных прав как объектов гражданских прав. Излагаются выводы о том, что препятствием для истребования обязательственных прав является отсутствие понятий владения правом и добросовестного приобретателя права для оборота обязательственных прав, как на уровне закона, так и в доктрине. Автор обращается к вопросу о том, можно ли владеть обязательственным правом. В связи с рассмотрением этого вопроса затрагивается теория владения и теория видимости права. На основе анализа соответствующих теорий и актуальной практики правоприменения автор приходит к выводу о непригодности категории господства к обязательственным правам, а также о том, что владение, в классическом его понимании, не применимо для обязательственных прав. Подчеркивается, что в отсутствие прямого законодательного регулирования разрешение проблемы применения виндикационного иска к обязательственным правам не представляется возможным. Приводятся аргументы в пользу вывода о том, что к настоящему времени имеется необходимость введения защиты добросовестного приобретателя обязательственного права (в частности приобретателя права требования) аналогично защите, предусмотренной статьей 302 Гражданского кодекса РФ для приобретателя вещи. Перспективной для разрешения обозначенного вопроса представляется разработка соответствующего механизма, с учетом особенностей обязательственных прав как объекта гражданских прав и неприменимости для такого механизма теории видимости права.

Ключевые слова: обязательственное право; имущественное право; вещь; объект гражданских прав; договор уступки права требования; виндикация; истребование имущества; защита прав; владение.

Как цитировать:
Жмаева Е.С. К вопросу о защите обязательственных прав // Российский журнал правовых исследований. 2021. № 4. С. 17–22. DOI: https://doi.org/10.17816/RJLS64265

Рукопись получена: 28.03.2021 **Рукопись одобрена:** 18.08.2021 **Опубликована:** 20.12.2021

Dividing property civil rights into proprietary and contractual rights is one of the fundamental issues in civil law theory. A great deal of research has been conducted to substantiate the specific distinctions between proprietary and contractual rights, thereby revealing the content of such rights and their legal regulations.

The theory of obligation rights dates back to Roman law, which is familiar with the concept of immovable things. Under this system, all things were divided into two groups: corporeal (the things that can be touched) and incorporeal (the things that cannot be touched). The corporeal things were considered to be those that were covered by the law.

Obligatory rights have taken their place in modern civil relations. The demand for the rights of obligations is explained by their economic usefulness and by the rapid development of civil relations, which subjects strive to streamline as much as possible. Furthermore, obligation rights are inextricably linked with goods that have an exchange value. These rights are called "ideal representatives of things" in the legal literature [1].

However, a developed theory of the transfer of obligation rights has not yet been developed by the science of civil law. Currently, the category of obligation rights is the subject of much debate and research. Scientific discussions concern the issues of classifying obligation rights into either objects of civil rights or objects of ownership rights, the possibility of selling such rights, and the methods of their protection. That said, it seems relevant to highlight one of the problematic issues relating to obligation rights: the issue of protecting the bona fide purchaser of obligation rights.

In practice, the abovementioned problem is manifested in the assignment contract, which contains many theoretical and practical issues that are widely debated at present. The main issue is whether the assignment has a causal or an abstract nature. At the moment, there is no unified approach as to whether the validity of the obligation right assignment depends on the validity of the agreement underlying the assignment.

In the context of problems connected with the obligation rights' protection, it is noteworthy to consider Scherbakov's statement that an assignee can never become empowered given the causality of assignment or its invalidity on different grounds. This is because it is impossible to find any outward appearance of availability of the alienator's right (claim), without which it is almost impossible to construct a figure of bona fide buyer. Furthermore, the main premise of bona fide buyer in property law — possession of a thing — is also missing.

As Baibak rightly pointed out, it is quite obvious that the existence of obligation claims as civil law objects must be protected from unlawful infringement. Both science and law practitioners consider whether it is reasonable to introduce the protection for the good faith purchaser of the obligation right in relation to the assignment, similar to the protection under Article 302 of the Civil Code of the Russian Federation (hereafter referred to as "Article 302"). Undoubtedly, this issue is of practical and theoretical interest.

An analysis of existing court practice shows that the issue of the obligation right protection under an assignment agreement via good faith acquisition is resolved in the negative, that is, courts do not recognize such a right as an object of bona fide acquisition. For example, in the assignment agreement in Case No 2-1627/2012, the Bogorodsk City Court of Nizhniy Novgorod Oblast specifically noted that the acquisition of certain properties is not protected under Article 302. The concept of property includes not only things (movable and immovable) but also property rights. Thus, strictly speaking, Article 302 is applied only to things (i.e., tangible objects, including securities in paper form) because the law is meant to protect possession by the purchaser and one can only possess a thing. Therefore, a property right, such as a claim under an obligation (an obligation right), a trademark right, a patent right, and so on, is not an object of good faith acquisition under Article 302.

