

Identification and Regulation of Repeated Prosecution in Civil Litigation

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Abstract: In 2015, China Supreme People's Court for the first time issued a judicial interpretation on civil procedure. In order to address the persistent problem of repeated prosecution of parties abusing their litigation rights in civil proceedings, the court makes provision for repeated prosecutions, so that it can be followed during trials. Undeniably, this judicial interpretation has filled the gaps in the law, but there are still some problems in its application. At present, Article 247 of The Judicial Interpretation of Civil Procedure Law stipulates that the standard of repeated prosecution should be "two same" or "three same." However, if only a formal review is conducted, the system will be discredited, and if it is subject to substantive review, it may lead to inconsistent judicial decisions in different places; therefore, it is disadvantageous to judicial authority and the understanding and application of the basic system of civil action. In view of this, it is necessary for us to examine whether this constitutes a repeated prosecution.

Keywords: Repeated prosecution; Non bis in idem; Identification criteria

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1. Raising of questions

At present, the principle of "non bis in idem" which translates "one-time protection of rights" that exists in theory holds that repeated prosecution is a behavior that should be prohibited. The Judicial Interpretation of Civil Procedure Law only provides the expression of "in the course of litigation" in the articles, but does not use the more explicit litigation department, which is widely accepted by the academia. Litigation is generally referred to the court accepted by the parties to the specific claims and the court adopted a certain way to conclude the state of fact ^[1]. The Judicial Interpretation does not introduce this concept and accurately identify the point in time from the beginning to the end of the proceedings, thus making it impossible to determine whether the parties can bring a new action. It cannot provide a clearer standard for the court to review the repeated prosecution.

The Judicial Interpretation of Civil Procedure Law has made a unified regulation on the identification of repeated prosecution: the same parties, the same litigation object, the same litigation request or the litigation request of the post litigation essentially negates the judgment result of the previous litigation. Even though it has been stipulated from scratch, in fact, the standard is still general and vague, and its application at different stages in the litigation process is still not consistent in a true sense. Moreover, the litigation request of the post litigation essentially negates the judgment result of the previous litigation. In practice, there are deviations in the understanding of local courts ^[2]. Therefore, there are still some shortcomings in this judgment standard. There are still doubts about the rationality of the conditions for the establishment of repeated prosecution and the rationality of the logical system constructed by this article,

which poses a few challenges to the protection of the parties' due litigation rights and the court's proper exercise of judicial power according to law. In 2019, China Supreme People's Court promulgated the "Implementation Measures for Establishing a Legal Application Dispute Resolution Mechanism" in order to unify the legal application and judgment standards, aiming at avoiding the legal application differences between the effective judgments at the same level from the judicial mechanism and solving the existing legal application differences among the effective judgments at the same level in a timely manner ^[3]. Therefore, it is an urgent problem to identify the standard of repeated prosecution.

2. Content and identification method of repeated prosecutions prohibited

In the civil action, the premise of repeating the discussion of prosecution is to make clear what "litigation" is. "Litigation" is a kind of dispute settlement mechanism that the parties request the courts to make a judgment for the purpose of protecting their own legal rights and interests. There must be one or several factors in the repeated prosecution as a reference for judging whether or not there is duplication. As far as pre- and post-litigation is concerned, the prevailing view is that in the litigation department, the parties in the same case will bring a suit again, no matter which court or which level of court it is brought before, and how to file a new one. In essence, the litigation of previous and post belong to the same action, that is, they constitute the repeated prosecution. This is prohibited by the civil law system and the common law system. The purpose of the prohibition of repeated prosecution is to avoid different or even contradictory decisions in the same case after two trials. The first reason is that the establishment of this system can effectively realize the economic value of litigation. The economic value of litigation is a basic value of the civil procedure. At present, in the context of the proposed reform of the judicial system and the rational optimization of the allocation of judicial resources, repeated abuse of the right to sue will contribute to a massive waste of judicature resources of, which is disadvantageous and contradictory to our country's aspiration to realize maximization of the utilization of otherwise limited judicature resources. Secondly, prohibition of repeated prosecution can also protect the legitimate procedural interests of the parties, so that the other party will not be repeatedly sued and constantly dragged into the custody of litigation, to protect the stability of litigation, and to facilitate a one-time settlement of disputes. Thirdly, one of the reasons why the law is believed by people is because it has the characteristics of stability. If in judicial practice, after making adverse judgments against the parties, the parties constantly adjust their litigation strategies, which affects the judges' free evaluation of evidence, and there will be a large number of "different judgments in the same case." This will greatly undermine the judicial authority, and is not conducive to resolving disputes.

