

MODELS OF ACTIO NEGATORIA IN THE LAW OF RUSSIA AND EUROPEAN COUNTRIES

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Actio negatoria is necessary in a situation wherein no one questions the ownership of an object by the owner, and the object remains in his possession, but someone exploits it without sufficient legal basis, treats it just as if he was endowed with the opportunity and the right to use someone else's object. Despite the apparent simplicity of actio negatoria in the legislation of European countries, three models of this lawsuit have been developed, built according to the actio negatoria design that existed at different stages of the development of Roman private law – the common law model, the Roman model, and the German model. This study is based on the method of analysis of judicial practice and the method of comparative law. Based on the results of this study, we conclude that actio negatoria is not a universal method of protection. It is necessary to deviate from the principle of residual attention of the legislator to actio negatoria, residual, first of all, compared to rei vindicatio. Based on the analysis of the three models of actio negatoria that exist in the law of European countries, a new, fourth model of this lawsuit is proposed. Only an immovable object can be the subject of an actio negatoria dispute. Actio negatoria cannot be used to challenge the registered right to immovable objects. Actio negatoria can be used to protect the subjective right of property from a violation of ownership which is produced by interfering with possession and which does not result in dispossession.

Keywords: comparative law; civil law; real right; property claims; actio negatoria; rei vindicatio; claim for recognition of real right.

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Introduction

Actio negatoria is intended to eliminate violations that interfere with subjective real rights in the normal course of. A right without a guarantee of the possibility of unhindered implementation is only a declaration. Therefore, the study of actio negatoria is of great importance.

The fate of actio negatoria is rather long-suffering. The doctrine of civil law has developed a contradictory understanding of actio negatoria, caused by giving its application excessive universality. Considering actio negatoria as a universal method of protecting property rights leads to the emergence of many problems, both theoretical and practical, primarily – the problem of competition of claims.

In the classical view, actio negatoria has a very clear scope of application – the elimination of interference in the use of an immovable object when the violation is of a purely factual nature, not connected with challenging the right. But taking into account that the civil legislation of European countries enshrines only two property claims – vindication and negatory, judicial practice and a portion of the scientific community chose to qualify claims for the protection of property rights by the path of least resistance: everything that is not connected with deprivation of possession must be qualified as actio negatoria. This led to an artificial expansion of the scope of actio negatoria and gave rise to the problem of competition and the ratio of real claims among themselves. The fact is that the application of this lawsuit is not universal. This situation is caused by the imperfection of legislation on property rights. For this

reason, many judicial acts and scientific works state that *actio negatoria* is by its nature considered: a claim for recognition of a property right, a claim for the release of an object from arrest, a claim for recognition of a property right as missing, a lawsuit for the demolition of unauthorized construction, a lawsuit for moving in, and a lawsuit for eviction... This chain of demands can be continued quite easily. Clearly, this entire list of substantive requirements cannot be covered by *actio negatoria*.

To date, no single *actio negatoria* model has been developed in civil law doctrine or in legislation. The experience of legislative regulation has developed three models of *actio negatoria*, each of which has its own strengths and weaknesses.

The editions of the articles of laws have shortcomings that make it difficult to determine the legal nature of *actio negatoria* and create an artificial situation in which some independent property claims formally fall within the definition provided by the law. In this regard, the need for establishing clear criteria for the application of this method of protection of property rights is growing.

1. Discussion on the Universality of Actio Negatoria in the Russian Legal Doctrine

In European legislation, *actio negatoria* is formulated as an opportunity for the owner to demand the elimination of all violations of his rights, even if these violations were not connected with deprivation of possession.

The legal literature is well established and the idea of *actio negatoria* as a universal method of protection¹ is not disputed.

This approach to *actio negatoria* does not seem rational and is associated with many circumstances. *First*, the overly abstract wording of the legislative design *actio negatoria*. This creates a situation in which requirements, the essence of which are in no way connected with negatory protection or protection from actual interference in the use of the object, are related to *actio negatoria*. *Second*, the formation of this construction proceeds from the residual principle in comparison with *rei vindicatio*. As a result, in law enforcement, *actio negatoria* has become a “fallback” in a situation where vindication is not applicable to protect property rights.

¹ See Gerhard Hohloch, *Die negatorischen Ansprüche und ihre Beziehungen zum Schadensersatzrecht* 29 (Frankfurt am Main: Metzner, 1976); Schahin Seyed-Mahdavi Ruiz, *Die rechtlichen Regelungen der Immissionen im Römischen Recht und in ausgewählten europäischen Rechtsordnungen: Unter besonderer Berücksichtigung des geltenden deutschen und spanischen Rechts* 175 (Göttingen: Wallstein, 2000); Eduard Picker, *Der negatorische Beseitigungsanspruch* 65–66 (Bonn: Röhrscheid, 1972); Hans Josef Wieling, *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen* 626 (Berlin: Springer, 2006); Heinrich Mager, *Besonderheiten des dinglichen Anspruchs*, 193(1) *Archiv für die civilistische Praxis* 68, 79 (1993); Jan Wilhelm, *Sachenrecht* 51 (Berlin: de Gruyter, 2007); Суханов Е.А. Вещное право: научно-познавательный очерк [Evgeny A. Sukhanov, *Property Law: A Scientific Essay*] 281 (Moscow: Statut, 2017); Усачева К.А. Негаторный иск в исторической и сравнительно-правовой перспективе // Вестник гражданского права. 2013. № 6. С. 90–95 [Kseniya A. Usacheva, *Actio Negatoria in Historical and Comparative Legal Perspective*, 6 *Civil Law Review* 84, 90–95 (2013)].



Third, the absence of comprehensive studies on the legal nature of *actio negatoria*. In the legal literature, *actio negatoria* is also considered as a residual. In civil law, special attention is paid to *rei vindicatio* as the most important means of protecting property rights.

Careful and comprehensive consideration of the characteristics of *actio negatoria* shows a clear lack of universality in its application. The conditions in which it is possible to use this protection method are quite specific and indicate a certain scope of application.

It is necessary to deviate from the principle of residual attention of the legislator to *actio negatoria*, residual, primarily in comparison with *rei vindicatio*. The understatement that takes place in the legislative formulations of the *actio negatoria* of European countries requires a lot of thinking for the legislator, and this allows for broad interpretation of the law and distortion of the essence of the considered method of protection. *Actio negatoria* cannot be used to protect a subjective right from violations related to deprivation of ownership or disputing the existence of a subjective right. A claim for recognition of property rights and a claim for exemption from arrest cannot be qualified as *actio negatoria*. At the same time, if the first of these requirements is an independent real claim, then the second is a type of action against the public authorities.

2. Actio Negatoria in Legislation in the Doctrine of Foreign Countries

Since the law of European countries is not uniform, it is worth starting with consideration of the Anglo-Saxon legal system, since it does not have a division into property and obligations of rights, property and obligations claims. Such a distinction is the basis of a pandect and institutional approach in the law of the countries of the Roman-Germanic legal system.

The absence of both *actio negatoria* and real claims in general are a peculiarity of the law of the countries of the Anglo-Saxon legal system and common law countries. Property rights in these countries are protected by certain types of lawsuits. In English law, there are two types of lawsuits aimed at restricting an authorized person from arbitrary interference with the exercise of law, which are in the nature of a tort lawsuit. First, it is a “claim of transgression” (trespass), which is used in the event of the intentional invasion of someone else’s land without the purpose of depriving a person of ownership, which entails an injunction against such actions or the obligation to compensate for damages. Second, the “claim of inconvenience” (nuisance), which is used to restrict the owner in exercising the powers in relation to the object.² It should be clarified that although the claims under

² See Kenneth A. Stahl, *The Trespass/Nuisance Divide and the Law of Easements*, 86(4) *George Washington Law Review* 966, 967–968 (2018); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining*



review are qualified as tort, it is always noted that they are applied in the sphere of property relations and do not include a claim for reimbursement of value.

Article 89 of the Law of the Republic of Estonia of 9 June 1993 “On Property Law” states:

The owner has the right to demand the elimination of any violation of the right to property, even if this violation was not related to deprivation of possession.

The civil law of the Republic of Latvia of 28 January 1937 does not distinguish literally between *rei vindicatio*, *actio negatoria*, and a claim for the recognition of a real right, but uses the generalized term “property claims” in Articles 1044–1066. Paragraph 1 of Article 376 “The Requirement to Eliminate Violations Not Related to Deprivation of Possession” of the Civil Code of the Republic of Moldova states:

If the right of the owner is violated by any other means besides illegal seizure or deprivation of possession, the owner may require the offender to stop the violation from the perpetrator.

Paragraph 2 of Article 172 of the Civil Code of Georgia of 26 June 1997 establishes the following rule:

If an encroachment on property or other obstacles occurs without taking away or depriving an object, the owner has the right to demand that the intruder stop these actions.

The definition of *actio negatoria*, as the right of the owner “to demand the elimination of any violations of his right, although these violations were not connected with deprivation of possession,” is enshrined in Article 305 of the Model Civil Code for CIS Member States.³ Moreover, a similar textual expression has *actio negatoria* in Article 304 of the Civil Code of Russia and the legislation of a number of countries neighboring Russia: Article 285 of the Civil Code of the Republic of Belarus, Article 264 of the Civil Code of the Republic of Kazakhstan, Article 293 of the Civil Code of the Republic of Abkhazia, Article 277 of the Civil Code of the Republic of Armenia, Article 325 of the Civil Code of the Republic of Tajikistan, Article 231 of the

Property Rights, 14(1) *Journal of Legal Studies* 13 (1985); A.H. Hudson, *Trespass or Nuisance*, 23(2) *Modern Law Review* 188, 188–189 (1960); *Property and Community* 57 (G.S. Alexander & E.M. Peñalver (eds.), Oxford: Oxford University Press, 2010).

³ Модельный Гражданский кодекс для государств – участников СНГ (часть первая) (принят постановлением Межпарламентской Ассамблеи государств – участников СНГ от 29 октября 1994 г.) [Model Civil Code for the CIS Member States (Part One), adopted by a resolution of the Inter-Parliamentary Assembly of the CIS Member States of 29 October 1994] (May 10, 2019), available at <http://base.garant.ru/2566930/>.



Civil Code of the Republic of Uzbekistan, and paragraph 2 of Article 289 of the Civil Code of the Republic of Kyrgyzstan.

Interestingly, there is no provision for changing the wording of *actio negatoria* in either the Concept of Development of Civil Legislation, or in the draft of amendments to the Civil Code of the Russian Federation developed on its basis. In the draft of amendments, this claim is constructed within the framework of the following rule: the owner or person who has a limited, real right is entitled to demand the elimination of any violations of his right that are not related to deprivation of possession (sec. 230, cl. 1). Here, the phrase “various violations” is replaced by the phrase “any violations,” which will undoubtedly preserve the uncertainty of the scope of application of the *actio negatoria* in the framework of the legislation.

