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Ineffectiveness of the Payment of Debt under the Polish Law

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Abstract: *The aim of the presented study is to answer the following question: whether – according to the Polish law which is not lex concursus in the case – the payment of debt if other required legal conditions are fulfilled may be ineffective?*

Key Words: *Bankruptcy Law; Bankruptcy Law Act; Civil Code; Ineffectiveness; Bankruptcy; Payment; Debtor; Creditor; Poland.*

Ineffectiveness of the bankrupt's deeds and the scope of *lex concursus*

Article 7 Section 2 point m) of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings stipulates that the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure (*lex concursus*). In particular, it shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

Article 16 of the Regulation (EU) 2015/848 provides an exception of the above-mentioned rule. Point m) of the Article 7 Section 2 shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and the law of that Member State does not allow any means of challenging that act in the relevant case.

Ineffectiveness of the bankrupt's activity

In the Polish bankruptcy law, there are adopted classic civil law institutions which undergo numerous modifications to the general rules, due to the purposes of bankruptcy procedures. Such institutions include tradi-

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

tional civil construction of ineffectiveness[1] of the debtor's deeds. The ineffectiveness of the bankrupt's activity belongs to the wide range of effects of the declaration of bankruptcy.[2]

In the Polish legal system, the court ruling on the declaration of bankruptcy is of a constitutive nature. In the context of the construction of the ineffectiveness of the bankrupt's activities adopted by the Polish legislator, it should be noted that some legal systems are known for the construction of the so-called declaratory declaration of bankruptcy. In this case, the court declaring bankruptcy determines the existence of the debtor's insolvency in the past. The court ruling shall state the date of material bankruptcy, as a result of which the declaration of bankruptcy has a retroactive effect from the date of the court's decision and any debtor's actions performed after the stated date of insolvency are ineffective with respect to the bankruptcy estate by operation of law. The Polish legal system, however, is based on a different assumption. The court ruling on the declaration of bankruptcy is of a constitutive nature which means that only those bankrupt's activities concerning bankruptcy mass that were effected after the declaration of bankruptcy are deprived of legal force. However, because practical experience teaches that debtors even before bankruptcy carry out activities that unjustifiably charge their property, it is necessary to have legal instruments to protect creditors against such acts of creditors who will receive their claims from the bankruptcy estate.[3]

The ineffectiveness of the bankrupt's deeds may arise a) by virtue of law; b) by the constitutive judgment of the court; c) by the constitutive ruling of the judge – commissioner.

[1] See GUTOWSKI, M. *Bezskuteczność czynności prawnej*. 1. wyd. Warszawa: C. H. Beck, 2013, p. 149. ISBN 978-83-255-4810-0.

[2] See F. Zedler in JAKUBECKI, A. and F. ZEDLER. *Prawo upadłościowe i naprawcze: Komentarz*. 3. wyd. Warszawa: Wolters Kluwer, 2010, p. 34. ISBN 978-83-264-0653-9; GURGUL, S. *Prawo upadłościowe i naprawcze: Komentarz*. 7. wyd. Warszawa: C. H. Beck, 2010, p. 54. ISBN 978-83-255-1183-8; and R. Adamus in WITOSZ, A. ed. et al. *Prawo upadłościowe i naprawcze: Komentarz*. 3. wyd. Warszawa: LexisNexis, 2010, p. 60. ISBN 978-83-7620-445-1.

[3] See ADAMUS, R. *Prawo upadłościowe: Komentarz*. 2. wyd. Warszawa: C. H. Beck, 2019. 1263 p. ISBN 978-83-8158-022-9.

