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Bonum requirements of the beneficiary in the corporate rights protection system in Ukraine: Implementing best practices

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In the process of interaction of corporate governing bodies with other entities of corporate legal relations to ensure its organizational and economic activity, situations are possible when the parties to such interaction pursue multi-vector or mutually exclusive goals, which is caused by the polar pursuit of corporate interests. The purpose of the paper is to identify the peculiarities of bonum requirements of the beneficiary in the system of corporate rights protection in Ukraine and to study foreign experience in this aspect. The concept of bonus requirements of the beneficiary was considered as a means of protecting corporate rights and a way of resolving a corporate conflict; derivative (indirect) action was investigated as a way of resolving corporate conflict in other countries; the theoretical and statutory consolidation of the basis of civil liability of the corporation governing body is determined; the responsibility of the governing body of the corporation for the damage caused and the principle of protection of the weaker party are outlined; the concept and legal nature of the derivative action as a way of protecting the rights for damages caused by the governing body of the corporation on the basis of the dictionary definitions of the term are provided. It was concluded that the principle of protection of a weaker party in the corporate law of Ukraine is a general idea of providing legal protection of a party of legal relations, which is limited by the appropriate possibility due to self-regulated and purposeful legal actions (creation of a legal subject – legal entity) as a form of compensation of identical level of legal possibilities of participants of civil law relations.

Keywords: civil legislation, business activity, conflict, bonum requirement, beneficiary, derivative action.

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INTRODUCTION

The corporate identity of a corporation is embodied in the activities of its governing bodies, the purpose of which is to strive for the acquisition of business results and to satisfy the other interests of the legal entity, its members (founders). However, in the course of the interaction of corporate governance bodies with other entities of corporate relations regarding the provision of its organizational and economic activity, situations are possible when the parties to such interaction pursue multifaceted or mutually exclusive goals, which is caused by the polar pursuit of corporate interests (Kostruba 2019).

Such an idea, according to Professor Yu.M. Zhornokuy (2015), is the basis for the emergence of corporate conflict . The scientist notes that in the conditions of opacity of the majority of domestic joint-stock companies, their main advantages are realized through current management and decision-making largely due to the shadow schemes. In such circumstances, it is easy to lower profits and not pay dividends or perform other obligations. Therefore, for a shareholder who has acquired the relevant corporate rights but does not have a real opportunity to influence management decisions, investing is a risky business (Zhornokuy 2015).

An indication of the civil law liability of a legal entity, the insulation of its property from its participants (founders), as well as participation in civil circulation on its own behalf and interests excludes the possibility of external influence on the adoption of corporate governance acts by a legal entity. This, in fact, creates the conditions for possible abuse of rights by the governing bodies of a legal entity and, as a consequence, violation of its interests, which ultimately affects the realization of subjective civil rights of affiliates to it. One of the effective ways of resolving these corporate conflicts is to appeal to a beneficiary who has a legitimate interest in the proper exercise of corporate rights, demanding protection of the infringed rights of the company.

A way of resolving [such] corporate conflict is to file a claim to protect the subjective civil rights of the corporation, thereby protecting the interests of the corporation's member (founder). Under the procedural doctrine of the Anglo-American legal system, such a procedural form of corporate legal protection has been embodied in the presentation of a "derivative" or "indirect" claim. Its emergence is an achievement of US case law and a distinctive feature of the common law legal system. At the same time, the legal geography of the distribution of this construction in the legal system of many countries of the world is quite large and, as of today, is not an absolute monopoly of the Anglo-Saxon system of law (China, Hong Kong, Singapore, Chile, USA, Italy, Germany, Australia, New Zealand).

The emergence of a derivative (indirect) action is inextricably linked to the activities of companies and, above all, to the joint-stock form of business organization, when abuse on behal of company management leads

to the need for comprehensive settlement of liability issues in a joint-stock company. The concept of a derivative (indirect) action came from the English practice of a trust, that is, the trust management of another's property, in turn, the duties of the directors of the corporation come from the principle of its activity – management of another's property, the funds of its owners – participants (founders) of the corporation. As a trust manager manages someone else's property, they have a responsibility – they must act most effectively in the best interests of the corporation and take its responsibilities seriously (Burtseva 2011).

The presence of conflicting or contradictory interests of participants in corporate relations and corporate dispute causes the existence of rights related to the subjective rights of the corporation protected by the law interests of other members of corporate relations, which are not recognized as subjective civil rights. By their legal nature, corporate interest protection is a bonum means of protecting the beneficiary's legitimate interest (*bonum* – Lat. good, benefit). In this regard, Professor A.V. Kostruba rightly points out that the main purpose of the bonum requirements is to ensure the rights of the company so as to prevent possible losses from the activities of unrelated persons associated with it.

