

Theoretical and Practical aspects of the Paulian Action

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Abstract: The Paulian or revocatory action is one of the great institutions of the Roman-Germanic system of law, with a millenary existence, a veritable legal colossus, the Paulian action has remained a living institution with a particular practical use.

The Paulian action is governed by Article 895 of the Civil Code and is the legal action whereby the creditor seeks a declaration that legal acts concluded by the debtor to the detriment of his interests, such as legal acts by which the debtor creates or increases his insolvency, has unenforceable. Thus, the Paulian action enables creditors to be protected if the debtor diminishes the assets that may be subject to seizure in order to avoid payment of his debts. It is exercised by the creditor against the third-party acquirer of the disputed asset, its purpose being in national legal systems to restore to the debtor's assets an asset which has been fraudulently disposed of. In this perspective, a paulian action is an action which allows a creditor to obtain the unenforceability against him of an act of disposition of assets made by a debtor in order to fraudulently reduce those assets. The conditions for a Paulian action are, according to the doctrine, the following: the contested act must have caused the creditor damage, the existence of fraud on the part of the debtor; the creditor must have a claim that is certain and, in principle, prior to the contested act; the complicity in fraud of the third party with whom the debtor has contracted, if the contested act is for consideration. the creditor must have a claim that is certain and, in principle, prior to the contested act; the complicity in fraud of the third party with whom the debtor has contracted, if the contested act is for consideration. the creditor must have a claim that is certain and, in principle, prior to the contested act; the complicity in fraud of the third party with whom the debtor has contracted, if the contested act is for consideration.

In this respect, the paulian action can play a role in company law in order to ensure the protection of a company's creditors, in particular in the presence of company restructurings.

Keywords: Paulian action (revocation), debtor, creditor, fraud, patrimony, assets, dispute.

INTRODUCTION

Paul's action gives him the right to prevent the debtor from harming him through fraudulent acts, that is, through acts concluded with third parties directed precisely against the interests of creditors, their purpose being to prevent the payment of claims to the latter.

Therefore, the Pauline action is that action by which the creditor request revocation or judicial annulment of acts concluded by the debtor in fraud of his rights (Costin, 1980). That is why it is also called a revocation action. In the same way, he defines the Paulian action and legal practice, showing that it consists of the legal means "through which the creditor can act against the legal acts made in fraud of his rights by the debtor .." and which ".. derives from the general right of pledge with regarding the latter's patrimonial property, placed at the disposal of the creditor in order to realize his claim, through forced execution"(Costin, 1980).

At the basis of the revocation action is a psychological element, namely, the tendency of the debtor in difficulty to enter into legal acts with third parties either to harm the creditors or to have, possibly, a profit in the future. From a legal point of view, it is considered that the basis of this action is the principle of good faith performance of obligations (para. 1 art. 9 and para. 2 art. 572 CC of the Republic of Moldova), as well as the right of general pledge that they have unsecured creditors on the debtor's patrimony. Also, considering that fraudulent acts are a civil offense against creditors, the debtor is required to repair the damage thus caused.

In the doctrine, it is also noted that the Pauline action is directed against the third party with whom the debtor concluded the fraudulent act. In this situation, there are certain legal grounds for the liability of the third party, namely, if he was in bad faith - that is, complicit in the fraud - he will be obliged to repair the damage thus caused, and if he was in good faith and had something to gain due to of the act concluded with the debtor, will be held according to the principle of unjust enrichment.

The Paulian action is a personal action, even if it is directed against an act regarding the alienation of real estate rights and aims, in essence, like the oblique action, to return some assets to the debtor's patrimony to allow the creditor to enforce enforcement on those assets as well.

In the same way, it is considered to be, in one opinion, an action for damages, because it aims to indemnify the creditor for the fraud attempted by the debtor and has the effect of revoking the fraudulent act until the competition of the respective claim. In another opinion, it is seen as an action in the unenforceability of the act concluded by the debtor.

In the light of these considerations, we could mention that the Pauline action differs essentially from the oblique action. The oblique action is exercised in the name of the debtor, and the Paulian action is exercised by the creditor in his own name. It follows from this that the creditor who exercised one of these actions without result can then exercise the other. Also, in the Paulian action, the defendant cannot oppose the exceptions that he could have opposed to the debtor, because the creditor exercises it in his own person.

The field of application of the Pauline action

In principle, through the Paulian action, the annulment of any legal act, for onerous or free title, through which the debtor reduced the general pledge of creditors, such as: alienation of goods, assignment of rights, creation of a mortgage, remission of debts, etc. . through the Paulian action, court decisions that remained final can be challenged, by which the debtor would have allowed himself to be bound by some fraudulent agreements concluded with his opponent (Alexandrescu, 1898). Thus, specialized literature and judicial practice admit the possibility of revoking a judicial transaction through the Pauline action. Thus, through a transaction that produces constitutive or translational effects of rights, the debtor's patrimony may be reduced and his creditors may be prejudiced.

