

THE PARTIES OF DERIVATIVE ACTION LITIGATION

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Straipsnyje analizuojama šalies samprata Anglijos, JAV ir Rusijos teisėje. Autorius daro išvadą, kad byloje dalyvaujantį asmenį – juridinio asmens ar jo organo – procesinė padėtis bylose, kuriose pareiškiamas netiesioginis ieškiny, priklauso nuo valstybėje galiojančio šalies sąvokos.

В статье анализируется понятие «стороны» в английском, американском и российском праве. Автор приходит к выводу, что определение процессуального положения участника, юридического лица и органа в производстве по косвенному иску зависит от понятия «стороны».

Derivative action is a procedural mean that organization's member uses for the recovery of damages in organization's interest. Derivative action procedural regulation differs in continental and anglo-saxon countries. We consider that difference of derivative action's procedural regulation is determined with features of these law systems. Professor M. N. Marchenko analyzed different points of view on this question¹. In conclusion M. N. Marchenko considers that the diversity of viewpoints and approaches to this problems is useful and constructive rather than their uniformity². M. N. Marchenko focuses on unconditional importance of the two most influential legal families' allocation. R. David has a pragmatic approach: he analyzed the essential features of law families³. Scientist determined the following features: the norm is a source of law, existence of legislative and codes, civil law as law regulating relations between people is the first law appeared, historical foundation was in Roman law and its reception. Common Law marks itself by existence of precedent as a law source, judge activity in making law, the lack of abstraction in the norm, the domination procedural law over substantive law, connection of law with Royal power⁴. These are only the essential features of law families' distinction. Also there are various understanding of specific institutions of material and procedural law. For example, different definition of parties in procedure causes diverse approaches to determination of plaintiff's and defendant's procedural position. In the USA and England the plaintiff is a member of corporation and the agency of corporation and the corporation are defendants. According to Russian law the plaintiff is the corporation, the defendant is the agency of corporation.

In common law procedural law is maximally separated from substantive law. It causes definition of party as only procedural phenomenon, nominal plaintiff's and nominal defendant's existence,

¹ МАРЧЕНКО, М. Н. *Сравнительное правоведение. Общая часть*. Москва, 2001, с. 251–263.

² МАРЧЕНКО, М. Н. *Сравнительное правоведение <...>*, с. 260.

³ ДАВИД, Р. *Основные правовые системы современности*. Москва: Прогресс, 1988, с. 39–40.

⁴ ДАВИД, Р. *Основные правовые системы <...>*, с. 41–43.

inconsistency of the necessary parties rule or the proper parties rule with definition of party in procedure. English and American researchers did not explore notion of party and its characteristics in general⁵. Professor V. K. Puchinskyi indicated that in English literature there was not clear definition of party⁶. In common law term “party” is interpreted as a person that participates in procedure voluntarily or involuntarily and is connected by result. There is not homogeneity in plaintiff’s and defendant’s determination. Also O. S. Goncharova notes that in American law parties are not only the subjects of disputes; a party is every participant in civil procedure (plaintiff, defendant, third party)⁷. But there were attempts to give party’s definition through connection with substantive law. A. Martin determines parties on action ex contractu, ex delicto and real action⁸. For example, in actions of contracts the right of action is vested solely in the person, having the strict legal title or interest in the contract as disclosed by its terms, action ex delicto must be brought in the name of the person whose legal rights have been violated. William B. Odgers and Walter B. Odgers considered that “whenever the defendant has violated some right of plaintiff’s, or has neglected his duty in some way which has injured the plaintiff, or has broken his contract with the plaintiff, the plaintiff has a good prima facie right of action”⁹. Modern doctrine and legislation does not connect party’s definition only with existence of dispute. According to Rule 19.1 Civil Procedure Rules (next – CPR) any number of claimants or defendants may be joined as parties to a claim¹⁰. This provision does not show notion “party” and characteristics of this notion. N. Andrews interprets notion of “party” in the context of the Senior Courts Act’s provisions¹¹. According to Section 151(1) of the Senior Courts Act 1981 a party is any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceeding. Using provision of Section 151(1) of the Senior Courts Act 1981 N. Andrews concludes that full party is only plaintiff- representative in the litigation on the representative action¹². Also American doctrine does not connect determining of parties with dispute’s existence. Professor H. G. McMahon states under federal practice and under modern American code procedure there are some types of parties: formal (nominal), proper, necessary, indispensable¹³. Formal party is a nominal party; it means that formal (nominal) party does not have real interest in the controversy. Formal party’s examples are the next friend bringing action for infant’s interest and public official as the obligee on bond bringing action to enforce the bond for the benefit of a person in interest. B.J. Conley indicates that technical rule requires formal party’s name to present in the record¹⁴. Proper parties are parties in real interest. Category “necessary parties” is introduced to avoid multiplicity of actions and to effect a complete adjudication of the controversy. The participation of all indispensable parties is necessary for taking court decision, they have interrelated interest in the subject matter.

