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CIVIL LIABILITY FOR VIOLATION OF CONSUMER RIGHTS IN BANKING RELATIONS

Annotation

This article is devoted to the study of civil liability of subjects of consumer legal relations in the banking sector. The concept of "responsibility" is one of the cornerstones of civil science. The purpose of this article is to address liability for example of consumer protection in banking legal relations, and also its features and species. For this responsibility will be considered as a whole responsibility of various data participants' legal relations, and its individual types of this responsibility through the prism of legislation, judicial practice, as well as scientific works.

Keywords: civil legislation, civil liability, consumer rights, consumer protection, no-fault liability.

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ТҰТЫНУШЫЛАРДЫҢ БАНК ҚҰҚЫҚТЫҚ ҚАТЫНАСТАРЫНДАҒЫ ҚҰҚЫҚ БҰЗУШЫЛЫҚТАР ҮШІН АЗАМАТТЫҚ-ҚҰҚЫҚТЫҚ ЖАУАПКЕРШІЛІК

Аңдатпа

Бұл мақала банк секторындағы тұтынушылық құқықтық қатынастар субъектілерінің азаматтық-құқықтық жауапкершілігін зерттеуге арналған. «Жауапкершілік» ұғымы азаматтық ғылымның іргетастарының бірі болып табылады. Осы мақаланың мақсаты банктік құқықтық қатынастарда тұтынушылардың құқықтарын қорғау мысалында жауапкершілікті, сондай-ақ оның ерекшеліктері мен түрлерін қарастыру болып табылады. Ол үшін жауапкершілік жалпы, осы құқықтық қатынастардың әртүрлі қатысушыларының жауапкершілігі, сондай-ақ оның жекелеген түрлері де заңнама, сот тәжірибесі, сондай-ақ ғылыми еңбектер призмасы арқылы қарастырылатын болады.

Түйінді сөздер: азаматтық заңнама, азаматтық-құқықтық жауапкершілік, тұтынушылардың құқықтары, тұтынушылардың құқықтарын қорғау, кінәсіз жауапкершілік.

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ГРАЖДАНСКО-ПРАВОВАЯ ОТВЕТСТВЕННОСТЬ ЗА НАРУШЕНИЕ ПРАВ ПОТРЕБИТЕЛЕЙ В БАНКОВСКИХ ПРАВООТНОШЕНИЯХ

Аннотация

Данная статья посвящена вопросам исследования гражданско-правовой ответственности субъектов потребительских правоотношений в банковской сфере. Понятие «ответственность» является одним из краеугольных камней цивилистической науки. Целью данной статьи является рассмотрение ответственности на примере защиты прав потребителей в банковских правоотношениях, а также её особенностей и видов. Для этого ответственность будет рассмотрена как в целом ответственность различных участников данных правоотношений, так и как отдельные её виды сквозь призму законодательства, судебной практики, а также научных трудов.

Ключевые слова: гражданское законодательство, гражданско-правовая ответственность, права потребителей, защита прав потребителей, ответственность без вины.

Despite the increased role of banks in the life of each person due to the increase in the number of non-cash payments, today the level of awareness and competence of the consumer about his rights in the field of banking services remains low. This situation is actively trying to correct the National Bank of the Republic of Kazakhstan Committee for the Protection of Consumer Rights, the Agency for the Protection and Development of Competition of the Republic of Kazakhstan, other bodies and organizations, as well as courts.

Traditionally, the following types of liability for violation of consumer rights are distinguished: civil law; administrative; criminal.

According to civilists, "civil liability is one of the forms of state coercion, consisting in the recovery by the court from the offender in favor of the victim of property sanctions that transfer the unfavorable property consequences of his behavior to the offender and are aimed at restoring the violated property sphere of the victim" [1, p.445]. Civil liability, as opposed to criminal or administrative, can be compensatory in nature and therefore is the most effective for the consumer.

The Civil Code of the Republic of Kazakhstan provides for measures of civil liability in many articles, but we need to remember the following.

Analysis of the provisions of the Civil Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan "On Protection of Consumer Rights" [2] made it possible to identify the following forms of civil liability for violation of consumer rights: compensation for losses; payment of penalty; compensation for moral damage; collecting a double deposit amount from the consumer's counterparty; liability for non-performance of a monetary obligation. It seems appropriate to consider how effectively the above means are used. The limits of civil liability for violation of consumer rights are not limited to the Civil Code of the Republic of Kazakhstan, they are also determined by the Law of the Republic of Kazakhstan "On Protection of Consumer Rights".

