

THE PAULIAN ACTION WITHIN THE REGULATORY CONTEXT OF LAW No. 287/2009 CONCERNING THE CIVIL CODE

Roxana Anca ADAM¹

Abstract: *The term Paulian Action originates in Roman law, where it was a class action carried in the name of all creditors by a curator bonorum, with the effect of obligating the debtor to pay the defrauded creditors an amount equal to the value of the alienated assets. As will be shown, in current legal practice the action is individual and benefits only the creditor who files suit. The term of revocatory action was coined by its main effect, namely of inter partes rescinding of the attacked deeds, which in modern law is considered synonymous to non-opposability.*

Key words: *general guarantee, fraud, complicity of the acquiring third party, uncontested claim.*

1. Introduction

The Paulian action holds paramount practical importance, as numerous debtors seek to elude fulfilment of their assumed obligations and to frustrate enforcement of the creditor's debt by alienating their assets and the closing of deeds with third parties.

Debtors can compromise their own assets by deeds closed with third parties, thus diminishing the values of their assets. Evidently, the creditor cannot restrict all of the debtor's freedom of action, as a person cannot be declared incapable merely because they have debts.

However, the debtor's freedom of action has to be bounded, in such a way as not to allow him to compromise his own assets – the guarantee offered to the creditors – by means of fraudulent deeds.

Such a restriction is materialised by the law that enables creditors to attack the fraudulent deeds closed by the debtor with third parties such as to frustrate enforcement of the creditors' debt, and request these deeds to be declared non-opposable, that is not binding to the creditors.

The basis of the Paulian action is the chirographary (non-privileged) creditors' right to general guarantee provided by art.2324 of the Civil Code.

The Paulian action is legislated by the provisions of art.1562 par. (1) of the Civil Code, according to which "a creditor who proves his prejudice can request the juridical deeds made by his debtor in fraud of his rights, in particular a deed by which he renders himself insolvent or augments a state of insolvency, to be declared non-

¹ Faculty of Law, *Transilvania* University of Braşov.

opposable, that is not binding to the creditor.”

2. Applicability

The term Paulian Action originates in Roman law, where it was a class action carried in the name of all creditors by a curator *bonorum*, with the effect of obligating the debtor to pay the defrauded creditors an amount equal to the value of the alienated assets.

As will be shown, in current legal practice the action is individual and benefits only the creditor who files suit.

The term of revocatory action was coined by its main effect, namely of inter partes rescinding of the attacked deeds, which in modern law is considered synonymous to non-opposability.

The Paulian action holds paramount practical importance, as numerous debtors seek to elude fulfilment of their assumed obligations and to frustrate enforcement of the creditor's debt by alienating their assets and the closing of deeds with third parties.

According to the current law, the Paulian action is not directed against the debtor but the third one who closed the contract with because, the debtor being generally insolvent, the obligation to repair the damage focuses on third-party purchasers.

The literature has shown that the obligation and responsibility of the third party has a dual legal basis: or the third party was dishonest, too - so complicit in the fraud, and in this case he has a tort arising from article 1357 New Civil Code; or the third party even being in good faith, has benefited from the act which caused the injury to the creditor, and in this case he is held under the principle that no one may unjustly enrich at the expense of another.

The thesis stated above is not viable, because if the third party is in good faith and contracted for valuable consideration, the act between him and the debtor has never been abolished.

Also the creditor may not turn against him through an action arising from unjust enrichment due to the condition of the existence of a link between the increase and decrease of other heritage assets, because this case is about increasing the third party's assets and decreasing the debtor's assets and not the creditor's.

Moreover, it would be totally unfair and contrary to the principles of equity that a person in good faith should not be protected, because the protection of the principle of good faith is a measure that is necessary to provide security in the civil circuit.

In principle, by Paulian action the non-opposability to the claimant creditor of any juridical deed can be requested, regardless if made free of charge or onerously, by which the debtor diminishes the general guarantee offered to his creditors, deeds including alienation of assets, assigning of debts, establishing of mortgages, transactions, etc.

Thus, in general, the applicability of the Paulian action does not differ from that of the oblique action.

