

EXPRESS FORMS OF THE RIGHT TO SUE (RIGHT OF LEGAL PROTECTION) IN THE COMMON LAW SYSTEM

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ABSTRACT

After the abolition of the writ system and the fusion of common law and equity law court procedures, direct forms for initiating civil proceedings were introduced in almost all national civil procedural systems of the common law system, and with this, tacitly, for activating the right to legal protection in civil proceedings. They overcame the centuries-old case law according to which civil proceedings are initiated only upon administrative permission and enabled direct access to a common law court without accompanying formalities and with predictable court costs. These direct forms for initiating civil proceedings in England are known as single claim, and in the USA as complaint.

Key words: abolition of the writ system, single claim, complaint.

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Introduction

Direct forms for initiating civil proceedings in England and in USA are real proof that the civil procedure in the common law system is significantly approaching the civil procedure of the civil law system, although in no case should they be equated with the lawsuit or other forms of expression with the help of which the right to legal protection is activated in the civil procedure of the civil law system.

The reason for this should be sought in the formalism and schematization of the direct forms for the activation of the civil procedure of the common law system, which closely resemble the standard forms that have recently been used in the regulations of the civil procedural law of the EU due to the influence of the procedural law of the common law in the Community before Brexit.

However, despite the fact that the forms of expression of the right to sue in the common law system are alien to the procedural culture of the civil procedure of the civil law system, due to the new trend for electronic conduct of civil procedure in the civil law system, this topic is gaining popularity (English Civil Procedure Rules, 1999, practice direction 510). This is so because these forms of initiating civil proceedings are the starting point for e-litigation in national civil procedural legislations of the common law system and they can be a solid comparative procedural model. It is for this reason that the subject of this paper is determining the entity that can activate the right to sue and the expressive forms of the right to sue in civil procedure of the common law system (Maitland, 1909, 1).

1. Subject who can activate the right to sue in civil proceedings of the common law system

Given the fact that the right to legal protection in civil proceedings of the common law system is created practically (Schmitthoff, 1972, 38), and not as a scientific institute, the common law case law does not recognize the institute of "subject who can activate the right to legal protection in civil proceedings" but operates with the term "party who can initiate the litigation, the trial (lawsuit)".

The term "party who can initiate the litigation, the trial (lawsuit)" in common law is not legally defined but is built through case law in a historical dimension (Bhatia, 2010, 306). In addition, just as in the civil law system, in the common law system, the civil procedure is initiated by the plaintiff, who in the doctrine of common law is most often called the plaintiff or claimant.

A plaintiff is a party who initiates litigation, a trial before the court, or a party who seeks a remedy from the court. A plaintiff can be a living human being (natural person, person that is an individual human being) or a legal entity as a fundamental legal fiction (juridical person is a fundamental legal fiction). This fiction includes various organizations that are treated as legal entities provided that they exist.

The party against whom the claim is made is called the defendant. The defendant is a party who sues the plaintiff in connection with a civil wrong (civil wrong). A defendant can be a living human being (natural person, person that is an individual human being), an existing legal entity as a fundamental legal fiction (juridical person is a fundamental legal fiction) or an object. Especially in situations where the defendant is an object, the practical construction of the term party in civil procedure of the common law system is felt. In order for a defendant to be sued as a subject, the court must have jurisdiction over the subject in rem. A typical example of this is the case of *United States v. Forty Barrels and Twenty Kegs of Coca-Cola* from 1916, in which the defendant was not Coca-Cola directly, but Forty Barrels and Twenty Kegs.

It can be noted that the civil procedure of the common law system is basically built on an individualistic party scheme. This is largely a consequence of the "connection between writ and right" that was created in the Middle Ages and due to the historical and practical construction of civil procedure.

However, in recent times this dominance has been destroyed because in the civil procedure of the common law system the idea of protecting public rights is also being opened up. Real proof of this are the class actions and public interest actions that appeared in the USA.

The difference between class actions and public interest lawsuits basically consists in the fact that with class actions, the representative plaintiff seeks protection of both the individual right and the rights of other persons he

represents as injured parties (Article 23 of the Federal Rules of Civil Procedure of the United States), while with public interest lawsuits, protection is not sought for an individual right but for the entire community, and the plaintiff is protected by the very fact that he belongs to that community.