At present, there are seven ways in judicial practice to identify the correlation between the previous and post litigation:

- (1) Although the claims are different, the main disputed facts and the object of the lawsuit are the same. For example, the previous litigation requests the return of principal, the post litigation requests the return of interest, the previous litigation claims the liability for contracting negligence of the contract, and the post litigation mainly determines that the contract is invalid.
- (2) The claim and object of action are the same, but the main disputed facts are different. For example, in the contract, one party filed multiple breach of contract lawsuits with different facts.
- (3) New facts that appear after the judgment has entered into force. For example, after the judgment on the dispute of debit and credit becomes effective, the obligee takes the loss as the lawsuit request to reinstitute the lawsuit because of the loss caused to the obligee by the delay of one party.
- (4) Based on the same fact, there are more than two legal elements between the same parties, resulting in

more than two claim forms with the same aim ^[4]. For example, in the product Tort Liability, the parties can both claim damages to the court, and can propose to confirm the liability for breach of contract.

- (5) The claim is the same, but the main disputed facts and the object of the action are different. For example, bill right holder brings forward a lawsuit with the behavior of creditor's rights, but the latter brings forward a lawsuit because of the behavior of bill, the right type that the previous and the post litigation is quite different.
- (6) The main disputed facts of previous and post litigation are different, and the subject of the litigation is also different. But the litigation request of the post litigation may substantially deny the judgment result of the previous litigation ^[5]. In the above example, the previous litigants claim the liability for contracting negligence to win the lawsuit, which confirms that the contract has been established and effective, but then sues for invalidation of the contract, which essentially negates the judgment result of the former lawsuit.
- (7) The main disputes and the subject matter of the previous and post litigation are the same, but the parties are different. For example, in the loan contract, the creditor transfers the creditor's rights to a third party after the litigation.

The above-mentioned seven situations roughly include the situations that may arise from the identification of repeated prosecutions, and the adoption of different methods will inevitably lead to different results. Of course, no matter which method is adopted, there is no distinction between advantages and disadvantages, and there is no order. It depends entirely on how legislators and judges make trade-offs in the face of different value conflicts, whether it is efficiency first or human rights protection. If it is inclined to pursue efficiency first, then the standard for prohibiting repeated prosecutions is more stringent; if it is inclined to pursue human rights protection, then a more relaxed standard is adopted. But in short, no matter what criterion is adopted, the unification of the application of the law is the most important thing. Under the premise that the court can make the same judgment in the same case, it can also make a clear behavioral guideline for the parties who want to file a lawsuit again.

3. Judicial status and problems of repeated prosecutions prohibited

Since the Judicial Interpretation of Civil Procedure Law was issued in 2015, the number of cases related to repeated prosecution found in the database nationwide is as follows: there were 1,715 cases in 2014, 4,554 in 2015, 7,966 in 2016, 11,368 in 2017, 14,900 in 2018, and 17,351 in 2019 (note: the number of cases decreased nationwide in 2020 due to COVID-19 pandemic, so the data has no reference value.) It can be seen that 2015 was a turning point, with repeated prosecution cases rising in the following years, which really shows that Article 247 of the Judicial Interpretation of Civil Procedure Law has played a role in practice. Forty judgment documents involving repeated prosecution cases in the past two years were randomly selected for analysis. Referring to some Supreme Court Civil Final Appeals, it was found that article 297 of the Interpretation of Civil Procedure Law was cited in 15 cases on the basis of "the subsequent litigation claim substantially negates the previous judgment result," while 21 cases did not apply this provision, thus adopting a more flexible substantive review. In my opinion, the problems of identification and regulation of repeated prosecution in civil proceedings in China are as follows:

3.1. Lack of regulations on litigation system

The course of civil litigation in China is phased at two time points. One is the process of the advance

litigation and after the effective judgment is made. It does not describe the mainstream concept of “litigation system” that has been adopted by various countries. However, when the party filed another litigation during the previous litigation, it was precisely at the time when the lawsuit system required the regulation of repeated lawsuits. Although it is not difficult to find the legislator’s positive attitude towards the litigation department in the provisions of the Civil Procedure Law, after all, there is no express provision that makes it difficult for judges to identify repeated prosecutions when hearing cases, so they have to take free proof and understand the application. It is inevitable that there will be deviations. The complete concept of the litigation department is yet to be introduced despite the availability of many laws related to the litigation department.