We suppose that there is a foundation for definition of a formal party in modern American legislation. Rule 17 Federal Rules of Civil Procedure (next- FRCP) is named as “Plaintiff and Defendant.

⁵ See, for example: ЭНДРЮС, Н. *Система гражданского процесса Англии: судебное разбирательство, медиация, арбитраж*. Москва: Интропик Медиа, 2012.

⁶ ПУЧИНСКИЙ, В. К. *Гражданский процесс зарубежных стран*. Москва: Зерцало, 2008, с. 138.

⁷ ГОНЧАРОВА, О. С. *Соучастие в гражданском процессе России и США*: дис. <...> к.ю.н. Екатеринбург, 2012, с. 134.

⁸ MARTIN, A. *Civil procedure at Common Law*. St. Paul, 1905, p. 154.

⁹ ODGERS, W. B.; ODGERS, W. B. *The common law of England*. Vol. II, London, 1920, p. 1130.

¹⁰ See: *The Civil Procedure Rules*. URL: <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>>.

¹¹ ANDREWS, N. Multi-Party Litigation in England. *Legal Studies Research*, No. 39/2013, p. 4–5.

¹² ANDREWS, N. Multi-Party Litigation <...>, p. 4–5.

¹³ MCMAHON, H. G. The Joinder of Parties in Louisiana. *Louisiana Law Review*, 1958, Vol. XIX, p. 1.

¹⁴ CONLEY, B. J. Will the Real Party in Interest Please Stand Up? *Washington and Lee Law Review*, 2008, Vol. 65, p. 689.

Capacity. Public Officers” in Title IV. “Parties”¹⁵. Rule 17 FRCP requires joining of real party in interest in civil procedure. But in some instances enumerated in R. 17 (a) (1) FRCP action may be sued in own names certain persons without joining parties in real interest. These persons are an executor, an administrator, a guardian, a bailee, a trustee of an express trust, a party with whom or in whose name a contract has been made for another’s benefit, a party authorized by statute. These individuals are formal parties in procedure, they have not substantive interest in the controversy.

Definition of parties in the litigation on the derivative action has historical foundation in the court decision *Foss v. Harbottle*. Case *Foss v. Harbottle* was interpreted by judge Jenkins JL in case *Edwards v. Halliwell*. Jenkins JL wrote: “The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio”¹⁶. Commenting court decision *Foss v. Harbottle* I. M. Ramsay and B. B. Saunders indicates that this rule contains two principles (principle of proper plaintiff, principle of internal management)¹⁷. But English court practice made some exceptions to rule *Foss v. Harbottle*, according to these exceptions member of the company has the right on action to enforce company’s right against director of the company and other agency. Of course, in this instance the member of company is not a proper plaintiff, he is nominal or formal plaintiff. Member of the company has derivative interest in subject matter. The exceptions of rule *Foss v. Harbottle* are the illegal or ultra vires act exception, the special majority exception, the personal rights exception, the fraud on the minority exception, the interests of justice exception¹⁸.

