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ORIGINAL PAPER

# The defendant's "offensive" in civil proceedings. An interpretation of the *reus fit actor rule*

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**Abstract:**
What is characteristic of civil proceedings is the active behaviour of the claimant who initiates the lawsuit, establishes the limits within which the it takes place or causes it to be terminated. But, to the same extent, the defendant may make use of procedural means which give him the opportunity to get out of the defensive state or even to become a real claimant.
This analysis captures the usual procedural mechanisms by which the defendant asserts claims in the lawsuit, as well as a series of atypical procedural instruments, which give new values to the *reus fit actor* rule.

**Keywords:** *civil proceedings, defendant's defence*, *reus fit actor.*

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**Introductory considerations**

The claimant, who initiates the civil proceedings, seems to hold a dominant position, influencing the development of the lawsuit through procedural mechanisms conferred by law. Starting from the fact that the civil action is initiated by the claimant, a series of procedural provisions give the claimant, at least at an early stage of the civil proceedings, procedural prerogatives outlining the procedural framework from an objective and subjective perspective, and determines the jurisdiction of the court that is to decide the case or through which the procedural process may be terminated. Within certain legal limits, the claimant seems to be sovereign in the exercise of these prerogatives, since the possibility of court interference or opposition by the other participants in the proceedings is quite slight at this procedural stage. Likewise, as a general rule, there are procedural principles and rules intended to prevent the abuse of right in the form of the claimant's discretionary exercise of the prerogatives conferred by law.

The legal provisions intended to support the primary role of the claimant in initiating and shaping the civil proceedings are found in the Romanian Civil Procedure Code, both in the general part, in the matter of principles, civil action, participants in the civil proceedings and in the part devoted to the jurisdiction of courts, and in the special part, where the full role of the claimant is highlighted in the regulations devoted to the claim form and disposition acts.

The principle of availability, which governs civil proceedings, regulated under art. 9 of the Civil Procedure Code, gives the claimant, in his capacity as the holder of the subjective civil right brought before the court, the prerogative to start the action and to end it under certain conditions (Paul, 2023: 108-109). The phrases, accepted by legal doctrine, according to which the parties are "masters of the lawsuit" or "the lawsuit is the property of the parties" (Deleanu, 2013: 215), have, at least in an early stage of the lawsuit, a strong resonance with regard to the claimant. Thus, with the exceptions provided by law, when other persons or entities are entitled to initiate the civil action, the claimant is the one who begins the civil proceedings. This prerogative, generically recognised by the principle of availability, is implemented through the concrete mechanism of the claim form, regulated by art. 194 of the Civil Procedure Code, but also by the provisions of art. 192, in accordance with which, "for the defence of their legitimate rights and interests, any person may address the court system by notifying the competent court with a claim form, for the defence of their legitimate rights and interests". Once the claim is filed, through its elements, namely the parties, the subject matter and the cause, the procedural framework is determined from an objective and subjective perspective.

The concept of civil action, as defined by art. 29 of the Civil Procedure Code, is subsumed to the availability of the claimant, at least in its initial active component, consisting of the procedural means provided by law for the protection of the subjective right claimed. The references provided by the claim form, namely the nature and value of the claimant's demands, the capacity, domicile or residence of the defendant, determine an important extrinsic aspect of the civil action, namely the jurisdiction of the court that will decide on the dispute. In principle, the jurisdiction established in this way, if it complies with the legal provisions, verified and accepted by the court, cannot be modified by the requests of the defendant or other participants in the proceedings. The aspect is important in the economy of the lawsuit, since, if the defendant or third parties have their own claims in connection with the litigation initiated by the claimant, they can capitalize

on them in the process thus initiated, in which case the jurisdiction of the court notified by the claimant is extended to the respective claims or they can resort to a distinct procedural approach that will follow the specific rules of jurisdiction.

The claimant, as well as the defendant, may use procedural means by which the initial procedural framework established from a subjective perspective can be modified by involving third parties in the proceedings, so that the court decision can be enforced against them. From the point of view of the terms laid down by law, the claimant benefits from longer time limits compared to the defendant, within which he can formulate the request for the forced intervention of third parties, in the form of suing another person or the impleader. Pursuant to art. 68(2) and art. 73(2) of the Civil Procedure Code, such a request by the claimant may be made no later than the completion of the investigation of the case before the first instance court.

As regards the disposition acts, one of their important components is the claimant's right to waive the request, legally unconditional up to a certain procedural moment, respectively with certain pecuniary consequences or conditioned by the defendant's agreement if the withdrawal occurred above a certain procedural threshold (art. 406 of the Civil Procedure Code). At the same time, if he waives his very subjective right brought before the court, the claimant is sovereign in this approach, with no provision on any legal or temporal conditioning, or related to the agreement of the opposing party (art. 408 of the Civil Procedure Code). An important prerogative recognized to the claimant is the modification of the claim form before the first term at which he is legally summoned (art. 204 of the Civil Procedure Code). In this case, however, the court will order the postponement of the trial and the communication of the amended claim to the defendant, who will have the opportunity to file a defence or even a counterclaim.