The idea of collective legal protection from the common law system has recently been increasingly revived in the civil law system, where collective legal protection shows its own peculiarities and has yet to be legally implemented. The real proof of this is the representative actions and model test procedures in Germany and Austria (Mulheron, 2009, 410-431).

2. Expressive form of the right to sue in England - Single claim

A direct form in which civil proceedings are initiated in England is a single claim (Quinn, 2007, 43-44). This form for initiating civil proceedings was first introduced by Part 7 of the English Civil Procedure Rules 1999.

Although a single claim shows its own characteristics in the specific types of tracks in English civil proceedings, it basically contains the following mandatory elements in both the small claims track and the fast claims track and the multi claims track: choice of competent court, data for identifying the parties, details and reasons for identifying the dispute, data on the value of the claim and other claims, legal basis for the claim and signature of the claimant.

Typically, the single claim form is completed electronically and sent by the claimant to the court in accordance with Part 3 of the English Civil Procedure Rules 1999, which relate to the filing and management of court cases.

In the first part of the single claim, data is filled in for the purpose of choosing a competent court. When choosing a competent court, the claimant must use one of the following three basic criteria: the court nearest to the place where the event occurred, the court nearest to the place of residence of the defendant or, if several persons are sued with the same single claim, *forum non conveniens* for all defendants.

In the second part of the single claim, the claimant identifies the defendant and enters personal identification data. In this part of the single claim, the following data is entered: name, surname, address, country, postcode and telephone number, as well as data about the claimant's legal representative.

In the third part of the single claim, the reasons and motives are entered for the purpose of identifying the dispute. In this part of the single claim, the plaintiff must explain what happened, when it happened and where it happened. Then, information is entered on how much money he is requesting or what goods he is requesting to be refunded. In a situation where identifying the dispute is impossible without submitting certain documents, he must attach those documents electronically to this part of the single claim, and if he cannot do so, he must state the reasons for that, that is, explain why they are not attached, and if possible, where the documents can be obtained.

In the fourth part of the single claim, the plaintiff declares how much money he is requesting, and if he is requesting other interests: interest, costs of the procedure and the value of those claims. In a situation where interest is requested, the plaintiff must specify the time period for which the interest is requested as well as the amount of the interest rate, along with information on the contract or court rules on the basis of which the interest is requested.

In the fifth part of the single claim, the legal basis of the claim is stated, after which the plaintiff signs.

After electronically submitting a single claim to the court, the court gives the plaintiff a claim number.

3. Expressive form of the right to sue in the USA - Complaint

The direct form with which civil proceedings are initiated in the USA is a complaint. This form for initiating civil proceedings was first introduced by Rule 3 of the US Federal Rules of Civil Procedure from 1938. Following the model of this federal rule, many national civil procedure systems of the US states introduce the complaint as an initiating form for civil proceedings.

In order to understand the meaning and function of the complaint, despite the variations at the national procedural level in the US states, the model for the structure of the complaint of the Californian civil procedure legislation will be shown as an example (Part 5, Title 6, Sections 425.10 – 425.18 of the California Code of Civil Procedure of 1871).

According to the California Civil Procedure Code, a complaint is used as a form for initiating civil proceedings in a situation where the plaintiff has previously sent a demand letter to the defendant in an attempt to reach a settlement before suing, and the defendant has not agreed to the demand letter (Shafir and Rosen, 2016, 1). The reason for this solution of the Californian civil procedure law should be sought in the fact that trials in the USA are the most expensive. Due to the unsuccessful attempt to reach an agreement with the defendant in such situations, the plaintiff files a complaint and initiates a lawsuit because he believes that the defendant has violated his right and caused him damage (Suzanne, 2007, 5).

Complaint as a form with which the plaintiff initiates the civil procedure contains the following elements (sectors): a brief description with an introduction to the reasons for the lawsuit (introduction), data for identifying the parties (parties), data on the jurisdiction of the court (statement of jurisdiction), general data related to the facts of the claim (general allegations), other information and beliefs (information and beliefs), precise specification of the causes of action (causes of action), prayer for relief (prayer for relief) and signature of the plaintiff (Elliott, 2011, 1-2).

In the first part of the complaint, the plaintiff provides a brief description of the causes of action, the nature of the action, and in a way briefly informs the court about what he is suing for, i.e. what the subject of the dispute is.