The subjects of bonum (beneficial) remedies for corporate rights are participants in corporate relations who, albeit have no civil rights (corporate, etc.), are carriers of the interests protected by law, which seek to facilitate the proper exercise of the right of another person (corporation) and are recognized as independent object of protection, along with the protection of subjective civil law (corporate, etc.), in accordance with the provisions of part 2 of Article 16 and Article 16 of the Civil Code of Ukraine. Bonum claims of the beneficiary constitute corporate rights remedies designed to resolve a corporate conflict in situations where the entity (corporation, etc.) is deprived of the ability to properly protect its rights (due to the dishonesty of the company manager, the inability to make a shareholder decision to approve (grant permission) the company's actions necessary to protect its rights, etc.).

DERIVATIVE (INDIRECT) ACTION AS A WAY OF RESOLVING CORPORATE CONFLICT

The most common bonum means to protect a beneficiary's corporate claims is a derivative (indirect) action. Considering the American model of the original claim in historical retrospect, it should be noted that by the beginning of the XIX century the shareholders had no right to file a claim for damages caused by the corporation. This circumstance is conditioned by the existence of the principle of separation of the rights of the corporation from the rights of shareholders in the US corporate law, which is fully consistent with the legal nature of the legal entity. Subsequently, the lack of a proper mechanism for controlling the adoption and enforcement of corporate

governance decisions led to an increase in the number of abuses on their part. To prevent corporate and shareholder violations, the court gives shareholders, as equity owners, the opportunity to file claims against directors in a class action lawsuit, which later became an achievement of case law and a distinguishing feature of US law.

One of the first court decisions made by US courts in a derivative action dates from the first half of the 19th century. In case of Robinson vs. Smith, the New York Chancellor's Court upheld the right of shareholders to sue the corporation, arguing that the offense against the corporation must be eliminated, the offense against the corporation constitutes a derivative offense against the shareholder, which allowed the derivative action to gain popularity at the beginning of the 20th century. In 1855, a derivative action again became the subject of consideration in the case of Dodge vs. Woolsly. In a decision in this case, the US Supreme Court noted the dual nature of a derivative action that combines two claims. The first is a claim against the corporation so as to induce it to perform its own fiduciary obligations to protect the rights of the shareholder. The second claim is a claim to protect the rights of a corporation against those who harm the corporation itself (Puchniak et al. 2012, Dent 1981).

In each of the above cases, claims are presented in the interests of the corporation, as well as by persons whose rights are not directly violated. The procedural motivation of the plaintiff in the given legal tactics is consolidated in the formula: protection of rights through protection of interests lies precisely in ensuring their own interests through protection of the rights of the corporation, since the rights of the corporation, through a derivative method, affect the rights of its participant (founder), which, at a certain level of procedural activity, manifest only legal interest.

While in the United States, the formation of a derivative action was conditioned upon a practical need and constitutes the result of ongoing law-making as a response to controversial corporate law issues, in Ukraine, this institution is undergoing a different path of development – from the coverage of the problem of the derivative action in scientific papers to discussion in the legal environment to legislative consolidation in the national legal system of alternative rules of such claim, formation of the basis for the formation of an institution of derivative action. However, despite the massive legal "artillery training" at hand, historical and theoretical prerequisites, this legal instrument for resolving corporate conflicts has not been given due weight in the field of applied jurisprudence. In this context it is reasonable to cite the opinion of the prominent civilist of pre-revolutionary Russia, I.T., Tarasov who stated, "… that only a properly formed system of liability of the joint-stock company and its bodies can prevent shareholders and third parties from those violations that are inevitable not only as the result of overt abuse, but also due to the

impossibility to define the limits of competence of each body by law, statute and instructions…" (Tarasov 2000).

At the present stage, the introduction of such a tool for resolving the corporate conflict in the national legal system of Ukraine as a derivative action is connected with the adoption of the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on the Protection of Investor Rights" (2015). The aforementioned regulation amended the Article 89 of the Commercial Code of Ukraine, which is set out in the new wording. The provisions of paragraph 2 of Article 89 of the Civil Code of Ukraine determines that officials are liable for losses incurred by them to a business company. Thus, in the opinion of R.A. Maydanyk (2016), due to an imperfect theoretical justification of the model of a derivative action in the procedural law of Ukraine, a doubt is formed in the scientific community about the adequacy of the protection of a minority of shareholders, in particular conditioned upon the lack of standards for proving unlawful or dishonest behaviour of officials.

Given the dynamism, the evaluative nature and the open list of duties of an official managing the company, the legal principle underlying the statutory definition of fiduciary, by their nature, responsibilities of the corporate governance body, in our opinion, should be the principle of reasonableness, fairness and good faith in the civil law of Ukraine, and not an exhaustive legislative definition of the list of responsibilities for managing the company, thereby providing an opportunity for truly existing relations to adequately determine and interpret the responsibilities of corporate governance officers.

