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ACTIO PAULIANA: A LEGAL REMEDY FOR INDIVIDUAL CREDITORS OR FOR ALL THE CREDITORS? FROM ROMAN LAW TO THE PRESENT DAY*

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Abstract
The article analyses whether, if a debtor divests themselves of their assets and thereby renders satisfaction of creditors impossible, the right to challenge the debtor's acts should be vested exclusively in all creditors jointly, appropriately represented, or whether individual creditors should retain the possibility of relying on individual legal remedies. To answer this question, the authors use the dogmatic method, the historical method, and the comparative method.

The first section of this paper discusses how creditors were protected under Roman law. After an analysis of the legal remedies available in classical law, the standing to bring an *actio Pauliana* in Justinian's law is discussed. Such an *actio* was available to the *curator bonorum* acting on behalf of all creditors, but it could also be brought by individual creditors.

In contemporary law, the issue discussed in this article arises when a debtor is declared bankrupt. In such a situation, German law does not allow individual creditors to bring or continue individual actions. Until recently, the position under Polish law was similar, but following a recent resolution adopted by the Supreme Court, the prohibition has been relaxed and creditors are allowed to make auxiliary use of individual legal remedies. This is possible primarily when the receiver is unwilling or unable to bring an action on behalf of the bankruptcy estate. The latter approach merits approval, as it properly balances the interests of the parties concerned.

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1. INTRODUCTION

Debtors' dishonest actions, consisting in deliberate, often ostensible, disposal of assets to prevent effective enforcement, have been known for centuries. For a long time, legislators have also sought not only means of compulsory enforcement of obligations, but also effective methods to prevent dissipation of assets that would otherwise be available for enforcement, providing various instruments under different branches of law.[1] It is worthwhile to bring into focus civil law instruments in this area, namely *actio Pauliana*. Although Roman law scholars consider regulations relating to *actio Pauliana* to be among the least clear in Roman law,[2] in the course of legal development it ultimately proved to be a lasting and valuable element of Roman heritage.

In Roman law, acting to the detriment of creditors was known as *fraus creditorum*. It meant that a debtor performed a juridical act or took another step with the aim of defrauding creditors (*consilium fraudis*), thereby preventing effective enforcement against him. The detriment to creditors consisted in the debtor becoming insolvent or even more insolvent (*eventus damni*).[3] Any measure taken with the intention of worsening the creditor's position was considered detrimental to the creditor.[4] Examples included: establishing a dowry,[5] disposing of property,[6] releasing a debt,[7] releasing a pledge,[8] assuming a liability (sale contract, lease, etc.),[9] repaying a debt that was not yet due or repaying a debt after enforcement proceedings had begun,[10] procedural neglect leading to depletion of assets (deliberately losing a lawsuit),[11] making a donation,[12] etc. Although the prevailing view in the literature is that

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[1] M. Pyziak-Szafnicka, *Ochrona wierzyciela w razie niewypłacalności dłużnika*, Warszawa, 1995, pp. 12–13.

[2] H. Ankum, '"Interdictum fraudatorium" et "restitutio in integrum ob fraudem"', in: Guarino A., Labruna L. (eds), *Synteleia Arangio Ruiz*, Napoli, 1964, p. 779, even described them as 'les plus obscurs de droit romain'. Similarly, C. Ferrini, *Di una nuova teoria sulla revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Milano–Napoli, 1887, p. 3; X. d'Ors, *El interdicto fraudatorio en el derecho romano clasico*, Roma–Madrid, 1974, p. 1; A.D. Centola, 'A proposito del consilium fraudis nella revoca degli atti in frode ai creditori', *Studia et Documenta Historiae et Iuris*, 2015, Vol. 81, p. 361.

[3] M. Kaser, *Roman Private Law*, transl. Dannenbring R., Durban, 1965, p. 52; W. Litewski, *Rzymskie prawo prywatne*, 2nd ed., Warszawa, 1994, p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, 3rd ed., Warszawa, 2018, p. 594.

[4] D. 42,8,1 pr.: *quae fraudationis causa gesta erunt*; D. 42,8,17,1: *Omnes debitores, qui in fraudem creditorum liberantur, per hanc actionem revocantur in pristinam obligationem.*

[5] D. 42,8,25,1.

[6] D. 42,8,1,2.

[7] D. 12,2,9,5; D. 42,8,1,2. D. 42,8,17 pr.; D. 42,8,10,22; D. 42,8,25 pr.

[8] D. 42,8,2.

[9] D. 42,5,25; D. 42,8,6,5; D. 42,8,7.

[10] D. 42,8,10,12; D. 42,8,6,7; D. 42,8,10,16.

[11] D. 42,8,3,1; D. 42,8,3 pr.