Ineffectiveness regulated in the Polish Civil Code and the Bankruptcy Law Act

There are two sources of ineffectiveness of the debtor's deeds performed before declaration of bankruptcy: Articles 127 – 135 of the Bankruptcy and Rehabilitation Law Act from 28th February 2003 (hereinafter referred to as the "Bankruptcy Law Act") and Articles 527 – 534 of the Civil Code from 23rd April 1964 (hereinafter referred to as the "Civil Code"). If a deed of a debtor is not ineffective on the basis of the Bankruptcy Law Act, it can be considered ineffective on the provisions of the Civil Code. The provisions of the Civil Code on *actio Pauliana* are complementary to the regulations of the Bankruptcy Law Act. In some cases, a specific state of affairs may exhaust both the premises of the regulations of the Bankruptcy Law Act and the general principles of the Civil Code. However, it should be emphasized that the provisions of the Civil Code, in accordance of the Article 131 of the Bankruptcy Law Act, will apply only to those activities that are not ineffective by virtue of law. A good illustration of the above-stated theses is a fragment of the judgment of the Supreme Court of the Republic of Poland of 3rd October 2007[4] which indicated that in the Article 131 of the Bankruptcy Law Act has been established the principle of subsidiary application of the provisions of the Articles 527 – 534 of the Civil Code. The provisions on the ineffectiveness of the bankrupt's deeds are a special regulation in relation to the provisions on the *actio Pauliana*, but this is not about the relationship *lex specialis derogat legi generali*, but about the complementarity of the norms.

There are a number of significant differences between the classic civil construction of the ineffectiveness of the debtor's activities regulated in the Articles 527 – 534 of the Civil Code[5] and the construction of the ineffectiveness of the bankrupt's activities regulated in the Articles 127 – 135 of the Bankruptcy Law Act. These differences can be observed on several stages. First of all, significant difference occurs in relation to the construction of premises of the ineffectiveness of the debtor's and the bank-

[4] See IV CSK 184/07, OSNC 2008, no. 12, item 142.

[5] See M. Pyziak-Szafnicka in OLEJNICZAK, A. ed. et al. *System prawa prywatnego: Tom 6: Prawo zobowiązań – część ogólna*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych Polskiej Akademii Nauk, 2009, p. 1281. ISBN 978-83-255-0155-6; and M. Sychowicz in BIENIEK, G. ed. et al. *Komentarz do Kodeksu cywilnego: Księga trzecia: Zobowiązania: Tom 1*. 7. wyd. Warszawa: LexisNexis, 2007. 698 p. ISBN 83-7334-644-9.

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

rupt's activities.[6] Secondly, there is a serious difference with regard to the mechanism of ineffectiveness of the activity.[7] Thirdly, the results of the ineffectiveness of the debtor's activities and the ineffectiveness of the bankrupt's activities are different.[8] Finally, there are different rules for pursuing claims for ineffectiveness of the debtor's actions and for ineffectiveness of the bankrupt's deeds.

The provisions on the ineffectiveness of a bankrupt's activity in relation to the bankruptcy estate (Articles 127 – 135 of the Bankruptcy Law Act) are intended, in the assumption, to protect the bankrupt's estate and thus the bankrupt's creditors. Practical experience confirms that debtors – in the face of an imminent bankruptcy – often take steps to dispose of their property and do not satisfy creditors equally. As a consequence, it may turn out that some of the bankrupt's activities may lead to privileges of some chosen persons. Therefore, the Bankruptcy Law Act adopts the construction of an ex-post adjustment of certain activities of the debtor

[6] See BABIARZ-MIKULSKA, K. Bezskuteczność czynności upadłego w stosunku do masy upadłości w świelte przepisów ustawy – Prawo upadłościowe i naprawcze: (próba usystematyzowania i analizy przesłanek). *Przegląd Sądowy*. 2004, vol. 14, nr 7/8, p. 113. ISSN 0867-7255; ZEDLER, F. *Prawo upadłościowe i naprawcze w zarysie*. 1. wyd. Kraków: Zakamycze, 2004, p. 102. ISBN 83-7444-065-1; LEWANDOWSKI, R. and P. WOŁOWSKI. *Prawo upadłościowe i naprawcze*. 1. wyd. Warszawa: C. H. Beck, 2011, p. 128. ISBN 978-83-255-2563-7; PODEL, W. and M. OLSZEWSKA. *Upadłość w praktyce: Komentarz, orzecznictwo, piśmiennictwo, wzory, przykłady, przepisy*. 1. wyd. Warszawa: Difin, 2012, p. 167. ISBN 978-83-7641-678-6; CZECH, T. Bezskuteczność zabezpieczenia rzeczowego na podstawie art. 130 prawa upadłościowego i naprawczego. *Monitor Prawa Bankowego*. 2011, vol. 2, nr 9, p. 69. ISSN 2081-9021; ADAMUS, R. Bezskuteczność i zaskarżanie czynności upadłego w Prawie upadłościowym i naprawczym. In: A. WITOSZ, ed. *Instytucje prawa upadłościowego i naprawczego*. 1. wyd. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2006, p. 70 and following. ISBN 83-226-1575-2; and ADAMUS, R. *Bezskuteczność i zaskarżanie czynności upadłego: Komentarz*. 1. wyd. Warszawa: C. H. Beck, 2010, p. 24. ISBN 978-83-255-1200-2.