The applicability of the Paulian action includes only the juridical deeds closed by the concerned debtor, while excluding the actual juridical deeds.

There are also deeds that cannot be revoked by Paulian action, like those concerning non-prosecutable or strictly personal rights, closely linked to the debtor's person, including non-patrimonial or patrimonial personal rights the exercising of which entails the subjective appreciation of their holder.

In the case of such rights, the Paulian action would be ineffective on account of their being non-traceable.

However, the repository action can be promoted with respect to legal acts concerning non-pursuable rights in those situations where determining the extent of such rights has been consented to by the debtor deliberately in order to fraud unsecured creditors.

Thus, in the case of a maintenance contract, the dependent person's creditors – shall promote a Paulian action when the dependent one encloses a free of charge contract which results in the emergence or worsening of charge, in order to fraud them, by decreasing his patrimony.

In this case there is no need to prove complicity in fraud of the third party contractor, because he defended a free patrimonial advantage – *certat de lucro captando* - while the lender seeks to avoid injury – *certat de damno vitando*.

Also bringing a Paulian action is admissible if the debtor assumes a maintenance obligation which is clearly very onerous, which causes or aggravates the state of insolvency.

You cannot question the equivalence of the contract because a contract is random, but the obligation he has to fulfil will be appreciated in relation to its means and other obligations which the supporter has to carry out.

Also, the payment of outstanding debts made by a debtor, even insolvent, and even of bad faith cannot be attacked by other creditors.

This payment does not prejudice the creditors because the debtor's assets do not diminish, as any payment has the effect of extinguishing a debt.

Finally, when contracting new debts, the debtor retains the right to administer the estate and conclude acts that

are conducive to the juridical change of the patrimony.

For this reason, in principle it is accepted that the debtor can validly contract more debt, although he thereby worsens insolvency without previous creditors to request revocation of new obligations.

If the debtor does not assume a simple new debt, but he is guilty of qualified fraud, meaning that he would have an understanding with the new creditor to share the creditor's benefit in the prejudice of other creditors' rights, the first creditor has the right to pursue a Paulian action against the fraudulently act.

3. Prerequisites of the Paulian action

A. *The attacked deed needs to have caused a prejudice to the creditor*, consisting of the debtor causing or augmenting his state of insolvency (*eventus damni*) [art. 1562 par. (1) Civil Code]. If the debtor, even by fraudulent deeds, has not caused his state of insolvency, the action will be rejected as lacking interest. The prejudice needs to be personal and actual, as it is the very reason for a Paulian action.

In general, prejudice is proved by the protocol devised by the court executor upon foreclosure, wherein it is established that the debtor has no further executable assets.

The provisions of art.1562 par. (1) of the Civil Code concern deeds whereby the debtor induces or augments a state of insolvency, an enumeration in this sense being merely enunciative. Consequently also other deeds closed by the debtor in fraud of the creditor's rights can be attacked, if such deeds caused prejudice to the creditor.

B. *The debtor's fraud*, that consists in the debtor having knowledge of the damaging effect to the creditor of that deed. The

debtor realised that by that deed he induced or augmented his insolvency, regardless whether that deed had been made free of charge or onerously, even if its immediate goal had not been frustration of the creditor. The existence of fraud is presumed based on knowledge of the caused prejudice, regardless of the debtor's reason for closing the deed, namely for his own interest or seeking to frustrate his creditors.

Paulian fraud is thus committed by knowing the prejudice, and not by special intent of causing prejudice. Indeed, unconsciousness about causing prejudice completely justifies the debtor's deed, rendering it incontestable.

The debtor's subjective attitude need not take on the form of intent (of *dolus*) such as to cause prejudice to the creditor.

Proof of fraud can be brought by all means admitted by law, and its verification is left to the free appreciation of the court of law.

In the case provided at art.1156 par. (4) of the Civil Code, the legislator presumes the existence of fraud.

The personal creditors of successors can request the revoking of the distribution of the estate, without the necessity of proving fraud committed by the co-beneficiaries of such distribution, but only if, despite their having requested to be present, distribution of the estate was conducted in their absence, without their being convoked.