Losses. Compensation for losses under Art. 9 of the Civil Code of the Republic of Kazakhstan is one of the ways to protect civil rights.

Losses caused to the consumer are subject to compensation in full in excess of the penalty, in accordance with paragraph 2 of Art. 13 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights". In addition, compensation for losses is provided for by Art. 9 of the Civil Code of the Republic of Kazakhstan. So, in accordance with paragraph 3 of Art. 9 of the Civil Code of the Republic of Kazakhstan, losses are understood as expenses that a person whose right has been violated has made or will have to make to restore the violated right, loss or damage to his property (real damage), as well as the unearned income that this person would have received under normal conditions of civil turnover, if his right had not been violated (lost profits).

If the person who violated the right received income as a result of this, the person whose right was violated has the right to demand compensation, along with other losses, for lost profits in the amount not less than such income.

As can be seen from Article 9 of the Civil Code of the Republic of Kazakhstan, the legislator divides losses into real damage and lost profits. Recovery of real damage in favor of consumers of banking services in violation of their rights, as a rule, does not raise questions in judicial practice.

These rules should be interpreted as the obligation of the money transfer operator to return to the consumer the amount of the banking transaction that was carried out without the consent of the consumer or in violation of the provisions of the law on proper notification of the consumer about the relevant. A similar approach is in judicial practice, but with the proviso that the consumer must properly use the means of electronic payment. In turn, the procedure for notifying the client of a credit institution must be detailed in the agreement concluded with the consumer, taking into account the specifics of the electronic means of payment and the timing of notification by the

credit institution of the client about the transactions performed.

At the same time, the established maximum period for notification by the consumer of a bank or credit institution (within 24 hours) increases the consumer's desire to keep the electronic means of payment and exclude violations of the rules for its proper use.

With proper and timely information about the transaction and its disagreement by the client, the money transfer operator is obliged to reimburse the consumer (client) the amount of the corresponding transaction, if he does not prove a violation on the part of the client himself. This provision corresponds to the existing world standards for regulating the payment services market and is aimed at protecting the rights of consumers when they use electronic means of payment.

Among the circumstances testifying to the violation by the client of the procedure for using the electronic means of payment, the courts include, for example, negligent storage, use of a card, including reporting card data to third parties. In the absence of such violations on the part of the client and subject to the deadline for notification, the courts satisfy the requirements of consumers to recover losses from unauthorized debiting of funds. At the same time, the courts, in addition to the mentioned norms, are also guided by Art. 29 of the Law of the Republic of Kazakhstan "On the Protection of Consumer Rights".

An agreement with the participation of a consumer on the provision of banking services may itself contain a condition on the liability of the parties to the agreement. Such conditions must comply with the imperative norms of the current legislation.

Forfeit. As already clear from Art. 293 of the Civil Code of the Republic of Kazakhstan, a legal penalty is established by law, and a contractual penalty is a contract.

According to paragraph 5 of Art. 28 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights", a contract on the performance of work (provision of services) between the consumer and the contractor may establish a higher penalty (penalty).

Speaking about the contractual penalty, one should also take into account the provisions of Article 358 of the Civil Code of the Republic of Kazakhstan, which provides that an agreement to limit the liability of the debtor under an accession agreement or other agreement, in which the creditor is a citizen acting as a consumer is null

and void, if the amount of liability for this type of obligation or for this violation is determined by law and if the agreement was concluded before the occurrence of circumstances entailing liability for non-fulfillment or improper fulfillment of the obligation. Thus, according to the courts, by virtue of the requirements of paragraph 2 of Article 358 of the Civil Code of the Republic of Kazakhstan, part 1 of Article 16 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights", the terms of the contract that infringe on the rights of the consumer in comparison with the rules established by laws or other legal acts of the Republic of Kazakhstan in the field of consumer protection are invalidated.

For violation of the established deadlines for the performance of work (provision of services) or the new deadlines set by the consumer, the deadlines for eliminating the shortcomings of the work performed (provided service), terms of satisfaction of individual consumer requirements, a penalty is provided for each day (hour, if the period is defined in hours) of delay in the amount of three percent of the price of work performance (provision of services), and if the price of performance of work (provision of services) is not determined by the contract on performance of work (provision of services) - the total order price.