3.2. The boundary between the subject matter of the litigation and the claim is blurred

According to the principle of “no plaintiff, no judge,” the scope of the court hearing can only be determined based on the litigant’s request. However, the litigant’s request is the subject of the court’s trial and is called the subject of the litigation. Even if substantive law doctrine of the subject matter of litigation is adopted, the litigation request is affected to a certain extent by the jurisdictional trial mode. Under the guidance of seeking truth from facts and pursuing objective truth, judgments are no longer based on the actual litigation requests of the parties ^[6]. The litigation request is the prerequisite of the main substantive rights, and the subject matter of the litigation is the basis for supporting the premise. The two complement each other and are difficult to separate. If the parties wish to request the court to support their claims, they must not deviate from the legal relationship of the entities on which the claims are based. The litigation claims of the parties are actually the same as the subject matter of the litigation ^[7]. China’s attitude towards civil litigation has adopted the elements of the old substantive law to identify the subject matter of the litigation. The subject matter of the lawsuit is equal to the claim based on the substantive law filed by the plaintiff. In addition, Article 247 includes the claim and the subject matter of the lawsuit. The parallel conditions are used to identify repeated prosecutions, which are superfluous in the provision.

3.3. Link of repeated prosecution and compulsory counterclaim

The counterclaim is actually an independent claim and will not be changed due to this claim. The purpose of the counterclaim is to oppose the claims of the present suit, and in the case of “the claims of the latter suit substantially negate the results of the judgment of the previous suit,” the parties to the present suit and the counterclaim can be exchanged. Even if the subject matter of the litigation is different or the form of rights protection is different, as long as there are repeated trials and offsetting judgments, the subsequent litigation will not be allowed to be filed. Instead, the defendant should initiate a counterclaim or the plaintiff in the preceding litigation in which the litigation belongs. The change method of the complaint shall be dealt with at the same time ^[8]. If a counterclaim is not filed during the course of this lawsuit, and the lawsuit is filed after the result of the judgment in this lawsuit, it will trigger the condition of repeated prosecution and may be prohibited. This makes the interpretations of article 247 a compulsory counterclaim.

4. Suggestions on the improvement of repeated prosecution system

4.1. Introducing the concept and theory of litigation system

The conceptual system of “litigation department” is not clarified. Therefore, the identification and regulation of repeated litigation in the concept of civil litigation is very important. During this period, the parties are not allowed to re-sue the same matter. After the judgment becomes effective, the judgment replaces the litigation apartment to restrict repeated litigation. Based on this, in China’s civil litigation legislation, it is necessary to clarify the litigation department that is clearly stipulated, and reasonably express the concepts related to it, instead of making it unclear. This measure can better align China’s law

with that of the civil law and enhance international legislative, judicial and academic communication. It is especially important to emphasize that the time for filing a case is the starting time of the litigation system, and with reference to the regulations of Japan and Taiwan region, it is argued that for litigation filed by the parties during the debate stage, the time for the litigation system starts from the time of the verbal statement.

4.2. Refined identification standards for repeated prosecutions

The interpretations of Article 247 of the Civil Procedure Law stipulate:

