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Seizing Securities in Criminal Proceedings of the Russian Federation: Theory and Practice *

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Abstract
The article discusses topical issues related to the difficulties encountered by the investigator when seizing securities. The authors, on the basis of the studied criminal procedural and civil legislation, proposed to amend the Code of Criminal Procedure of the Russian Federation, solving contradictions in theory and practice. Based on the results of studying the theoretical and practical aspects of the investigator's activities in imposing seizure of securities, a number of issues were highlighted, which were studied in detail. In addition, proposals were made to improve the current criminal procedural legislation, which will allow the investigator to optimize the activities on the application of this measure in the future in procedural coercion, both in general and in relation to certain types of securities.
Keywords: bona fide acquirer, criminal proceedings, interrogator, seizure of securities.

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Penyitaan Surat Berharga dalam Proses Pidana Federasi Rusia: Teori dan Praktik

Abstrak
Artikel ini membahas tentang kesulitan-kesulitan yang dihadapi penyidik dalam penyitaan surat berharga. Para penulis, berdasarkan undang-undang acara pidana dan perdata yang dipelajari mengusulkan untuk mengubah Kode Acara Pidana Federasi Rusia, memecahkan kontradiksi dalam teori dan praktik. Berdasarkan hasil kajian aspek teoretis dan praktis dari kegiatan penyidik dalam melakukan penyitaan surat berharga, beberapa hal menjadi sorotan yang dikaji secara rinci. Selain itu, diusulkan untuk memperbaiki undang-undang acara pidana saat ini, yang memungkinkan penyidik untuk mengoptimalkan kegiatan penerapan tindakan ini di masa depan dalam paksaan prosedural, baik secara umum maupun dalam kaitannya dengan jenis surat berharga tertentu.
Kata kunci: Pengakuisisi Bonafide; Proses Pidana; Interogator; Penyitaan Surat Berharga

Конфискация ценных бумаг в уголовном судопроизводстве Российской Федерации: Теория и практика

Аннотация
В данной статье рассматриваются трудности, с которыми сталкиваются следователи при конфискации ценных бумаг. Авторы на основе изученного уголовно-процессуального и гражданского законодательства предложили внести изменения в Уголовно-процессуальный кодекс Российской Федерации, разрешающие противоречия в теории и практике. По результатам изучения теоретических и практических аспектов деятельности следователя при конфискации ценных бумаг выделен ряд вопросов, которые подробно изучены. Кроме того, предлагается внести изменения в действующий уголовно-процессуальный закон, которые позволили бы следователям оптимизировать их дальнейшее осуществление данного деяния в условиях процессуального принуждения как в целом, так и в отношении отдельных видов ценных бумаг.
Ключевые Слова: Добросовестный Покупатель; Уголовное Судопроизводство; Дознаватель; Конфискация Ценных Бумаг

A. INTRODUCTION

Today, compensation for harm caused by a crime does not meet the principles of legality and justice and does not correspond to the modern level of development of society. Therefore, a theoretical rethinking of existing scientific views on compensation for harm caused by a crime is required, and the substantiation of new provisions on the establishment and compensation of harm (Tien et al., 2021, p. 214).

The seizure of property is one of the most common ways to compensate the victim caused by a crime. In accordance with Clause 13.1 of Art. 5 of the Code of Criminal Procedure of the Russian Federation, property includes documentary securities, as well as uncertified securities, the rights to which are recorded in the register of owners of uncertificated securities or a depository.

As the law enforcement practice shows, the solution of the issue of seizure of securities is the most difficult and requires special knowledge in various fields of science. Relations associated with securities have their own specifics, since the legislation and regulations governing relations in the securities market have an extensive system of legal norms that regulate the procedure for dealing with securities, which contributes to the emergence of difficulties when imposing seizure on this category. Property in the enforcement activities of bodies of preliminary investigation in criminal cases.