In Case No. 2-290/2018 involving a dispute from an assignment agreement, the Leninsky District Court of Izhev stated that under vindication claims, the dispute subject matter is an object of civil rights that can be reclaimed (returned) to the proper person. In this case, the Court ruled that the disputed property had not fallen out of the plaintiff's possession because no right to it had arisen. Meanwhile, in Case No. A28-1140/2018, the Arbitration Court of the Kirov Region assessed the defendant's arguments that it was a bona fide purchaser of the claim and rejected them accordingly. This is because the assignee is responsible for the validity (invalidity) of the transferred right (claim) under Article 390 of the Russian Civil Code, and in the absence of an existing right (claim), the rights and lawful interests of a bona fide assignee are subject to protection under the procedure set out in Article 390. Furthermore, the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation from December 23, 2010 №. 63 "On some issues associated with the application of Chapter 3.1 of the Federal Law on Insolvency (Bankruptcy)" touches upon the issue of vindication and talks specifically about the vindication of things, not rights.

At present, the acquirer of a liability right under an assignment agreement does not have access to the full scope of protection provided by the law to the acquirer of an item. To determine whether this state of affairs is fair, one should turn to the theory of obligation rights as objects of civil rights. The literature defines obligation right as a kind of good of ideal (intangible) nature belonging to a plenipotentiary person that acts as a right of claim of

DOI: https://doi.org/10.17816/RJLS64265

a creditor against a debtor, which, in turn, can be realized by third parties [2].

Based on the fact that the civil law provides for the extension of the sale contract norms to property rights, Murzin proposed the thesis on the trend of equating rights to things [3]. As Iering previously noted, the obligation functions in the new time turnover in the same way as the thing functions in the old time turnover [4]. This corresponds to the contemporary development of market relations. Thus far, obligation rights have received increasing attention given that the law-enforcement practice, which is constantly renewed, has revealed the necessity of a special legal regime for assessing obligation rights. Moreover, Chubarov holds the opinion that the objects of ownership rights are not only things but also rights themselves [5].

At the same time, one cannot ignore that the legal regime of obligation rights is different from the legal regime of a "thing." Without entering into a discussion on the problem of the rights' recognition as objects of property rights, it should only be noted that the obligation right is regarded as an object of civil rights within the scope of this article. Thus, if one proceeds from this thesis, the absence of appropriate protection for obligation rights seems unnatural.

It follows from the content of Articles 301–303 of the Civil Code of the Russian Federation that the reclamation object is a property and that there are no exceptions to the category of property. Under Article 128 of the Russian Civil Code, property rights are included in the property category. Another noteworthy consideration is the position of the European Court of Human Rights regarding the content of the property category, as expressed in its judgment on Complaint No. 74694/01 dated 01.04.2004. In this case, the Court stated that the term "property" within the meaning of Article 1 of Protocol No. 1 in the Convention refers to either existing property or rights, including the right to claim, about which an applicant can assert that he/she has at least a legitimate expectation that these rights will be realized.

Russian civil law does not contain prohibitions on the vindication of obligation rights and specific regulations for the their vindication. Civil law theory is dominated by the position that a claim for reclamation should provide evidence that a person previously possessed the property. However, one obstacle to reclamation is the absence of the concepts of ownership and bona fide purchasers of rights for the turnover of obligation rights, both at the level of the law and in the doctrine.

Related to the above, Repin explains the sufficiency of possession proof in vindication proceedings based on the fact that it is the property possession that acts as a sign of entitlement, thus giving a semblance of ownership in the first place [6]. This statement is obviously based on the right visibility theory. Jacoby, who studied law visibility theory, derived the reliance principle on external factual composition. Cherpakhin considered the right visibility theory, according to which the right visibility gives grounds to assume the existence of all the elements of the factual right composition, and notes that such visibility generates a factual evidentiary presumption [7]. Thus, the existence of an easily recognizable right visibility source as an objective prerequisite for a bona fide purchaser's protection is considered the starting point for that purchaser's good faith. The legal visibility concept in relation to public credibility explains the acquisition of a right by a bona fide purchaser. Furthermore, as far back as the Soviet doctrine, the visibility theory had already been criticized by Agarkov, who considered it objectionable. Regarding the relations generated by facts, the author considers the visibility of law as a sign of its incompatibility with the turnover needs [8].

