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Legal Nature Pauline Action - II

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Abstract. In part two, we will continue our analysis of Pauline action. It can be perceived as a form in which the creditor prejudiced by the fraudulent acts of his debtor entered into with or for the benefit of a third party. The real rise of the Pauline action was only marked by the development of capitalist relations in the XVII-XIX century. It is not by chance that the classic theories trying to explain the institution of Pauline action were elaborated by the German doctrine of the XIX century marked by the pandectist current. Among the classical theories, however, we also find theories that recognize the *sui generis* nature of the Pauline action, a theory supported by us.

Keywords: Pauline action, legal nature, Pauline theory, creditor, debtor; fraud

The theory of the exclusive defense of creditors' interests or the "legal theory". The representatives of this theory are the German authors Cossack, Eccius, Menzel and Krasnopolski, as well as prof. Шершеневич. The main idea of the said theory consists in the recognition, in the interests of the creditor, of an obligatory relationship *ex lege* when certain factual circumstances are met. The content of this special obligation report is the creditor's right to claim the goods acquired by the third contracting party from the debtor under the fraudulent legal act (Golmsten, 1893).

In the following, however, the physiognomy of the alleged *ex lege* obligatory relationship is constructed differently by the proponents of the legal theory. Thus, Cosack proposes the introduction of a general obligation on account of all acquirers which consists in bearing the risk related to the acquisition: if the disposing debtor does not have enough assets for the forced enforcement, the acquirers will return the asset/service received. The quoted author himself mentions that: any person who has acquired an asset from another person's estate, commits to bear the adverse consequences (limitations) related not only to real duties and rights, but also to the general purpose of the asset to serve as guarantee fund for the disposer's creditors; but in the interests of the civil circuit, this general obligation is limited so as not to be excessively burdensome to the debtor. Eccius constructs this obligation *ex lege* differently: the creditor can claim from the third contracting party the restitution of the service/asset because it is considered not to be alienated. The debtor's estate, for reasons of equity, is also considered to be extended to the asset transferred (executed service) for the benefit of the third contracting party, in the

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sense that this asset/service returns to the category of assets that can be subject to enforced execution initiated by the creditor. Krasnopolski, another representative of the legal theory, considers that, in certain circumstances, in the interest of the creditor and within the limits of that interest, one is recognized as having the right to consider the legal effects of the debtor's fraudulent actions as unfulfilled (Golmsten, 1893, pp. 2-41).

A number of criticisms have been leveled at the legal theory. Their synthesis is detailed by Prof. Голмстен, the main ones being as follows:

a) The category of *ex lege* obligations in general is open to criticism, or even these obligations represent the effects of a legal fact (complex as the case may be). In relation to these obligations, the law has the same intermediary role as in the case of contractual and tortious obligations. Thus, the creation of a new *ex lege* obligation is a not exactly inspired solution because the legislator's possibility to create such obligations is infinite, but every time the problem of identifying the legal basis/nature of the newly created *ex lege* obligation will arise. The argument regarding the need to protect the interests of the civil circuit, of equity does not help to determine the *ratio juris*.

b) The legal theory tries to determine the legal nature of the Pauline action through the prism of secondary matters. Thus, the creditor's right to challenge fraudulent acts is considered a right to restitution of the asset. But the restitution of the asste is the practical consequence of the successful realization of the said right. The main effect of the Pauline action is to "make ineffective" the fraudulent legal act in relation to the claimant creditor. Namely, the legal nature of the lack of legal effects (relative ineffectiveness) is the primary matter that requires legal qualification, which legal theorists fail to do.

c) The legal theory completely ignores the subjective element. The *consilium fraudis* condition is at the heart of the Pauline action and cannot be overlooked. The construction of the legal theory does not allow the differentiation of the liability of the third contracting party according to one's good or bad faith. In fact, this criticism is a bit exaggerated in our view, or the legal regulation given by the legislator of the modernized Civil Code is sufficient to determine the legal facts from which the Pauline creditor's right to action originates.

d) In essence, the legal theory only represents a broadening of the application field of the tort theory as the basis of the creditor's right to challenge the fraudulent act concluded by the debtor with the third contracting party. The subjective element considered by the legal theory, which allows the transfer of the relative ineffectiveness risk of the fraudulent legal act from the debtor to the third contracting party, can be seen as a violation of the obligation to take into account the other obligations of the debtor (Ionescu, 2018, pp. 24-28). In this case, however, we are in the presence of an illegal conduct that entails the tortious liability of the third contracting party, a fact that brings us back to the tort theory.