[7] See KORZONEK, J. *Prawo upadłościowe i Prawo o postępowaniu układowem: Komentarz: Przepisy wprowadzające, przepisy wykonawcze, ustawy dodatkowe*. 1. wyd. Wrocław: Budaco, 1992 [reprint], pp. 221-222; ADAMUS, R. Dochodzenie roszczeń z tytułu czynności upadłego bezskutecznych z mocy prawa. *Monitor Prawniczy*. 2011, vol. 19, nr 16, p. 859. ISSN 1230-6509; and ALLERHAND, M. *Prawo upadłościowe: Postępowanie układowe: Orzecznictwo sądów polskich z lat 1936 – 1998: Wzory pism w postępowaniu upadłościowym: Przepisy wykonawcze i związkowe: Skorowidz: Komentarz*. 1. wyd. Bielsko-Biała: Park, 1998, p. 213. ISBN 83-87056-33-2.

[8] See GNIEWEK, E. Sprzedaż nieruchomości przez syndyka masy upadłości w toku postępowania upadłościowego w razie bezskuteczności względnej wcześniejszego rozporządzenia przez upadłego. In: L. OGIEGŁO, W. POPIOŁEK and M. SZPUNAR, eds. *Rozprawy prawnicze: Księga pamiątkowa Profesora Maksymiliana Pazdana*. 1. wyd. Kraków: Zakamycze, 2005, p. 961. ISBN 83-7444-148-8.

in the event of the bankruptcy being declared. Some activities of the debtor – if bankruptcy has not been declared – could be effective. The design of the ineffectiveness of the bankrupt's deeds is, therefore, one of the instruments to improve the situation of all creditors as a result of the bankruptcy of their debtor. The construction of the ineffectiveness of the bankrupt operation, at the same time, gives the debtor some freedom of action in legal transactions before the declaration of bankruptcy.[9]

In the literature, the institute of the ineffectiveness of bankruptcy is aptly treated as an instrument to implement the debt collection function of the Bankruptcy Law Act.[10]

Premises of the ineffectiveness of the debtor's activities under the Civil Code are included in a more synthetic way than it is made in the Bankruptcy Law Act. In general, the legislator in the Civil Code refers to the "act performed to the detriment of the creditors" (Article 527 of the Civil Code). In the Bankruptcy Law Act, the regulation of ineffective operations is, in principle, more dispersed. For example, the ineffectiveness refers to free-of-charge activities, payment or securement of a debt not due yet to be paid, activities between related entities, free-of-charge security of someone else's personal debt, payment of rent or lease in advance, remuneration for the work of the bankrupt's representative higher than the average remuneration, etc. The ineffectiveness of the debtor's activities regulated in the Civil Code is based primarily on the premise of the action with the detriment of the creditors, expressed directly in the text. Acting against the detriment of the creditors is the main reason for tying negative effects to the debtor's activity. Meanwhile, the Bankruptcy Law Act does not form a legal fact of the creditors' injury in the content of its provisions. The complementary relationship between the construction of the ineffectiveness in the Civil Code and in the Bankruptcy Law Act allows for comprehensive protection of the creditors if some bankrupt's activity falls outside the type of activities indicated in the Bankruptcy Law Act or falls out the protection period (the protection period is, for

[9] See JASIŃSKA, M. Nowe oblicze skargi pauliańskiej. *Fenix.pl*. 2012, vol. 3, nr 4, p. 4. ISSN 2082-3398; and JASIŃSKA, M. *Skarga pauliańska: Ochrona wierzyciela w razie niewypłacalności dłużnika: Komentarz do art. 527 – 534 KC i przepisów powiązanych (KRO, PrUpN, KPC, KK)*. 2. wyd. Warszawa: C. H. Beck, 2015, p. 287. ISBN 978-83-255-6953-2.

[10] See KUŹNIK, M. Umowy powodujące przelew wierzytelności a bezskuteczność czynności upadłego z mocy prawa. In: A. WITOSZ, ed. *Instytucje prawa upadłościowego i naprawczego: Tom 2*. 1. wyd. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2008, p. 111. ISBN 978-83-226-1736-6.