In turn, the recovery of a penalty for violation by banks and other credit organizations of the terms for returning a deposit or providing other services to the consumer is an ambiguous issue in law enforcement practice. One can find conflicting judicial practice on the application of forfeit in such cases in accordance with paragraph 5 of Article 28 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights" or interest accrual under Article 353 of the Civil Code of the Republic of Kazakhstan.

Also, in cases where credit organizations denied consumers their demands to reimburse the amount of payments or illegally withheld commissions, the courts were guided by consumer protection legislation when determining the amount of the penalty.

However, the application to the relations of the parties of the provisions of the articles of the Law on the Protection of Consumer Rights regulating the consequences of violation by the contractor of the deadlines for the performance of work (provision of services) and the timing of the elimination of deficiencies in the work performed (service rendered) is erroneous, since the actions

of the credit institution to charge an account service commission are not the drawback of the work (services), for violation of the deadlines for which a penalty may be charged on the basis of the Consumer Protection Act.

A penalty for the same breach of a monetary obligation can be collected simultaneously with the interest established by this norm only if the penalty is of a punitive nature and is subject to recovery in addition to losses incurred in case of non-fulfillment of the monetary obligation. With regard to the possibility of simultaneous collection of forfeit under the norms of the Law "On Protection of Consumer Rights" and interest for the use of other people's money under paragraph 1 of Article 353 of the Civil Code of the Republic of Kazakhstan, the following can be noted: in monetary obligations arising from civil contracts providing for the obligation of the debtor to pay for goods (works, services) or pay the funds received on a return basis, interest may be charged on the overdue amount on the basis of Article 353 of the Civil Code of the Republic of Kazakhstan.

With regard to reducing the penalty by courts in cases of protecting the rights of consumers of banking services on the basis of Art. 297 of the Civil Code of the Republic of Kazakhstan, the situation is far from in favor of consumers.

This problem should be looked at a little more broadly and raise a fundamental question - how appropriate is the use of special legal means of protecting consumer rights in the form of a high penalty, as well as a fine, in relation to violations by the bank when providing consumer services related to the return/disposal of funds. It should also be noted that monetary relations, including with the participation of the consumer, require special regulation due to the special social significance, danger and other non-civil factors. On the other hand, as already noted in this work, from the point of view of the consumer, the untimely return of funds by the bank to the consumer is, as a rule, an extremely unpleasant fact for him, causing much more damage than, for example, untimely transferred goods. If only because a person may be left without a livelihood, which in turn is also a significant social factor. Therefore, the complete non-use of special legal means of protecting consumer rights in the form of an increased penalty not only unreasonably infringes on consumer rights, but also does not create incentives for banks and other credit institutions for a special attitude towards consumer rights, in comparison, for example, with the rights

of entrepreneurs. And given the low financial literacy of the consumer, this situation will only contribute to abuse by banks.

In addition, the previous law enforcement practice also showed that even the application of the provisions of the law on consumer protection on a special penalty did not give a full effect, because these provisions and the existing law enforcement practice do not exclude the possibility of reducing the penalty at the discretion of the court, which is often done by the courts, approaching this issue very subjectively.

In this regard, in our opinion, it seems expedient to introduce into the legislation of the Republic of Kazakhstan directly provided for by law special legal means on the responsibility of banks and other credit organizations to consumers for late execution of banking services in the form of an increased penalty and a fine in the prescribed amount without the possibility of reducing it by the court. Its size, based on the peculiarities of banking legal relations and the impossibility of its reduction by the court, should probably be determined less than the currently established law on consumer protection for goods and services.

According to the method of calculating the penalty, it can be divided into fines accrued once and penalties accrued over a period of time, the so-called continuing penalty.

The penalty we considered earlier from paragraph 5 of Article 28 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights" is just a penalty, since it is paid by the contractor to the consumer for each day (hour, if the period is defined in hours) of delay.