The wording of the *actio negatoria* enshrined in the Civil Code of the Russian Federation is not fundamentally different from the universal construction of *actio negatoria*, according to which it is built in the legislation of Western European countries.

Clause 1 of § 1004 of the German Civil Code (hereinafter the BGB) reads:

If the right of ownership is violated in any other way than the seizure or unlawful deprivation of possession, the owner may request the violator to rectify the violation.

Actio negatoria in German law is aimed at protecting the owner mainly from the influence of third parties and is referred to as a claim for eliminating exposure and refraining from exposure (*Beseitigungs- und Unterlassung*).

Excessive universalization of *actio negatoria* through the expansion of its scope of application was also noted by German scientists. P. Gröschler writes:

§ 1004 BGB extends the negatorian action, limited to individual cases of unlawful use of the right, to a general claim for eliminating violations of property rights not related to dispossession and further abstaining from them. Thanks to their function of protective claims, now both the vindication claim from § 985 BGB and the claim from § 1004 BGB can be designated as negatory claims in a broad sense.⁴

According to a fair comment by A. Gubareva and A. Latyev, “just as in Russian civil legislation (Art. 304 of the Civil Code of the Russian Federation), this law is also formulated in a residual method in the legislation of other countries” compared with *rei vindicatio*.⁵

⁴ Грёшлер П. Защита права собственности в германии: теория и практика // Цивилистические исследования. Вып. IV 2007–2009 [Peter Gröschler, *Protecting Property Rights in Germany: Theory and Practice in Civil Studies*. Vol. IV 2007–2009] 374 (B.L. Khaskelberg & D.O. Tuzov (eds.), Tomsk: Peleng, 2010).

⁵ Губарева А.В., Латыев А.Н. Правовой режим недвижимости по законодательству зарубежных стран [Alexander N. Latyev & Anna V. Gubareva, *The Legal Regime of Real Estate Under the Laws of Foreign Countries*] 92 (Yekaterinburg: USLU, 2009).



The authors go on to explain this situation through the following circumstances. First, the norms on *actio negatoria* cover an extremely wide range of violations, which are simply impossible to describe in the text of the law. Second, possession of an object is a necessary factual prerequisite for using it. Third, the legislator also pays more attention to vindication than to *actio negatoria* because the possession of an object is often the necessary basis for *bona fide* acquisition from an unauthorized person.⁶

The greater development of the legal technique of Western European legislation in the matter of regulating negatory protection is manifested in the fact that the lawsuit is given preventive significance. In the first paragraph of § 1004 of the BGB, it is established that if there is reason to expect further violations, the owner may submit an *actio negatoria*, and the second paragraph states that this requirement is excluded if the owner is obliged to allow influence on his property.

In paragraph 2 of Article 641 of the Swiss Civil Code states that the owner of an object “has the right to demand it back from anyone who illegally withholds it, and to eliminate any unlawful influence on it.” The article cites vindication and negatory suits, the latter being formulated as a universal method of protection.

The Civil Code of the Canadian province of Quebec in Article 953 provides for *actio negatoria*, but within the framework of abstract legislative construction: the owner may object to any encroachment or any use of his property by a person not authorized by him or the law.

Compared to the German definition, Italian law more narrowly describes the scope of *actio negatoria*, indicating that it is aimed at denying the arbitrary effect of servitude. Article 949 of the Civil Code of Italy states:

The owner may demand the declaration of the absence of the right exercised by others on objects when he is motivated by the reluctance to establish a servitude.

Italian law also argues in favor of the vast nature of the *actio negatoria*, which provides effective protection against all sorts of encroachments on the subjective property right of individuals, in fact and under the law.⁷ In spite of the legislative formulation of *actio negatoria* in Italy, at the level of judicial practice it is given universal significance, which is emphasized in the scientific literature.⁸

In France, the rules on *actio negatoria* are generally not explicitly established by the Civil Code. They are developed by doctrine and jurisprudence through interpreting and applying general rules on ownership and property rights, and

⁶ See Latyev & Gubareva 2009, at 92–93.

⁷ See Mammei U., Суханов Е.А. Основные положения права собственности [Ugo Mattei & Evgeny A. Sukhanov, *The Main Provisions of the Property Right*] 267 (Moscow: Yurist, 1999).

⁸ See Seyed-Mahdavi Ruiz 2000, at 175.



determine the scope of *actio negatoria*, by suppressing servitude violation in relation to another party's object. The basis of the broad interpretation is found in Article 544 of French Civil Code (FCC), which provides a definition of property rights:

Property is the right to use and dispose of objects in the most absolute way, unless the exercise of this right is not prohibited by laws or regulations.

The phrase "the most absolute way" allows for the freedom of property to be demanded from unlawful actions of persons both in terms of *rei vindicatio* and *negatory*. The accuracy of this interpretation is indicated indirectly by Article 2278 of the FCC, where owner's protection is fixed. In the first paragraph it is stated:

Ownership is protected, regardless of its legal basis, from a violation that affects or threatens to violate it.

According to Article 523 of the General Civil Code of Austria of 1812,

in respect of servitudes, there may be two lawsuits: one against the owner in defense of the servitude, and the other in defense of the owner, directed against anyone who claims servitude.

It turns out that in Austria, *actio negatoria* is also limited to the scope of denying the unauthorized assignment of a servitude, despite the fact that the Austrian legal system gravitates towards German law, where *actio negatoria* is interpreted more widely than in any legal system. The fact is that the Austrian General Civil Code was influenced by the French legal system, due to the active military and legislative activities of Napoleon. For this reason, Austrians treat the civil code as a monument of jurisprudence and changes to it are rarely made. Legal provisions are modified by judicial interpretation of the civil code. It turns out that the Romanesque model of *actio negatoria* is enshrined in the civil code, and in judicial practice the lawsuit is committed to universal significance, as in the German model. Such a differentiated approach has been analyzed in the scientific literature.⁹

In Japanese civil law, there are three types of lawsuits in defense of property rights: the requirement to return property, the requirement to eliminate property violations, and the requirement to prevent property violations.¹⁰ The last two requirements define the scope of *actio negatoria* in Japan.

⁹ See Hohloch 1976, at 29.

¹⁰ See Вагацума С., Ариидзуми Т. Гражданское право Японии. Кн. 1 [Sakae Wagatsuma & Tooru Ariizumi, *Japanese Civil Law. Vol. 1*] 181 (R.O. Khalina (ed.), Moscow: Progress, 1983).



The most broad interpretation of *actio negatoria* is in Chinese law. Article 35 “The Right to Remove Obstacles and Dangers” of the Law of the People’s Republic of China “On Property Rights” (adopted by the All-China National Assembly of People’s Representatives on 16 March 2007) states that

the right holder may demand that obstacles be eliminated and the danger be eliminated if they interfere with or may interfere with real rights.

The main disadvantage of this design is the absence of criteria for the use of negatory protection, which makes this standard overly flexible.

3. The Actio Negatoria Model in Russian Legislation: History and Perspective

The current version of Article 304 of the Civil Code of the Russian Federation does not take into account the achievements of the theory of civil law and does not correspond to the fundamental changes in legislation that have occurred during this long time. The legislative construction of *actio negatoria* does not take into account the division of objects into movable and immovable.

The history of the development of scientific ideas and legislation on negatory protection was very thoroughly analyzed by K. Usacheva.¹¹ The author shows how a negatory lawsuit consistently expanded its scope of application from the archaic period of Roman private law to modernity, absorbing more and more property claims: confessional, prohibitive, a claim for challenging the record of state registration of real estate rights, a claim for recognition of property rights and so on, until it was left alone with *rei vindicatio*, becoming a universal requirement to eliminate any violations which did not entail deprivation of possession.

The textual wording of the *actio negatoria* contained in Article 304 of the Civil Code of the Russian Federation will be 100 years old in the near future. It is rare to find such a constant norm in the history of Russian legislation. The legislative formulation of *actio negatoria* has not undergone significant changes since the Civil Code of the RSFSR of 1922 and to this day.

The legislator, as before, still does not pay any significant attention to the regulation of *actio negatoria*, nor to the consolidation of its construction. *Actio negatoria* was absent in the text of the Code of Laws of the Russian Empire of 1832, as well as in subsequent editions in 1842 and 1857; before the Soviet codification of civil law, there were no rules on negator protection. At the same time in Germany, the first dissertation research on *actio negatoria* was conducted in 1732 by C. Thomasius & J.W. Warmers – “The Burden of Proof on *Actio Negatoria*.”¹²

¹¹ See Usacheva 2013, at 92–106.

¹² See Christian Thomasius & Johann W. Warmers, *Dissertatio iuridica inauguralis de onere probandi in actione negatoria* (Hala Magdeburgica: Hendel, 1732) (May 10, 2019), also available at <https://books.google.ru>.



Actio negatoria has not been studied in the scientific literature since the Russian Empire. An exception is the idea proposed in 1895 by K. Annenkov that Russian law is known for negator protection through the broad interpretation of Article 574 of the Code of Laws of the Russian Empire, which deals with tort liability.¹³ Naturally, actio negatoria cannot be derived from obligations for reparation of damages, at most this is possible from the general definition of property rights as a claim for freedom of ownership. But this is the maximum negator protection for this historical stage of development of Russian law.

In later scientific papers, actio negatoria is already discussed in greater detail and is provided in the section on regulating legal relations arising from servitude.¹⁴

An attempt to regulate actio negatoria was undertaken in the framework of the preparation of the draft Civil Code of the Russian Empire in 1905, in which Article 773 mentioned two classic property suits – vindication and negatory. When drafting the project, the achievement of German rights was taken as a basis, which were expressed in the text of the German Civil Code, and the actio negatoria was worded as follows:

The owner has the right to demand the elimination of such violations of his property rights that are not connected with deprivation of property.

In the Civil Code of the RSFSR of 1922, created based on the text of the draft of the Civil Code of the Russian Empire in 1905, actio negatoria was mentioned in the last paragraph of Article 59. The Civil Code also contained the rules on settlements when returning objects from illegal possession. Article 59 of the Civil Code of the RSFSR of 1922 stated:

The owner has the right to demand the elimination of any violations of his rights, even if they were not connected with deprivation of possession.

Article 304 of the Civil Code of the Russian Federation fully reproduces paragraph 6 of Article 28 of the Fundamental Principles of Civil Legislation of the USSR of 1961. This article states:

The owner may demand the elimination of any violations of his rights, even if these violations were not connected with deprivation of possession.