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

example, "six months before the date of filing the bankruptcy petition" and the activity had been carried out earlier).

It should be pointed out that on the basis of the Civil Code, the issue of the knowledge (state of consciousness) of a third party is important for acting to the detriment of the creditors (for example, on the Articles 527 § 1, 528, 530 of the Civil Code). In the case of the Bankruptcy Law Act, however, the issue of the knowledge of a third party is of a vestigial character and refers to the knowledge of "grounds for declaring bankruptcy" (Article 127 Section 3 of the Bankruptcy Law Act).

The Bankruptcy Law Act states that the bankrupt's activity is ineffective against the bankruptcy estate. Undoubtedly, the editorial abbreviation was used here. The debtor's action is ineffective with respect to the creditors and, therefore, the right-holder. The bankruptcy estate is not a legal entity. The mass of bankruptcy is the estate of the bankrupt which is created on the date of declaration of bankruptcy (since 0.00 hour on the day on which the bankruptcy was declared) and acquired during the bankruptcy proceedings. Therefore, the mass of bankruptcy should not be seen in the rank of a legal entity that can be a party to legal relations, but only in the rank of the subject of legal relations. In other words, an act that is ineffective against the bankruptcy estate is ineffective for the creditors. According to the Article 189 of the Bankruptcy Law Act, a creditor in the meaning of the Bankruptcy Law Act is everybody who is entitled to satisfy from the bankruptcy estate, even if the claim did not require notification. The concept of a creditor under the Bankruptcy Law Act is not the same as the creditor's concept under the civil law. The creditor on the basis of the Bankruptcy Law Act could be, for example, a creditor in respect of tax arrears.

Ineffectiveness and the invalidity of a legal transaction

The construction of the ineffectiveness of the bankrupt's activity differs from the construction of the invalidity of the legal act (Article 58 § 1 and § 2 of the Civil Code). A legal act is invalid in the case of (a) the conflict of the legal action with the law; (b) the purpose of the legal act to circumvent the law; (c) the contradiction of the activities with the rules of social coexistence.[11] In the judgment of the Court of Appeal in Krakow of 16th

[11] See GUTOWSKI, M. *Bezskuteczność czynności prawnej*. 1. wyd. Warszawa: C. H. Beck, 2013, p. 41. ISBN 978-83-255-4810-0.

January 2015,[12] it was raised that annulment is the most severe sanction of a defective legal act, whereas construction of the ineffectiveness of a relative legal act is that which protects a person whose satisfaction of claims has been excluded by carrying out a legal action with a person who is not the owner of the thing. Such an action is, therefore, important because ineffectiveness is a sanction not so much due to an irregularity inherent in the legal act itself, which is the essence of absolute invalidity, but due to the intentions of people who took the action. Recognition of an activity as ineffective is determined by the conditions and circumstances in which the action was taken, not the irregularities inherent in it. Therefore, it is a sanction because the legal act was concluded in a specific situation, and not for the reason of the sanction of nullity that it was wrong and did not meet the conditions (premises) of regularity. The effect of the invalidation is that the party who received the benefit should issue the benefit in kind, and if it was not possible, then it is obliged to return its value (Article 410 of the Civil Code – *condictio sine causa*).[13] The effect of the ineffectiveness of legal action in the area of the Bankruptcy Law Act is that "what is lost or not entered into by the bankruptcy estate is transferred to the bankruptcy estate, and when the transfer in nature is impossible, the equivalent in money should be paid to the bankruptcy estate" (Article 134 Section 1 of the Bankruptcy Law Act). In turn, the so-called "counter-performance" of a third party (and, in principle, the donation made by a third party) shall be reimbursed to the person if it is in the mass of bankruptcy separately from other property or if the mass is enriched. If the benefit is not refundable, the third party may claim a claim in the bankruptcy proceedings (Article 134 Section 2 of the Bankruptcy Law Act). It can be argued that the scheme of the construction of the effects of the nullity and the ineffectiveness of a legal act in the area of the Bankruptcy Law Act is similar.[14] It should be further emphasized that an absolutely invalid legal act is null and void from the moment it was made; each court should automatically consider the state of nullity of the legal action. In the case of the ineffectiveness, the situation is slightly different.

[12] See I ACa 1493/14.

