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SOME CONSIDERATIONS REGARDING THE RECOVERY OF A DEBT BY THE UNSECURED CREDITOR OF AN HEIR

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Abstract: *Nowadays, the article 1107 of the New Civil Code regulates the acceptance of an inheritance by the heir's creditors. For a better understanding of the difficulties that the heir's unsecured creditor faces in enforcing his rights, this short overview attempts, on the one hand, to highlight certain aspects of the present-day configuration of the unsecured creditor's legal position, and, on the other hand, to examine the special case of the heir's unsecured creditor and some of the obstacles that he faces in order to recover the debt in an effective way.*

Key words: *succession, inheritance, unsecured creditor, heir, oblique action, National Notary Registry of Successions.*

1. Introduction

A person's death is socially in principle a sad event, one of the few exceptions being probably the situation in which the heir with concrete vocation to inherit the deceased is insolvent. As a result of the opening of the inheritance, the creditors of the insolvent heir might assert claims, either amicably, in the event that the debtor accepts the inheritance and then he pays his debts willingly, or by court, if the heir (debtor) does not exercise the right of inheritance option in the sense of accepting the inheritance.

However, among all the heir's creditors, the unsecured creditor is in the most precarious situation, because he does not have any privilege, any hypothec right, any right equivalent to hypothec, according to art. 2347 from the Civil Code (Law no. 287/2009 regarding the Civil Code), nor any right of pledge for the assets from the debtor's patrimony in order to effectively exercise the claim, so that the exploitation of his rights by court may prove extremely difficult in this context.

2. The Unsecured Creditor's Legal Position

According to the most recent legal definition that we can find at point 6 of art.3 from the Law no. 151/2015 on insolvency proceedings against private individuals (Law no. 151/2015 on insolvency proceedings against private individuals), the unsecured creditor is that creditor who does not have the quality of the holder of a claim that benefits from a case of preference.

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Claims that benefit from a case of preference refer to the claims accompanied by a preferential right to payment and/or a hypothec and/or rights equivalent to hypothec, according to art. 2347 from the Civil Code, and/or a right of pledge for the assets from the debtor's patrimony, no matter if this is the main debtor or a third party guarantee towards the individuals who benefit from the preference cases.

Consequently, the unsecured creditor does not benefit from any preferential rights to payment (preference granted by law to a creditor, on considering his claim, even if the other creditors' rights appeared or were previously scored) (Boroi, & Ilie, 2012, p. 113), neither by hypothec (the real right on the movable or immovable assets affected to the execution of a debt, regulated by the art. 2343 from the Civil Code), nor by the regulation of the transactions equivalent to hypothec (property reserve clauses, redemption pacts and assignments of receivables completed for security purposes) and not for the pledge (the pledge that requires the debtor's dispossession of the guarantee affected asset, regardless of the moment and of the legal basis of the constitution of this -art. 186 from the Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in The Official Journal of Romania, Part I, no. 409 from 10th of June 2011).

Furthermore, for the part of the uncovered claim, is also an unsecured creditor the creditor who benefits from the preference case, but whose claim is not totally covered by the value of the asset affected to the preference case. We have to underline that the simple registration in the Electronic Archive for Security Interests in Movable Property of a claim does not determine its transformation into a claim that benefits from a preference case.In the same sense, the doctrine also offered a synthetic definition according to which "the unsecured creditors are those creditors that do not have a security interest to provide the achievement of the claim that they have against the debtor (hypothec, pledge, privilege), but only a right of «general pledge» on the debtor's present and future assets, these assets serving as creditors' common guarantee" (Boroi, G., Anghelescu, C. A., 2012, p. 227).

So, to the actual execution of the rights of claim, the unsecured creditor has only general and joint guarantee established by art. 2324 paragraph (1) from the Civil Code in favour of all the creditors, regarding all debtor's present and future movable and immovable assets. This guarantee is known in the doctrine under the name `general pledge of the unsecured creditors`, the term `pledge` not having in this context its technical meaning of real right, but the meaning of guarantee, insurance (Boroi & Ilie, 2012, p. 89, n. 3). This guarantee regards all of the debtor's traceable assets existing in his patrimony at the moment of the forced execution, regardless of the fluctuation of the patrimony between the date of issuance of the claim and the date of the forced execution.

The subject of the right of general pledge of the unsecured creditors does not consist of the actual assets that exist in the debtor's patrimony at the date of the foreclosure, but the subject of the general and joint guarantee is the debtor's patrimony itself, the unsecured creditors supporting the effects of the legal acts concluded by the debtor (Matefi, 2015, p. 107), acts that enrich or deplete the patrimony, excepting the acts through which their interests are defrauded. The legislator allows the unsecured creditors to trace any assets that entered their debtor's patrimony between the moment of filing the claim and the one of the execution of the guarantee, between these two moments the debtor's patrimony being in a continuous dynamics (Vişinoiu, 2014, p. 2416).