B. METHODS

As the main method in the process of writing this scientific article, the authors used the dialectical method of cognition, which made it possible to comprehensively consider the issues of the investigator's activity in seizing securities and the related problems of legal regulation of the application of procedural coercion in the form of seizure of securities.

A formal-logical method, through the use of which the existing situation is characterized, associated with an insufficiently effective procedure for applying a measure of procedural coercion in the form of seizure of securities, the identified problems are analyzed and ways to solve them are proposed.

The method of participatory observation was used to explicate the legal practice that exists in the seizure of securities, to identify the actual patterns, as well as inaccuracies, gaps in the mechanism of legal regulation of the investigator's activities to seize securities.

The method of researching documents was used in the study, analysis, systematization and generalization of materials from criminal cases, in which securities were seized.

The method of legal and technical analysis was used when formulating and submitting proposals for improving the Russian criminal procedural legislation in terms of the application of a measure of procedural coercion in the form of seizure of securities

As a result of the application of this methodology, new knowledge was obtained on the seizure of securities, as well as proposals were developed to improve the current criminal procedural legislation governing the procedure for seizure of securities and the practice of its application.

C. RESULTS AND DISCUSSION

Changing financial and economic relations in our state have led to a turn towards innovations in the life of "ordinary" citizens, who have become more enlightened in the field of various opportunities for making a profit associated with the acquisition and use of securities (Ukhanova, 2017, p. 97).

In practice, consideration of the issue of the grounds and procedure for seizing securities raises a number of questions that, in the opinion of the authors, require detailed study. The seizure of securities by its legal nature is the personification of restorative justice, since it is through the application of this measure of criminal procedural coercion that the victim of a criminal offense can count on compensation for the harm caused by the crime (Ivanov et al., 2021a, p. 1378-1379). Taking into account the current regulatory legal framework governing various categories of securities, it is necessary to systematize knowledge about the features of each type of securities listed in the Code of Criminal Procedure of the Russian Federation.

Considering such a category of property as securities, it should be noted that the peculiarities of the procedure for seizing securities are enshrined in Art. 116 of the Code of Criminal Procedure of the Russian Federation. As F.N. Bagautdinov, this is due to the presence of a number of individuals and legal entities who own securities, the value of which is expressed in monetary terms, in view of which they can also be arrested (Bagautdinov, 2003, p. 41).

Also noteworthy is the fact that Art. 116 of the Code of Criminal Procedure of the Russian Federation also refers to the seizure of securities certificates. However, when it comes to a certificate certifying the rights to the securities

indicated in it, for example, a share certificate, then the seizure should be imposed on both the certificate and the shares themselves owned by the suspect (accused), and vice versa, the seizure of shares presupposes the seizure of the corresponding certificate, which is indicated in the recommendations of the General Prosecutor's Office of the Russian Federation dated March 30, 2004 No. 36-12-04 ("Grounds and procedure for the application of temporary suspension from office, seizure of property and securities, monetary penalty").

In Art. 116 of the Code of Criminal Procedure of the Russian Federation states that the arrest is carried out in order to ensure the possible confiscation of property specified in Part 1 of Art. 104[1] of the Criminal Code of the Russian Federation, either in order to ensure compensation for harm caused by a crime, or in order to ensure the execution of a penalty in the form of a fine, arrest on securities, or their certificates. The seizure is imposed at the location of the property or at the place of registration of the rights of the owner of the securities in compliance with the requirements for the seizure of property.

At the same time, one should agree with the opinion of N.S. Kashtanova, who claims that the wording "at the location of the property or at the place of registration of the rights of the owner of securities", which is used by the domestic legislator, has a certain legal inaccuracy (Kashtanova, 2017, p. 1097). From the meaning of the specified formulation, its true meaning, invested in it by the legislator, is unclear. Either we are talking about the rules for determining the territorial jurisdiction when filing a petition for the seizure of securities before the court, or we are talking about the place where (depending on the type of security) copies of the court order should be sent, as well as the protocol of the investigator on imposing seizure of securities. An illustrative example is the seizure of uncertified securities, when copies of the court order, as well as the protocol of the investigator on the seizure of the specified securities, are sent to the location of the issuer or the holder of the securities register, which upon receipt of the specified procedural acts cannot perform operations related to with the disposal of securities (Kashtanova, 2017, p. 1097-1098).