Full reproduction of paragraph 6 of Article 28 of the Fundamental Principles of Civil Legislation of the USSR of 1961, devoted to actio negatoria, is also characteristic of

¹³ See Анненков К. Русское гражданское право. Т. 2: Права вещные [Konstantin Annenkov, *Russian Civil Law. Vol. 2: Property Rights*] 283 (St. Petersburg: Tip. M.M. Stasyulevicha, 1895).

¹⁴ See Гамбаров Ю.С. Вещное право [Yuriy S. Gambarov, *Property Law*] 29, 225 (St. Petersburg: Publication of the Student Mutual Benefit Fund of the St. Petersburg Polytechnic Institute, 1909); Хвостов В.М. Система римского права [Veniamin M. Khvostov, *Roman Law System*] 263 (Moscow: Spark, 1996).



other inactive normative acts: Article 156 of the Civil Code of the RSFSR of 1964; USSR Law of 6 March 1990 "On Property in the USSR"; paragraph 2 of Article 30 of the Law of the RSFSR of 24 December 1990 "On Property in the RSFSR"; and paragraph 2 of Article 54 of the Principles of Civil Legislation of the USSR and the Republics of 1991.

At the same time, only the Civil Code of the RSFSR of 1964 contained a separate article devoted to *actio negatoria* – Article 156 "Protecting the Rights of the Owner from Violations Not Connected to the Deprivation of Possession."

Based on the analysis of *actio negatoria* models, the following edition of Article 304 of the Civil Code of the Russian Federation can be proposed:

Article 304. Elimination of violations of property rights not related to dispossession (*actio negatoria*)

1. An owner or a person who has a limited right in rem has the right to demand the elimination of unlawful, continuing actions which prevent him from utilizing real estate or which threaten such a violation, but did not result in deprivation of possession or contest of the right itself.

2. If there is a reason to expect further violations, then the owner or a person who has a limited real right has the right to demand that the violator be charged with the obligation not to perform similar actions in the future.

3. The creation of actual obstacles to the exercise of ownership by an owner or a person who has a limited real right which did not entail deprivation of ownership are the basis for the presentation of an *actio negatoria*.

4. A person who owns an immovable property may require the removal of actual obstacles to the exercise of possession that did not result in dispossession.

4. Existing Models of *Actio Negatoria* in European Law

Summarizing the civil legislation of the countries of Europe, there are three *actio negatoria* models, which are constructed according to the *actio negatoria* design that existed at different stages of the development of Roman private law; Roman private law developed for many centuries and was not static:

1) Common law model – built on Gaius' *casuistic Institutes*. It is from this that the very absence of the classic (for us) *pandect* division of civil law into property and obligations, property claims and obligations follows. According to common law, *actio negatoria* is unknown, and the consequences of interfering with the normal use of an individual's object are eliminated by *deli trespass* and nuisance lawsuits. *Trespass* is claimed in court when such a violation of ownership which did not result in the loss of property;¹⁵ nuisance is claimed when the actions of the person create

¹⁵ See Paul Davies, *Injunctions in Tort and Contract in Commercial Remedies: Resolving Controversies* 127, 128–131 (G. Virgo & S. Worthington (eds.), Cambridge: Cambridge University Press, 2017); Henry E. Smith, *The Persistence of System in Property Law*, 163(7) *University of Pennsylvania Law Review* 2055, 2079–2081 (2015).



anxiety to the owner and do not allow for normal use of the property.¹⁶ According to V. Bagaev, nuisance is similar to *actio negatoria* in many ways, although there are differences. For example, only activity on a neighboring plot of land can be the source of violation. This tort makes it possible to regulate conflicts between neighbors, while *actio negatoria* protects against a wider range of violations. Another feature is the possibility, within the framework of nuisance, to not only prohibit activities, but also to hold them accountable for the damage caused by real estate;¹⁷

2) Roman model (French and Italian) – based on the understanding of negatory protection during the classical period of development of Roman private law as a lawsuit eliminating violations, which is expressed in the form of misappropriation by the person of a servitude or a similar right with respect to another individual's property.¹⁸ The remaining violations of the normal course of the exercise of property rights are resolved by fine actions. For the sake of justice, it is worth pointing out that the French understanding of servitude encompasses a classical servitude, both limited property rights and neighboring rights, which in France are called legal servitude.

Historically, *actio negatoria* appeared as a way of denying the possibility of establishing servitude. Moreover, originally *actio negatoria* was referred to as *actio negatoria servitutis*;

3) German model – based on a pandect analysis of the achievements of the late Roman Empire and Byzantine legislation, the so-called post-classical Roman private law. Within the framework of this understanding, property rights are protected by property claims, which include vindication and *actio negatoria*. At the same time, where *rei vindicatio* eliminates violations related to the deprivation of possession, *actio negatoria* suppresses all other forms of violation of property rights only if they are not related to the deprivation of possession.¹⁹ Vindication and *actio negatoria* eliminate the whole range of possible violations of property rights, and *actio negatoria* is given universal significance.

German legal thinking is characterized by hypertrophic expansion of the scope of negatory protection through the subsidiary application of § 1004 of the BGB to

¹⁶ See *Protection of Immovables in European Legal Systems* 438–466 (S.M. Santisteban & P. Sparkes (eds.), Cambridge: Cambridge University Press, 2015).

¹⁷ See Багаев В.А. Приобретение недвижимого имущества по давности владения по российскому и английскому праву: Дис. ... канд. юрид. наук [Vladimir A. Bagaev, *Acquisition of Real Estate by Prescription of Ownership under Russian and English Law: Thesis for a Candidate Degree in Law Sciences*] 162 (St. Petersburg, 2015).

¹⁸ See Jean Carbonnier, *Droit civil. T. 2* (Paris: P.U.F., 2004); *Codice civile: Annotato con la giurisprudenza* 797–799 (L. Ciafardini & F. Izzo (eds.), Napoli: Edizioni Giuridiche Simone, 2012); Philippe Malaurie & Laurent Aynès, *Les biens* 360 (Paris: Defrénois, 2007); Fritz Baur, *Beiträge zum materiellen Recht und Verfahrensrecht* 137–138 (Tübingen: J.C.B. Mohr (Paul Siebeck), 1986); Jean-Louis Bergel et al., *Les biens* 504 (2nd ed., Paris: L.G.D.J., 2010); Cesare Sanfilippo, *Istituzioni di diritto romano* 218 (Soveria Mannelli: Rubbettino, 1996).

¹⁹ See Bernhard Windscheid, *Lehrbuch des Pandektenrechts. Bd. 1* 546–547 (Düsseldorf: Buddeus, 1870); Hohloch 1976, at 26; Picker 1972, at 65–66; Wieling 2006, at 626.



claims based on obligations of relations,²⁰ protection of personal non-property rights and so on. Most often, the need for a subsidiary application of § 1004 of the BGB is caused by the admissibility of the *actio negatoria* preventive function to ensure the elimination of a repeated similar violation. J. Wilhelm points out the applicability of *actio negatoria* for rights of obligations;²¹ M. Habersak justifies the idea of using *actio negatoria* in corporate relations.²²

5. Model of *Actio Negatoria De Lege Ferenda*

In determining the legal nature of *actio negatoria*, there are two diametrically opposed approaches – from the absence of negatory protection, or its assumption in servitude relations, to giving the *actio negatoria* universal significance as a way of protecting property rights from any violation that did not entail deprivation of possession. Is it possible to assume that the model that will work best will be the one which will take something in between two-pole models for the real amount of negatory protection?

In practical terms, the preservation of a universal understanding of *actio negatoria* aggravates the issue of *actio negatoria* competing with other real claims and demands for the protection of civil rights. At the theoretical, doctrinal level, this means stagnation in the development of civil law science on the issue of the protection of property rights and the systematization of property claims. With the universality of *actio negatoria*, it turns out that any and all requirements for the protection of property rights that are not subject to *rei vindicatio* will be qualified as a negator requirement, regardless of how diverse the violation is. The picture does not turn out to be the most optimistic in the development of science – *actio negatoria* predatorily absorbs all claims in defense of property rights, except for vindication. There should not be a situation in which the legal qualifications of the requirements do not need to be understood, and you can simply refer to the article of the law and interpret this norm, whose contents are elastic, to substantiate any legal position.

Given the universality of *actio negatoria*, the determination of the nature of such claims as a claim for recognition of a real right, a claim for exempting property from arrest, a claim for recognition of a real right of an absentee, a claim for eviction, a claim for demolition of an unauthorized construction, a claim for resettlement, and others are well-defined and manifestations of the diverse and comprehensive *actio negatoria*. With this qualification, a legal chimera is created, due to which *actio negatoria* can be used to protect from everything that does not suit the owner, but does not deprive

²⁰ See Mager 1993, at 79.

²¹ See Wilhelm 2007, at 51.

²² Mathias Habersack, *Die Mitgliedschaft – subjektives und "sonstiges" Recht* 21–22 (Tübingen: Mohr Siebeck, 1996).



him of possession of the object: the actual and legal actions of the defendant; in relation to movable and immovable objects; violation or dispute of property right by the defendant – all of this is the one and universal *actio negatoria*.

An attempt to rectify the situation with the unlimited universalization of *actio negatoria* was undertaken as part of the reform of Russian civil legislation. The draft amendment of the Civil Code of the Russian Federation, developed on the basis of the Concept for the Development of Civil Legislation, contains a proposal to consolidate the list of property claims in Article 227, which would consist of four requirements. On par with *rei vindicatio* and *actio negatoria*, it was proposed to specify the requirement to release an object from arrest (Art. 232) and the requirement to recognize real rights (Art. 233) as independent property claims (Art. 233).

The pandect revolution in the understanding of *actio negatoria*, when the transition was made from the perception of this claim as a method of protection from the usurpation of servitude by the defendant, to the universal perception of this requirement, had a practical basis. Since that time, the list of property claims has increased and is now not limited to only *rei vindicatio* and *actio negatoria*. Might not it be time to rethink negatory protection, having gone from excessive versatility and having filled this lawsuit with specific content and scope of application? The increasing complexity of civil turnover and the development of the doctrine of property claims give us the basis for a new revolution in the understanding of *actio negatoria*.

Therefore, there is every reason to offer a *fourth model of the actio negatoria*. Based on the above considerations, we propose to formulate the legislative structure of *actio negatoria* as follows:

an owner or an individual who has a limited real right has the right to demand the elimination of unlawful continuing actual actions that prevent him from using an immovable object or create a threat of such violation, but did not entail deprivation of possession or challenging the right itself.

6. Only an Immovable Object Can Be the Subject of an Actio Negatoria Dispute

The non-universality of *actio negatoria* is manifested in the fact that this requirement can only be a method to protect the rights of an immovable object which is assigned to this category due to its physical properties.