If the court satisfies the consumer's claims in connection with the violation of his rights established by the Law on Consumer Protection, which were not voluntarily satisfied by the manufacturer (performer, seller, authorized organization or authorized individual entrepreneur, importer), the court will recover a fine from the defendant in favor of the consumer, regardless of whether such a claim was filed with the court (paragraph 6 of Article 13 of the Law). At the same time, when the court satisfies the requirements declared by public associations of consumers (their associations, unions) or local self-government bodies in defense of the rights and legitimate interests of a particular consumer, fifty percent of the amount of the fine determined by the court is collected in favor of these associations or bodies, regardless of whether they declared such a requirement.

The fine under paragraph 6 of Art. 13 of the Law on Consumer Protection is considered by the Supreme Court of the Republic of Kazakhstan as a legal forfeit, as a result of which the courts have the opportunity to reduce it under Art. 297 of the Civil Code of the Republic of Kazakhstan. At the same time, in a lawsuit, banks or other credit organizations usually declare claims to reduce the penalty under Article 297 of the Civil Code of the Republic of Kazakhstan, and based on this article, the amount of the fine is determined. Also, if the amount of monetary compensation for non-pecuniary damage awarded by the court is taken into account when determining the fine to be collected from the insurer in favor of the consumer of the insurance service in accordance with paragraph 6 of Article 13 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights", then the amount of court costs when determining the amount of such a fine is not taken into account.

Moral injury. According to Supreme Court Regulation No. 7 of 27 November 2015 "On the application by the courts of legislation on compensation for moral damage" [3], "moral damage" means moral or physical suffering caused by actions (inaction) encroaching on the intangible benefits belonging to the citizen from birth or by virtue of the law (life, health, personal dignity, business reputation, privacy, personal and family secrets, etc.), or violating his personal non-property rights (the right to use his name, the right of authorship and other non-property rights in accordance with the laws on the protection of rights to the results of intellectual activity) or violating the property rights of a citizen.

Norms on compensation for moral damage are contained, for example, in Art. 9, 141-146, 951-952 of the Civil Code of the Republic of Kazakhstan. So, if a citizen is caused moral harm (physical or moral suffering) by actions that violate his personal non-property rights or encroach on the intangible benefits belonging to the citizen, as well as in other cases provided for by law, the court may impose on the violator the obligation of monetary compensation for this harm. According to paragraph 2 of Art. 951 of the Civil Code of the Republic of Kazakhstan, moral damage caused by actions (inaction) that violate the property rights of a citizen is subject to compensation in cases provided for by law.

The Law of the Republic of Kazakhstan "On Protection of Consumer Rights" determines that moral damage caused to the consumer as a result

of violation by the manufacturer (contractor, seller, authorized organization or authorized individual entrepreneur, importer) of consumer rights provided for by laws and legal acts of the Republic of Kazakhstan regulating relations in the field of consumer rights protection, is subject to compensation by the causer of harm in the presence of his fault.

Regarding the proof of moral damage in cases of protection of the rights of consumers of banking services, we can note the remark of the Supreme Court of the Republic of Kazakhstan, according to which, within the meaning of the Law on Consumer Protection, the very fact of violation of consumer rights presumes the defendant's obligation to compensate for moral damage and the refusal to satisfy the claim for compensation for moral damage is not allowed.

The direct obligation to compensate for moral damage caused by actions (inaction) that violate the property rights of a citizen, in cases provided for by law, is enshrined in paragraph of Article 951 of the Civil Code of the Republic of Kazakhstan. For the purpose of additional legal protection of the consumer as a weak side in the legal relationship, a simplified procedure for compensation for moral damage is established by Article 15 of the Law of the Republic of Kazakhstan "On Protection of Consumer Rights". Presuming the very fact of the possibility of causing such harm, the legislator freed the victim from the need to prove in court the fact of his physical or moral suffering.

As can be seen from judicial practice, courts, as a rule, recover moral damage in favor of consumers of banking services.

Separate remains the question of the amount of moral damage to be recovered in favor of the consumer.

Today it is difficult to say how much moral damage is subject to recovery on claims for the protection of the rights of consumers of banking services. The fact that the courts have no consensus on the amount of moral damage to be recovered has long been written in the press and in legal literature [4].

Thus, in our opinion, despite all the difficulty of financial determination of moral labor, it is necessary to do this at the level of the Supreme Court of the Republic of Kazakhstan, both to protect consumer rights and to protect persons against whom such claims are made.