Likewise, the creditors of an heir may request the revocation of the deed of renunciation of inheritance, as well as the deed of acceptance of an insolvent succession, made in fraud of their rights. Conversely, the acts by which the debtor refuses to enrich himself cannot be revoked, such as the non-acceptance of a donation.

The following documents cannot be revoked through the Pauline action:

- ✓ Acts regarding non-patrimonial personal rights;
- ✓ Acts regarding patrimonial rights that involve a personal, subjective assessment of the debtor;
- ✓ Acts relating to untraceable patrimonial rights. However, the revocation action is admissible against legal acts that concern untraceable patrimonial rights when they were concluded by the debtor with the intention of defrauding the interests of creditors. This is the case of a maintenance contract through which the debtor assumes an excessive obligation that clearly exceeds the needs of the beneficiary; the debtor's obligation may be reduced, through Paulian action, within the normal limits of the maintenance needs of the third party, thereby protecting the interests of the creditor;
- ✓ The acts by which the debtor incurs new debts, because the reduction of the patrimony does not take place *ex nunc*, but only creates the risk of eventual insolvency, when those debts will become due. In case a guarantee was constituted, the doctrine showed that it can be attacked through the Pauline action only if it was constituted independently of the main obligation and after it. In the same category, the cases of legal options between rights or acts, options established by law, are studied, because creditors cannot invoke their prejudice due to the fact that the debtor has chosen a disadvantageous solution. Finally, it is considered that the payment of a debt cannot be challenged through the revocation action, because this cancels a passive element of the debtor's patrimony, even if the payment made reduces the asset to be divided among the other creditors. The solution is justified by the fact that the payment of a receivable is a necessary act. Of course, the payment made fraudulently, fictitiously, in order to damage the other creditors could be attacked through the Paulian action.

The conditions for exercising the Pauline action

In order for the Pauline action to be admissible, the following conditions must be met:

➤ **The debt of the one exercising the Paulian action must be certain, enforceable and liquidate.** Also, in principle, the Pauline action can only be brought by creditors prior to the deed whose revocation is requested, due to the fact that at the time of its conclusion, the subsequent creditor did not have a general lien on the debtor's patrimony; a previous act of the debtor, in general, cannot be prejudicial or fraudulent towards creditors subsequent to its conclusion. From this rule it is admitted that there is also an exception in the situation when the debtor has previously perfected with the proven intention of depriving the future creditors

of the guarantees that they, without knowing the conclusion of the respective act, had in mind when they decided to contract with the debtor (Hamagiu, Georgan, 1928). In this regard,

Proof of the previous character of the debtor's claim compared to the moment of the conclusion of the act whose revocation is requested can be made by any means of proof. He need not have, for this purpose, the definite date. In relation to the fraudulent act, the respective creditor has the quality of a third party proper. For him, that act has the value of a legal fact.

Related to this condition, there are discussions in the specialized literature about whether or not the creditor must have an enforceable title to exercise the Pauline action. Some authors consider that it is not necessary for the debtor to have an enforceable title, because the Paulian action is not an act of execution, but of revocation of a fraudulent act (Stătescu, Bîrsan, 2008). Others appreciate that, on the contrary, this condition is necessary for the reason that the creditor, who did not resort to the foreclosure procedure, will not be able to prove the debtor's insolvency (Costin1989). We consider that the Paulian action is a subsidiary action, which means that it is admissible only after establishing the debtor's insolvency. Or, for this purpose, the creditor is obliged, in advance, to start the enforcement procedure against the debtor and only being unable to realize his claim will he be able to prove that the respective act is prejudicial to him. Therefore, practical needs require that the right to claim be ascertained through an enforceable title.

In relation to the enforceable character of the claims, the doctrine discussed to what extent the claims with a term and those affected by a suspensive condition can give the creditor the basis for a revocation action. In an opinion, in both cases the action must be refused. In another opinion, in the case of the suspensive condition, the creditor's right being uncertain, the granting of the Pauline action would not be justified; in the case of a term claim, the action could be exercised because the creditor in such a situation has an asserted right, but it is necessary that the debtor's insolvency can be established without the execution of his assets, taking into account that in the case of a term claim, the creditor cannot proceed for execution until the deadline has been met.