New provisions about derivative proceeding named in mentioned above doctrine as statute derivative action were adopted by English Rule of Civil Procedure 1998 with amendments and Companies Act 2006. There are different points of view about relation between The Common Law derivative action and The Statute derivative action¹⁹, but we can say that the legislative goes on tradition in determining of procedural position of member of the company, company and company’s agency. It is considered in the doctrine that the claimant in derivative proceeding is the shareholder who brings the action on the behalf of the company, the company must be defendant to the claim²⁰. This conclusion is confirmed by legislative provisions and provisions of court practice. According to Section 261(1) Companies Act 2006 a member of a company who brings a derivative claim must apply to the court for permission to continue it. The legislation does not require that the member of the company as the plaintiff in the derivative proceeding would meet certain characteristics (for example, it is not the requirement of certain number of shares’ ownership). The legislative does not give certain meaning to wrongdoing’s time for commencing derivative action; according to Section 260 (4) Companies Act

¹⁵ *Federal Rules of Civil Procedure*. Cornell University Law School, 2015, p. 134.

¹⁶ *Edwards v. Halliwell*, [1950] 2 All ER 1064.

¹⁷ RAMSAY, I. M.; SAUNDERS, B. B. *Litigation by Shareholders and directors: an empirical study of the statutory derivative action*. Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2006, p. 8.

¹⁸ RAMSAY, I. M.; SAUNDERS, B. B. *Litigation* <...>, p. 9–10.

¹⁹ See, for example: KOH, P. Derivative Actions “Once Removed”. *Journal of Business Law*, 2010; JOFFE, V. QC; DRAKE, D.; RICHARDSON, G.; LIGHTMAN, D.; COLLINGWOOD, T. *Minority Shareholders: Law, Practice and Procedure*. Oxford University Press, 2011; KERSHAW D. The Rule in *Foss v. Harbottle* is Dead. Long Live the Rule in *Foss v. Harbottle*. *LSE Law, Society and Economy Working Papers*, 2013, № 5.

²⁰ JOFFE, V. QC; DRAKE D.; RICHARDSON, G.; LIGHTMAN, D.; COLLINGWOOD, T. *Minority Shareholders* <...>, p. 42–43.

2006 it is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

In the derivative proceeding the defendant is the director or another person (or both) (Section 260 (3) Companies Act 2006). Derivative action is sued not only against the present director, but against the shadow director and the former director. Section 251 (1) Companies Act 2006 gives definitions of these directors' types (the shadow director, the former director).

Rule 19.9 (3) RCP determines procedural position the company, body corporate or trade union as defendant. English courts considers company as nominal defendants. In the case *Roberts v. Gill & Co & Anor* court indicates that the company, body corporate or trade union must have participation in the procedure, the plaintiff is driving power and for this reason the company, body corporate or trade union may have procedural position only as nominal defendant²¹. V. Joffe QC, D. Drake, G. Richardson, D. Lightman, T. Collingwood consider that the company must be party for two reasons²². First of all, the company must be bound by the court decision. Secondly, the company must obtain the benefit of any relief granted in the action.

Using terminology of Rule 17 FPCP American researchers and court practice consider the corporation as real party in interest, but the corporation's procedural position is determined as nominal defendant, the member of the corporations's procedural position is determined as nominal plaintiff²³. So, we can conclude that the existence of substantive interest in the controversy does not correlate plaintiff's and defendant's procedural position. In American doctrine and court practice party is only procedural institute; position in substantive relationship does not predetermine position in the procedure (for example, in the procedure on the derivative action).