However, not all procedural scholars see in the above norm the rules of territorial jurisdiction established by the legislator when filing a petition for seizure of securities before the court. So, V.Y. Petrikin notes that when seizing securities, the procedure provided for in Art. 115 of the Code of Criminal Procedure of the Russian Federation, and the features set forth in Art. 116 of the Code of Criminal Procedure of the Russian Federation, meet only the purposes of seizure and description of securities in the protocol (Petrikin. 2007, p. 97).

Our analysis of judicial practice in criminal cases revealed the existence of serious contradictions in the interpretation of the above formulation. So, canceling the court decision on the permission to seize securities and sending materials for a new court hearing, the appellate instance noted: in accordance with Part 3 of Art. 115 of the Code of Criminal Procedure of the Russian Federation, the investigator's petition for the seizure of property is considered by the court in accordance with the procedure established by Art. 165 of the Code of Criminal Procedure of the Russian Federation. According to this position of the legislator, requests for investigative actions are subject to consideration at the place of the preliminary investigation or the production of the investigative action. At the same time, there is a special rule fixed in Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, which regulates the specifics of the procedure for seizing securities. According to the provisions of Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, seizure of securities or their certificates is imposed at the location of the property or at the place of registration of the rights of the owner of the securities in compliance with the requirements of Art. 115 of the Code of Criminal Procedure of the Russian Federation. Thus, as noted by the court, Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation directly determines the territorial jurisdiction for consideration of the investigator's petitions for the seizure of securities. In this case, as can be seen from the materials presented to the court, the investigator's petition for the seizure of funds in the form of dividends payable in respect of ordinary registered uncertified shares of the OAO was considered by the Tverskoy District Court of Moscow at the place of the preliminary investigation of the case. At the same time, as can be seen from the materials presented to the court, ordinary registered uncertified shares of OAO are kept in the depository of ZAO “C”, the address of which is under the jurisdiction of the Presnensky District Court of Moscow, where, based on the provisions of Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation and the investigator's petition for the seizure of funds in the form of dividends payable on these shares is subject to consideration.

As part of the consideration of another appeal, the appellate court also indicated that by virtue of Part 1 of Art. 47 of the Constitution of the Russian Federation, no one can be deprived of the right to have his case examined in that court and by the judge to whose jurisdiction it is attributed by law. As can be seen from the submitted materials of the petition, currently the activity of maintaining the register of shareholders of OAO "B" is carried out by OOO “P”, located at the address, the territory of which belongs to the jurisdiction of the Basmanny District Court of Moscow, while the petition of the investigator was

essentially considered by the Presnensky District Court of Moscow at the place of the preliminary investigation. In such circumstances, the ruling of the court of first instance cannot be recognized as lawful, in connection with which it must be canceled, and the material, at the request of the investigator, must be sent for a new trial to the Basmanny District Court of Moscow.

The foregoing jurisprudence allows us to conclude that in Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, the courts see the rules for determining the territorial jurisdiction when filing a petition before the court for permission to seize securities.

At the same time, in judicial practice, there are also cases in which, within the framework of assessing the legality of the adoption by the court of first instance of a decision to authorize the seizure of securities, the courts of appeal did not see procedural violations and noted that in accordance with Part 2 of Art. 165 of the Code of Criminal Procedure of the Russian Federation, applications for permission to seize securities are subject to consideration at the place of the preliminary investigation or the production of an investigative action, and not at the location of the property or at the place of registration of the rights of the owner of the securities. So, in one of the appellate decisions, the court indicated: by virtue of Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, seizure of securities or certificates is imposed at the location of the property, or at the place of registration of the rights of the owner of the securities. On the basis of Clause 9, Part 1 of Art. 29 of the Code of Criminal Procedure of the Russian Federation, only the court, including in the course of pre-trial proceedings, is competent to make decisions on the seizure of property.