Current jurisprudence recognizes the right visibility theory for vindication purposes. For example, in Case No. 2-1832/20, the Zavodskoy District Court of Saratov pointed out that possession is a social visibility of the ownership right and that it is a phenomenon that can be recognized by others. Thus, only the open form of possession leads to ownership acquisition. The notion that people must be able to observe possessions leads to the legitimate question of whether it is possible to possess an obligation right. The notion of "possession" in everyday life is used to denote dominion over an object. This is evidenced by the semantics of the word "possess" in Russian. According to Ozhegov's Dictionary of the Russian Language, to "possess" means to "keep in one's power" or to "subordinate to oneself." According to Dal's Explanatory Dictionary of the Great Russian Language, to "possess" means to "rule with full authority" or to "call by right one's own." Possession theory is quite extensive and has a long history. In fact, many scholarly works on the subject have been published, and as Vaskovsky has pointed out, no issue in civil law has been investigated as often as the possession issue.

At the beginning of the 20th century, Pokrovsky, a famous Russian lawyer, considered possession one of the most difficult civil law divisions despite the habitual nature of this term in everyday life; specifically, he considered possession as one of the most disputable civil law institutes in the literature of this century [9]. In accordance with the provisions reflected in the Digesta in classical Roman law, possession is understood as a state of a person in relation to a thing. In other words, owners are usually referred to in relation to the objects they possess. Sklovsky notes that possession is always material and apparent [10].

Judicial practice also applies the category of possession exclusively to things. Thus, in Case No. 2-226/2020, the Frunzensky District Court of Ivanovo defined possession as the actual possession of a thing. In Case No. 2-968/2019, the Krasnoperekopsky District Court of Yaroslavl pointed out that the right to own refers to the owner's right to own

a land plot, i.e., to enter and stay on the plot without any hindrance and to control the land plot, including the right not to let other persons enter the plot. Thus, to "own" a thing, one must actually "possess" it.

In civil law theory, Murzin studied in detail the ownership problem of obligation rights (claims) and concluded that the possibility of right possession must be recognized [3]. Later, this position was criticized for the lack of theoretical arguments, with researchers referring to the works of German jurists to refute Murzin's conclusions. For example, Regelsberger has argued that most obligation rights are exhausted by a single exercise, which excludes the possibility of possession, as it involves the duration of the external right manifestation [11]. As for von Iering: "he becomes the owner who either gives or commands that a thing be given a position which corresponds to ownership and will thereby declare himself as the person claiming ownership" [4].

Considering the possession category in this aspect, Baybak calls possession a prerequisite of the owner's legal protection and exercise of his/her rights in relation to the thing, further arguing that nothing of the kind cannot be found in relation to the claim possession. Here, he also states that in respect of the claim, there can be no question of actual domination, because the claim is not a real object; therefore, we can only raise the legal impact question, which can be exercised via other powers and not by possession [1].

Notably, the position on the unsuitability of dominance category in relation to obligation rights is well founded. Indeed, with regard to rights in rem, dominance is manifested in the dominance of the subject's will over the material object. In the case of obligation rights, there is every reason to speak of the dominance of one subject's will over that of another subject. For Tretyakov, this domination of one will over another is a "claim" and not a manifestation of domination [12]. He further justifies his approach by the fact that, in this case, the creditor has the right to the debtor's behavior and that the implementation depends on the debtor, while the role of the creditor's activity is minimal.

It seems that if there is no reason to speak of dominion over an object, then there is no reason to speak of possession. The traditional understanding of possession presupposes that it gives rise to the appearance of the ownership right. In order to recognize, in good faith, the acquirer of a compulsory right, the right ought to be possessed by the acquirer, and there must be visible evidence of this. Therefore, possession — as it is classically understood — is not applicable to obligation rights. Given that proof of possession is a necessary condition for the vindication possibility, vindication as it currently exists in civil law is also not applicable to obligation rights. It would appear that such a provision unduly restricts the scope for the protection of obligation rights.

The stated problem is primarily revealed by practice. Law enforcement shows that in the current realities, the established approach to the legal regime of obligation rights is outdated. An increasingly complex civil turnover, in which debt claims have economic value alongside commodities and are actively traded between entities, requires updating the legal regime for debt rights and ensuring their comprehensive protection.

The urgency of the issue regarding the vindication possibility for subjective rights is based on the fact that, unlike things, subjective rights are less tangible and have no material form. Thus, it is difficult to demonstrate possession of such civil rights' objects due to their immateriality, all the more so because subjective rights — being objects of civil rights — require protection.

Based on legal visibility theory, the current vindication mechanism is not suited to the protection of property rights. In light of the foregoing, it must be concluded that in the absence of direct legislative regulation, it is not possible to resolve the problem of the vindication claim application to property rights. As to the question of whether there is a need to introduce protection of the obligation right (including the claim right) similar to the protection under Article 302, it seems that such a need has emerged. Related to this, the development of an appropriate mechanism could be a promising approach to resolving this issue, considering the peculiarities of obligation rights as an object of civil rights and law visibility theory's inapplicability to such a mechanism. The introduction of such a different protection from vindication would also strengthen

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the stability of the parties' legal position, thus facilitating more predictable judicial practice and reducing the risk of inability to protect rights.

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