According to provisions of FRCP shareholder, member of a corporation or an unincorporated association as plaintiff must meet certain requirements. Firstly, he must represent the interests absentee members in enforcing the right of the corporation or association fairly and adequately (R.23.1 (a) FRCP). Secondly, plaintiff must show that he was member of a corporation or an unincorporated association at the time of the transaction complained of (the contemporaneous or continuous ownership requirement) (R.23.1 (b) (1) FRCP). But several states of USA added and (or) changed requirements to plaintiff in derivative action litigation²⁴.

The different understanding of notion "party" was evolved in Russian law. The parties are the intended participants of controversial material relation. A. A. Melnikov considers that main characteristic of action litigation is existence of two parties (a plaintiff and a defendant) with contrary legal interests, they have dispute about substantive right²⁵. So, interest of plaintiff must confront interest of defendant. Characteristics of the notion "party" include supposition about connection of party with controversial substantive relation, existence of plaintiff's and defendant's interests, interest of parties have substantive and procedural character, aim of participation is to protect their rights and legal interests, the party bears the substantive and procedural consequences of court decision, the party bears court costs²⁶. T. E. Abova notes parties in civil procedure and parties of substantive relationship are

²¹ *Roberts v. Gill & Co & Anor*, [2008] EWCA Civ 803 (11 July 2008).

²² JOFFE, V. QC; DRAKE, D.; RICHARDSON, G.; LIGHTMAN, D.; COLLINGWOOD, T. *Minority Shareholders* <...>, p. 43.

²³ CONLEY, B. J. Will the Real Party <...>, p. 689; *Cohen v. Beneficial Loan Corp.*, 337 US 541 (1949).

²⁴ See, for example: MORRIS, G. G. Shareholder Derivative Suits: Louisiana Law. *Louisiana Law Review*, 1996, Vol. 56.

²⁵ МЕЛЬНИКОВ, А. А. *Правовое положение личности в советском гражданском процессе*. Москва: Наука, 1969, с. 124.

²⁶ МЕЛЬНИКОВ, А. А. *Правовое положение* <...>, с. 125–126.

independent law institutes²⁷. But according to provisions of Russian law individuals who was harmed will be never defendant in civil procedure, he is always plaintiff. Different scenario is possible in English and American law on derivative law litigation: corporation whose right is enforced in civil procedure becomes the defendant. Of course, logic of substantive relation's development can not be transferred on logic of procedural relation's development, that's why we say about the supposed connection of party with substantive relation.

There are different points of view about procedural position of member and corporate in Russian doctrine. Prof. V. V. Yarkov considers that in derivative action litigation substantive plaintiff is corporation, procedural plaintiff is member of the corporation²⁸. Prof. G. L. Osokina thinks that plaintiff is the corporation, member of the corporation is legal representative of the corporation²⁹.

Meanwhile the Supreme Court of Russian Federation (next- the SC of RF) took into account problem of member's and corporation's procedural positions. The SC of RF stated that plaintiff on action for recovery of damages from the agency is corporation; in this case defendant is individual, that according to provisions of law, other legislation may act on behalf of legal entity, members of the collegial agency, individuals that have actual ability to determine actions of a legal entity³⁰. In our opinion such determining of procedural positions on derivative action litigation correlates understanding of party in Russian doctrine. But the procedural position of the member requires further reflection and interpretation.

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²⁷ АБОВА, Т. Е. Стороны в гражданском процессе. In *Курс советского гражданского процессуального права: в 2-х т.* Т. 1. Отв. ред. А. А. Мельников. Москва: Наука, 1981, с. 244.

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²⁹ ОСОКИНА, Г. Л. *Гражданский процесс. Общая часть*. Москва: Норма, 2013, с. 296.

³⁰ *О применении судами некоторых положений раздела 1 части первой Гражданского кодекса Российской Федерации*. Постановление Пленума Верховного суда Российской Федерации от 23 июня 2015 г. № 25.

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PROCESO, KURIAME PAREIŠKIAMAS NETIESIOGINIS IEŠKINYS, ŠALYS

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S a n t r a u k a

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