This initial role of the claimant in the original configuration of the lawsuit can be compensated, counteracted or completed by the defendant, in turn an original part of the process, who, through his prerogatives and through the instruments recognized by law, can add objective or subjective elements to the initial procedural framework. Although the defendant's involvement in the proceedings is also caused by the claimant, once he becomes a party, the defendant has his own procedural means - requests, proper defences and procedural exceptions - through which he can counteract, complement or even annihilate the claimant's legal action.

In relation to the situations presented, in which the procedural position of the claimant clearly prevails, there are hypotheses in which the defendant, through the procedural means at his disposal, either completes the procedural framework set by the claimant, or cooperates in the exercise of certain procedural acts through which both parties exercise their procedural rights. Thus, the role of the defendant in the civil proceedings can be passive and defensive or active and offensive, as he may have a complementary position to the claimant, cooperating or agreeing when this is necessary in accordance with the legal provisions.

In this context, I have proposed a reinterpretation of the reus fit actor situation, when the defendant becomes an active party in the judicial procedure or even a genuine claimant. The phrase reus fit actor is usually viewed in the context of assigning the burden of proof - in excipiendo reus fit actor - designating situations in which the defendant, having his own claims against the claimant, acquires a position similar to that of the latter or the hypothesis in which the defendant raises a procedural exception as a means of defence (Ciobanu, Briciu, Dinu, 2023: 448). Beyond these hypotheses, the defendant,

coming out of the defensive, can have a major influence on the procedural framework initially set by the claimant, by using procedural mechanisms allowed by law, both in the first instance and in appeals for reformation, thus outlining new values of the reus fit actor rule.

**The defendant's position in the first instance**

Correlative to the claimant's position, the defendant's position in the first instance civil proceedings must be viewed in an integrated manner, in relation to the principle of availability, the civil action, the participation of third parties in the proceedings and the disposition acts, as well as the mechanisms regulated in the special part of the Civil Procedure Code dedicated to the first instance lawsuit.

After the claimant, pursuant to the provision contained in art. 9(2) of the Civil Procedure Code, according to which "the subject matter and limits of the trial are established by the requests and defences of the parties", it is also the defendant's turn to contribute to shaping the procedural framework (Zidaru, Pop, 2020: 42). Following the determination of the procedural framework by establishing the parties, the subject matter and the cause by the claimant, the defendant can set the limits of his defences and even reconfigure the procedural framework by attracting third parties to the lawsuit or he can influence the claimant's demands by way of a counterclaim.

The civil action, as regulated by art. 29 of the Civil Procedure Code, necessarily integrates the defence made by the defendant. Along with the procedural means provided by law for the protection of the subjective right requested by the claimant, the civil action also includes those intended to ensure the defence of the parties in the lawsuit (Leş, 2014: 254). The defence referred to in the legal text must be viewed in a broad sense, encompassing the defendant's claims, such as the defence, the counterclaim or the request to introduce third parties in the lawsuit, the actual defences and exceptional defences relied on by the defendant, the appeals that he could use, as well as other procedural instruments made available by law to ensure a fair trial.

As regards bringing third parties to court, the possibilities recognised by law for the defendant are even more than those available to the claimant. The defendant may formulate the two requests for forced intervention, namely the summons to court of other persons who could claim, by way of a separate request, the same rights as the claimant and the impleader; in addition, he is the only one that may use the request called the indication of the holder of the right. Specific to the request to summon other persons to court and the request to indicate the holder of the right is the fact that, as a result of them, the initial defendant may be removed from the trial. Thus, in the case of summoning other persons to court, pursuant to art. 71 of the Civil Procedure Code, if the defendant declares that he recognizes the claim and will execute it against the person whose right will be established through the court, he will be removed from the trial, and the trial will continue between the claimant and the third party summoned to court, who will dispute their right brought to court. Similarly, in the case of the identification of the holder of the right, pursuant to art. 77(3) of the Civil Procedure Code, if the third party indicated by the defendant as the holder of the right acknowledges his claims, and the claimant consents, the defendant will be removed from the trial, and the third party will take his place. These aspects represent an important change in the procedural framework, made following the defendant's actions.