According to the established principle, justice should be understood as a form of reflecting the content of substantive means, the procedural form and practice of their application to the objective laws of building such a system of legal regulation of public relations, the purpose of which is to maintain an optimal balance of rights and interests of participants in civil relations, public and private interests, determined with consideration of the purpose of approval of the indisputable primacy of human dignity, foundations of reasonableness and good faith in legal relations of any kind.

Reasonableness, in turn, is a manifestation of the underlying nature of the disrupted regulatory and/or emerging security relationship, the extent of the assessment of the circumstances of the case, the capabilities available, and the actual conduct of the parties, which allows to determine the appropriate, objectively and subjectively feasible set of measures, aimed at preventing the offense, occurrence or increase of the damage caused by it, as well as for compensation of pecuniary and non-pecuniary losses inflicted on the creditor.

Good faith as a principle of civil law can be defined by an abstract legal duty to act in the exercise of subjective civil rights and obligations, with due care in the circumstances of others' rights and interests and due diligence (also

in the conduct of their own affairs), not abusing their rights or causing damage in the course of their exercise, apparently disproportionate to their purpose (Primak 2014).

THE BASIS OF CIVIL LIABILITY OF THE CORPORATION GOVERNING BODY

On the other hand, the effectiveness of the mechanism of protection of rights of participants of corporate legal relations is achieved by theoretical definition and statutory consolidation of the basis of civil law liability of the body of corporate governance. The basis of civil liability is the totality of its mandatory elements (signs). Today it is doctrinally determined that such a set of elements forms the composition of a civil offense. At the same time, in our opinion, G.K. Matveev's (1955) conclusion that the common ground of civil liability is the unity of subjective and objective elements of a civil offense is questionable. For the most part, it is expedient to speak of the primacy of the objective elements of the set of the offense, to which the accessory value is subjective. In doing so, it is advisable to pay attention to their dialectical relationship.

Thus, if the elements of the composition of the civil offense are objective, which include: unlawful behaviour, the presence of damage and the causal relationship between the unlawful action and the result of the damage are static, their presence is an unchanged and non-alternative condition for civil liability, then the subjective elements of the set of the civil offense are variable with respect to the objective ones. For example, the fault of a person, which may be absent but does not exclude the possibility of bringing a person to civil liability. The above should be fully attributed not only to the grounds for the occurrence of tort liability, but also the contractual one (by legal nature, the relations that are established between a participant (founder) of a corporation and its governing body are contractual).

Thus, supporters of the theory of causation, recognize the fact of causing damage as the basis of civil liability. With that, the subjective grounds for such damage do not matter for the legal qualification of the responsible person's actions. The main thing is that there is a causal link between the person's behaviour and the fact of the damage. If available, further investigation into the grounds that caused the damage is unnecessary (Article 612 § 2, Article 614, § 618 of the Air Code of Ukraine, Articles 91-92 of the Civil Code of Ukraine) (Air Code of Ukraine 2011, The Civil Code of Ukraine 2003). Therefore, the risk of non-performance of the terms and conditions of the contract shall be borne by the party irrespective of the objective or subjective grounds, the presence of which influences or may influence the improper performance of the obligations under the contract. In accordance with the above formula, the construction of grounds for the occurrence of tort liability in civil law of Ukraine (Article 1170, 1173-1177,

1187 of the Civil Code of Ukraine) was also constructed. The above exceptions to the principle of the presumption of guilt in the civil law of Ukraine have socio-economic conditions. Each of them, as noted by G.K. Matveev (1955), should be considered as a sanction against the debtor, which establishes an increased amount of liability for breach of obligations. In his view, which should be upheld: "… such increased liability of the debtor who defaulted is rather consistent with the task of strengthening contractual discipline: attributing the "accidental" risk that arises after the delay would be a complete surprise to them and would be unfair…".

It should be noted that in the theory of civil law the issue of substantiation of "innocent liability" is regulated in detail in the field of tort relations, in particular, the obligation to compensate for the damages caused by the source of increased danger. Thus, in 1938, the idea of risk as a subjective basis for "innocent responsibility" was initiated in the writings of Kh.I. Schwartz. This scientist saw the subjective basis of responsibility of the owner of the source of increased danger, not only in intent or negligence, but also in anticipation of a probable possibility of causing damage. The application of the theoretical developments of civilists during the USSR to the current problematic of corporate law gives certain grounds for concluding that it is advisable to presume the guilt of the corporation governing body for causing harm to them.