On the other hand, however, the legal theory is supported by strong practical arguments. Until the modernization of the Civil Code and implicitly until the entry into force of art. 895-899 related to Pauline action, this institution had no existence in our law. In the previous judicial practice, injured creditors did not have such a method of defending their rights, but resorted to the action to establish the absolute nullity of the harmful acts under art. 221 paragraph (1) Civil Code (as amended until March 1st, 2019), qualifying them as fictitious or, as the case may be, simulated[1]. So, in the absence of express regulation, we cannot even talk about Paulian action, and the creditors' defense against debtors' frauds is capitalized according to other rights defense methods, such as the action in the declaration of simulation.

[1] Decizia Curții Supreme de Justiție din 19 august 2020, pronunțată în dosarul, nr. 2, ra-787/20- http://jurisprudenta.csj.md/search_col_civil.php?id=57684.

The theory of the judicial decision enforceability. The theory of the enforceable force of the judicial decision is of Praetorian origin, being elaborated by the German courts in the XIX century and constantly applied in German jurisprudence. The representatives of this theory are the German lawyers Hartman and Lippman. In essence, this is of a procedural nature, being closely related to the forced enforcement of court decisions. From this point of view, the creditor's right to contest the fraudulent acts concluded by the debtor is an extension of the right to demand enforcement. The Pauline action is a means of ensuring the effective enforcement of the court decision, and the Pauline process is only a stage of the enforcement procedure. Being of a procedural nature, the creditor's right cannot be built on a certain material-legal basis. The purpose of the Pauline action is to make enforcement possible by returning the fraudulently alienated asset to the mass of assets that constitute the subject of enforcement. Given the fact that the fraudulently alienated asset returns to the debtor's estate in order to be able to be pursued by force, it is required that the said asset be in the estate of the third contracting party, otherwise the Pauline action is void. Thus, the creditor's right is recognized as real (Golmsten, 1893, pp. 2-41).

Starting from the ideas elaborated by the jurisprudence of the German courts, Hartmann structured them from a theoretical point of view. He sees two sides of the creditor's right to challenge: one positive and the other negative. The latter consists in declaring the ineffectiveness of the fraudulent legal act, and the former in the restitution of the asset from the third contracting party with the aim of enforcing the court decision pronounced against the debtor. Thus, the Pauline action is an action intended to facilitate forced enforcement, which is admitted with regard to the third contracting party in a limited volume. The intrinsic foundation of this anomalous liability of the third contracting party is identified by Hartmann in the needs of the civil circuit and credit. The presumption that, under certain conditions, the debtor continues to own these objects is established against the person to whom the objects of enforced execution were handed over. The contracting third party, acquiring objects of forced enforcement from the debtor, deprives the creditor of the possibility of realizing one's claim, and thus one is considered a debtor within the limits of the assets acquired from the debtor and within the limits of the creditor's damage[1].

Against the theory of the enforceability of the court decision, a series of criticisms have been brought, some well-founded and others not so much (Golmsten, 1893): a) It is criticized that this theory does not determine the legal foundation of the investigated institution. And this is true, the very representatives of the named theory testify to this.

It starts from the premise that the asset is (still) at the third contracting party, while the Pauline action does not require such a condition to be admitted. Indeed, even art. 898 paragraph (2) of the modernized Civil Code expressly provides that if the third contracting party or the beneficiary cannot return the benefit owed, the creditor can claim its monetary value according to the legal provisions on unjust enrichment. It is mentioned in the literature that the lack of the asset in the estate of the third contracting party is not an impediment for the admission of the Pauline action, in this case the rule of real subrogation applies: *pretium succedit in locum rei.*

It is not satisfactorily explained why it is not the debtor oneself but the third contracting party who is held liable. d) It is stated that the right of appeal represents an extension of the right to demand forced enforcement, which leads to the total assimilation of the right of appeal with the right to enforce the obligation, a right that already enjoys enforceable force. However, this is not exact, the named rights being distinct. The assignment of the right of appeal to the right to the enforcement of the obligation

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does not mean confusing them, but the existence of the common legal foundation. e) It is stated that the examined theory does not admit appeal in the case of alienation of fungible goods, especially money. f) This theory does not establish clear criteria for delimiting the good and bad faith of the third contracting party. g) But the most serious criticism of the theory of the judicial decision enforceability resides in contesting the real nature of the Pauline action. This would mean that the unsecured creditor has a real right to the debtor's estate, which is wrong, although this idea is accepted by the French Civil Code, being supported by the French Civilians.