The availability of the civil action is also reflected in what concerns the defendant. With the exception of the claimant's waiver of the right itself and the waiver

of the action until the first term at which the parties are legally summoned, uncensorable by the defendant, all other disposition acts presuppose the defendant's initiative, agreement or participation. Thus, as provided for in art. 406(4) of the Civil Procedure Code, in the event that the claimant abandons the trial at the first term at which the parties are legally summoned or after this moment, the express or implied consent of the other party, respectively of the defendant, is required. The defendant may terminate the trial by recognising the claimant's demands (art. 436 of the Civil Procedure Code) or by concluding a transaction with the claimant (art. 438 of the Civil Procedure Code).

In the first instance trial, the defendant's position may be purely defensive, when, without proposing evidence in defence or having lost the right to propose evidence, he defends himself "by discussing in fact and in law the merits of the opposing party's claims and evidence" (art. 263 of the Civil Procedure Code). Even in this case, however, as the High Court of Cassation and Justice decided in an appeal in the interest of the law, the defendant may resume his active position from an evidentiary point of view before the appeal court. Thus, by decision no. 9 of March 30, 2020, published in the Official Gazette of Romania no. 548 of June 25, 2020, it was stated that "in the consistent interpretation and application of the provisions of art. 470, art. 478 paragraph (2) and art. 479 paragraph (2) of the Civil Procedure Code, in relation to art. 254 paragraphs (1) and (2) of the Civil Procedure Code, the notion of new evidence that can be proposed and approved in the appeal stage includes both the evidence proposed before the first instance court by the claim form or defence, as well as the evidence that was not proposed before the first instance court or was proposed late, and in respect of which the first instance court found the loss".

Another position of the defendant in the first instance may be that in which he formulates defences against the claimant's request for summons by means of a counterclaim. Thus, the defendant combats the claimant's request in fact and in law, proposing evidence or raising procedural exceptions meant to paralyze the claimant's action. In this hypothesis, too, although the defendant's role is still defensive, his attitude may be considered offensive if he invokes more aggressive defences, likely to influence the procedural framework with repercussions even in the appeal. This is the case of invoking by counterclaim the nullity of the act on which the claimant's request is based or of usucapion against an action for the claim of an immovable property, without requesting the annulment of the act, respectively the finding of the acquisition of the property right by usucapion, an aspect that would have required the formulation of a counterclaim. This type of defence may result in the rejection of the claimant's action, but without being found in a solution at the level of the operative part of the judgment, by which the first instance would rule on the annulment of the act or the acquisition of the property right by usucapion.

Finally, the defendant truly becomes a claimant by formulating his own claims against the original claimant, through a request formulated in the action initiated by the latter. The procedural means is the counterclaim, which can be formulated "if the defendant has, in connection with the claimant's request, claims deriving from the same legal relationship or closely related to it", as provided for in art. 209(1) of the Civil Procedure Code. By means of the counterclaim, the defendant leaves passivity, the defensive procedural attitude and the defences promoted by the response and formulates his own demands against the claimant. In this case, the defendant's claim has the character of a true civil action, which could be formulated by the defendant separately from the proceeding started by the claimant. As a matter of fact, etymologically, the term comes

from the Latin reconventio which means action - conventio - of the defendant - reus (Deleanu, 2013: 916).

Another important prerogative of the defendant, which places him in the position of a genuine claimant, is recognised by art. 209(2) of the Civil Procedure Code. Thus, if the claims made by the defendant through the counterclaim concern other persons than the claimant, they may be sued as defendants.

By formulating the claims incidentally in the action initiated by the claimant, the effect of prorogation of jurisdiction is also produced, which means that the court invested by the claimant becomes competent to resolve the counterclaim through which the defendant formulates his own claims against the claimant, even if this request fell within the jurisdiction of another court if it had been formulated separately. As noted in the literature, by formulating a counterclaim, the defendant does not simply seek to reject the claimant's request, but seeks to neutralize his claim, mitigate it or even oblige the claimant to pay (Boroi, Stancu, 2020: 445; Ciobanu, Briciu, Dinu, 2023: 399). In this sense, the definition given to the counterclaim by the French Civil Procedure Code is suggestive, as "the claim by which the original defendant seeks to obtain an advantage other than the simple rejection of his opponent's claims" (Deleanu, 2013: 917).

The qualification of the counterclaim as a genuine claim form and, implicitly, of the defendant as a true claimant also results from the fact that the counterclaim is, in principle, independent of the main request. Thus, it will be decided even if the claimant waives the lawsuit or the right, or when the claim form has been rejected as time-barred or cancelled.

**The position of the defendant in the appeal**

In the appeals for reformation, first and second appeals, the dominant position is apparently held by the party that filed the appeal, i.e. the appellant in the first or second appeal. To a large extent, this situation is natural, since filing the appeal is subject to the principle of availability, and the limits of the jurisdiction of the judicial review court are established by the party that filed the appeal. Whether they held the capacity of claimant or defendant, the appellants in the first or second appeal are the ones who present the grounds of illegality or groundlessness regarding the challenged judgment, being dissatisfied with the decision rendered.