[13] See P. Mostowik in OLEJNICZAK, A. ed. et al. *System prawa prywatnego: Tom 6: Prawo zobowiązań – część ogólna*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych Polskiej Akademii Nauk, 2009, p. 308. ISBN 978-83-255-0155-6.

[14] See ADAMUS, R. Kilka uwag o zasadzie pierwszeństwa zaspokojenia wierzyciela na podstawie art. 532 KC. *Monitor Prawniczy*. 2013, vol. 21, nr 15, p. 799. ISSN 1230-6509.

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

Subject of ineffectiveness

Under the regulation of the Article 527 of the Civil Code, the subject of effectiveness is a legal action of the debtor. The legislator uses the term "legal action". The main content of the legal action is the statement of the will. It is rather a common opinion of the Polish doctrine.[15]

As a rule, under the Bankruptcy Law Act, the subject of ineffectiveness are legal actions of the bankrupt (unilateral, bilateral or multilateral). Ineffectiveness does not apply to the bankrupt's factual acts or torts.[16] However, ineffectiveness may concern other phenomena than the bankrupt's activities. Protection of the bankruptcy estate by using the construction of ineffectiveness is associated not only with the ineffectiveness of the bankrupt's deeds, but also with the ineffectiveness of the other legal events, such as the effects of a court judgment (Article 125 Section 1 of the Bankruptcy Law Act). In the verdict of the Krakow Court of Appeal of 8th May 2015,[17] it was aptly assumed that "the settlement constitutes a legal relationship and such a settlement may be the subject of a Pauliana complaint, even if it results in a material benefit in kind to replace of monetary obligation (datio in solutum)." In the resolution of the Supreme Court of the Republic of Poland of 8th October 2015,[18] it was indicated that "the subject of the action specified in the Article 527 § 1 of the Civil Code may be the debtor's procedural act in the form of a consent expressed in the proceedings for the abolition of the co-ownership of common property for granting property to the other co-owner without being equivalent to him/her."

Ineffectiveness may refer to the activities that may include all assets of the bankrupt (material things, rights, etc.), and even a conglomerate of rights and obligations (the enterprise, organized part of the enterprise, etc.). However, if the act of the bankrupt has the object or right excluded

[15] See J. Naczyńska in HABDAS, M. and M. FRAS, eds. et al. *Kodeks cywilny: Komentarz: Tom III: Zobowiązania: Część ogólna (art. 353 – 534)*. 1. wyd. Warszawa: Wolters Kluwer, 2018, p. 1134. ISBN 978-83-8124-068-0; and P. Machnikowski in GNIEWEK, E. ed. et al. *Kodeks cywilny: Komentarz*. 4. wyd. Warszawa: C. H. Beck, 2011, p. 967. ISBN 978-83-255-1942-1.

[16] See MACHOWSKA, A. Ochrona wierzycieli przed skutkami niekorzystnych rozporządzeń majątkiem przez dłużnika i upadłego w kontekście nieważności i bezskuteczności czynności prawnych upadłego. Problemy praktyki sądowej. *Fenix.pl*. 2013, vol. 4, nr 2, p. 6. ISSN 2082-3398.

[17] See I ACa 271/15.

[18] See III CZP 56/15.

from the market (res extra commercium), then such activity will be invalid (Article 58 of the Civil Code), and not ineffective.

The law does not indicate in which order debts to many creditors should be paid by the debtor. The Civil Code introduces the conflict-of-law rules regarding the method of making payments to the same creditor (Article 451 of the Civil Code). The general assumption is the following: the debtor should settle all his/her obligations as soon as they become due. If the debtor has the ability to settle all his/her financial obligations, the order of their payment is in principle irrelevant. The problem arises when the debtor's funds are insufficient to cover existing liabilities (both matured and non-matured). However, in this case, if the debtor manages his/her own assets, the legislator does not introduce a general hierarchy of liabilities, as in the case of enforcement (Article 1025 of the Code of Civil Procedure) or the state of liquidation of the debtor (Article 342 of the Bankruptcy Law Act). The subject of the complaint – *actio Pauliana* – may be debtor's behaviour formally permitted by law (performance of an obligation). However, in some circumstances, a formally admitted behaviour may be subject to a negative assessment from the point of view of other provisions: offense regulations in the matter of favouring a creditor or provisions on actions with creditors' injury.