A number of conditions are presented to an object whose subjective right can be protected by a negatory claim. The subject of a dispute in this lawsuit can only be an object (1), individually-defined or individualized (2), preserved in kind at the time of the dispute (3) which is immovable, due to its physical properties (4).

As an object of property rights and property-legal protection, an object can be defined as a physically and independently of the subject, a spatially-limited



object in respect of which a legal regime is established at the legislative level and is individually-defined or individualized.

Judicial practice is based on the fact that when making a statement of *actio negatoria*, the claimant must prove that he has the appropriate right to an individually-defined object. The appeal determination of the Novosibirsk Regional Court of 16 May 2017 in case No. 33-4705/2017 states that the subject of proof for *actio negatoria* includes, among other things, the circumstances justifying the claimant's ownership of the individual object that is subject to dispute.

At the time the *actio negatoria* is presented, the object must be preserved in kind, therefore only an individually-defined object can be the actual subject of a dispute. It should be noted that the differences between individually-defined objects and objects that are defined by generic characteristics are largely relative and depend on the specific conditions for the participation of such objects in public circulation. Therefore, objects that have the same common properties for all objects of a given type can acquire the properties of individually-defined objects and retain these properties by the time the claim is filed, which allows the owner to select objects that constitute his property from among others.

The specificity of the *actio negatoria* is manifested in the fact that a dispute over this method of protection can only apply to an immovable object: a land plot, buildings, structures, and other relevant objects. This feature of the *negator* requirement is also noted in the practice of arbitration courts. The Federal Arbitration Court of the North-West District, in its resolution of 13 September 2005, in case No. A13-2368/02-09, concluded that in *actio negatoria* (elimination of the violation not related to dispossession by transferring construction eight meters from the wall of a trade pavilion) should be refused, because the subject of the dispute is not real estate.

Progress towards the solution of this issue in arbitration practice is characterized by the fact that there are no cases in which the subject matter in *actio negatoria* is a moving object. That is, everything comes is moving from the opposite direction: there are no cases in which a dispute arises from the elimination of interference in the use of exclusively movable objects. Therefore, it is simply impossible to ignore such a large amount of empirical material in our research. For example, it is very indicative that in all points of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, "Review of Judicial Practice on Some Issues of Protecting the Rights of the Owner from Violations Not Involving Deprivation of Possession," cases are cited where immovables are the subject of a dispute.

Of course, in court practice, there are cases in which *actio negatoria* is presented in relation to movable objects, but only in direct connection with real estate, or as part of a property complex.²³ For example, by decision of the Presidium of the Supreme

²³ See resolutions of the Presidium of the Supreme Arbitration Court of the Russian Federation of 2 October 2007 No. 1916/07 in case No. A32-65585/2005-22/1514, of the Federal Arbitration Court of the North Caucasus District of 18 January 2006 No. F08-6900/2006, of the Federal Arbitration Court of the Ural District of 20 October 2004 No. F09-3464/04GK.



Arbitration Court of the Russian Federation of 18 January 2000 No. 6615/99, the court upheld the company's claim to eliminate the violation of property rights not related to deprivation of possession, the subject of which was buildings and structures, machinery and equipment, road and rail transport funds, office equipment, and other property located in the territory of the defendant and acquired at the auction.

Actio negatoria is focused on the protection of rights to immovable objects as it is practically impossible to make it difficult to use a movable object. The mobility of this category of objects allows for the possibility of changing circumstances or external conditions for their use. When operating an immovable object, the opposite is true. If a third party creates obstacles in the use of real estate, the owner cannot move his object in order to protect themselves from violations. That is why actio negatoria is used only to protect the rights of immovables. Movable objects simply do not need negatory protection because of their mobility. Moving objects which are large, but still mobile is a purely matter of and does not affect legal qualifications. In the case of interference in the use of a movable object, it is advisable to use measures of operational protection or self-defense rights. These measures will be more effective and will make it possible to eliminate the negative impact on the movable object in a timely manner.

The considered scientific idea is not only based on a physical property of a movable object such as mobility, but also on the legal regime of real estate itself, which establishes the peculiarities of owning and using this type of object. The procedure for using the property is largely dependent on external factors and, when a third person creates interference with the use of the object, the owner cannot move his object in order to protect himself from violations. The situation with movable objects is diametrically opposite. For example, one individual's action can be qualified differently depending on the object of encroachment: the soot from a ventilation shaft of a restaurant's kitchen can be deposited both on a car which can be moved and on the window of a neighboring home. But in the first of these situations, there is no real need to burden the court with requirements that can be implemented independently.

In addition, among the conditions for satisfying actio negatoria, both in theory and in practice, it is indicated that the violation should be of a real nature. It is possible to determine the imaginary or reality of the violation by establishing whether the claimant can use his object in an different way, in which the difficulties caused by the defendant's actions would cease to exist. That is, the court must establish that the claimant does not have different means to freely use the object belonging to him. Consequently, the fact that the owner of a movable object is able to independently suppress a negative impact by moving his property is undoubtedly the reason movable property does not meet the negatory requirement. For example, the shadow of the neighbor's high fence puts shade over a water tank, which leads to the deterioration of water – this is one situation; if the same high fence darkens



a part of the neighbor's garden plot, which makes it impossible to harvest – this is a different situation which falls within the scope of application of *actio negatoria*.

What matters is not even the mobility of a movable object, but the nature of the violation in relation to it. Interference in the use of a movable object will not have a significant negative value; the degree of adverse effects of such an impact is minimal. The proprietor of a movable object can independently eliminate the hindrance, and judicial protection is provided in a situation when government coercion is required to protect his right.

The above condition for the satisfaction of *actio negatoria* confirms the validity of the thesis that it should be applied only to real estate, for which the change in external conditions of use is not subject to the owner. Allowing the application of *actio negatoria* to a situation of creating any interference with the use of an object would lead to abuse of the right and increased conflicts between neighbors.

It should be noted that the conclusion formulated above makes it possible to take a fresh look at how to properly challenge a registered right to immovables. In the literature it has been suggested that the right to an immovable object cannot be protected by *rei vindicatio*, and *actio negatoria* must be used for this purpose. A detailed analysis of the procedure for challenging a registered right and the use of *actio negatoria* for this purpose will be made in the fourth chapter of the book.

7. Properties and Definition of Actio Negatoria

Based on the thesis about the universality of *actio negatoria* and to ensure the distinction between property claims among themselves, it is possible to distinguish the following characteristic features:

- 1) The negatory requirement can only protect the rights of an immovable object;
- 2) The purpose of *actio negatoria* is expressed in its inherent restorative function. *Actio negatoria* is aimed at curbing illegal obstacles to an individual using and comfortably owning his property and eliminating the consequences of the violation, which leads to the restoration of the situation existing before the violation of the right;
- 3) *Actio negatoria* aims to prohibit the creation of obstacles for the use and peaceful possession by an individual of his property and to eliminate the consequences of interference. This civil law requirement is aimed at denying the possibility of third parties to arbitrarily interfere with the owner's use of the object. The purpose of *actio negatoria* is to suppress unlawful restrictions on the ability to use your object, with the end result being that the situation existing before the violation is restored;
- 4) *Actio negatoria* is used to protect the subjective rights of property from violations not related to deprivation of possession of an object. Unlawful seizure of the subject matter of the dispute cannot be the actual basis of negatory protection. A violation involving deprivation of possession is protected by *rei vindicatio*. The contrast between negatory and vindication claims is characteristic of the entire



history of the development of civil law and does not give grounds to allow any competition between them;

5) Actio negatoria cannot be used to challenge the real right; it is used to protect the subjective right of property from violations. A contestation may be carried out by means of a claim for recognition of a real right, which in this case cannot be qualified as a form of actio negatoria. The same can be said about the qualification of the requirement to challenge the registered right to real estate.

In classic works, it is noted that actio negatoria is not intended to eliminate challenging the law; C. Sanfilippo writes that this lawsuit has “the aim of repelling anyone who, although not disputing the claimant’s right to property, however, claims to utilize it...”,²⁴

6) Non-contractual nature of negatory requirements. This means that if there is a binding legal relationship between the parties to the dispute regarding the subject of the dispute, then said contract will be the basis for considering the dispute. The non-contractual nature of actio negatoria is due to the fact that it protects real rights specifically;

7) Actio negatoria is implemented within the framework of a protective relationship of a relative nature. The protective relations associated with the use of property claims are active and one-sided legal relations – to eliminate a violation, active actions of the offender are necessary, while only one side has the obligation to eliminate the violation and its consequences, and the other party only has the right to demand the elimination of the violation.

Consequently, actio negatoria at the stage of its application in a concrete life situation is realized within the framework of an independent protective legal relationship of a relative nature, while the legal relationship between the owner and the person who violated his right does not give rise to an obligatory legal relationship between them;

8) Actio negatoria is a substantive requirement of a restorative nature. All property claims are based solely on substantive law.

Based on the indicated features of actio negatoria, the following definition can be proposed: actio negatoria is a substantive, non-contractual requirement of a person owning and/or using a real estate lawfully, presented to a third party for the elimination of continuing illegal actions that impede the use of immovables or run the risk of such a violation, but did not entail deprivation of ownership or contesting the right itself.

8. Actio Negatoria Protects Both the Use and Possession of the Object

Most European countries allow the use of actio negatoria for the protection of possessions. The legislation of some Western European countries establishes that

²⁴ Sanfilippo 1996, at 218.



a violation of possession can take place in two forms: deprivation of possession and an obstacle to peaceful possession.

Clause 1 of § 858 “Prohibited Arbitrariness” of the BGB stipulates that

a person who deprives an owner of his possession against the will of the latter or prevents him from exercising possession, acts unlawfully...

Moreover, a similar rule was planned to be introduced into Russian civil legislation during the Russian Empire. In a draft Civil Code of the Russian Empire, in Article 144(141), it was stated that

a violation of possession is recognized as the unauthorized taking of property from the owner, as well as any unauthorized act that deprives the owner of the use of property or hampers him in that position.²⁵

In German pandect law, vindication and *actio negatoria* are usually distinguished on the basis of how ownership is violated – complete deprivation of possession entails the use of *rei vindicatio*, and partial restraint of peaceful possession – *actio negatoria*.²⁶

It is worth providing a good example to understand the construction of “interference to the possession of.” Cases of interference with ownership can be attributed to situations in which obstacles are created in the passage into a building or premises (the establishment of a barrier, a guard point, etc.). This is clearly a case when *actio negatoria* should be used. Such a violation does not deprive of ownership, but complicates it, and complicates the use of real estate. As can be seen from the example, one actual action resulted in a violation of the ability to own and use an object without any interference from third parties.