[12] D. 42,8,6,11.

this applied exclusively to fraudulent acts committed after creditors had taken possession of the debtor's assets for the purpose of enforcement (*missio in bona*),[13] as A.M. Manzo has shown,[14] and (at least some) chronologically earlier acts could also be challenged.

For the sake of clarity, before presenting the key issue of entities to which *actio Pauliana* was applicable in Roman law and is applicable in contemporary law, it is worth noting that the term *actio Pauliana*[15] itself is mentioned only once in the Digests – D. 22,1,38,4.[16] Nevertheless, the term has become very popular in almost all legal systems in Europe and is still commonly used today.[17]

2. REMEDIES AGAINST *FRAUS CREDITORUM* IN CLASSICAL ROMAN LAW

There is no information in the sources on how measures that depleted assets were counteracted in earlier periods of Roman law development, which is probably due to the fact that initially liability for debts was personal – the debtor was liable for their debts with their person, i.e. their life and freedom.[18] When enforcement

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[13] Thus, e.g. C. Ferrini, *Di una nuova teoria…*, op. cit., p. 4.

[14] The source texts confirming A.M. Manzo's position are D. 42,6,6,13 (*… deinde eius bona venierint …*), D. 42,8,9 (*… cuius bona possessa <non> sunt …*) and, with a much more general application: D. 42,8,1,2; D. 42,8,3; D. 42,8,1,1. For more, see the considerations in A. Manzo, 'Curatori bonorum vel ei, cui de ea re actionem dare oportebit. Spunti di riflessione sulla legittimazione attiva della tutela processuale prevista in Ulp. 66 ad ed. D. 42.8.1 pr.', *Studia et Documenta Historiae et Iuris*, 2017, pp. 459–463. This position is also indirectly supported by D. 42,8,6,7, where the payment of a debt before *missio in bona* was recognised as unchallengeable; since Julian and Ulpian considered this a case of the debtor's impoverishment, it should be beyond doubt that other alienations before *missio in bona* could be challenged.

[15] For more on the origin of the name, see, e.g. G. Impallomeni, 'Pauliana actio', *Paulys Realencyclopädie der classischen Altertumswissenschaft*, 1970, Vol. S XII, pp. 1009–1010, and the literature cited therein; X. d'Ors, *El interdicto…*, op. cit., pp. 15, 47–54; C. Willems, *Actio Pauliana und fraudulent conveyances. Zur Rezeption kontinentalen Gläubigeranfechtungsrechts in England*, Berlin, 2012, pp. 26–30.

[16] D. 22,1,38,4 (*Paulus libro* 6 *ad Plautium*) – *In Fabiana quoque actione et Pauliana, per quam quae in fraudem creditorum alienata sunt revocantur, fructus quoque restituuntur: nam praetor id agit, ut perinde sint omnia, atque si nihil alienatum esset: quod non est iniquum (nam et verbum 'restituas', quod in hac re praetor dixit, plenam habet significationem), ut fructus quoque restituantur.* [In both the Fabian and Paulian Actions, by means of which property which has been disposed of for the purpose of defrauding creditors is recovered, the produce of said property must also be returned; for the Praetor uses his authority to place everything in the same condition as if nothing had been alienated; and this is not unjust, for the words 'you shall return', which the Praetor makes use of in this matter, have a broad signification, so that the produce of the property must also be surrendered]. All English translations of the *Digests*: *The Digest or Pandects of Justinian*, Samuel P. Scott, Cincinnati, 1932; https://droitromain.univ-grenoble-alpes.fr/Anglica/digest_Scott.htm (accessed: 10 March 2026).

[17] See also M. Radin, 'Fraudulent Conveyances at Roman Law', *Virginia Law Review*, 1931, No. 2, p. 110.

[18] J. Fiema, *O zaskarżaniu czynności dłużnika zdziałanych ze szkodą wierzycieli*, Lwów, 1937, pp. 9–10; G. Impallomeni, 'Azione revocatoria (diritto romano)', *Nuovo Digesto Italiano*, 1956, Vol. 2, p. 147; M. Pyziak-Szafnicka, *Ochrona…*, op. cit., p. 15; A. Manzo, 'Curatori…', op. cit., pp. 449–450.

against property replaced personal enforcement, classical law recognised three legal instruments, developed in praetorian practice, to protect creditors' rights against the debtor's fraudulent actions: *in integrum restitutio*,[19] *interdictum fraudatorium*[20] and **denegatio actionis*.[21] These remedies supplemented the protection system in civil law, which, at the end of the Republic, proved to be insufficient in many respects. The aim of the praetors, as Ulpian declares in *D.* 42,8,1,1, was to protect creditors from the effects of acts of disposal made by the debtor with the intention of defrauding them.[22]