Ineffective by law is the payment of a non-due debt if it was made by the bankrupt within six months before the date of filing for bankruptcy (Article 127 Section 3 sentence 1 of the Bankruptcy Law Act).[19]

The Supreme Court of the Republic of Poland in its judgment of 13th April 2017[20] stressed that the *ratio legis* of the regulation of the Article 127 Section 3 of the Bankruptcy Law Act is the protection of all creditors against the depletion of the bankruptcy estate in the form of selective satisfaction of some creditors. If on the forefront of bankruptcy the debtor makes the payment in advance, even before the maturity date, the situation is suspicious. *Ratio legis* determines the interpretation of a legal norm. In the Polish Supreme Court's jurisprudence, the tendency was to consider all actions equivalent to payment in cash and resulting in redemption of liabilities for the repayment of an unpaid cash payment (with an effect in the form of ineffectiveness against the bankruptcy es-

[19] As to the problem of the legal nature of the performance of the obligation, see SZEJNA, S. Charakter prawny wykonania zobowiązania. *Państwo i Prawo*. 2010, vol. 65, nr 12, p. 79. ISSN 0031-0980.
[20] See III CSK 125/16.

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

tate ex lege). The same applies to the use of legal structures on the foreland of bankruptcy in the form of a contract for a third party (Article 393 of the Civil Code) or a debt transfer (Article 921[4] of the Civil Code), thus reducing the value of the future bankruptcy estate.

The judgements of the Supreme Court of the Republic of Poland also expressed the view that the sanction of ineffectiveness of a legal action may also refer to a legal act consisting in the performance of an obligation by a bankrupt under a contract for the benefit of a third party. This position should also be referred to in the case of payment. As the Supreme Court of the Republic of Poland puts in its judgment of 13th April 2017, III CSK 125/16, "the ineffectiveness of the act of repaying non-due debt through the use of a contract for a third party (Article 393 of the Civil Code) or the remittance (Articles 921[1] and 921[4] of the Civil Code) cannot take place only within the payment relationship (transferred – recipient of the transfer), but must take into account the ratio of coverage (transferor – transferred), explaining that it is ready to provide the recipient of the transfer, wanting to release the debt against the transferor and the currency ratio the content of which is the debt of the transferor to the recipient of the transfer and the intention to make a transfer to the recipient of the transfer to release the transferor from the obligation […]."

It is rather accepted that payment of a monetary debt is a legal action.[21]

There are several theories about the nature of the performance of the commitment.[22] The contractual theory assumes that performance of the obligation is a separate legal act, consisting in a declaration of the both parties' will – the debtor and the creditor. The argument for this theory is the fact that often to achieve the effect of remitting the obliga-

[21] See T. Wiśniewski in BIENIEK, G. ed. et al. *Komentarz do Kodeksu cywilnego: Księga trzecia: Zobowiązania: Tom 1*. 2. wyd. Warszawa: LexisNexis, 1999, p. 49. ISBN 83-219-1028-9; and ruling of the Supreme Court of the Republic of Poland of 3. 4. 1992, I PZP 19/92, OSNCP 1992, no. 9, item 166. Contrary, see judgment of the Supreme Court of the Republic of Poland of 23. 4. 1976, III CRN 46/76, OSPiKA 1977, no. 2, item 29.

[22] See SZPUNAR, A. Charakter prawny wykonania zobowiązania. *Rejent*. 1998, vol. 8, nr 5, p. 11. ISSN 1230-669X; T. Dybowski in RADWAŃSKI, Z. ed. *System prawa cywilnego: Tom III: Część 1: Prawo zobowiązań: Część ogólna*. Wrocław: Ossolineum, 1981, p. 77. ISBN 83-04-00741-X; SERDA, W. *Nienależne świadczenie*. 1. wyd. Warszawa: Państwowe Wydawnictwo Naukowe, 1988, p. 20. ISBN 83-01-07962-2; and ENNECCERUS, L. and H. LEHMANN. *Lehrbuch des bürgerlichen Rechts: Band II: Recht der Schuldverhältnisse*. 15. Aufl. Tübingen: Mohr Siebeck, 1958, p. 249.

tion is not enough to actually fulfil the benefit. It is possible to conclude an agreement on the performance of an obligation implicitly.[23]