In the second part of the complaint, the plaintiff enters data for the identification of the defendant and personal identification: name, surname, address, country, post office box, data about the representative.

In the third part of the complaint, the plaintiff provides data regarding the jurisdiction of the court. In this part, the plaintiff states the criterion why he is suing in a specific court, whether because the defendant's residence is there, whether because the event occurred in the territory of that court,

whether because that court is the most suitable, whether the civil procedure law or the civil law authorizes it, etc.

In the fourth part of the complaint, the plaintiff provides general data about the claim. In this section, the plaintiff states the facts (statement of facts) on which the claim is based, which will be proven in discovery (e.g., the defendant owes him money), as well as the reasons for which he is suing. The facts are numbered one below the other. The purpose of this section of the complaint is for the defendant to familiarize himself with the facts in order to prepare his defense.

In the fifth part of the complaint, the plaintiff presents his information and beliefs in a situation where he is unable to present the facts in the section on general data about the claim. Here, the plaintiff summarizes the information that he believes or thinks to be correct (belief-based suspicion). He does this because he knows or believes that the facts will be revealed in discovery.

The fourth and fifth parts of the plaintiff's complaint are crucial for the so-called "Notice pleading jurisdiction" because they give the defendant the opportunity to familiarize himself with the subject of the dispute, with the facts, but also to prepare his defense. In a situation where the plaintiff does not emphasize the Notice pleading, the defendant can file a demurrer, a notice to desmis, i.e. reasons for rejecting the claim. Notice to desmis is used by the defendant in a situation where the section of the complaint in which the plaintiff presents the general data about the claim and his information and beliefs does not contain facts, only conclusions, i.e. in a situation where the facts are not sufficiently specified. The court will grant the notice to dismiss if it is tenable in order to avoid discovery that would be pointless without facts to prove it (Rule 41(b) of the Federal Rules of Civil Procedure of the United States of 1938 and Goodman, 1952, 184-191).

In the sixth part of the complaint, the plaintiff sets out the causes of action one after the other.

This part of the complaint looks something like this: on the day XX.XX.XXXX, the defendant hit me, told me he was going to break me completely, pulled my head and caused me harm in front of all my friends. Based on this event, the plaintiff states that the defendant's action was intentional (performed with the intention of hitting him), that it was

painful, that it was insulting (because he was hurt in front of his friends) and that it cost him XXXX dollars in sick leave. Then the plaintiff subsumes all of this under the law. The plaintiff does this in a way that must be careful to ensure that the facts correspond to the law in order to justify the cause of action before the court. The plaintiff must be careful that the facts correspond to the law, because otherwise he may be sued by the defendant for malicious prosecution, and the ratio for this should be sought in the common law doctrine according to which: "not everyone can be sued for everything under the sun". In the seventh part of the complaint, the plaintiff asks the court for a legal remedy (prayer for relief) in accordance with the facts and law that support the cause of action, after which he signs the entire request.

4. Central part of the direct forms for initiating civil proceedings in the common law system – causes of action

The doctrine of the common law will recognize various causes of action throughout the case law. This is so because the causes of action as the heart, the core of a single claim and complaint are the bridge that connects the civil wrong with the legal remedy that is sought and obtained from the court.

Throughout the case law of the common law, various specific causes of action for civil trials, litigations will appear. Usually they are divided into: 1) causes of action under common law and 2) causes of action under equity law. Causes of action under common law are the most commonly used causes in civil trials.

Common law causes of action are a combination of facts that are put forward by the plaintiff in the direct form to initiate civil proceedings for a civil wrong committed by the defendant.

The defendant's wrong may consist of a civil wrong committed by the defendant (tort) or a breach of contract (Schneier, 1999, 3). Hence, a distinction is usually made in common law between causes of action for a civil wrong committed and causes of action for a breach of contract.

It must be noted that in the same trial the plaintiff may raise both a cause of action based on a civil wrong and a cause of action for a breach of

contract. On the basis of the causes of action thus raised, the defendant may be convicted of both, on the basis of only one or on no grounds. Based on the presented causes of action, the plaintiff seeks and obtains a special legal remedy from the court.