- (1) When identifying repeated litigations in a litigation apartment, the parties, legal relationships, and litigation claims are the same, and can be slightly relaxed on the basis of general understanding, especially in the events involving complex disputes and facts. The previous litigation in the litigation department has not yet become an effective judgment. However, it is possible that the later litigation may materially negate the verdict of the previous litigation. In addition, in the case of different requests before and after, although the same payment target is required, the party does not receive the right of payment or can only receive one payment, and it is deemed to be a repeated lawsuit. This view may be criticized because the scope of prohibition of repeated prosecutions is too wide, and the defendant loses the freedom to the jurisdiction court, independently carries out the litigation, or forces a merger. However, at this stage, it is not the ultimate deprivation of the right of judicial remedies for the parties to sue related matters. As the “local protectionism” gradually disappears or overcomes, the influence of jurisdiction on the substantive results is relatively small, thus saving judicial costs.
- (2) The identification of repeated prosecutions after the trial takes effect. In order to avoid trial raids and deprivation of judicial remedies for the parties, the standards stipulated in Article 247 should be stricter, especially for the substantive denial of the previous lawsuit. The verdict on the provisions of the judicial interpretation of civil prosecutions regarding the prohibition of repeated prosecutions are too vague, and do not distinguish between repeated prosecutions in different stages. Various systems are mixed with each other, resulting in a certain degree of confusion. In order to solve this problem, the identification criteria of repeated prosecutions and the different forms of the effect of the referee on subsequent prosecutions can be set according to different needs, so as to gradually sort out a relatively clear theoretical system and provide reasonable guidance for judicial practice ^[9].

4.3. Optimization of relevant systems for prohibiting repeated prosecutions

4.3.1. Improving the system of judge’s interpretation

The concept of the rule of law of Chinese citizens is developing. The parties’ understanding of litigation rights is not comprehensive, and they cannot claim their own rights well at one time. At this time, the judge is required to clarify the litigation claims, so that the litigants have a clearer understanding of their litigation claims and avoid future possibility of repeated litigation; if the party refuses to make changes to the litigation request after explanation, it should be recorded to deny the party litigation again under this situation.

4.3.2. Establishing a nationwide case registration information sharing system

At present, many courts in China have used Internet technology to build electronic databases for collecting case information, but these databases are independent of each other and cannot realize timely sharing of case information. I think that the “Internet +” model can be adopted at present to fully integrate the Internet and traditional litigation procedures, and use Internet information technology to achieve audit iterations of litigation services ^[9]. Every stage of the case should be clearly presented to avoid repeated prosecutions.

4.3.3. Improving the pre-trial conference system

The pre-trial procedure is to make a judgment on whether a case that meets the acceptance conditions is necessary to enter the court trial. Judicial interpretation has also continued to refine the pre-trial review system. The purpose of pre-trial review is to conduct formal review of the parties, litigation claims, and subject matter of litigation, pre-procedural review, and clarify the focus of disputes in the case. From these perspectives, the pre-trial conference system and the system of prohibiting repeated prosecution have the same results. For example, the function of pre-trial procedures in promoting the exchange of evidence and fixing disputes can help both parties to understand the main facts and evidence in a timely manner, so as to determine whether they are repeated litigations. I think it is possible to appropriately change the functions of the pre-trial conference, give some substantive rights to the pre-trial review, and terminate the procedures of some cases that obviously constitute repeated prosecutions in the pre-trial conference.

5. Epilogue

The prohibition of repeated prosecution plays an important role in maintaining the credibility of the law or improving judicial efficiency. There are not a few and some problems in actual operations. This paper focuses on the issues of early identification in the prohibition of repeated prosecutions, and aims to refine the judgment of repeated prosecutions and attempt to prohibit repeated prosecutions, protect the interests of the parties, and maintain judicial order. This paper defines repeated prosecution from a legal point of view, and expounds its status in China's judicial practice and its role. Secondly, it analyzes the problems and causes in the prohibition of repeated prosecution system, and proposes corresponding solutions and suggestions. Related theories, such as the affiliation of the litigation apartment and the subject matter of the litigation are still in the exploratory period in China. There is no final conclusion on the legislation, and the academic communities have different opinions. In the absence of these theoretical studies, it is difficult to refine the identification standards. It is particularly important to construct a theoretical system that conforms to the national conditions and use it as a fulcrum to perfect the system design. This legislative system needs to be improved in accordance with various institutional provisions: clarifying the scope of application, clarifying the legal consequences, strengthening the protection of respondent's rights, maintaining procedural justice as the purpose, and realizing the requirements of judicial justice.

In short, the identification of the prohibition of repeated prosecutions must be discussed at different levels and dimensions based on the development history and conceptual changes of the procedural law and the Chinese judicial environment, and adjusted and improved in the direction of the actual situation in China.

Disclosure statement

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