Based on Part 2 of Art. 165 of the Code of Criminal Procedure of the Russian Federation, a petition for conducting an investigative action is subject to consideration by a single judge of a district court at the place of conducting a preliminary investigation or production of an investigative action. As it was established in the session of the court of appeal, the motion to seize the registered papers – shares belonging to M. – was brought before the court by the official in charge of the criminal case. As correctly established by the court of first instance in the contested decision, the petition fully complies with the requirements of the criminal procedure legislation, substantiated by the materials of the criminal case submitted to the court. Thus, the court of first instance made a lawful and well-grounded decision to authorize the seizure of securities at the place of the preliminary investigation.

Analyzing the norm provided for in Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation ("seizure is imposed at the location

of the property or at the place of registration of the rights of the owner of the securities"), it should be noted that there are some contradictions in the understanding of the wording "at the location of the property or at the place of registration of the owner's rights" seizure of securities and require legislative regulation of the specified norm. Based on the meaning of the above expression, if the legislator had the goal of establishing jurisdiction when the court considers applications for permission to seize securities, then it should be noted that in practice this understanding causes some difficulties, for the solution, which, in our opinion, is necessary in Part 2 Art. 165 of the Code of Criminal Procedure of the Russian Federation, make the following amendment: "A petition for an investigative action shall be considered by a single judge of a district court or a military court of the corresponding level at the place of preliminary investigation or an investigative action, except for cases for which part of the first article 116 of this Code establishes other rules for determining territorial jurisdiction. The said petition must be considered no later than 24 hours from the moment of its receipt by the court, except for the cases provided for by part 3^1 of this article".

At the same time, one cannot but agree with the opinion of N.S. Kashtanova, who claims that if the legislator did not set himself the goal of establishing specific territorial jurisdiction when seizing securities, and the existing judicial practice under Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation erroneously interprets the interpretation of the norms of the current criminal procedure legislation; in the Code of Criminal Procedure of the Russian Federation, it is also necessary to make some changes and additions that will eliminate the legal gaps in this norm. This author proposes to make the following changes to Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation: "In order to ensure the possible confiscation of property specified in part one of Article 104 of the Criminal Code of the Russian Federation, to ensure compensation for harm caused by a crime, or to execute a penalty in the form of a fine, seizure of securities or their certificates is imposed at the location of the property or accounting for the rights of the owner securities in compliance with the requirements of Article 115 of this Code, including taking into account the rules for determining the territorial jurisdiction established by the second part of Article 165 of this Code" (Sokolova, 2018, p. 1102-1103).

Considering further the specifics of the seizure of securities, it should be noted that bearer securities held by a bona fide acquirer are not subject to seizure (Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation). In accordance with Art. 302 of the Civil Code of the Russian Federation, a bona fide acquirer is a person who acquired property for compensation from another

person who does not have the right to alienate it, about which the acquirer did not know and could not know.

It should be borne in mind that, according to Russian law, the sign of "good faith" is relevant if the owner of the disputed property acquired this property through a transaction that met the conditions of the validity of the transactions, with the exception of the fact that the person who alienated the property was illegitimate. In addition, the acquirer is not recognized as being in good faith if, at the time of the acquisition of the property: a) there was a note on the litigation on this property in the Unified State Register of Rights (hereinafter USRR); b) this property was not registered with the person who alienated it, as indicated in the resolution of the Plenum of the Supreme Court of the Russian Federation No. 10, Plenum of the Supreme Court of the Russian Federation No. 22 dated April 29, 2010 "On some issues arising in judicial practice when resolving disputes related to the protection of property rights and other property rights". However, despite the fact that the legislator has quite clearly explained the law on the inadmissibility of seizing securities that were acquired in good faith, in judicial practice there are also negative results of seizing bearer securities held by a bona fide acquirer.