The above approach does not fully comply with the civil law nature of the liability of the head of the corporation for the damage caused to it, which should be based on the objective nature of the fault of the inflictor of damage and the resulting general presumption of no fault of the head of the corporation, if the latter is not rejected by the plaintiff by proving such fault. In this context, the formation in the modern domestic doctrine of a two-level concept of the grounds for the responsibility of the head of a corporation for damage caused to it, which is based on the idea of a general presumption of the director's lack of guilt and the burden of denying its absence on the plaintiff, and a number of counter-presumptions that transfer the burden of proving innocence to the head of the corporation, deserves attention.

Thus, in the opinion of R.A. Maidanyk, the director's guilt, as the basis of their responsibility to society, should not be presumed, and the plaintiff should bear the burden of proving the guilty nature of the director's behaviour (or members of collegial management bodies). The specified author believes that this is a general rule, which should be challenged by a number of counter-presumptions, which also transfer the burden of proving innocence to directors, such as, for example, concluding a transaction in a conflict of interest, invariable knowledge that the transaction is unprofitable for society, etc.

With that, the content of the concept of guilt regarding the responsibility of directors should be established through the concept of

reasonable and conscientious behaviour. In this case, the director's responsibility for those miscalculations that fall within the scope of ordinary business risk should be excluded. And guilt should be determined through objective compliance of decisions of the governing body with established customs with the standards of business practice (the "good leader" standard) (Maydanyk 2016).

At the same time, it is expedient to mention the opinion of O.S. Ioffe, according to which, the obligation to compensate for the damage caused in the absence of guilt (including in the case of force majeure circumstances), has a stimulating effect on such a person – mobilizes them to seek out and introduce into the field of their activity of new means that contribute, if not to elimination, then to mitigation or reduction of the manifestation of such force majeure. In other words, such a duty has to do with influencing the consciousness and will of the person causing the damage and is therefore a liability (Bratus 1976).

Thus, the fiduciary nature of the legal relations that form between the body of the corporation and its shareholder, the meaning of which is to transfer the powers of the latter to the management of the legal entity, its property, trust between members of society is one of the main factors of interaction between members of society. Social trust lies not only in the field of cultural development of society, but also dialectically transitions into the economic field. Its presence in the field of corporate legal relations presupposes commission of legally significant actions by corporation officials in the interests of a legal entity, which is connected with the use of certain levers of management, financial and other material resources.

In other words, fiduciary relationships are those in which the trust of one party to the other, or the mutual trust of both, is the basis for the emergence, change or termination of the relationship. The motive of trust in such relationships becomes their accessory element, which emphasizes its essence in them. Such an element underlies certain rules for the legal regulation of fiduciary relationships, first and foremost, regarding the terms of liability of the parties.

Thus, the fiduciary nature of the relationship between the corporation's participant (founder) and the body of the legal entity, despite the mutual respect of these persons, at the same time puts the shareholder in a difficult position, creating an objective possibility of abuse of such fiduciary trust. Ukraine's judicial practice demonstrates the validity of such a conclusion. The stated business standard is based on the idea of recognition of reasonable decisions of the governing body of the corporation that objectively meet the business standard (doctrinal and statutory criteria which are not defined), as emphasized by R.A. Maydanyk (2016)), and such conformity is connected with the level of professional competence of the official legal entity. The level of such competence should enable the governing body of the corporation to

anticipate the possible adverse effects of its activities. In this case, exemption from liability is possible only if the corporative damage is brought in the procedural form as the result of economically unforeseen risks of entrepreneurial activity (force majeure circumstances, compliance with the limits of normal economic risk).

RESPONSIBILITY OF THE CORPORATE GOVERNING BODY FOR THE DAMAGE CAUSED AND THE PRINCIPLE OF THE WEAKER PARTY PROTECTION

Historically, the principle of innocent responsibility preceded the principle of guilty. It is known that English law in the regulation of property turnover for a long time operated only in the category of innocent liability, considering the debtor's assumption of duty as a guarantee that provides the creditor with unconditional satisfaction of its claims. In essence, this responsibility was based on risk acceptance. As already noted, in today's context of complication of economic turnover, it is increasingly necessary to consider the principle of risk, which is gradually replacing the principle of responsibility for guilt (Sadikov 1974).

In other words, there is a need to strengthen the protection of relevant individuals who have independently deprived themselves of such an opportunity by transferring the corresponding fiduciary rights of the corporation governing body. Such an action (transfer of the rights of a corporation’s governing body), although it corresponds to the legal nature of the corporation (theory of interest), but significantly weakens the legal status of a person who gives part of their legal personality (legal status and capacity) to an artificially created subject of civil law (legal entity).