Regarding the collection of a double deposit amount when protecting the rights of the consumer of banking services, the following can

be noted. According to paragraph 2 of Art. 338 of the Civil Code of the Republic of Kazakhstan, if the party who gave the deposit is responsible for non-fulfillment of the contract, it remains with the other party. If the party who received the deposit is responsible for non-fulfillment of the contract, it is obliged to pay the other party a double amount of the deposit. In accordance with paragraph 1 of Art. 337 of the Civil Code of the Republic of Kazakhstan, a deposit is recognized as a monetary amount issued by one of the contracting parties on account of payments due from it under the contract to the other party, to prove the conclusion of the contract and to ensure its execution. In the field of banking services, the use of a deposit is not accepted, and in the studied judicial practice not a single case has been found where a deposit is mentioned. Thus, it can be noted that in the field of protection of the rights of consumers of banking services, this form of civil liability is not relevant.

Liability for non-fulfillment of a monetary obligation is provided for by Art. 353 of the Civil Code of the Republic of Kazakhstan, according to part 1 of which, for the use of other people's funds due to their unlawful withholding, evasion of their return, other delay in their payment, or unjust receipt or savings at the expense of another person, interest is payable on the amount of these funds. Recall that under the Law of the Republic of Kazakhstan "On Protection of Consumer Rights" for violation of consumer rights, a penalty is provided, considered by us earlier. As we have already indicated above, a penalty for the same breach of a monetary obligation can be collected simultaneously with the interest established by this norm, only if the penalty is of a punitive nature and is subject to recovery in addition to losses incurred in case of non-fulfillment of a monetary obligation. Thus, as a rule, in cases of protecting the rights of consumers of financial services, the courts collect simultaneously from the debtor the penalty and interest provided for by law for the use of other people's funds under Art. 353 of the Civil Code of the Republic of Kazakhstan.

From all of the above, we can conclude that if initially in the Law of the Republic of Kazakhstan "On Protection of Consumer Rights" we see a large number of sanctions applicable in defense of consumer rights, then in fact in the courts the claims of consumers are subject to colossal cuts due to the lack of uniformity in judicial practice.

Therefore, the following conclusions can be drawn from this article:

1) The legislation of the Republic of Kazakhstan in relation to consumer banking legal relations establishes the general civil liability of performers, as well as special liability provided for by the law on consumer protection. The legislation of the Republic of Kazakhstan does not provide for special civil liability of executors to consumers of banking services.

2) It is proposed to introduce imperative legal regulation and establish a unified procedure for notifying the consumer of completed banking operations on his account, since it was revealed that the dispositive legal regulation of this procedure contributes to the imposition by the banking service provider of unfavorable and/or unclear conditions for such a notification and leads to untimely detection by the consumer of the fact of violation and the impossibility of its suppression and/or recovery of damage from the banking service provider.

3) It was revealed that the lack of special legal regulation of the recovery of an increased penalty and a fine for late provision of banking services to consumers and late satisfaction of the requirements of the consumer of banking services gave rise to conflicting law enforcement practice not only at the level of lower courts, but also at the level of legal positions and reviews of the Supreme Court of the Republic of Kazakhstan. Failure to apply the provisions of consumer protection legislation on the recovery of an increased penalty and fine for late provision of certain banking services to consumers and for late satisfaction of consumer requirements of banking services not only unfairly infringes on their rights, but can also provoke a massive increase in abuse by banks and social tension from consumers.

4) It was also revealed that the dispositive legal regulation of the possibility of reducing the amount of forfeit and fine provided for by consumer protection legislation, at the discretion of the court, leads to inconsistent law enforcement practice and often to an excessive and unfair decrease in disputes between consumers and performers of banking services.

5) It is proposed to introduce into the legislation of the Republic of Kazakhstan special provisions on liability for violation of consumer rights in the banking sector, including directly securing the possibility of collecting a special penalty and fine for late provision of banking services to consumers and late satisfaction of consumer requirements of banking services without the possibility and legislatively consolidate an exhaustive list of

conditions for its reduction by the court and clear digital values of such a reduction.

6) With regard to the recovery of moral damage in case of violation of the rights of consumers of banking services, there are no special legal means other than those applied to consumers in general, namely, the presumption of moral dam-

age. The problem of determining the amount of moral damage is also relevant for consumer banking relations and requires the determination of specific amounts at the legislative level or clarifications from the Supreme Court of the Republic of Kazakhstan.

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