Thus, in particular, the preliminary investigation authorities seized the uncertified shares of OAO "E", which belonged to OOO "P" and which were on the personal account of the registrar, OAO "P". By a court order, such seizure was recognized as lawful. In the cassation appeal of the representative of OOO "A-P", the question was raised about the cancellation of the court order on the grounds that the arrested shares belong not to OAO "E", but to LLC "OOO" and have nothing to do with the property of OAO "E". The panel of judges canceled the court ruling, indicating: according to Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, bearer securities held by a bona fide acquirer are not subject to seizure. Based on the requirements of the law, when considering the case, the court had to check whether OOO "A-P" was a bona fide acquirer and whether the said shares were not received as a result of the criminal actions of the suspects. However, as can be seen from the minutes of the court session, the court did not comply with the provisions of the law, did not establish the ownership of the shares, the method of their acquisition and their relation to the criminal case under investigation, and did not substantiate its decision on the legality of the seizure from the point of view of the legislative requirements.

Paying attention to the provisions of Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, it is necessary to conclude that only bearer securities held by a bona fide acquirer are not subject to arrest.

However, civil law specifies not only bearer securities, but also documentary order securities, as well as registered securities certifying a monetary claim.

In our opinion, the current reaction of Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation was originally based on the provisions of Part 3 of Art. 302 of the Civil Code of the Russian Federation, according to which money, as well as bearer securities cannot be claimed from a bona fide purchaser (Sokolova, 2018, p. 199).

In 2013, significant changes in a number of provisions were made to the Civil Code of the Russian Federation, aimed at resolving the existing problems associated with the institution of securities. Thus, the Federal Law of July 2, 2013 No. 142-FZ "On Amendments to Subsection 3 of Section I of Part One of the Civil Code of the Russian Federation" introduced a special Art. 147, which spoke about the peculiarities of reclaiming documentary securities from a bona fide acquirer. In accordance with Part 3 of Art. 147 bearer securities, regardless of what right they certify, as well as order and registered securities certifying a monetary claim, cannot be claimed from a bona fide acquirer.

Noteworthy is the fact that in accordance with Part 1 of Art. 149 of the Civil Code of the Russian Federation uncertified securities certifying only the monetary right of claim, as well as uncertified securities purchased at organized auctions, regardless of the type of certified right, cannot be claimed from a bona fide purchaser. The Supreme Court of the Russian Federation also draws attention to the above circumstance in paragraph 41 of the Resolution of the Plenum of June 23, 2015 No. 25 "On the application by the courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation".

Based on the foregoing, it can be concluded that the current civil legislation has expanded the provisions of Part 3 of Art. 302 of the Civil Code of the Russian Federation on the specifics of reclaiming property from a bona fide purchaser.

On the basis of the studied criminal procedural and civil legislation, it is proposed to add to Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, the following amendments and additions, and state them in the following edition: "Documentary bearer securities, regardless of the right they certify, are not subject to seizure, order and registered securities certifying a monetary claim, as well as uncertificated securities purchased at organized auctions or the claims that certify only the monetary right that are in the possession of a bona fide acquirer".

At the same time, it should be noted that when analyzing the content of Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation,

our attention was attracted by the fact that from the content of Part 3 of Art. 115 of the Code of Criminal Procedure of the Russian Federation, it follows that the arrest can be imposed on property held by other persons who are not suspects, accused or persons who are legally financially responsible for their actions, if there are sufficient grounds to believe that it was obtained as a result of the criminal actions of the suspect, the accused was either used or intended to be used as a tool, equipment or other means of committing a crime, or to finance terrorism, extremist activity (extremism), an organized group, an illegal armed group, a criminal community (criminal organization). So, the law regulates the seizure of the property of other persons, that is, it is necessary to determine the contradictions that collide in Part 3 of Art. 115 and in Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, namely with the question of the possibility of seizing bearer securities held by a bona fide acquirer, in the event that there is sufficient reason to believe that these securities are the object of criminal actions set out in the content of Part 3 of Art. 115 of the Criminal Procedure Code of the Russian Federation (Sokolova, 2018, p. 200).