It should be noted that such ideas for the protection of the rights of the weaker party are formed in the doctrine of law in the early 20th century in the works of Yu.S. Gambarov (1911). Therefore, the attempt to justify the existence of "innocent liability" and extend its boundaries to corporate relationships is meaningless and has a clear legal tradition. Its application in the field of legal regulation of corporate relations, as well as in the civil law of Ukraine in general, as mentioned at the time by S.M. Bratus (1976), only increases the demands of caring and attention to the mandatory side of corporate legal relations. These requirements are also related to the weakness of the shareholder (participant) against the corporate governance body as a result of a fiduciary trust in its activities. These requirements include: the ability to conceal information about the subject matter of the governing body of a corporation; limitation of the range of remedies of the shareholder's interests, which makes the corresponding mechanism of its implementation imperfect, the availability of less status opportunity against the counterparty.

In support of its own legal position in the context of establishing the presumption of guilt of the corporation’s governing body in the event of

negative consequences of the adoption and implementation of appropriate management decisions, it is advisable to determine the criteria of the “weaker party” in corporate legal relations. Thus, the essence of the weakness in corporate relations is determined by establishing the signs of the latter. The corresponding classification is provided by O.O. Volos in the dissertation research "Principles of law of obligations" (Volos 2015). Agreeing with E.V. Vavilin, the author notes that the weaker party is the participant with a smaller economic base, status opportunities in comparison with the counterparty. In addition, the obliged weaker party is a person who has a subjective civil right, but the forms and methods of its implementation are imperfect, and a mechanism has been established by regulations for the implementation of such a right in specific legal relations.

In our opinion, the general idea proposed by scholars should also be extended to the structure of the implementation of corporate legal relations. First, the latter include elements of obligatory legal relations, and secondly, the transformation of a part of personal subjective civil rights in favour of another participant in the legal relations corresponds to the nature of corporate relations. The above requires reasonable compensation for the existing imbalance in the structure of such relations. In addition, it is reasonable that a weaker party in corporate legal relations is a shareholder who has a smaller set of legal tools for realizing the goal of their right – to make a profit and participate in the management of the corporation thanks to the fiduciary trust of their own confidence in the exercise of such a right by the governing body of a legal entity. Therefore, it is the shareholder who needs to provide great legal opportunities to protect their rights and interests by, inter alia, strengthening the responsibility of their counterparty.

In support of the above, the opinion of other civilian scholars on this issue should be emphasized. Thus, from the standpoint of O.O. Volos “… In science, in civil law relations, the position of the principle of the protection of the weaker party is upheld. At the same time, its place has not been sufficiently resolved in the system of law...”. D.V. Slavetsky considers the idea of protecting the weakness of the contract as an unnamed institutional principle of contract law. Meanwhile, considering the legal rules that reflect this principle, it is noted that the provisions on the protection of the weaknesses also apply in relations with unilateral actions (organization of games, betting, etc.). These rules do not relate to contract law, therefore, in the author's opinion, the scope of the principle of the protection of the weaker party is extended to all institutions of the law of obligations (Volos 2015). M.I. Braginsky's view is that the main task of civil law is to equalize the rights of participants in a legal relationship by establishing special rights for one of them. The above is achieved either by recognizing additional rights for the weaker person, or by establishing additional obligations for the stronger party (Braginsky & Vitryansky 2000).

Apart from the form of doctrinal proof of the validity of extending the limits of liability of the governing body of the corporation for causing damage to the latter, the principle of protection of a weak party in corporate relations determines the possibility of ensuring not only the subjective civil rights of the shareholder, but also their legal interest. The foregoing provides for the expansion of the range of jurisdictional methods of protecting subjective civil rights and interests of the participant (founder) of the corporation, other persons also through the procedural form of a derivative action.

That is, a derivative action is not solely a form of protecting the rights and interests of participants in corporate legal relations, with the help of which representation and satisfaction of a shareholder’s claims on the corporation’s governing body for compensation for damages resulting from its management decisions are ensured. Through this procedural model, the rights and interests of any person are protected in another way, which guarantees their restoration as a participant in corporate legal relations.

THE CONCEPT AND LEGAL NATURE OF A DERIVATIVE ACTION AS A WAY OF PROTECTING THE RIGHTS FOR DAMAGES CAUSED BY THE GOVERNING BODY OF A CORPORATION

The elaboration of the given argument requires a theoretical definition of the term "derivative action". It is generally accepted for such claims to have so-called "indirect" protection. Yu.M. Zhornokuy indicates that the derivative nature of the present suit involves the awarding of such a claim in favour of a joint stock company and not a shareholder, that is, the company acts as a direct beneficiary. Respecting the interests of the company also means ensuring the interests of its members (Zhornokuy 2015).