C. *The creditor needs to hold an uncontested claim*, in principle prior to the contested deed, represents the third prerequisite for the eligibility of the Paulian action.

The provisions of art.1563 of the Civil Code require as the sole condition to be met by the creditor's claim in order for a Paulian action to be eligible *enforceability at the time of taking action*, the legislator

waiving the previous requirements of liquidity and enforceability.

D. *Complicity of the third acquirer to the debtor's fraud.* The complicity of the third acquirer consists in his realising the fraud on the debtor's creditors' rights determined by the debtor's insolvency. If the third acquirer is not an accessory to the fraud, the creditor will not be able to attack his acquisition.

The fraudulent connivance of the debtor and the third acquirer consists in the third party having knowledge of the debt and acquiring the executable asset for the very reason of impeding enforcement of the debt.

In other words, the third party's complicity is materialised by his bad faith at the time of closing the fraudulent deed with the debtor.

This is a necessary condition only if the attacked deed is *onerous*, and not if it was devised free of charge, as in the former case the third party and the creditor tend to avoid causing of damage (*certat de damno vitando*), while in the latter case the creditor is more interested as he seeks to avoid a damage, while the third party seeks to obtain a gain (*certat de lucro captando*).

If the deed is free of charge, it suffices to determine the caused prejudice and the debtor's fraud, a complicity of debtor and the third party in the committed fraud not being a necessary condition.

Thus the deed can be attacked even if the third acquirer was of good faith and not accessory to the debtor's fraud.

The fraud consists in the third party having knowledge at the closing of the deed that the debtor will cause prejudice to the creditor by that very deed, which induces or augments the debtor's insolvency.

Fraud can be proved by any means, including witnesses and presumptions.

The solution is justified, as in the case of onerous deeds, both the claimant creditor and the third acquirer seek to avoid causing a prejudice.

In such a situation the acquirer who closed the deed in good faith will be preferred.

4. The effects of the Paulian action

If the Paulian action is admitted, the fraudulent deed will be revoked, and the effects of the Paulian action analysed in relation to the third acquirer, the debtor and the other creditors of the debtor:

A. *In relation to the third acquirer* the deed is revoked, but only to the extent of enforcing the debt. According to *art.1565 par.(1) of the New Civil Code (NCC)*, by admitting a Paulian action the attacked deed is declared non-opposable, that is not binding to the claimant creditor, as well as to all other creditors, who, having the possibility of pursuing this action, have intervened in the case.

Thus the claimant creditor and, as the case may be, the third party in the suit will be able to foreclose the executable asset as if this asset had never left the debtor's patrimony, the alienation being non-opposable, not binding for them.

The court's decision of admitting the revocatory action renders the asset unavailable until the completion of enforcement by foreclosure of the debt underlying the action [art.1565 par.(2) – Final thesis of the Civil Code].

For it to be binding to third parties, the measure of unavailability of the asset needs to undergo the formalities of real estate or moveable asset publicity, the provisions of art.628 NCC concerning the inalienability clause being applicable correspondingly. If the asset has been alienated by the acquirer, according to

art.1565 par. (2) in connection with art.629 par. (2) Civil Code, the creditor can request the cancellation of the thus closed deed.

B. *In relation to the debtor*, the revoked deed continues to produce effects in relation to the third party. The debtor's deed is revoked only partially with regard to the relationship of the creditor and the third party.

The asset returns to the debtor's patrimony only by a fiction based on the relationship of the creditor and the third party.

C. *In relation to the other creditors* of the debtor, the Paulian action produces no effect whatsoever, the revoking of the deed benefitting solely the creditor who filed the action and, as the case may be, the other creditors who, having the possibility of pursuing this action intervened in the case; it is only for these that the asset is considered as having returned into the debtor's patrimony.

The other creditors do not benefit from the effect of the Paulian action, as for them the asset is definitively removed from the debtor's patrimony and implicitly from their general guarantee.

Consequently the Paulian action has individual character, the filer of the action exerting his own right. The claimant does neither represent the debtor or any other of the debtor's creditors.

