

Challenging the decision of the financial commissioner in court: distribution of the burden of proof

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Abstract. This article discusses evidentiary activities with an insurance (financial) company contesting the decision of the financial commissioner, adopted by him at the request of a consumer of financial services at the pre-trial stage of resolving an auto insurance conflict. Comparative legal analysis, system-structural analysis, and synthesis make up the methodological basis of the study. The relevance of the study, because of the legal nature of cases challenging the decision of the financial commissioner, reflecting a qualitatively “new” format of the mechanism for protecting the rights of this participant in auto insurance legal relations in the Russian Federation, is because proving in any civil case makes up the “core” of all judicial activities to resolve civil law conflict. The author evaluates implementing the legally established paradigm of adversarial litigation in the consideration and resolution of this category of cases, because the subject of judicial review is the decision of a public competent person, who, as a general rule, is charged with proving the legality and validity of his decision. The article explores the feasibility of implementing an “active” role of the court in implementing this mechanism for protecting the rights of insurance companies.

1 Introduction

Actualization of out-of-court settlement of auto insurance disputes (often not resolved out of court) in the Russian Federation has become more common in recent years. The increased interest in the domestic legal regulation of the out-of-court mandatory procedure for resolving motor insurance conflicts, because of the vector of implementation of foreign experience and the reduction in the burden on the judicial system, shows the importance of providing state mechanisms for protecting civil rights in this area of life. The Russian doctrine notes the importance of protecting the rights of consumers of financial services in insurance legal relations [1]. Shows the priority of protecting the rights of the individual in the ideology's formation of the state [2], and the concretization of the rights of the individual is assessed as the duty of the state [3].

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2 Methodology

Comparative legal analysis, system-structural analysis, and synthesis make up the methodological basis of the study. Using these research methods allowed the author to determine the relevance of the problem, assess the current state, and plan conclusions about the future development prospects.

The sphere of auto insurance occupies a significant place in connection with the popularization of the sphere of road traffic, the increase in vehicles that are assessed as sources of increased danger, and because of its legal nature, has a savings function. Insurance legal relations in the Russian Federation have long been a classic model of interaction: an insurance (financial) company and a consumer of financial services. The state vector of protecting civil rights insurance legal relations was previously more focused on the consumer of financial services, as the weakest party in the insurance legal relationship. And this seems to be objectively justified, including in the judicial resolution of the auto insurance dispute that has arisen. Procedural instructions on the “active” role of the court in the consideration and resolution of civil cases of this category, expressed in the duties of the court, have been legally established and developed in Russian law enforcement and judicial practice:

- involve the proper defendant in the case,
- put for resolution in case of absence collecting a fine from the insurance (financial) organization for non-fulfillment of requirements voluntarily, collecting a fine for refusing to satisfy the consumer voluntarily under the legislation on consumer protection.

These powers of the court find their form of expression precisely through duties. The consumer of financial services, because of the legal position in the insurance legal relationship, because of contractual imbalance, in the procedural form of dispute resolution, formally being an independent party to the litigation remains the most vulnerable, weak side in comparison with another subject - a professional participant in the insurance services market.

The effectiveness of the state vector of development of national legislation in auto insurance legal relations from the standpoint of providing the consumer of financial services with the opportunity to implement the most “effective” mechanisms for protecting civil rights is not in doubt.

The adoption of the Federal Law of June 4, 2018 No. 123-FZ “On the Commissioner for the Rights of Consumers of Financial Services” (the Law on the Financial Commissioner) [4] introduced the position of a financial commissioner competent for mandatory pre-trial settlement of a motor insurance dispute, and the specifics of the settlement of motor insurance conflicts were transformed. The question of the advisability of introducing the position of financial commissioner into Russian reality and the effectiveness of his activities, which he has been carrying out in the categories of cases under study since June 1, 2019, was studied in [5, 6, 7, 8], where both positive and negative reviews.

The purpose of the regulatory introduction of the position of financial commissioner in the Russian Federation was to reduce the judicial burden for the consideration and resolution of cases of this category. From the report on the activities of the courts of general jurisdiction for 2018, before introducing legal norms on the financial commissioner, the courts of general jurisdiction of the Russian Federation received 282,125 cases on claims from the compulsory motor third party liability insurance agreement of vehicle owners (the «OSAGO» agreement), and 11,632 cases - on cases from a voluntary property insurance contract (the «Casco» contract) [9].