In describing the institute of indirect actions in US case law, P. Malyshev noted that indirect actions were introduced into US case law to resolve conflicts arising from conflicts of interest between corporation owners and its executives. They are filed by shareholders on behalf of the corporation for the protection of interests, which the corporation itself refused to protect for whatever reason, in other words, where the interests of the shareholders were damaged not directly, but indirectly, that is, usually due to a decrease in the value of the shares; hence the name of the claims – "derivatives" (Malyshev 1996). O.S. Listarova (2010) sees an indirect action as "a claim of a corporation participant to protect the interests of other corporation members and the corporation at large, proposed to compensate for the damage caused to the legal entity in the event of illegal actions of its managers, officials and bodies".

The construction of a derivative action is subjected to critical reflection by G.L. Osokina (1999). In her opinion, “... an indirect (derivative) action is an abstract, purely speculative construction that does not have a solid

theoretical foundation and does not enter the field of practical law enforcement. In this regard, it represents a dead-end way in the development of the theory of the claim form of protection of rights and legitimate interests...”. While criticizing the existence of this form of claim, the author at the same time classifies derivative actions as a form of corporate claims. V.V. Yarkov (2000) does not agree with this position, believing that corporate claims stand out upon classifying claims on substantive grounds. At the same time, derivative actions are determined within a fundamentally different classification – depending on the nature of the protected interest, as well as the identity of the beneficiary. Thus, according to the scientist, in an indirect action, the beneficiary is society itself, in favour of which the award is charged. The benefit of the shareholders themselves is indirect, since they personally do not receive anything.

We shall note that the theory of civil procedure uses numerical criteria for classifying claims. Each of them has a specific purposeful orientation and plays its own part in ensuring effective legal protection of the rights and interests of participants in legal proceedings. In particular, classification according to the subjective criterion of a derivative action, along with a direct one, provides an opportunity to determine the subject composition of the dispute, its jurisdiction, the issue of the subject of proof, affiliation and admissibility of evidence, the amount of court fees, form procedural remedies, etc. That is, not only theoretical but also practical importance. Therefore, even ungrounded criticism must have a reasonable degree of sufficiency. In the absence of such, the author does not share the opinion of Professor G.L. Osokina. The Ukrainian legal thought emphasizes that the filing of such claims requires the obligatory appeal of the shareholder to the executive body with a description of the claims and requirements for such a claim by the joint-stock company (Zhornokuy 2015, Spasibo-Fateeva 2007). According to the logic of the scientist, filing a claim by the governing body deprives the shareholder (participant) of the corporation of the right to appeal with the corresponding claim.

Thus, N.V. Semenenko notes that "the development of a market economy has led to the consolidation and emergence of a number of new concepts, such as "corporate law", "corporate disputes" and, accordingly, a mechanism for protecting the rights of participants of various associations, including indirect actions” (Semenenko 2007). As noted by L.M. Rakitina (2009), “… in the process of improving the civil legislation on business companies, attempts are made in the science of civil procedural law to distinguish claims related to the activities of such organizations from the general mass. Such claims are proposed to be called indirect, derivative or corporate…”. M.N. Ilyushin (2009) sees the derivative action as "a new form of representation" and also as a "way of protecting the rights... whose purpose is exhausted by corporate legal relationships". M.A. Rozhkova (2007) also

emphasizes that "indirect action is a way of protecting rights, the purpose of which is exhausted by corporate relationships".

In our view, in order to determine the legal nature of the derivative action, the understanding of these claims must be refined. First, we believe that the protection of the subjective civil rights and interests of the participants (founders) of the corporation through a derivative action must be considered in the context of not only corporate but also other substantive relations. And this approach is not new to the civil law of Ukraine. Thus, in accordance with Article 47 of the Law of Ukraine "On Copyright and Related Rights" (1993) the protection of copyright and related rights of their subjects is exercised by collective management organizations, which also grant non-exclusive rights to use copyright objects to any persons by means of concluding agreements with them on the use of copyright objects and/or related rights.

US legal traditions also make it possible to use such claims not only in corporate law. Thus, according to the information contained in the Black's Law Dictionary of legal terms, there are several definitions of the concept of "derivative action". With that, a derivative action is not always regarded as a type of corporate action. In particular, the nature of the claim in the derivative action suggests that it is:

– an action of the beneficiary of the trustee aimed at compulsory observance of the right belonging to the trustee (fiduciary);

– an action filed by a corporation's shareholder to protect the rights of the corporation against third parties (usually employees of the corporation) insofar as the corporation did not independently file such an action against third parties;

– an action arising out of claims for damages caused to another person. Such an action is, for example, an action by a husband on the loss of consortium. In other words, it is an action by one spouse against a third party about the loss of the benefits that the spouse received from the marriage union and which were lost as a result of causing damage to the other (Black 1968).