➤ **That deed was concluded in fraud of the creditor's rights**, i.e. to have caused him damage. The damage consists in the fact that, through that act, the debtor caused his insolvency or aggravated his existing insolvency (eventu damni). Proof of the debtor's insolvency must be provided by the creditor. Thus, as I stated, the Paulian action has a subsidiary character, in the sense that the creditor will be able to exercise it only after, following the debtor, it is established that he is insolvent. In this way, the Paulian action is admissible only after the creditor has resorted, without result, to the other legal means provided by law to obtain the realization of the claim. When the creditor does not prove the state of insolvency, the third parties, in the Paulian action, can invoke the exception of the benefit of discussion (Hamagiu, Georgan, 1928).

The creditor does not have to prove the debtor's solvency when the latter is in a state of bankruptcy or notorious insolvency. The solution is the same also in the hypothesis where the debtor is solvent but the pursuit of his assets presents too many or great difficulties, being litigious, located in another country or due to physical and moral wear and tear they could not be valued through forced sale (Hamagiu, Georgan , 1928).

Finally, we also show that the insolvency of the debtor must be a direct and exclusive consequence of the contested act; therefore, the Pauline action is inadmissible if the insolvency was caused by a fortuitous event subsequent to the conclusion of that act, even if that fortuitous act would not have been sufficient to produce this consequence in the debtor's patrimony.

➤ **Fraud of the debtor**. (Cîrcei, 1985) The notion of debtor fraud is controversial. In a first opinion, by fraud is understood the fact that the debtor realized, simply knew that by the act that concludes it, he causes or aggravates his insolvency. In another interpretation, it was considered that fraud is synonymous with the debtor's intention or intent. And finally, in an intermediate conception, it is appreciated that between the intention to harm the creditor and the simple knowledge of insolvency, there are differences only of degree and not of essence, because the knowledge of the harm by the debtor also implies the intention to harm.

We consider real the opinion according to which for the existence of fraud (consilium fraudis) it is sufficient for the debtor to have known that by concluding the act he is causing or aggravating his insolvency, causing damage to his creditors. The debtor's fraud does not involve contractual malice, i.e. fraud committed with the intention of prejudicing the creditor, but only the debtor's awareness of the result of his act, i.e. causing or increasing his insolvency, even if prejudicing the creditors was not the immediate purpose of his conduct.

In the doctrine, the question of the criteria according to which it can be established whether or not the act was fraudulent was raised. In an opinion, the comparative moral value of the assets that determined the commission of the respective act is taken into account. In another opinion, it is sufficient for the debtor to know that acting in a certain way will harm his creditors. For Josserand (Josserand, 1953), for example, if it turns out that the debtor knew the result of the act, it can be assumed that he wanted to harm his creditors, and this regardless of whether the act is onerous or free.

➤ **Complicity of the third party acquirer in the debtor's fraud.** This condition is only necessary if the creditor requests the revocation of a deed concluded by his debtor with a third party. The complicity of the third party consists in the proof of the fact that he realized that by that act the creditors of the debtor are prejudiced, due to the insolvency of the latter. The Pauline action is directed against the third party beneficiary who, in the process, has the capacity of defendant. In the case of documents with onerous title, it is necessary to establish the bad faith of the third party, his participation in the fraud, in the sense of his knowledge of the prejudice to the creditor through those documents.

In the case of documents with a free title, the condition of complicity of the third party is not necessary. By revoking the deed, the third party beneficiary has nothing to lose, since he has not paid an equivalent. Thus, between the interest of the injured creditor and the interest of the third party, consisting in the defense of a patrimonial advantage with which he was enriched, for reasons of equity, protection is granted to the creditor. However, following the admission of the Pauline action, the third party beneficiary with a free title will be able to be pursued only up to the competition of the value with which he was enriched (Hamagiu, N.Georgean, 1928).

We should not be ignorant of the fact that sometimes the third party acquirer alienates, in the meantime, the asset that was transferred to another person. In such a hypothesis, the sub-acquirer will have the same legal treatment as its author. In relation to this, a court ruled: "as far as the subacquirers are concerned, the same rule applies to them as to the acquirers. Consequently, the deed will be annulled if they acquired for free, regardless of their good or bad faith, or if, acquiring for a fee, they were in bad faith, that is, they knew the fraud committed by the alienator". We mention that, regardless of the situations in which the subacquirer finds himself, if the act concluded by the first acquirer with the debtor is an act against which the Pauline action is not admissible, it will also be inadmissible against the subacquirer (Hamagiu, Rosetti-Bălănescu, 2008).

The effects of the Pauline action

The Pauline action has, mainly, the effect of causing the revocation of the fraudulent deed which, thus, will no longer be opposable to the creditor and he will be able to pursue the asset that was the object of that deed. If the Paulian action is admitted by the court, the challenged legal act can be revoked. The effects of admitting the Pauline action must be analyzed in relation to the third party acquirer, the debtor and the other creditors of the debtor (Costin, 1980).