The procedural framework in which the trial in the first or second appeal is conducted is determined by the application of procedural rules, so that, on the one hand, the verification of the validity and legality of the decision of the previous court is ensured, and on the other hand, the trial is not excessively resumed. In addition to the legal instruments available to the appellant in the first or second appeal, there are also mechanisms in the appeals that provide the premises for a more aggressive position of the respondent. In the latter case, it is interesting to analyse the position of the initial defendant, who won the case by rejecting the claimant's request to be summoned to court and who has the position of respondent in the first or second appeal filed by the claimant. Of course, all the possibilities of the respondent-defendant are subsumed by the specific rules regarding the limits within which the trial in the first or second appeal takes place and the regime of defences. At the same time, the invocation or reiteration of exceptions or nullities in the appeals is a problem that must be analysed both in terms of the provisions regulating the trial in the appeals, and of the invocation rules specific to each procedural means.

First, by responding to the first appeal, the respondent may invoke a peremptory exception, such as the authority of res judicata, which may lead to the admission of the appeal and the rejection of the claim form. The claimant-appellant may thus get, in his own appeal, in a worse situation than that of the challenged decision, an aspect permitted by the legal provisions contained in art. 481 in conjunction with art. 432, thesis II of the Civil Procedure Code. It is also possible for the respondent-defendant, by responding to the first appeal, to invoke a cause of absolute nullity of the legal act on which the claimant bases his action or to reiterate defences, which tend to reject the appeal.

At the initiative of the respondent, the procedural framework in the appeal initially established by the appeal of the main appellant may be expanded. The tantum devolutum quantum apellatum rule does not limit the formulation of defences by the respondent through the response to the appeal, an aspect permitted by art. 478(2) of the Civil Procedure Code. Through the response to the appeal, reasons can be invoked to support the decision of the first instance court and additional evidence can be proposed compared to that in the first instance. In this way, the devolutive effect of the appeal extends to the defences of the respondent, whether these are defences of substantive or procedural law (Boroi, Stancu, 2020: 764).

In the counterclaim, the respondent can directly invoke defences or substantive nullities in the appeal, as, under certain conditions, absolute procedural exceptions of public order, which were not raised before the first instance court, can also be raised.

On the other hand, however, the invocation of an absolute, peremptory exception for the first time in the appeal, by the respondent, in the absence of a cross-appeal, raises the issue of the incidence of the principle of non reformatio in pejus. In this regard, in judicial practice it has been held that the judicial review court will be able to analyse public order exceptions, which can be raised at any time during the trial, but the consequences of their admission will be assessed in the light of the aforementioned principle. If the effect were to worsen the appellant's situation in his own appeal, the exception will be rejected on this basis (decision no. 4/2022 pronounced by the High Court of Cassation and Justice - Panel for appeals in the interest of the law, regarding the interpretation and application of the provisions of art. 430 paragraph (2) of the Civil Procedure Code, published in the Official Gazette of Romania no. 362 of April 12, 2022). Another solution would be to dismiss the appeal, without consequences for the first instance decision, if the respondent raises a peremptory exception in the claimant's appeal. Finally, the respondent-defendant may invoke in the appeal the absolute nullity of the legal act, as a substantive defence, in which case the application of the principle of non reformatio in pejus must also be assessed.

Secondly, the procedural framework in which the appeal is decided can be extended at the initiative of the respondent by filing the cross-appeal. The cross-appeal mechanism can worsen the situation of the main appellant, aiming to change the first instance judgment, as provided for in art. 472(1) of the Civil Procedure Code. This effect is produced by reiterating defences or exceptions that could not be brought to the appellate court's analysis only through the respondent's counterclaim, since they had been decided by the first instance court, and the express failure to challenge them would have determined the entry into the authority of res judicata for the respective party. In this way, compared to the limits initially set by the main appellant - claimant in the first instance, the cross-appeal creates the possibility of worsening his situation in his own appeal and extends the limits of the trial in the appeal. Moreover, as decided by the supreme court, the cross-appeal is limited to the subject matter of the main appeal, and may concern any

other solutions contained in the operative part of the challenged decision or in its motivation (decision no. 14/2020 of the HCCJ Panel for appeals in the interest of the law, published in the Official Gazette of Romania no. 875 of 25 September 2020).

In conclusion, in the light of the situations presented, without substituting for the claimant, one can imagine hypotheses in which the defendant leaves the defensive position and becomes an active actor in the civil proceedings, reshaping the procedural framework from an active or passive perspective, and puts the claimant in the position of reassessing the chances of the initiated legal action.

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