In the event that the debtor concludes a legal transaction through which he creates or increases the state of insolvency, the unsecured creditor, if he proves the prejudice, can require a judicial decision that the act may not be set up against him, relying on the

provisions of the art. 1562 paragraph (1) from the Civil Code that regulates the revocatory action (Paulian). This means of protection of the creditor's rights involves as an allowed situation the debtor's concluding a legal act regarding patrimonial rights, either with the direct intent to harm the creditor, even by knowing that the document causes or worsens the insolvency state.

But what really happens when the debtor, already in a state of insolvency, refuses to get rich, thus perpetuating the state of insolvency, even if he could have collected an inheritance that could have recovered his financial situation?

3. The Heir's Unsecured Creditor

As we have already seen, among all creditors, the unsecured creditor finds himself in the worst situation (Prescure, & Matefi, 2012, p. 192), by benefiting only from the general pledge of the unsecured creditors, the general and joint guarantee established by art. 2324, paragraph (1) from the Civil Code. However, the unsecured creditor's situation under the current regulation has been improved through the express consecration of the right of the heir's creditors to accept the inheritance, by way of an oblique action, but only in the limit of the sufficiency of their claim: `The heir's creditors may accept the inheritance, obliquely, in the limit of the sufficiency of their claim' (art. 1107 from the Civil Code). So, the acceptance of the inheritance, made by the heir's creditor, produces effects only in the limit of the sufficiency of the claim of its creditor, so the effects are relative because they are produced only regarding the plaintiff creditor and only in the limit of his claim.

The exercise of the oblique action in the sense of accepting the inheritance by the heir's creditor is a particular case of the oblique action regulated by art. 1560 from the Civil Code: `The creditor whose claim is certain and exigible might exercise the debtor's rights and actions when this one, in the creditor's detriment, refuses or neglects to exercise them`. The specific difference between the general oblique action and this particular case consists in the fact that the court order of admission of the (general) oblique action brings profit to all the creditors ` with no preference in favour of the creditor who exercised the action` (art. 1561 from the Civil Code) while the effects of the admission of the oblique action for the acceptance of the inheritance by the creditors strictly reflect on the creditor who exercised the action and only in the limit of his claim.

Previously, under the influence of the Civil Code from 1864, the right of the heir's creditors to accept the inheritance constituted the subject of some controversies in the doctrine, but according to the dominant opinion in the speciality literature, the right of succession option was of patrimonial nature, not of `strictly personal` nature as it seemed to result from the art. 974 from the 1864 Civil Code, as it might have been exercised by the heir's personal creditors by oblique action (Deak, 1999, p. 424).

Also, in order to make the claims, the unsecured creditors of the forced heirs also benefit from the right to require the reduction of the excessive liberalities (art. 1093 from the Civil Code). The reason why the legislator also admitted the forced heirs' unsecured creditors the right to require the reduction of the excessive liberalities resides in the fact that the reduction is a means through which the forced heirship of the forced heirs that come effectively to the inheritance is protected (Nicolae, 2016, p. 464), the rejoining of the heirship improving the financial situation of the heir and implicitly his capacity to pay his debts, thus increasing the unsecured creditor's chances to recover their debt.

The right to require the reduction of the excessive liberalities is not a strictly personal right, but a patrimonial right, that may be developed by oblique action by the forced heirs' unsecured creditors, if the following conditions are accomplished: the forced heir should not have introduced himself the action in reduction, meaning to be inactive, to refuse or neglect to exercise it; the creditor should have a serious and legitimate reason, namely the heir should be insolvent; the creditor's claim should be certain and exigible (Trăilă, 2015, p. 157).

4. Obstacles in the Efficient Recovery of the Debt

According to the above, the heir's unsecured creditor seems to have at reach all the necessary levers in order to develop the right of claim by court order, the appearances are however deceiving. Both the case of the debtor already in the insolvency state and who refuses to get rich, thus developing the insolvency case, although he could have collected an inheritance that could have re-established his financial situation, and the case of the debtor who accepts the succession, but alienates the assets that he received through inheritance before the unsecured creditor could have taken action are two hypotheses not to be neglected and which probably intervene in practice more often than one might think.

So, the main obstacle in the way of the actual enforcement of the rights of claim by the unsecured creditor of an heir is both the lack of visibility on the debtor's patrimony, and especially the lack of visibility on what concerns the debtor's chance to have become an heir with concrete vocation to inherit the deceased, and consequently able to pay his debts.

Although nowadays there is a National Notary Registry of Successions (RNNEOS - NNRS) where all the notarial deeds referring to accepting, respectively disclaiming the inheritance, are registered, managed by the National Centre for Managing the National Notary Registers – CNARNN (NCMNNR) – INFONOT – entity with legal personality, founded and organised under the authority of The National Union of Public Notaries from Romania, founded on May 1st 2013, its main purpose being the management of the national notary registers (art. 162 from the Law no. 36/1995 of the public notaries and notarial activity, published in The Official Journal of Romania, Part I, no. 479 from 1st of August 2013) – the study of it by an unsecured creditor who does not know his debtor in the most intimate way obviates any action in this direction. The procedure of studying the national notary registers was established through the decision of the Executive Office of the Council of the Public Notaries Union from Romania (http://www.infonot.ro/).