In the legal literature, procedural scholars' express different points of view on this matter. So, according to G.V. Arshba, these securities are not subject to seizure (Arshba, 2004, p. 125). Another point of view is shared by V.Y. Petrikin, indicating that the seizure of this type of securities from a bona fide acquirer is possible, provided that they are forged by the suspect, the accused, or stolen from the property of the rightful owner, and then sold to a bona fide acquirer.

The authors of this article adhere to the second point of view, since in our opinion, with a systemic interpretation of Part 3 of Art. 115 of the Criminal Procedure Code of the Russian Federation in its relationship with Part 2 of Art. 116 of the Code of Criminal Procedure of the Russian Federation, one should rely on the letter of the Prosecutor General's Office of Russia dated March 30, 2004 No. 36-12-04, which notes: if there is sufficient reason to believe that bearer securities were, for example, forged by the suspect (accused) or stolen from the property of the rightful owner , and then sold to a bona fide purchaser, then such securities in accordance with Part 3 of Art. 115 and clause 3.1 of Part 2 of Art. 82 of the Code of Criminal Procedure of the Russian Federation are subject to arrest and attachment to the materials of the criminal case as material evidence. The foregoing allows us to state that bearer securities, which are the object of criminal acts set forth in Part 3 of Art. 115 of the Code of Criminal Procedure of the Russian Federation and those held by a bona fide purchaser are subject to arrest, which is also confirmed by the judicial practice we have studied.

Drawing a conclusion from the above, it should be noted that the legal mechanism for seizing securities is poorly understood and very complex. At the same time, according to a number of legal scholars (D.A. Ivanov, S.V. Ermakov, E.N. Alimamedov, A.S. Esina), seizure of property and securities will be a really effective way of securing a civil claim only in the case of its procedurally competent application and compliance with all provisions of the criminal procedure law (Ivanov et al., 2021b, p. 392).

In this article, both from the theoretical and from the practical side, the grounds and a special procedure for seizing securities are studied. Based on the results, a number of issues were identified, which were studied in detail, in addition, according to the results of the study, proposals were made to improve the current criminal procedure legislation, which will allow the investigator to further optimize the activities on the application of this measure of procedural coercion, both in general and in relation to certain types of securities.

D. CONCLUSION

In conclusion, we believe it appropriate to formulate the following conclusions regarding the issues of seizure of securities.

It is proposed to amend the second part of Art. 116 of the Code of Criminal Procedure of the Russian Federation, which establishes that documentary bearer securities, regardless of the right attested by them, order and registered securities certifying a monetary claim, as well as uncertificated securities purchased at organized auctions or certifying only the monetary right of a claim held by the bona fide acquirer are not subject to seizure.

A change is required in the wording of the second part of Art. 165 of the Criminal Procedure Code of the Russian Federation, which regulates the procedure for considering a petition for an investigative action by a single judge of a district court or a military court of the corresponding level at the place of preliminary investigation or production of an investigative action, except for cases for which Part 1 of Art. 116 of the Code of Criminal Procedure of the Russian Federation established other rules for determining territorial jurisdiction. This petition must be considered no later than 24 hours from the moment of its receipt by the court, with the exception of cases provided for in Part 3 of Art. 165 of the Code of Criminal Procedure of the Russian Federation.

Based on the results of studying the theoretical and practical aspects of the investigator's activity in seizing securities, the authors considered and resolved

a number of issues that allow the investigator to further optimize the activity on the application of this measure of procedural coercion, both in general and in relation to certain types of securities.

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