Consequently, unlike the effect of an oblique action, the effect of the Paulian action is not returning the asset to the joint guarantee of all creditors and thus to benefit all these creditors.

5. Prescription of the Paulian action

According to art.1564 Civil Code the right to file this action is prescribed *after 1 year* from the date when the creditor

became aware or should have become aware of the prejudice caused by the attacked deed, unless differently provided by law.

The prescription period is not calculated from the closing date of the fraudulent deed, but depending on two alternative moments.

The first moment is *subjective*, namely the date when the creditor has become actually aware of the prejudice caused by the closing of the juridical deed, while the second moment is *objective*, being determined in each case by circumstances or the creditor's preparation.

6. The Legal Nature of the Paulian Action

The Paulian action is a personal action, since the creditor who exercises it does not put forward the debtor's right on the property, but a personal right.

The Paulian action differs from the oblique action because the first belongs to unsecured creditors, and the second is exercised by the creditor on behalf of the debtor.

The Paulian action is personal even if the contested measure is an immovable object. In this case the action is not of real nature because unsecured creditors are granted the right of general lien and not a real right over the property.

Moreover, the admission of the Paulian action does not result in the recognition of ownership or other real right in the person of the plaintiff creditor, but the abolition of the act which caused him harm.

Since the admission of the Paulian action the act is cancelled, it produces the same effects as the action for annulment of a legal act.

It differs from an action for annulment because it has a relative feature, having

effects only between the creditor and the third party, while an effective nullity action produces effects on every person, leading to the application of the *resoluto jure dantis resolvitur jus accipientis*. The act remains valid between the parties and enforceable against others.

The action for annulment has effects of partial or total abolition of the act throwing parties in the past, whereas the Paulian action act is revoked only within the limit of the loss suffered by the creditor.

It is also considered that the Paulian action has its own, autonomous configuration being an action in unopposability of the act concluded by the debtor for defrauding the creditor's interests.

This view has also been criticized as insufficient to cover the full specific of the Paulian action, claiming that the contested act becomes inapplicable to the creditor not as a result of the promotion of the Paulian action by the creditor, but that conclusion being committed by the debtor under certain conditions, has resulted in defrauding the creditor's rights.

Taking these conditions into account, the inapplicability of the fraudulent act results directly from the law.

The repository action represents only the juridical means of investing courts with the power to check whether the conditions required by law are respected.

In our opinion, along with other authors we consider that the Paulian action is an action on the unenforceability of the act concluded by the debtor to prejudice the interests of the creditors.

In this respect there is also the jurisprudence, which held that the Paulian action is legally justified in order to defend the general pledge of creditors against acts of fraud by the debtor and their rights.

7. Distinction between the Paulian action and the simulation action

As an exception to the principle of enforceability of the contract to third parties, simulation created by its effects a legal situation within the meaning of changing the effectiveness of the usual regime and enforceability of legal documents.

For a proper study of the two institutions, on overview of the main similarities between the two actions will be made:

a) the unsecured creditors holding the simulation action act in their own name, similarly to the Paulian action;

b) being an individual action, the simulation action only benefits the plaintiff creditor, as it happens in the case of the Paulian action.

Although the simulation action displays similarities with the Paulian action, the two institutions differ clearly, so we present the following peculiarities of distinctiveness:

a) the legal basis for the simulation action consists of the provisions of article 1175 Civil Code and article 1289 New Civil Code, on the other hand, the legal basis for the Paulian action are the provisions of article 975 of the Civil Code and article 1562 New Civil Code, on different grounds grafted on the idea of general pledge article 1718 of the Civil Code (i.e. article 2324 New Civil Code) ;

b) the scope of the simulation action is circumscribed to unilateral contracts and legal documents signed by the debtor subject to the applicant's communication; on the other hand the Paulian action is circumscribed, with some exceptions, to the debtor's patrimonial rights and actions;

c) the simulation action tends to remove a simulated act and restore a real legal situation whereas the Paulian action tends

to repair the damage caused by a real truthful, but fraudulent act.

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