Undoubtedly, with respect to real estate, use is impossible without the exercise of ownership; these powers are interrelated. Using an immovable object for its intended purpose is impossible without owning it, and vice versa. If creating obstacles and barriers to the normal use of an object is a violation of the right of use, then difficulty in physical command of the object violates possession. As long as the owner commands the object, possess it, the right of ownership can be violated, but only by creating obstacles that impede possession.

In itself, possession is an actual state, that is, a static, and use has a dynamic characteristic – it is carried out by actions. Use is the ability to extract and use at

²⁵ Гражданское уложение Российской империи: Проект Высочайше учрежденной Редакционной комиссии по составлению Гражданского уложения с объяснениями. Кн. 3: Вотчинное право [Draft Civil Code of the Russian Empire. Book 3: “Votchinnoe Law”] (Jurisprudence, 1902).

²⁶ See Jürgen Baur & Rolf Stürner, *Sachenrecht* 137 (Munich: C.H. Beck, 2009); Manfred Wolf & Marina Wellenhofer, *Sachenrecht* 360 (27th ed., Munich: C.H. Beck, 2012); Harm P. Westermann et al., *Sachenrecht* 287 (Heidelberg: C.F. Müller, 2011).



their discretion the useful properties of objects. Extraction of useful properties also ensures the satisfaction of the interest of the owner. But the use of real estate is impossible without owning it and actually being located in it or on it.

The Western European tradition in giving *actio negatoria* properties of protection against interference in possession is based on the ideas of Roman private law. Possession in ancient Rome was defended by three kinds of owner's interdicts. Among them was an interdict on the retention of possession – interdict *retinendae possessionis* (D. 43.17.1.pr.; Gaius 4.110), which was built according to the formula “how you own now.”²⁷

Therefore, interfering with the ability to extract useful properties from an object by one's actions automatically entails difficulty in owning it. In this situation, it is simply impossible to distinguish between ownership and use. Therefore, one can argue with all certainty for the applicability of the *actio negatoria* for eliminating interference with the ownership of immovable property.

In fairness, it is worth noting that cases where *actio negatoria* can protect possession are quite rare, and at its core, *actio negatoria* is connected with the protection of use from actual interference.

In Western European countries, the indication that obstruction of possession without deprivation is the basis for the application of *actio negatoria* is necessary to justify the possibility of extending possessory protection to such a situation. § 861, “Requirement to Restore Ownership,” of the BGB states that if an owner is deprived of his possession by prohibited unsanctioned action, he may demand the return of his property, and § 862, “Requirement to Eliminate Breaches of Possession,” if peaceful ownership is violated through unsanctioned action, the owner may demand the cessation of violations. In German literature, the possibility of the existence of possessory-negator protection is investigated in sufficient detail.²⁸ Henry Maher points to the possibility of protecting titleless ownership requirement similar to the *actio negatoria*.²⁹

The Law of the Republic of Estonia of 9 June 1993 “On Property Law” separates the violation of ownership (Art. 44) and the removal of possession (Art. 45). Paragraph 1 of Article 44 states that

in the event of a violation of ownership, the owner has the right to demand the elimination of the violation and the prevention of further violation,

and Article 45 establishes the *rei vindicatio* that

²⁷ See Sanfilippo 1996, at 226–227.

²⁸ See Baur & Stürner 2009, at 93, 97; Westermann et al. 2011, at 168; Wolf & Wellenhofer 2012, at 58.

²⁹ See Mager 1993, at 79.



in the event of withdrawal of possession, the owner has the right to demand the restoration of possession from the person who is a self-styled owner in relation to the bearer of the claim.

Clause 1 of Article 125 of Book 3 of the Civil Code of the Netherlands contains a similar rule on the possibility of possessory protection, which reads:

A person who has acquired possession of a certain property may, on the basis of loss of possession or possession interference, present the same claims for returning property or for cancellation of possession interference, which belongs to the copyright holder.

Article 929 of the Civil Code of the Canadian province of Quebec states that an owner who has had continuous possession of an object for more than one year has the right to sue anyone who violates his possession or deprives possession in order to put an end to the violation or regain possession.

Article 2278 of the Civil Code of France establishes the following rule in the first paragraph:

Possession is protected, regardless of its legal basis, from a violation that affects or threatens to violate it.

Paragraph 1 of Article 928 of the Swiss Civil Code states that an owner who is being disturbed may file a lawsuit against the violator, even if the latter claims to have the right to act in the way he has. The second paragraph of Article 928 specifies that the claim is to cease the violation and prohibit further violation and damages. Article 926 of the Swiss Civil Code is devoted to deprivation of ownership.

It should be noted that it is more correct to speak about possessory protection not by means of *actio negatoria*, but about possession protection by means of a claim according to the negator requirement model. But for the sake of simplicity, we will use the notion of “*actio negatoria*” as a designation for such a proprietary claim.

In Latin American countries, this lawsuit is called “the requirement to maintain possession.” Article 985 of the Civil Code of Ecuador states that

the owner in the statement of claim has the right to demand the elimination of interference to possession, the elimination of the threat of deprivation of his possession, compensation for losses incurred, the provision of a guarantee of non-occurrence of facts that he reasonably considers a threat to his possession

and Article 523 of the Brazilian Civil Code, located in Chapter 5, “On Ownership Protection,” establishes that preservation claims and reinstatement claims are made



without formalities. Article 972 of the Civil Code of Colombia of 1873 states that possession claims are intended to preserve or restore ownership of real estate or property rights based on them. And in Article 977, this provision is specified, stating that the owner has the right to demand that third parties not interfere with his possession of an object, not deprive him of his possession, compensate him for the damage caused, and provide him protection from those whom he is reasonably wary of.

Latvian Civil Law of 1937, in Article 914, establishes the circumstances in which the possession is considered violated – if someone tries to appropriate an object or a part of it, or the right, or creates an obstacle for the owner to use his possession, including with the use of threats that may cause him reasonable concerns.

In the Concept for the Development of Civil Legislation, a proposal was made on the possibility of introducing owner protection through *actio negatoria* (para. 6 of cl. 1.7 of sec. 4 of the Concept). The clause states that “the possibility of providing possessory protection to owners in order to remove impediments of ownership not related to dispossession” should also be explored. However, in the draft amendment of the Civil Code of the Russian Federation, possessory protection is defined solely as the owner’s claim for possession protection, to be satisfied by the court, if it is determined that an object has left the owner’s possession against his will (Art. 216 “Requirement for Possession Protection”).

Ownership protection, as follows from the definition given by Roman law, is protection regardless of the right, protection of property as an actual state. Ownership protection is a simplified way of protecting real or perceived rights and is based on the everyday understanding that objects are usually in the possession of those who are entitled to them.

The legal basis for the use of negatory possessory protection will be the actual presumption of the legality of open ownership of the object, which will be discussed further when considering the legal basis of *actio negatoria*.

Consequently, *actio negatoria* can be used to protect a subjective property right from a violation of ownership which is produced by interfering with possession and which does not entail deprivation of ownership. At the same time, there is no difficulty in introducing possessory protection into the Russian civil legislation according to the model of negator requirement, that is, legislatively fixing the ability of any owner to eliminate actual interference with his possession.

9. Conditions to Meet Actio Negatoria

A violation which is the actual basis of *actio negatoria* has the following characteristics:

1) Is only an action. Only actions that are initial with respect to inaction in the voluntary elimination of violations can be illegal by the offender. The purpose of *actio negatoria* is to prohibit the offender from carrying out certain illegal actions or to restore the situation that exists before the violation;



2) Is factual. The legal nature of *actio negatoria* only allows it to eliminate actual interference in the exercise of property rights. The lawsuit is aimed at protecting the peaceful use of the object, and use always involves by actual actions. Equally, the violation of use is possible only by actual actions.

In contrast to *actio negatoria*, a claim for the recognition of a real right is filed in the case of challenging the existence of a real right, which is expressed in the creation of legal interference. Therefore, there is no reason to agree with the statement in the literature that *actio negatoria* protects against violations expressed in fact or legal obstacles to the exercise of the right to use.³⁰ K. Usacheva believes that in case of negatory protection from actual interference and challenging an entry in the EGRN, “we speak about encroachment on a legal position – only by different means.”³¹

Legal nature is only challenging the existence of a subjective right which is the basis for a claim for recognition of a real right that has an independent legal nature. This is why it is impossible to agree with the legal position of the Supreme Arbitration Court of the Russian Federation set out in paragraph 12 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, by virtue of which the scope of application of the *actio negatoria* includes requirements on recognizing real rights as absent.

In German law it is permitted to adjust the real estate registry by means of *actio negatoria*.³² But this approach is due to the fact that in German law, the list of property claims is exhausted *rei vindicatio* and *actio negatoria*, while Russian law has a more extensive system of property claims. The admissibility of adjusting a registry entry largely illustrates the excessive versatility of *actio negatoria*, which is attached to it by judicial practice;

3) The action is illegal, that is, it is carried out arbitrarily, without authorization, without a sufficient legal basis. *Actio negatoria* will be satisfied only if the wrongfulness of the actions of a third party is proved, and it does not matter if this behavior was guilty. Obstacles to the violation of property rights are far from always connected with the intention of the violator to create obstacles for the owner or the lack of due diligence. This explains the indifference of the negatory requirement to the subjective experience of the interferer in the normal use of the object. This is illustrated well by Article 89 of the Law of the Republic of Estonia of 9 June 1993 “On Property Law,” where it is stated that a negator requirement is excluded if the owner is obliged to tolerate a violation;

4) The violation is not related to dispossession. As a general rule, the object that is the subject of a dispute must be in the possession of the claimant. A person who

³⁰ See Краснова С.А. Система способов защиты вещных прав [Svetlana A. Krasnova, *The System of Ways to Protect Property Rights*] 109 (Moscow: INFRA-M, 2013).

³¹ See Usacheva 2013, at 87–90.