After the entry into force of the provisions on the financial ombudsman (2019), the courts of general jurisdiction of the Russian Federation received 167,043 cases on claims from obligations under an OSAGO agreement and 7,140 cases on claims from a hull insurance agreement. During this period, the courts considered the satisfaction of the stated

requirements in full 139,065 cases under OSAGO agreements and 5,167 cases under a hull agreement [10].

In 2020, 100,829 cases of claims from the OSAGO agreement and 5,328 cases of claims from the Casco agreement were received. 63,441 cases were considered the satisfaction of the stated requirements in full - on claims under an OSAGO agreement, and 3,393 cases on claims under a hull agreement [11].

In the first half of 2021, the courts of general jurisdiction of the Russian Federation received 40,367 cases of claims under an OSAGO agreement and 2,737 cases of claims under a hull insurance agreement [12].

The legislative transformation of the procedure for resolving a motor insurance dispute was expressed in introducing a mandatory pre-trial procedure for resolving a motor insurance dispute by contacting the consumer with a financial commissioner because the mechanism for protecting the rights of participants in insurance legal relations is also extended to an insurance (financial) organization, which is granted the right to challenge the decision in court financial commissioner, accepted at the pre-trial stage of dispute resolution. Here, we are talking about a qualitatively new format for protecting the rights of insurance (financial) organizations in case of disagreement with the decision made by the Financial Commissioner: a judicial review of the legality and validity of the disputed decision of the Financial Commissioner.

Regulatory provision of the insurance (financial) organization with the right to apply to the court with claims to challenge the decision of the financial commissioner, made by him at the pre-trial stage of resolving a motor insurance dispute, seems to be a positive trend in maintaining a "balance" in providing all participants in an insurance conflict with various ways to restore violated civil rights. Because of the absence in the Law on the Financial Ombudsman of a legal provision on the right of a consumer of financial services to challenge the decision of the Financial Ombudsman, it is assumed that such a right is not granted to them, however, this does not exclude the possibility of a statement (statement in the statement's text of claim) by the consumer of his arguments about disagreement with him. The compensation mechanism in protecting the right of a consumer of financial services in case of disagreement with the results of the pre-trial settlement of a motor insurance dispute is legally provided for the right to go to court with requirements to the insurance company to resolve the dispute on the merits.

In connection with the adoption of the Law on the Financial Ombudsman, auto insurance disputes are subject to consideration and resolution in court:

- according to the consumer of financial services addressed directly to the insurance (financial) organization to recover insurance compensation,
- according to the insurance (financial) organization to challenge the decision of the financial commissioner, which he made at the mandatory pre-trial stage of conflict resolution.

Since litigation about challenging the decision of the financial commissioner by an insurance (financial) organization represents a "new" category of civil law disputes, the author considers the theoretical and practical aspects of their study to be very relevant. When studying this procedural form of resolving litigation, questions arise about implementing the principle of competitiveness of the parties in a trial, about the procedural interaction of participants, because of a single goal: the establishment of legally significant circumstances, about procedural "fairness" in the obligation's distribution to prove the legality and validity of the disputed decision of the financial commissioner.

3 Research results

Judicial disputes on contestation by the insurance (financial) organization of the decision of the Financial Ombudsman are subject to consideration under the rules of civil procedural

legislation, which is provided for in the Law on the Financial Ombudsman. The subject of the judicial review is the decision of the financial commissioner, adopted by him at the request of the consumer of financial services at the mandatory pre-trial stage of settling a motor insurance dispute. The decision of the Financial Ombudsman (a public, competent, autonomous, and independent person) is an act issued because of a quasi-judicial proceeding. The dispute between the insurance (financial) company and the consumer of financial services is resolved after the entry into force of the act, and an appropriate executive document of enforcement is issued.

The subject of judicial review, in this case, will be the decision of a public official competent for the pre-trial resolution of a motor insurance dispute. The analogy in the procedural features of resolving this kind of litigation can be traced to the existing administrative cases in the Russian Federation on challenging decisions of state authorities, subjects of the federation, local self-government, and officials, which are resolved in the manner prescribed by Chapter 22 of the Code of Administrative Procedure of the Russian Federation. The identity of these categories of cases is seen in the subject of judicial review - verification of the legality and validity of the exercise of public authority by a competent public person (financial commissioner) for the execution and application of regulatory legal acts. The federal legislator directly determines the type of legal proceedings on claims to challenge the decision of the financial commissioner, which does not fall under administrative legal proceedings.