- *In relation to the third party acquirer, the legal act is revoked.* Its effect will be limited to repairing the damage suffered by the creditor. The third party will be able to offer the creditor the amount necessary to settle his claims, thus keeping the respective asset. The revocation takes place only within the limits necessary to realize the right of claim of the claimant creditor. This explains the fact that if the damage is lower than the value of the object of that contract, "the third party has the right to keep the property acquired, offering the creditor payment of the debt. On the other hand, if the third party acquired the good free of charge, he has the obligation to return it." (Costin, 1980)
- *In relation to the debtor, the revoked act continues to exist and produce its effect in its relations with the contracting third party.* The revocation of the act operates exclusively in the relations between the creditor and the third party. The thing returns to the debtor's patrimony only through a fiction grafted on the relations between the creditor and the third party acquirer. Consequently, what exceeds the creditor's payment needs definitively belongs to the third party. Also, the third party acquirer with onerous title will be able to turn against the debtor through a recourse action to obtain what he paid the creditor.
- *In relation to the debtor's other creditors, the admission of Paul's action does not produce any effect.* The revocation of the contested act benefits only the creditor or creditors who brought the action. Therefore, the Pauline action has an individual character. This is explained by the fact that the person who brought the action exercises his own and individual right. The plaintiff does not present either the debtor or the other creditors of the debtor.

The legal nature of the Pauline action

There is no doubt that the Pauline action is a personal action. The creditor who exercises it does not invoke a right of the debtor over the good object of the contested legal act, but a right of his own; this right has a personal character, because the law does not grant the creditors, based on the general pledge, a real right over the debtor's assets. In this sense, we can see a model of Pauline action in Appendix 1.

As I have shown, the admission of the Pauline action has the effect of revocation or total or, as the case may be, partial annulment of the act concluded by the debtor with the third party. Some authors stated that it is an action to cancel a legal act (Popescu, Anca, 1997). Others have appreciated that it is an action in the unenforceability of the legal act concluded by the debtor in fraud of the interests of his creditors (Stătescu, Bîrsan, 2008). And finally, it was also said that we are in the presence of an action to repair the damage caused to the creditor (Hamagiu, Georgean, 1928).

We share the point of view according to which the Pauline action is an action in reparation. Its legal basis vis-à-vis the debtor consists, on the one hand, in the general pledge right of the creditor, and on the other hand, in the idea that the debtor has committed, through the concluded act, an illegal act against the creditor, causing him a damage that must be repaired. Compared to the third person who concluded the fraudulent act with the debtor, the legal basis of the Pauline action differs, as it is with the onerous title or with the free title. When the deed is for onerous title, the revocation can only be ordered if the third party acquirer is in bad faith. Being in bad faith, the Paulian action is based on the principle of tortious civil liability. If the legal act is free of charge, the Pauline action is based on the principle that no one is allowed to enrich himself unjustly at the expense of another and will result in the revocation of the act, regardless of whether the third party is in good or bad faith. Therefore, both in one case and in the other, the Pauline action is intended to ensure the reparation of the damage caused to the creditor. Revoking the act is not an end in itself. It is the appropriate legal means of reparation of the damage caused to the creditor by concluding the act of fraud by the debtor with the third party acquirer. Revoking the act is not an end in itself. It is the appropriate legal means of reparation of the damage caused to the creditor by concluding the act of fraud by the debtor with the third party acquirer. Revoking the act is not an end in itself. It is the appropriate legal means of reparation of the damage caused to the creditor by concluding the act of fraud by the debtor with the third party acquirer.

Conclusions

The Paulian action is one, among many other legal means, that the creditor can resort to in order to correct the debtor's improper conduct, when the latter, through his fraudulent actions, compromises the possibility of satisfying the creditor's claim from the assets of the debtor's estate.

The Paulian action offers a great support to the pursuing creditors to return in their favor the goods taken out of the debtor's assets through fraud. The researched problem is of particular importance, given the fact that it concerns the insurance and security of relations between the creditor and the debtor. This problem has not only a legal-moral importance but also for economic development. Economic progress would be impossible without the insurance of creditors' claim rights, not by chance, as I mentioned above, since commercial relations appeared, the legislator has been concerned with granting insurance to creditors.

In the specialized literature, the thesis is presented, that the Pauline action gives creditors a right of guarantee under certain circumstances, which aims to make unenforceable a fraudulent legal act of the debtor vis-à-vis his creditors. This ground that underpins the Pauline action, derives from the principle that the entire patrimony of the debtor, legal or natural person, forms the common general pledge of all creditors of this debtor.

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