³² See Baur & Stürner 2009, at 148; Picker 1972, at 93.



does not own the subject of the dispute cannot make an *actio negatoria*, since this requirement cannot be used to impose on the violator the obligation to return the object. This circumstance has been repeatedly pointed out in court practice.³³ It should be understood that the condition of retaining ownership of the dispute on the side of the plaintiff is a prerequisite only in cases when the subjective right of the plaintiff itself contains the includes of ownership.) This condition is not mandatory in the absence of this authority in the subjective right (for example, *servitute*);

5) The violation is not related to challenging the existence of a subjective right to an object. *Actio negatoria* is used to protect against interference that is not related to the denial of the existence of a subjective real right from the plaintiff, that is, with dispute over rights. *Actio negatoria* is used to protect against violations that interfere with the owner's use of his property, that is, when the defendant does not seek to appropriate his subjective right of ownership, and when he interferes with this right without doubting the fact that the owner has said rights;

6) The violation did not entail the termination of the right of ownership or the limited real right to an object. The presence of this characteristic of negatory violations is related to the proprietary nature of the claim being considered. The subject of a dispute over property claims is only an individually-defined object (*res individuae*), preserved in kind at the time of the presentation of the claim. Since property law implies the possibility of taking actions in relation to an object, it is this possibility that can be violated. Therefore, if a negative impact on the part of the defendant led to the destruction of an object, an *actio negatoria* cannot be presented;

7) Creates a hindrance in the peaceful execution of subjective rights of property, which prevents the use of the object. This criterion of applicability of *actio negatoria* is that as a result of the violation, the useful properties of an immovable are reduced;

8) Is real. *Actio negatoria* is presented when the owner is hampered in the normal use of his object. In this case, the violation should be real, and not be far-fetched. As a criterion to determine the imaginary nature or the reality of the violation, it was proposed to establish the possibility of the plaintiff using his object in an alternative way, in which the difficulties caused by the actions of the defendant would be negated. The legal basis for such a distinction between reality and imaginary violation is the principle of good faith, the principle of equality of participants in civil relations, the inadmissibility of arbitrary interference with anyone in private affairs, and the need for unhindered exercise of civil rights.

³³ See resolutions of the Presidium of the Supreme Arbitration Court of the Russian Federation of 11 March 2014 No. 15324/13 in case No. A09-7111/2012, of 5 June 2012 No. 360/12 in case No. A29-9477/2010, of 29 May 2012 No. 17530/11 in case No. A40-79091/10-157-682.



10. Scope of Application of Actio Negatoria in Russian Case Law

It is not possible to enumerate individual cases where actio negatoria is applicable; it is only possible to name the most common situations:

1) Creating shade over a neighboring land plot and other property from perennial plantings, a high fence, an erected structure, advertisement, etc.³⁴ The decision of the Federal Antimonopoly Service of the Ural District of 13 August 2013 No. F09-7724/13 in case No. A60-22571/2012 states that by obliging the defendant to repair damages in the structures and decoration of premises, to perform work to comply with the regulations on natural lighting, the court, applying the provisions of Articles 304, 1082 of the Civil Code of the Russian Federation established that expert opinion identified the reasons for the deformation of the structures which arose due to a violation of the insolation requirements during the construction of the building, and the respondent created obstacles that prevented the plaintiff from exercising his property rights and caused damage to his property.

An example of such use of actio negatoria is provided in paragraph 7 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, where the dispute is dealt with from a demand to dismantle a wooden building without a foundation, as its installation cast shade over the standards on the first floor of the claimant building. Satisfying the claims, the court indicated that an expert concluded that a wooden building located near the building prevents daylight from entering the premises on the first floor of the building according to standards;

2) Dumping of garbage or storage of materials on a third party's plot of land,³⁵ blockage of aisles, and littering of premises. Paragraph 13 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153 states that by satisfying the actio negatoria, the court may impose on the violator the obligation to perform certain actions (for example, take out the garbage), and also refrain from actions (for example, stop dumping production waste on the land plot). Clause 13 provides two legal disputes. In one case, the joint stock company appealed to the arbitration court with a claim for elimination of violations of the property right to the land plot by obliging the municipal unitary enterprise to stop dumping production waste on this site and to

³⁴ See decisions of the Federal Arbitration Court of the Ural District on 16 February 2011 No. F09-395/11-C6 in case No. A47-2403/2010, of the Eighteenth Arbitration Court of Appeal of 21 April 2016 No. 18AP-3606/2016 in case No. A07-19219/2015; determinations of the Vladimir Regional Court of 24 January 2012 in case No. 33-168/2012, of the Sverdlovsk Regional Court of 10 April 2012 in case No. 33-3968/2012.

³⁵ See decisions of the Supreme Court of the Russian Federation of 27 April 2015 No. 302-ES15-4092 in case No. A78-2362/2011, of 29 March 2017 No. 307-ES17-2251 in case No. A05-548/2016; resolution of the Eighteenth Arbitration Court of Appeal of 29 March 2013 No. 18AP-2154/2013 in case No. A07-12018/2012.



remove garbage from the site within a week from the moment the court decision enters into legal force. If the garbage was not removed within this period, the plaintiff asked the court to recover from the defendant 10,000 rubles, which corresponds to the cost of garbage collection. Satisfying the demand, the court indicated that, by virtue of the provisions of Articles 12 and 304 of the Civil Code of the Russian Federation, the court may oblige the defendant not only to refrain from performing any actions, but also to take any actions if necessary to eliminate the violation of the plaintiff's right. In another case, the owner appealed to the arbitration court with a claim for the elimination of violations of the property right to the land, by obliging the defendant to remove building materials from his land;

3) Unauthorized extension by a third party to the wall of a building of the owner of another building or structure.³⁶ The decision of the Supreme Court of the Russian Federation of 17 February 2015 in case No. 302-ES14-1496 states that the construction of an extension by the business owner to the supporting external wall of an apartment building without the consent of the homeowners' association gives rise to an *actio negatoria* for demolishing this construction.

Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 9 October 2012 No. 5377/12, formulated the legal position: since the outer walls of the building, being enclosing, load-bearing structures, belong to all owners of premises in the building, the reconstruction of the building by adding additional rooms to it affects the rights and legitimate interests of all owners of the capital construction object;

4) Interference with the use of common property which belongs to the owners of an apartment building. Paragraph 3 of the Review of the Court Practice of the Supreme Court of the Russian Federation for the Fourth Quarter of 2012 (approved by the Presidium of the Supreme Court of the Russian Federation on 10 April 2013) states that if the rights of the owner of a dwelling in an apartment building in shared ownership have been violated by one of the co-owners as a result of the unlawful use of the common property of a dwelling house, they can be protected by going to court with a claim for elimination of violations of the right of property not related to deprivation of possession.

A similar legal position is set out in paragraph 39 of the Review of the Practice of Resolving Disputes by Courts Arising in Connection with the Participation of Citizens in the Shared Construction of Apartment Buildings and Other Real Estate Objects (approved by the Presidium of the Supreme Court of the Russian Federation on 4 December 2013);

5) Creation of obstacles to access to objects (passage, driveway), including by installing barriers, hiring security, installing a fence, barriers, and other objects. In

³⁶ See resolution of the Eighteenth Arbitration Court of Appeal of 6 August 2018 No. 18AP-15011/2018 in case No. A47-11933/2017.



this case, the requirement is based on the construction of the claimant's provision of keys/key fobs or dismantling of the structures.³⁷ The decision of the Supreme Court of the Russian Federation of 28 November 2016 No. 306-ES16-15755 in case No. A65-24262/2015 states that the appellate court, supported by the district court, reasonably satisfied the business owner's claim for dismantling the barrier and the iron gates, which halted further abuse of rights by the defendant. The courts found that the plaintiff could not access the premises belonging to him, due to the defendant's creating obstacles by installing a barrier and a gate on the only access road without obtaining the consent of the owner of the disputed premises.

The resolution of the Eighteenth Arbitration Court of Appeal on 19 December 2016 No. 18AP-15579/2016 in case No. A47-12975/2015 analyzes the legality of the demand of a garage cooperative to remove obstacles to using the land plot by dismantling the metal chain installed between the curb (pavement) and a fence enclosing the construction site of a car wash.

An example of such a case of *actio negatoria* is set out in paragraph 4 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, which says:

The owner of the building, in whose favor the servitude of passage through the neighboring land plot is established, has the right to a claim for the removal of obstacles in the passage through the employee's land plot (Art. 304 of the Civil Code of the Russian Federation), including the tenant of this site, creating such obstacles.

From the description of the plot of the case put in the basis of paragraph 4, it is said that the cooperative appealed to the court for the society to remove obstacles to travel on the land plot owned by the defendant. The cooperative proved that in 2008, a court order established an easement for travel on the land plot owned by the defendant and adjacent to the land plot of the claimant; servitude was registered in USRN. After the owner rented a land plot burdened with a servitude, the tenant installed a fence with a gate arm and refused to let the vehicle of the cooperative on to the employee land plot without paying a separate fee to the tenant of this plot. The court concluded that, since the claimant owns the dominant land plot, his demand to remove obstacles to the passage on the employee land plot is an *actio negatoria*. It is worth noting that since the servitude as a real right has the property of following, the fact that the lease agreement does not include information on the presence of the servitude does not exclude the obligation of the tenant to follow

³⁷ See resolutions of the Eighteenth Arbitration Court of Appeal of 24 July 2014 No. 18AP-7706/2014 in case No. A76-25305/2013, of 27 June 2014 No. 18AP-7926/2018 in case No. A76-9101/2017, of 4 March 2016 No. 18AP-1359/2016, 18AP-1361/2016 in case No. A47-1917/2015, of 14 October 2010 No. 18AP-9417/2010 in case No. A47-2526/2010.



the conditions of the existing restriction. Consequently, tenant awareness of the presence of a servitude has no legal significance for this dispute;

6) Illegal tapping into a gas pipe: removing obstacles to the use of a gas pipe, by dismantling an illegal tap into a gas pipe.³⁸ In the decision of the Supreme Court of the Russian Federation of 22 January 2016 No. 309-ES15-18392 in case No. A76-32463/2014, the court concluded that the transfer of the case to the Judicial Board on Economic Disputes of the Supreme Court of the Russian Federation was denied, as the courts came to a decision that the defendant's tie-in to the above-ground gas pipe and the unauthorized disconnection of the underground gas pipe from the central boiler house violates the rights of the plaintiff as the owner of the underground gas pipe. The Supreme Court of the Russian Federation pointed to the legality of the satisfaction of the claim on the obligation to eliminate violations of the claimant's right to property, not related to deprivation of possession by: disconnecting (fixing a blind plug) the medium-pressure overhead gas pipe; removing the plug installed by the defendant in the flange connection of the high pressure gas pipe;

7) Water consumer releasing water and waste that is untreated according to the established norms, which prevents the use of water and natural objects.³⁹

The resolution of the Eighteenth Arbitration Court of Appeal of 26 September 2016 No. 18AP-10608/2016 in case No. A76-16117/2013 analyzes a dispute arising from the defendant's violation of the rules for operating a biological wastewater treatment facility with aeration by air placed on his land (recreation center). The owner of a neighboring land plot, on which the recreation center is located, appealed to the court with a request to prohibit the defendant from operating the facility for the biological treatment of domestic waste water. Satisfying the plaintiff's stated claims, the court of first instance, based on the results of three forensic examinations, concluded that the defendant's operation of the treatment plant violated the requirements of sanitary norms and water protection legislation, and these violations lead to a violation of the plaintiff's rights as the owner of related real estate and land use and water user.