The limited contractual theory consists in the fact that if the service takes the form of a legal act, a compliant agreement of the parties, even if implied, is necessary to perform the obligation. The performance is not a separate legal act.[24]

The theory of a real benefit assumes that performance of the obligation only serves to fulfil the obligation of the debtor. Additional debtor and creditor agreements taking the form of a legal transaction are not required to perform the obligation. The commitment will be made if the creditor has the right to accept the benefit.[25] According to the theory of a real benefit, there is no need to look for the will to perform the service. All accidents of performance of the obligation obtain a uniform character. The adoption of this theory also removes the problem related to the search for the creditor's will to accept the benefit. The objective elements determine whether the commitment was made. The fulfilment of the obligation assumes the nature of a factual activity. It is not possible to give one answer to the question what effect the various irregularities have on the remission of the obligation when fulfilling the service. If it takes the form of a contract (transfer of ownership), it is necessary to meet the general requirements of a legal transaction. Therefore, these conditions do not have to be fulfilled if the performance of the obligation does not take the nature of a legal transaction.

According to Professor Adam Szpunar, in contemporary legislation there is a tendency in determining the conditions for the performance in the objective manner. It is, therefore, unnecessary to have the debtor's will in performing his/her performance. The matter of knowledge and the will to accept the benefit by the creditor is of little importance. In a mass society, the payment from hand to hand becomes a phenomenon quite unique. It is connected with the development of modern forms of

[23] See ZOLL, F. *Zobowiązania w zarysie: Według polskiego Kodeksu zobowiązań*. 2. wyd. Warszawa: Gebethner i Wolff, 1948, p. 7; and SZPUNAR, A. Charakter prawny wykonania zobowiązania. *Rejent*. 1998, vol. 8, nr 5, p. 14. ISSN 1230-669X.

[24] See SERDA, W. *Nienależne świadczenie*. 1. wyd. Warszawa: Państwowe Wydawnictwo Naukowe, 1988, p. 21. ISBN 83-01-07962-2; and FIKENTSCHER, W. *Schuldrecht*. 7. neu bearb. Aufl. Berlin; New York: De Gruyter, 1985, p. 157. ISBN 3-11-007158-4.

[25] See HECK, Ph. *Grundriss des Schuldrechts*. 1. Aufl. Tübingen: Mohr Siebeck, 1929, p. 169; and LARENZ, K. *Lehrbuch des Schuldrechts: I. Band: Allgemeiner Teil*. 9. Aufl. München: C. H. Beck, 1968, p. 160.

SOCIETAS ET IURISPRUDENTIA
2019, ročník VII., číslo 3, s. 19-34
http://sei.iuridica.truni.sk
ISSN 1339-5467

payment. The agreement of the creditor and the debtor parties becomes a fiction, and even proponents of the contractual theory admit that statements of the parties' will may be made implicitly. The case is even more obvious when it comes to the performance of obligations relating to the provision of services. The provision often takes the form of a legal transaction. The form of the benefit that should take shape should not determine the legal nature of the performance of the obligation. The performance of an obligation means that the debtor has fulfilled his/her task.[26]

In the opinion of Sławomir Szejna, the provisions of the Civil Code do not determine the uniform nature of the performance of the obligation. Therefore, the general rule that performing obligations is always a factual act or a legal act, or even a contract cannot be accepted. Each time, the legal nature of the enforcement activity should be examined on the basis of the content of a specific obligation.[27]

Conclusions

As a rule, payment of a monetary debt performed by the debtor can be considered as a legal action in the meaning of the Article 527 of the Polish Civil Code. Such a payment can be treated as a legal phenomenon including statement of the will of the debtor (it depends on particular circumstances of the case). The Polish Civil Code does not exclude payment of the debt as a subject of *actio Pauliana*. It is important to stress that payment of an undue debt is an ineffective deed of the bankrupt under the clear provisions of the Article 127 Section 3 of the Bankruptcy Law Act.

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[26] See SZPUNAR, A. Charakter prawny wykonania zobowiązania. *Rejent*. 1998, vol. 8, nr 5, pp. 21-22. ISSN 1230-669X.

[27] See SZEJNA, S. Charakter prawny wykonania zobowiązania. *Państwo i Prawo*. 2010, vol. 65, nr 12, pp. 79-91. ISSN 0031-0980.

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http://sei.iuridica.truni.sk
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SOCIETAS ET IURISPRUDENTIA
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