In order to directly obtain information regarding the exercising of the right of succession option by the debtor heir, the unsecured creditor has to fill in a petition containing the following data regarding the deceased: surname, name, Personal Identification Number, date of birth (day/month/year), place of birth, date of death (day/month/year), place of death, last residence, (at least the locality and the county/department), the country, the name and the surname of the deceased's parents, other names and surnames under which he was known. Of these data, the minimum provided is represented by the surname, the name, the Personal Identification Number, the date of death, the date of birth and the last residence. To this petition must be enclosed a supporting evidence of the death, such as a photocopy of the death certificate, an extract from the registry of deaths etc. Also, the unsecured creditor might refer to the concluding issuance procedure regarding the result of the verifications performed in the Register of

Succession Procedures of the Chambers and in the national notary registers of the Union (art. 15, letter f from the Law no. 36/1995 of the public notaries and notarial activity), procedure fulfilled by the competent notary public, according to the law, to perform the succession procedure.

According to art. 331 from the Regulation for the implementation of Law no. 36/1995, for the concluding issuance regarding the checking of the inheritance evidences, the notary public checks the presentation of the death certificate, as well as proving the quality of heir or entitled person. The petition for the concluding issuance regarding the checking of the inheritance evidences is registered in the inheritance evidences of the Chamber and the notary public registers the case pending before the office, the concluding issuance falls under the responsibility of the notary public legally competent to settle the succession procedure. The notary public will issue, within 3 working days from the petition registration, a concluding statement regarding the result of the checking performed in the Register of succession procedures kept by the Chamber, as well as in the national notary registers stipulated by art. 163, paragraph (1) letters a)-c) from the law.

The concluding statement will contain the results of the checking of the mentions included in the certificates released by the succession registers. The notary public proceeds first to interrogate the registry kept by the Chamber where the deceased had the last residence. In the case that, as a result of checking, it is established that the succession is solved, it will be mentioned in the concluding statement, without proceeding to check the unique registers of the Union established by art. 163, paragraph (1) letters a)-c) from the law.

If as a result of the checking of the register kept by the Chamber it is established that the deceased's succession is not pending before any notary office, the interrogation of the Register of Succession Procedures would be done only when the deceased had his last residence abroad or his residence is unknown, but had left assets in Romania. But if as a result of the checking of the register kept by the Chamber, as well as in the national notary registers, it is established that the succession is pending before a notary office, the one who is interested will be guided to obtain the concluding statement from the notary public who instruments the case. The petition, through which the checking is required, together with the concluding statement issuance by the notary public as a result of the checking, is included in the notarial register or, if the case might be, in the succession register.

In the end, we have to mention that in the initial form, the procedure of the concluding statement issuance regarding the checking of the inheritance evidence, requested the entitled person (the unsecured creditor) to present to the notary public a copy of the request for summons, being mentioned whether it was filed or not. This request was, however, considered excessive by the legislator, so the Order of the Minister of Justice no. 392/C from May the 10th repealed it.

5. Conclusions

Taking into consideration both the procedure of consulting the Register of Succession Procedures kept by the Chamber, and the procedure of interrogation of the National Notary Registry of Successions, we cannot but conjecture that probably none of the heir's unsecured creditors ever appealed to any of these in order to develop by court order of his rights of claim.

Anyway, even the hypothesis in which the unsecured creditor would manage to present the death certificate (or at least a duplicate of this obtained according to the procedure regulated by the special law) and the consulting of the registers would show both the existence of the open legacy, as well as the quality of heir with concrete vocation of the insolvent debtor, we doubt the effectiveness of the means available to the unsecured creditor in the present state of the legislation, especially that the moment of establishing the right of pledge of some monitored assets from the debtor's patrimony, constitutes the creditor's switch to the foreclosure of the claim.

The conclusion cannot be any other than the fact that the precarity of the quality of unsecured creditor should determine on its own the potential future creditors to refer to guarantees, other than the right of general pledge of the creditor on the debtor's patrimony the more so as for example even the practice court was pronounced in that the inscription in the Land Registry of a legal action, in order to prevent the alienation of the ownership and to avoid the encumbrance of the real estate with duties, so that it might be provided the enforcement of the court order that is to be pronounced, it is necessary that particular action should be related to the right or to the estate registered in the Land Registry, relation that is not possible if the litigation for which the inscription has been solicited is based on the creditor's right of general pledge on the debtor's patrimony (Court of Appeal, Cluj, The Civil Section, decision no. 500/R March 3rd 2010).

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