The judicial act states that

the claimant is authorized to file the claim, and his demands, contrary to the opinion of the appellants, are negatory (Arts. 304, 305 of the Civil Code of

³⁸ See decision of the Supreme Arbitration Court of the Russian Federation of 20 December 2007 No. 16919/07 in case No. A53-11251/2006-C4-50; resolutions of the Federal Arbitration Court of the North Caucasus District of 26 September 2007 No. F08-6047/2007 in case No. A53-11251/2006-C4-50, of 22 October 2009 in case No. A32-027595/2008, of the Eighteenth Arbitration Court of Appeal of 9 August 2012 No. 18AP-7154/2012 in case No. A07-23089/2011; decision of the St. Petersburg City Court of 27 February 2013 No. 33-2837/2013.

³⁹ See decision of the Supreme Court of the Russian Federation of 4 December 2015 No. 309-ES15-16576 in case No. A76-4083/2014; resolutions of the Federal Arbitration Court of the Volga-Vyatka District of 7 July 2014 in case No. A11-10854/2011, of the Federal Arbitration Court of the Volga Region of 17 May 2005 No. A12-21420/04-S18, of the Federal Arbitration Court of the North-Western District of 9 June 2010 in case No. A44-1671/2009.



the Russian Federation)... Given the established Article 10 of the Civil Code of the Russian Federation, the principle of good faith of subjects of civil turnover, when installing the disputed structure, the defendant was obliged to take into account the rights and obligations of adjacent land users and owners of real estate objects.

8) Disturbance by excessive noise, smoke, odors. The appeal decision of the St. Petersburg City Court of 2 December 2015 No. 33-20921/2015 in case No. 2-20/2015 stated that the court of first instance reasonably concluded that the claims under Article. Articles 210, 304 of the Civil Code for the dismantling of the equipment to the satisfaction of the defendant, as the owner of non-residential premises, since the installation of the air conditioner, exhaust ventilation system, and metal duct ventilation system on the facade of the building exceeds the statutory noise level in the plaintiff's apartment, and said equipment was installed in violation of building codes and regulations;

9) The creation of a disturbance by the defendant's construction of a building, structure, construction, including the very fact of the start of construction work; the demand is formulated as the demolition of illegally-erected buildings and the dismantling of structures (sheds, canopies, etc.).⁴⁰ The decision of the Federal Arbitration Court of the North Caucasus District of 23 March 2010, which left the court decision in case No. A63-2961/08 unchanged, stated that the lawsuit to obligate the defendant to remove a fence built on the border of a glade adjacent to a residential complex and restore the surface the layer of land and forest plantations at the location of the fence is legally satisfied. The judicial act is motivated by the fact that the land plot provided to the business owner is part of a plot that belongs to the company for permanent (perpetual) use. The presence of the building erected by the business owner prevents society from exercising its rights.

Clause 9 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153 analyzes the requirement to ban the construction of a sports complex with a pool in a situation where the continued construction of a pool on a nearby site may cause the building foundation to sink, which will cause its wall to crack.

Actio negatoria and a claim for demolition of unauthorized construction may have intersections, but are independent requirements, each of which has its own sphere of application. Actio negatoria is based on a violation of the property rights of the plaintiff, while a claim for the demolition of an unauthorized construction proceeds from a violation of building codes and rules, or the unauthorized erection of a building on a land plot. It turns out that actio negatoria is an institution of private law and property law, while building codes and norms are an institution of public

⁴⁰ See resolutions of the Eighteenth Arbitration Court of Appeal of 27 June 2013 No. 18AP-5439/2013 in case No. A47-16377/2012, of 12 February 2015 No. 18AP-288/2015 in case No. A07-13113/2014.



law. Consequently, in judicial practice there is uncertainty as to whether the fact of violation of building codes and rules is the subject of proof by *actio negatoria* about the demolition of a building.

This category of cases causes difficulties in assessing the legality of the respondent's actions, which influenced the formation of the legal position of the Supreme Court of the Russian Federation *actio negatoria* from the respondent's construction of a building, structure, construction. Clause 1 of paragraph 46 of the resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation of 29 April 2010 No. 10/22 states:

When reviewing claims for elimination of violations of the right not related to deprivation of possession, the court establishes the fact of compliance with urban planning and construction rules and regulations during the construction of the relevant object.


This wording is due to the fact that the court may limit itself to evaluating only the city-planning and construction norms and rules, rather than analyze the more complex question of the reality of the interference created by the respondent's construction of the building, structure, construction. Identifying a violation of public norms is easier than assessing the reality of interference with the exercise of subjective right, but is not this procedural economy unnecessary? And does it not strike a blow to the principle of a comprehensive, complete, and objective investigation of the circumstances of the case?

Of course, clause 2 of paragraph 46 contains a softening of the legal position of the Supreme Court of the Russian Federation. It states that

non-compliance, including minor, of city-planning and construction norms and rules during construction may be the basis for satisfaction of the stated claim, if this violates the right of ownership or legal possession of the claimant.

However, it is important to understand that it is very rare for the courts to give priority to private rights if they have revealed even a minor violation of public norms, even if they do not directly relate to the essence of the dispute under consideration. To argue a court decision on a private dispute is easier by referring to abstract public interests, which are often evaluative concepts and their interpretation comes down solely to judicial discretion. In this matter it would be more logical to proceed from the principle of legal certainty. Naturally, the above legal position has become widely used.⁴¹

⁴¹ See Review of the Practice of Resolving Disputes by Courts Arising in Connection with the Participation of Citizens in the Shared Construction of Apartment Buildings and Other Real Estate Objects (approved by the Presidium of the Supreme Court of the Russian Federation on 4 December 2013), para. 39; Review of the Court Practice of the Supreme Court of the Russian Federation for the Fourth Quarter of 2012



As an example of an incorrect, expansive interpretation by courts of the rule of Article 304 of the Civil Code of the Russian Federation, you can bring forth a legal position in accordance with which the requirement that a land owner dismantle an illegally-erected power line on his plot is negatory. The decision of the Presidium of the Supreme Arbitration Court of the Russian Federation of 19 March 2013 No. 15104/12 in case No. A41-37356/09 states that the owner of the land plot has the right to demand that violations of his rights be eliminated, including dismantling power lines not built in accordance with the zoning of the land plot if the installation of the power lines violated town planning and construction rules and regulations. The fallacy of this approach is that *actio negatoria* is a means of protecting private rights and cannot be applied in the sphere of public legal relations. When deciding on the dismantling of such structures, the court's reference to the norm of Article 304 of the Civil Code of the Russian Federation is clearly excessive; it is enough to set clause 1 of Article 23, paragraph 2 of Article 78 of the Land Code of the Russian Federation and paragraph 1 of Article 51 GrK RF as the legal basis.

Demolition and disassembly falls within the scope of *actio negatoria* when it comes to violation of subjective rights and legitimate interests. An example of such a situation might be the provision of paragraph 1 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, which states that the requirement to dismantle a kiosk with equipment installed in the hallway of a non-residential building was qualified by the arbitration court as a claim for elimination of the violation of law not related to dispossession, as the plaintiff has free access to the hall of the building belonging to him. When considering the case, the court found that at the end of the children's fair, which was held in the lobby on the first floor of the center of children's creativity, all sellers who participated in the fair dismantled their kiosks, except for the defendant, which caused the plaintiff to go to court.

Consequently, the courts cannot set the mere fact of violation of building codes and rules of a public nature as the basis of a decision on *actio negatoria*. The basis for using *actio negatoria* is that a structure violates the right of the plaintiff, creates a real obstacle in using his object. If there is a violation of building codes and rules, but the building itself does not violate the rights of the claimant, then the *actio negatoria* about its demolition is not subject to satisfaction;

10) Interference as a result of unauthorized reconstruction.⁴² Paragraph 29 of the resolution of the Plenum of the Supreme Court of the Russian Federation and the

(approved by the Decision of the Presidium of the Supreme Court of the Russian Federation of 10 April 2013), sec. 3; resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 19 March 2013 No. 15104/12 in case No. A41-37356/09; decisions of the Supreme Court of the Russian Federation of 2 April 2013 No. 18-KG13-13, of 18 February 2014 No. 18-KG13-168, of 11 March 2014 No. 20-KG14-4, of 22 April 2014 No. 18-KG14-23, of the Judicial College in Civil Matters of the Supreme Court of the Russian Federation of 17 February 2015 No. 18-KG14-200, of 17 February 2015 No. 5-KG14-142.

⁴² See resolution of the Eighteenth Arbitration Court of Appeal of 8 August 2013 No. 18AP-12788/2012 in case No. A76-13319/2012.



Plenum of the Supreme Arbitration Court of the Russian Federation of 29 April 2010 No. 10/22 states that the provisions of Article 222 of the Civil Code of the Russian Federation do not apply to legal relations connected with the creation of illegally-erected objects that are not real estate, nor to redevelopment, reorganization (re-equipment) of real estate as a result of which no new property has been created. Persons whose ownership or legal ownership is violated by the preservation of such objects may apply to the court with a claim for the elimination of the violation of a right not connected with deprivation of possession (Art. 304 of the Civil Code of the Russian Federation).

In accordance with the legal position of the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation, the owners of premises in an apartment building and their associations have the right to present an *actio negatoria* to persons who have reorganized and/or rescheduled the premises.⁴³ When answering the first question in the Review of the Court Practice of the Supreme Court of the Russian Federation for the Fourth Quarter of 2011 (approved by the Presidium of the Supreme Court of the Russian Federation on 14 March 2012), it was concluded that the owners of units in an apartment building, non-proprietors, as well as associations of owners of units in an apartment building, including housing cooperatives, have the right to independently apply to the court with requirements to the persons who have reconstructed and/or re-planned the residential premises of their own accord in the manner provided for in Articles 304 and 305 of the Civil Code, and such requirements are subject to review by the courts.

The decision of the Constitutional Court of the Russian Federation of 16 December 2010 No. 1581-OO states that the provisions of Article 29 of the Housing Code of the Russian Federation, which has a special mechanism for public law monitoring of compliance with the procedure for redevelopment and/or reorganization of residential units, does not prevent the owners of units in an apartment building or associations of unit owners in an apartment building from using civil law protection methods, in particular, those stipulated by Article 304 of the Civil Code;

11) Drainage or discharge of water on another individual's land or other immovable object. The decision of the St. Petersburg City Court of 28 April 2011 No. 6336 states that the defendant's failure to submit evidence indicating an agreement reached with the plaintiff on sharing the rear wall of a garage belonging to him indicates the unauthorized construction of the garage by the defendant without obtaining the appropriate permission for it, in view of which the claims for the demolition of an unauthorized superstructure, due to which the system of rainfall removal from the roof of the claimant's garage is damaged, shall be satisfied.