In other words, the subject matter of the derivative action is the secondary claim of a person who has an indirect interest in it. This provides for the choice of ways of protecting the legal interest that are identical to the ways of protecting the rights of the individual. Secondly, such a legal construction as a derivative action is not limited to the area of tort of the governing body of the corporation. This is a procedural form of protection of real and obligatory rights in the structure of corporate legal relations (compensation of damage caused by the act, beyond legal capacity (ultra vires act), compensation of damage to the corporation property to third parties, recognition of the transaction as null and void, negatory and vindication requirements of the shareholder towards third parties for the benefit of the

corporation and others) through which the legal interest of the shareholder is achieved.

The purpose of filing a derivative action constitutes not only the protection of rights and interests of the corporation, but also the protection of rights of the shareholders themselves. Thus, the subject matter of the action is the rights and interests of both the corporation and the shareholders whose rights are violated indirectly as a result of the violation of the corporation's rights. Obviously, the main function of a derivative action must be consistent with the nature of the action in general, be an essential characteristic of the claim, "determine the legal significance of the legal structure of the claim and its role in the mechanism of protection of subjective rights (Zaitsev 1996), which provides for establishing the function of a derivative action as such – procedural – protection of subjective right or interest.

Therefore, a violation of the subjective right of a legal entity leads to a violation of the subjective right of the participant (founder) of the legal entity due to the close property and other relations between them. In case the legal entity does not exercise its right to judicial protection, the participant acquires the right to claim compensation for damages and makes a substantive legal claim to the court for the protection of the subjective right of the legal entity, since only in such order the protection of its subjective right is possible. Thus, a derivative action is applied when there is interconnection and interdependence of one material legal relationship with other material legal relations, when the rights and interests of one person cannot be protected without protection of the rights of another person. Upon filing a derivative action to protect the rights of another person, the goal of filing a derivative action is achieved – to protect the rights and interests of a member (founder) of an enterprise. The above gives grounds to reach a third conclusion: on the streamlining of legal procedural terminology. Thus, the above considerations testify to the use of the terms "derivative" and "indirect" action in the scientific environment as a procedural form of jurisdictional remedy for participants in corporate relationships. With that, in the vast majority of cases, these terms are identical.

In the Russian procedural doctrine, the problem of defining the concept of a “derivative action” and the choice of the terms “derivative” or “indirect” are disclosed through three positions. Some scientists prove the action through the attribute of “indirect” (V.V. Yarkov, L.N. Rakitina, M.A. Rozhkov, Y.T. Fathullin, M.N. Ilyushina, A.V. Khlebnikov, O.M. Rodnov, E.I. Pimenova), others – through the criterion of “productivity” (E. Chugunova, B.A. Zhurbin). Still others — use both “derivative” and “indirect” terms when determining the nature of a derivative action (I. Oskina, A. Lupu).

In some cases, researchers consider the action "indirect", call it "derivative" or vice versa (V.V. Lemeshov). Thus, D.A. Nagoyeva, upon

investigating the problematics of derivative actions in the procedural law concludes that scientists, speaking of "indirect" considered actions, refer to indirect protection of interests of participants of legal entities, or indirectness of the beneficiary in the action. Analysing the reasoning of V.V. Yarkov, who first proposed to allocate indirect claims within the scope of the classification of actions "by nature of interest protection and the beneficiary of the action", we shall emphasize that the name "indirect or derivative action" reflects the nature of the protected interests. In the case of an indirect action, provided its satisfaction, the direct beneficiary is the company in favour of which the award is made. The benefit of the shareholders themselves is indirect, since they do not personally receive anything in their favor, except for the compensation of the costs incurred by the defendant in the event of winning the case (Nagoyeva 2015).

At the same time, if we refer to the Dictionary of the Ukrainian language, the term “DERIVATIVE” means “formed, inferred, etc. from something similar (about size, shape, category, etc.). Derived exclamations include those formed from other parts of the language…” (Bilodid 1976). The following interpretation of the word "derivative" is given in S.I. Ozhegov's Dictionary: "Outlined from another, derived from something else" (Ozhegov 2007). A similar definition is provided in the Great Russian Dictionary of the Russian language by S.A. Kuznetsov (1998). D.M. Ushakov's Interpretive Dictionary (1996) and A.P. Evgeneva's Interpretive Dictionary (1981) extend the lexical meaning of this word: "produced, formed from another simple or basic quantity, form, category". The Oxford Dictionary considers the term "derivative" as created from, converted from, purchased from, adapted from, and so on. This term has a number of compound forms (Oxford English Dictionary 2019).