§ 2 of the German Law on the extra-bankruptcy appeal of the debtor's acts (Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners ausser des Insolvenzverfahrens) assigns active procedural status in the Pauline action only to the creditor who has an enforceable title capable of being enforced, provided that the forced enforcement in regarding the debtor's assets did not lead to the full satisfaction of the creditor's claim or if it can reasonably be expected that such enforcement will not lead to the full satisfaction of the claim (Usacheva, 2017).

French theory of the general pledge. According to the so-called theory, especially developed by prof. Fracois Laurent, the debtor's estate, seen as a universality of assets and liabilities, represents the object of an alleged pledge of the unsecured creditors from which they can realize their claims in case of need. The alienation of certain assets determined by the debtor has the effect of diminishing the "general pledge", and that is why injured creditors can resort to the Pauline action to "reintegrate" the pledge. We find these ideas in art. 35, 184 and 888 of the modernized Civil Code, as well as in doctrine, being unanimously adopted by the Romanian authors on the occasion of the exposing the theory of heritage as one of its main functions (Stoica, 2009, pp. 21-23). At the same time, this is also the explanation of the Romanian authors who studied, including monographically, the Pauline action (Ionescu, 2018, pp. 24-28).

Several rather serious criticisms have been brought against the general pledge theory (Golmsten, 1893): a) In this way, a new form of pledge is created, devoid of content and essence (lacking a determined object). It is understood that the pledge is a real right, matter in which the numerus *clausus principle* acts, which prevents the "creation" of new forms of real rights, including particular forms of the existing ones, except by express regulation. b) If the right of the unsecured creditor over the debtor's estate had really been a right of pledge, having been established from the moment the obligation was born, it should have granted the creditor the appropriate guarantees for the enforcement of the obligation by the debtor (e.g. the right to oppose the alienation of the assets over which they bear the alleged right of pledge). But following this logic we come to the conclusion of limiting the debtor in the right to manage one's assets, which would mean that any debtor, from the moment of the valid obligation, is limited in one's property rights. The positive law, however, does not limit the debtor in one's right to manage and use one's assets, a fact that requires the revision of the general pledge theory. c) Another fundamental criticism concerns the failure to respect the dualism of civil subjective rights (absolute and relative). From this point of view, the general pledge appears as a real right of claim. Of course, the existence of imperfect real rights, which acquire obligatory features and vice versa, cannot be denied, but these exceptions are well defined and systematized. If the followers of the general pledge theory wanted to create a rule of subjective civil law, they should have indicated exactly the real and relative features, which they did not do.

The alleged real right of general pledge is without a determined legal foundation. Being established together with the obligation relationship, it should arise precisely from the same basis as the debtor's obligation, which would be possible only in the case of a special agreement between the parties or in the case of an express rule (subjective civil rights cannot be inferred, but appear in connection with certain

legal facts). However, these aspects are completely neglected by the followers of the analyzed theory. **e)** The theory of the general pledge does not explain the reason for the liability not of the "pledger" debtor but of the third contracting party, in the conditions in which the debtor has disrespected the creditor's alleged right of pledge. In this case, it is required either to recognize the co-authorship of the third contracting party, which transposes us into the realm of the tort theory with all its shortcomings, or to admit the autonomous fault of the third contracting party with the granting of the *actio hypothecaria* to the creditor (in which case the creditor would have the right to pursue the "pledged" asset, waiving the need to challenge the fraudulent act).