An example of using *actio negatoria* to eliminate a violation related to the drainage and discharge of water on an immovable property is a legal dispute

⁴³ See decision of the Constitutional Court of the Russian Federation of 25 November 2010 No. 1553-OO.



described in paragraph 5 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153. The letter described a situation in which an individual business owner turned to the court with a claim for the elimination of a violation of a right by correcting the rainwater discharge pipe directed at the owner of the building on which the corresponding pipe is installed. In the trial, the plaintiff proved that on the building adjacent to its land plot, the rainwater drainage pipe was installed in such a way that rainwater drains onto his land plot;

12) Unauthorized installation of a pipe or cable on another individual's land plot or other real estate object; interference with the operation of a previously laid pipe or cable.⁴⁴

Actio negatoria is used to dismantle pipes and cables placed within immovable objects without the consent of the owner. Paragraph 11 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153 provides an example from court practice, wherein the plaintiff appealed to the court demanding the defendant dismantle part of the heating main pipe laid on the claimant's land plot without his consent.

A similar situation is described in paragraph 6 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153: the company that owns the land plot and the communication center building located on it appealed to the arbitration court with a claim for the obligation to remove the fiber-optic cable multi-service network from the building. Satisfying the claimant's requirements, the court proceeded from the fact that the company providing Internet access services uses property for this without the consent of its owner.

The resolution of the Arbitration Court of the Volga-Vyatka District of 6 November 2015 No. F01-4379/2015 in case No. A43-27268/2014 states that the plaintiff requested to oblige the defendant to dismantle an electrical cable that he mounted on the wall of the building. Satisfying the stated requirements on the basis of Article 304 of the Civil Code of the Russian Federation, the court indicated that the defendant did not provide evidence of an agreement on the question of placing the electrical cable on the wall of the building with the owner of the property and created an obstacle in the exercise of the owner's right.

An example in which actio negatoria is used to eliminate interference in the operation of a previously laid pipe or cable is set out in paragraph 10 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 15 January 2013 No. 153, which presents a dispute wherein the company that owns

⁴⁴ See decisions of the Supreme Court of the Russian Federation of 3 October 2017 No. 304-ES17-14291 in case No. A45-11678/2016, of the Federal Antimonopoly Service of the West-Siberian District of 19 March 2013 in case No. A46-20938/2012, of the Federal Arbitration Court of the Ural District of 7 April 2010 No. F09-1525/10-S6, of the Arbitration Court of the Ural District of 14 August 2015 No. F09-5214/15 in case No. A60-22007/2014.



the garage turned to the court with *actio negatoria* to address the cooperative, the owner of a neighboring building, through which the common pipe passes, demanding the opening a branch of the pipe through which drinking water is supplied to the claimant's facility. As established by the court of first instance, an agreement was concluded between the plaintiff and the water company for the supply of drinking water from the centralized water supply system. In order to fulfill this agreement, the water company installed a cold-water gauge assembly. A constructive feature of the pipe, which was supposed to output drinking water in accordance with the contract, was that the pipe ran through the production box of the cooperative, which also used water on the basis of a contract with the water company. The defendant made repairs to the box, as a result of which the branch of the pipe through which drinking water was supplied to the claimant's object was blocked. The court satisfied the claim, stating that the *actio negatoria* can be satisfied whether the defendant commits actions violating the rights of the plaintiff on his own land or on another party's land.

It is worth noting that in court practice, there are cases when the court refuses dismantling due to the social importance of the illegally-laid pipes and cables.⁴⁵ The resolution of the Federal Arbitration Court of the Volga District of 10 July 2012 in case No. A55-26180/2010 states that the placement of heat supply infrastructure on the claimant's land plot without his consent was carried out for socially important purposes, which, according to the court, cannot violate his property right. In the decision of the Tenth Arbitration Court of Appeal of 5 June 2012 in case No. A41-41519/11, the court refused to protect the claimant's right to property by *actio negatoria*, since "the social significance of gas supply facilities does not allow for the possibility of their demolition and dismantling";

13) Requirements to limit or eliminate the negative impact of industrial facilities. This issue is not often discussed, but environmental relations are within the scope of use of *actio negatoria* when an industrial facility is located on a neighboring land if there is an excessive effect on neighboring areas in the form of noise, gasses, vapors, odors, etc.⁴⁶ Russian legislation does not contain special rules regarding property claims in the field of environmental relations. In contrast to this, in part 1 of § 906 of the German Civil Code, there is a general rule that the land owner cannot prohibit the impact of noise, gases, vapors, odors and other similar effects from another land plot if they do not affect or insignificantly affect the use of the land. It turns out that such an interdiction is possible if the impact of an industrial facility significantly affects the use of the neighboring land plot.

⁴⁵ See resolutions of the Federal Arbitration Court of the Volga District of 10 July 2012 in case No. A55-26180/2010, of 19 July 2012 in case No. A55-27370/2010, of the Tenth Arbitration Court of Appeal of 5 June 2012 in case No. A41-41519/11.

⁴⁶ See Gabriela Mihelčić & Maša Marochini Zrinski, *Coexistence of Actio Negatoria and the Right to Live in a Healthy Environment*, 39(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 241, 242–243 (2018).



The analogue of *actio negatoria* in the law of common law countries – trespass and nuisance – is also actively used when affecting real estate which violates the environmental rights of citizens. It should be noted that trespass and nuisance are quite actively used by owners in different situations of anthropogenic impact on land plots.⁴⁷

Conclusion

As a result of the study, the following conclusions were made:

First, the statement on the universality of *actio negatoria* is not confirmed when a comprehensive consideration of the features (characteristics) of *actio negatoria* is found. It is necessary to deviate from the principle of residual attention of the legislator to *actio negatoria*, residual, first of all, in comparison with *rei vindicatio*. Based on the analysis of three models of *actio negatoria* that exist in the law of the countries of Europe, a new, fourth model of this suit is proposed.

Second, *actio negatoria* aims to prohibit the possibility of creating obstacles to the owner in the use of objects. *Actio negatoria* can be used to protect a subjective right of ownership from a violation of ownership which hinders peaceful possession but did not result in deprivation of possession.

Third, only real estate can be the subject of an *actio negatoria* dispute; *actio negatoria* cannot be used to challenge the registered right to immovables.

Fourth, *actio negatoria* may not be used to protect a subjective right from violations related to deprivation of ownership or disputing the existence of a subjective right. When qualifying claims for eviction and demolition of an unauthorized construction, it should be assumed that if the violation affects the entire property, then *rei vindicatio* is applicable, and if the violation is connected with the acquisition of only a part of the property, it is necessary to present an *actio negatoria*. A claim for recognition of ownership is an independent property claim. The requirement to release objects from arrest acts as a type of action to the public authorities.

Fifth, *negatoria* protection has clear limits of application, and a violation that is eliminated by this requirement is characterized not only by the absence of deprivation of possession, but also by many other signs. The violation which is the actual basis of the *actio negatoria* has the following characteristics: is only an action; is illegal; is factual in nature; has a lasting character or is carried out periodically (illegal state); is not associated with deprivation of possession; is not associated with denial of the existence of a subjective right to an object; did not entail the termination of the right of ownership; is associated with the creation of obstacles to enjoyment and ownership.

⁴⁷ Alexandra B. Klass, *Bees, Trees, Preemption and Nuisance: A New Path to Resolving Pesticide Land Disputes*, 32(4) *Ecology Law Quarterly* 763, 764–765 (2005); M. Stuart Madden, *Toxic Torts Deskbook* 38–42 (Chelsea: Lewis Publishers, 1992); David S. Caudill, *Legal Responses to Body Burdens: Discourses on Low-Dose Toxicity*, 18(2) *Griffith Law Review* 259, 265–267 (2009).



Sixth, from the position of the stated provisions, the doctrinal definition of *actio negatoria* is formulated – it is a substantive, non-contractual requirement of a person owning and/or using an immovable object legally, presented to a third party to eliminate continuing, undue factual actions which impede the use of an immovable or threaten such a violation, but did not entail deprivation of ownership or challenging the right itself.

Seventh, *actio negatoria* can be used to protect a subjective right of property from a violation of ownership which is produced by interfering with ownership and which does not result in dispossession. At the same time, there is no difficulty in introducing possessory protection into the Russian civil legislation according to the model of negatory requirement, that is, legislatively fixing the ability of any owner to eliminate actual interference with his possession.

References

- Bergel J.-L. et al. *Les biens* (2nd ed., Paris: L.G.D.J., 2010).
- Caudill D.S. *Legal Responses to Body Burdens: Discourses on Low-Dose Toxicity*, 18(2) Griffith Law Review 259 (2009). <https://doi.org/10.1080/10383441.2009.10854640>
- Habersack M. *Die Mitgliedschaft – subjektives und "sonstiges" Recht* (Tübingen: Mohr Siebeck, 1996).
- Hohloch G. *Die negatorischen Ansprüche und ihre Beziehungen zum Schadensersatzrecht* (Frankfurt am Main: Metzner, 1976).
- Hudson A.H. *Trespass or Nuisance*, 23(2) Modern Law Review 188 (1960). <https://doi.org/10.1111/j.1468-2230.1960.tb00586.x>
- Klass A.B. *Bees, Trees, Preemption and Nuisance: A New Path to Resolving Pesticide Land Disputes*, 32(4) Ecology Law Quarterly 763 (2005).
- Madden M.S. *Toxic Torts Deskbook* (Chelsea: Lewis Publishers, 1992). <https://doi.org/10.1201/9781351077354>
- Mager H. *Besonderheiten des dinglichen Anspruchs*, 193(1) Archiv für die civilistische Praxis 68 (1993).
- Merrill T.W. *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14(1) Journal of Legal Studies 13 (1985). <https://doi.org/10.1086/467764>
- Sanfilippo C. *Istituzioni di diritto romano* (Soveria Mannelli: Rubbettino, 1996).
- Smith H.E. *The Persistence of System in Property Law*, 163(7) University of Pennsylvania Law Review 2055 (2015).
- Wilhelm J. *Sachenrecht* (Berlin: de Gruyter, 2007). <https://doi.org/10.1515/9783110916928>
- Windscheid B. *Lehrbuch des Pandektenrechts. Bd. 1* (Düsseldorf: Buddeus, 1870).
- Wolf M. & Wellenhofer M. *Sachenrecht* (27th ed., Munich: C.H. Beck, 2012).



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