The term INDIRECT, is understood as such that is not directly related to something, not connected to the essential; not immediate. Something which is done not directly, but with intermediate periods, stages (Bilodid 1976). The word "indirect" in the dictionaries is defined almost equally: "Not immediate, incidental, with intermediate degrees" (S.I. Ozhegov), "1. implied; 2. Something performed evasively, not immediately" (D. Ushakov), "carried out, manifested not immediately, or not directly" (T.F. Efremov), "Not immediate, not direct; incidental” (Kuznetsov 1998). It becomes obvious that by these two terms in the investigated dictionaries we do not imply the same meaning. The derivative is not such that it is carried out by indirect, roundabout ways, and the indirect is not such that it is formed, arises from something else. We believe that "derivative" as an attribute implies the presence of something basic, something primary, from which a secondary (derivative) is formed. The relationship between the principal and the derivative is direct. Indirect means multidimensionality, that is, the presence

of an intermediate link that mediates the link between the first and subsequent links or the ambiguity between the first and the other links.

The difference in interpretation of the term explains the difference in the nature of the protection of the subjective civil rights and the legal interest of the individual. Thus, the purpose of filing a derivative action is to protect the right that is derivative from another, principal right related to it. That is, the protection of the corporation's rights is ensured through the protection of the rights of its shareholder because it is directly conditioned by the effective protection of the corporation's rights. The interest of the shareholder is derived from the interest of the corporation, which must receive its protection.

B.A. Zhurbin (2012) also believes that the right to file a derivative action derives from owning shares. "The interests of society are considered to be derived from the interests of its participants," points out V.V. Lemeshov (2005). Derivative action applies because a party to a corporate relationship is entitled to a share in the corporation's property. Therefore, their right to file an action is derived from the person's right to defend their interests and the associated right to share. In turn, the specificity of an indirect action is to protect the subjective civil law and legal interest of the corporation, and not directly the rights of its shareholder in whose profitability it is interested. However, as correctly stated by O.I. Chugunova (2003) "... a derivative action is a claim filed on behalf of a legal entity by a person who has a legal interest in it but is not a body that is entitled to make decisions on behalf of the corporation".

This functional division of claims into two types is as follows: the derivative action and the indirect action involve determining the subject of the claims of each of them. In the first case, these are the requirements with which a shareholder justifies a possible decrease in the capitalization of their assets. Their satisfaction is ensured by such methods of protection of rights and interests as invalidation of the transaction, termination of the right-infringing action, compulsory performance of obligations in kind, termination of legal relationship, etc., and the defendant is a third person whose actions affect the property status of the corporation and the corporation itself as a party to disputed relations. Otherwise, protection of the rights and interests of the corporation is provided in the absence of the occurrence of property damage directly to the shareholder (declaring the decision on creation of a branch of the corporation as invalid etc.) by means of restoration of the situation that existed prior to the violation, termination of the right-infringing action and others.

CONCLUSIONS

Thus, today there are not only doctrinal prerequisites for changing the amount of liability of the governing body of the corporation, but also clear rules regarding the legal grounds and the procedure for applying the

derivative action. At the same time, it is necessary to agree with the opinion of Professor R.A. Maidanyk, that in to overcome such, it is imperative to consolidate the list of duties and provisions – principles regarding the behaviour of officials of the governing bodies of a company by analogy with the corporate law of Germany and the countries of Anglo-American law (The United States, Canada, Australia, and the United Kingdom), the rights of companies which provide for the division of responsibilities into a group of "due diligence" and a group of "loyalty" responsibilities. An alternative to a reasonable balance in securing the interests of the corporation's shareholders and exercising the professional competence of the entity's management body may be the principle of presumption that the management body is responsible for causing damage to the corporation, which may be denied by the head of the management body by proving that its decisions are consistent with the business standard of "reasonable" manager.

It should also be concluded that, through the principle of "innocent (objective) responsibility" of the governing body of a corporation for the damage caused in making and implementing management decisions, the corporate rights of the shareholder (participant) are filled with real content. The principle of protection of the weaker party in the corporate law of Ukraine is the general idea of providing legal protection to the party of legal relations, that is limited by the corresponding possibility due to self-regulated and purposeful legal actions (creation of the legal subject – legal entity) as a form of compensation of the identical level of legal capabilities of participants of civil law relations. As is evident, the doctrine of civil law is dominated by the understanding of derivative actions solely as a procedural means of protecting participants in corporate relationships. The application of this method of protection is limited by the scope of corporate law. Derivative actions are referred to solely as a request by a shareholder in the interests of the corporation. Thus, the derivative action is an effective means of protecting the interests of minority shareholders against abuse by the governing body. The conventional notion of a derivative action as a mechanism of corporate governance or as a means of judicial protection of the rights and interests of subjects of exclusively corporate relations, which was established in the world practice, is also supported in the Russian scientific environment.

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