4.1. Causes of action for tort (tort law)

Tort law is a branch of common law that explains civil wrongs that arise from the failure to perform or improper performance of civil obligations that are not contractual in nature. Essentially, a tort is a "private wrong" that arises from a violation of an individual's civil right, where the wrongdoer's intent is irrelevant and the wrongful act results in injury to another person, property, dignity, or reputation. Tort law varies from state to state because it is a precedent-setting, uncodified law, and therefore causes of action based on tort law at a macro level can only be explained by generalization.

Because of its precedential nature, each common law country creates its own tort law based on binding court precedents, although the common legal principles on which tort law is based are felt everywhere in the procedural ether of the common law. Unlike breach of contract, tort is not a single cause of action. Tort is divided into three different types of claims in causes of action, which differ from each other in the actions for the defendant's defense.

Depending on the actions for the defendant's defense, a distinction is made between: 1) intentional tort, negligence tort, and strict liability tort.

4.2. Causes of action for breach of contract

Breach of contract is a special legal cause of action in the common law (Housten, 2012, 1).

Unlike the types of civil tort, breach of contract is the only cause of action.

The ratio for the existence of this cause of action is the common law doctrine according to which contracts are made to be realized (realized).

Given the fact that if contracts are violated, the purpose thus set is not achieved, the party that did not fulfill the act of the contract has committed

a violation, and therefore must compensate the damaged party. Consequently, breach of contract is a special cause of action and a type of civil wrong caused by the obstruction or inaction of a contracting party to a valid contract.

The breach of contract itself occurs when a party to the contract fails to fulfill the act prescribed by the contract. A condition for using this cause of action is that the parties to the contract, when concluding the contract, promised each other a counter-performance. This counter-performance according to the common law doctrine is a condition for the creation and validity of the contract. This is because a contract is not a contract if it does not cause acts, and therefore, according to the doctrine of common law, the breach of unilateral contracts is not a cause of action because they do not enjoy legal protection before the courts of common law. The real background for this narrower understanding of the concept of contract in the common law system (vis-à-vis the civil law system) is the doctrine of consideration, on the basis of which the common law contract law will be built, the beginnings of which should be sought in the medieval writ *assumpsit*, which protected certain segments of a given obligation.

Common law contract law is a law that concerns the management of the creation and execution of contracts. This law offers the possibility for the parties to the contract to regulate certain issues differently, which is unknown to civil tort law. Common law contract law applies to liquid contracts, and not to illiquid contracts understood as contracts concluded by the parties before or during court proceedings. Hence, only liquid contracts that have been breached can be a cause of action in civil proceedings.

A breach of contract occurs when a party to the contract, without legal justification, fails to perform or refuses to perform the act specified in the contract, or when it performs it incorrectly or is unable to perform it. A party to the contract breaches the contract when it violates an essential contractual act by failing to perform it without legal grounds. In this context, if the act is not essential and useful, there will be no basis for a cause of action for breach of contract due to non-performance. The party refuses to perform the contractual act intentionally. Usually, it does this in a way that clearly and absolutely manifests by its behavior that it does not intend to perform the act or when it tacitly does so by its actions or

inactions. A party to the contract incorrectly performs the act when it promises to perform a specific act in the contract, but in reality does something completely different. A party to a contract renders itself incapable of performing the agreed act when it performs an action that will make it unable to perform the agreed act in the future for the benefit of the other party to the contract.

Conclusion

Direct forms for initiating civil proceedings in England and the USA are single claim and complaint. These forms are inherent to electronic conduct of civil proceedings and have precise content.

The direct form in which civil proceedings are initiated in England is single claim. This form for initiating civil proceedings was first introduced by Part 7 of the Rules of Civil Procedure of England from 1999.

The direct form in which civil proceedings are initiated in the USA is complaint. This form for initiating civil proceedings was first introduced by Rule 3 of the Federal Rules of Civil Procedure of the USA from 1938.

A central part that direct forms for initiating civil proceedings must contain are the causes of action. Causes of action in the common law system are a combination of facts that are presented by the plaintiff in the direct form to initiate civil proceedings due to a civil wrong committed by the defendant. The defendant's wrong may consist of a civil offense committed (tort) or a breach of contract (breach of contract).

The subject that activates the right of action in civil proceedings in the common law system may be a living human being (natural person, person that is an individual human being) or a legal person as a fundamental legal fiction (juridical person is a fundamental legal fiction).

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