The normative definition of the competence of courts of general jurisdiction to resolve the categories of cases under study according to the rules of civil proceedings is because when considering and resolving the claims of an insurance (financial) organization to challenge the decision of the financial commissioner, an auto insurance dispute between a consumer of financial services and an insurance (financial) organization is subject to resolution, which is because of the legal characteristics of the consumer of financial services in the material insurance relationship as a weak side. The above aspects make it possible to distinguish between the legal nature of administrative cases challenging the decisions of competent public officials, where it is not typical for the court to resolve an existing civil law conflict on the merits, and the legal nature of cases on challenging the decision of the financial commissioner, in judicial review and resolution of which there is a need to resolve the corresponding civil conflict.

The question of the distribution of responsibilities for proof in cases of challenging the decision of the financial commissioner rightly arises, given that his activity is autonomous, and independent, and he is not involved in the court case. A situation arises in which the decision of the financial commissioner is challenged in court, but the obligation to prove the legality and validity of the decision taken by him is not assigned to him. We face the question of how the distribution of the burden of proof is supposed in this case, since the public person whose decision is being challenged is exempted from bearing the corresponding procedural obligation.

4 The discussion of the results

Doctrinal and legislatively fixed is the vector of adversarial litigation to resolve civil disputes in the Russian Federation. Each side must prove the validity of its legal position, and provide counter-evidence of the inconsistency of the opponent's position. The identity revealed earlier in the legal characterization of cases contesting the decision of the financial commissioner and administrative cases on invalidating the decision of an official allows us to draw an analogy, the use of which is not prohibited by directly applicable domestic law. The obligation to prove the legality of the disputed decision in a judicial proceeding rest with the person who made such a decision.

The Financial Ombudsman, when considering and resolving claims to contest a decision, may provide explanations on the merits of the declared claims, in which he can specify the grounds and motives for the decision. The Financial Ombudsman submits these documents, as part of the execution of the relevant court request to recover evidence (documents that are the basis for the contested decision), and not as part of the obligation to prove the legality of the contested decision.

The current situation appears to be "unique". For example, administrative proceedings on judicial control over the legality of the decisions made by public officials, some of the "aspects" of which are implemented in the civil procedure for resolving the categories understudy, do not imply any procedural exceptions aimed at exempting from the obligation to prove the legality of the contested decision, imposed to the person whose decision is subject to judicial review. A public person, the legality of whose decision is verified in court, is released from the obligation to prove the validity of such a decision, which causes implementing the "active" role of the court in considering and resolving such a case.

There are no grounds to argue about the violation of the principle of competition of the parties in the trial because of the specifics of the legal nature of the court case itself to challenge the decision of the financial commissioner, who is not involved in the case because of autonomy and independence.

Essential in this case is implementing the "active" role of the court in sending a judicial request for the recovery from the financial commissioner of the documents that served as the basis for the adoption of the disputed decision, help in the recovery of other evidence, which, in the opinion of the parties to the dispute, can refute the legality of the contested decision, and in ensuring during the trial the possibility of exercising all the procedural rights and obligations of the participants. The "active" role of the court is subject to implementation in the case's preparation for trial during the trial. The doctrine contains the idea that the main stage in implementing the "active" role of the court is the stage of preparing the case for trial [13]. Implementing the "active" role of the court in the adversarial process does not cancel, replace or diminish the content of the competition in resolving the conflict. The active role of the court is aimed at assisting the litigants in collecting, demanding, and presenting evidence in support or refutation of the contested decision of the Financial Ombudsman. The help from the court does not imply a change in the procedural interaction of all participants in the trial. The active role of the court directs and complements the evidentiary activities of the parties to the dispute [14].

The creation of an effective mechanism for protecting civil rights, based on the procedural "balance" of the participants in the auto insurance dispute, represents a positive trend in the development of statehood from the standpoint of ensuring human rights as the highest value. Achieving optimal legal proceedings, as correctly noted in the doctrine, is possible through the prism of adapting a specific judicial mechanism to the needs of persons applying for judicial protection of civil law [15].

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