Theory of the retroactivity of the judicial pledge elaborated by Prof. Golmsten (Golmsten, 1893)**.** The theory of the pre-revolutionary Russian professor Адольф Голмстен represents a variant of the theory of the judicial decision enforceability applied by the German courts at the end of the XIX century. It appropriates the main thesis of the theory of the court decision enforceability, namely the one according to which the right of the creditor to request the revocation (declaration of unenforceability in the terminology of the modernized Civil Code) of the acts concluded by the debtor to one's detriment, is an auxiliary remedy intended to make possible forced enforcement and realization of the creditor's claim. The realization of this right represents a stage of the process of the forced court decision enforceability, namely the collection of a sum of money. If the court decision is for the recognition of the right to the individually determined asset or the obligation to perform certain actions, then the forced enforcement can only consist of the forced transfer of the asset or the enforcement on the account of the debtor. In these forms, enforcement has nothing to do with the right to revoke fraudulent acts, or the act is declared unenforceable specifically to access the patrimony that could be sold and the creditor be paid from the price. If the patrimony (of the third contracting party) to which the creditor has access consists of money, they are transferred to the creditor to realize one's claim, and if the estate in question consists of debt rights, they are transferred to the creditor so that the debtor third party enforces for the benefit the creditor to realize the claim.

Enforcement in the mentioned cases involves a series of acts and procedural forms organically linked to each other that begin with the application of the seizure or ban on the assets that constitute the object of enforcement and end with the distribution of the collected amounts after the capitalization of these assets. In consideration of the distribution of the amounts resulting from the enforced capitalization, it is possible that the seizure or prohibition measures on the debtor's assets will be applied until the irrevocable decision is rendered (what we call today insurance measures). All these enforcement forms are sufficient grounds for recognizing the right of judicial pledge. This type of pledge consists of the right over the value, the price of the estate, so that the holder of the said right has the possibility of addressing the coercive bodies with requests regarding the adoption of insurance or conservatory measures aimed at realizing the pecuniary claim. The source of the judicial pledge is the law, which establishes certain conditions for the appearance and realization: the judicial pledge is established by the court decision pronounced in favor of the creditor and is carried out by the enforcement bodies at the request of the pursuing creditor.

Once the judicial pledge is instituted, the debtor is no longer entitled to alienate or renounce the assets that are the object of the judicial pledge. Said acts of alienation or relinquishment are invalid. They are to be ignored by the pursuing creditor who continues to benefit from the effects of the judicial pledge and in particular the pursuit of the asset even from the third party's estate. Obviously, in the case of the conclusion of such an act before the establishment of the judicial pledge, it is perfectly valid, but in certain situations it can be abolished. It is precisely these situations that are of interest for the exercise of the right of revocation by the creditor. The foundation of this special right of the creditor is therefore

the violation of the right of judicial pledge.

In order to solve the difficulties resulting from the non-coincidence in time of the conclusion of the fraudulent act and the establishment of the judicial pledge, Prof. Golmsten expressly assigns retroactive force to the right of judicial pledge from the moment of its actual establishment until the conclusion of the contested act. The right of judicial pledge is assumed to exist at the time of the conclusion of the fraudulent act. The anticipated existence of the judicial pledge is a legal fiction, a fact expressly recognized by the author, but he justifies it by facilitating the legal analysis and the use of this procedure in other theories.

The theory proposed by Prof. Голмстен recognizes the right of judicial pledge as a real right, with its own determined content, namely the limitation of the debtor's right of use from the moment the act is concluded (until the act is concluded, the debtor retains one's contractual freedom). These considerations highlight other vulnerabilities of the judicial pledge retroactivity theory. The *numerus clausus* principle is unanimously recognized in the matter of real rights (Sinitsyn, 2014; Akkermans, 2008), which excludes the application of the said theory whenever the judicial pledge is not expressly recognized by the legislator, as is the case with the modernized Civil Code, which does not establish such a form of pledge. Subsequently, the object of the actual pledge can be certain assets (patrimonial rights), fact that cannot be said about the judicial pledge. The alleged prohibition imposed on the debtor regarding the alienation of one's assets or the relinquishment of such assets is not expressly provided for by law, which makes it inapplicable under the law of our country from the perspective of art. 54 paragraph (2) of the Constitution.

The right of judicial pledge does not affect the (conventional) pledges established previously, being of lower rank. In case of competition, the conventional pledges have a higher legal force than the judicial one. Although it has the right of judicial pledge, the pursuing creditor remains an unsecured creditor.

In conclusion, the classical theories of Pauline action represent the beginning of the modern legal evolution of the examined legal institution. Without the effort of the authors named in this scientific article, it is difficult to imagine the state of contemporary legal thinking regarding the Pauline action, which otherwise presents a cardinal importance not only in the matter of common civil law, but especially in the matter of insolvency.

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