In integrum restitutio, an action was brought to remove the effects of juridical acts (especially alienation) performed with the purpose of defrauding creditors, if the third party was aware of the purpose of such acts. In the case of gratuitous acts, *actio in factum* was used, and the good faith of the purchaser did not protect a gratuitous acquisition. *Restitutio in integrum* was available (most likely only) to the *curator bonorum*[23] and was used during enforcement proceedings.[24] It can be assumed that it was considered inappropriate to involve a third party in numerous proceedings with individual creditors if, once restitution was granted, it applied to the challenged act as

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[19] Thus, for example, O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu dessen Wiederherstellung*, 3rd ed., Leipzig, 1927, pp. 436–439; M. Talamanca, 'Azione revocatoria. Diritto romano', *Enciclopedia del Diritto*, 1959, Vol. 4, p. 884; J.A. Ankum, *De geschiedenis der Actio Pauliana*, Zwolle, 1962, pp. 38–51; H. Ankum, 'Interdictum…', op. cit., p. 779. Initially, this position was also supported by G. Impallomeni, 'Azione…', op. cit., p. 147; G. Impallomeni, *Studi sui mezzi di revoca degli atti fraudolenti nel diritto romano classico*, Padova, 1958, p. 12. However, it should be noted that in the literature the view that *restitutio in integrum* was provided for in praetorian law is sometimes questioned; it is recognised that an *actio* was provided for in the praetorian edict; see, e.g. G. Impallomeni, 'Pauliana…', op. cit., cols 1011–1013; C. Willems, *Actio…*, op. cit., pp. 25–26, and the literature cited therein.

[20] See, e.g. J.A. Ankum, *De geschiedenis…*, op. cit., pp. 52–60; X. d'Ors, *El interdicto…*, op. cit., passim.

[21] See, e.g. J.A. Ankum, *De geschiedenis…*, op. cit., pp. 60–62. Beyond the scope of this discussion is the invalidation of the manumission of slaves to the detriment of creditors or for the purpose of reducing the patron's legitime. The *Lex Aelia Sentia* of AD 4 considered the manumission of slaves by an excessively indebted debtor for the purpose of defrauding creditors or reducing the legitime due to his patron to be invalid. For more, see, e.g. F. Schulz, 'Die fraudatorische Freilassung im klassischen und justinianischen römischen Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1928, pp. 197–284; A. Metro, 'La lex Aelia Sentia e le manomissioni fraudolente', *Labeo*, 1961, No. 2, pp. 147–200; G. Impallomeni, 'In tema di manomissioni fraudolente', in: Impallomeni G., *Scritti di diritto romano e tradizione romanistica*, Padova, 1996, pp. 99–109 (reprint from 1964); G. Impallomeni, 'Nota minima in tema di manomissioni fraudolente', in: Impallomeni G., *Scritti di diritto romano e tradizione romanistica*, Padova, 1996, pp. 265–268 (reprint from 1971); W. Litewski, *Rzymskie…*, op. cit., pp. 120, 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., pp. 143–144; F. del Pino-Toscano, *Recursos procesales contra el fraus creditorum en derecho romano clásico*, Sevilla, 2002, pp. 65–222.

[22] D. 42,8,1,1 (*Ulpianus libro* 66 *ad ed.*) – *Necessario praetor hoc edictum proposuit, quo edicto consuluit creditoribus revocando ea, quaecumque in fraudem eorum alienata sunt.* [The Praetor was compelled to introduce this Edict in order to protect the rights of creditors, by revoking any alienations of property which had been made for the purpose of defrauding them.]; see also A. Manzo, 'Curatori…', op. cit., pp. 450–451.

[23] O. Lenel, *Das Edictum…*, op. cit., pp. 437–439; W. Litewski, *Rzymskie…*, op. cit., p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 594. Differently, cf. H. Ankum, 'Interdictum…', op. cit., p. 783; similarly, M. Talamanca, 'Azione…', op. cit., p. 885, who notes, however, that it is impossible to determine whether creditors' standing was individual or collective.

[24] G. Impallomeni, 'Azione…', op. cit., p. 148; M. Kaser, *Roman…*, op. cit., p. 52.

a whole: the effect *of restitutio in integrum* was to restore the previous state of affairs, and thus to restore the alienated elements of the debtor's assets to the bankruptcy estate, enabling them to be used to satisfy all creditors.[25] It was therefore an extraordinary legal measure applied by the praetor, producing effects in the area of *ius civile* and giving rise to an obligation to return the performances received: any goods sold were re-included in the debtor's assets, any obligations incurred were deemed non-existent, while any releases from obligations were considered invalid.[26]

Interdictum fraudatorium was available to any creditor seeking enforcement who had suffered detriment as a result of fraudulent acts and who, despite participating in enforcement proceedings (*venditio bonorum*), had not been repaid by the purchaser of the debtor's assets.[27] This interdict could be directed against a person who had benefited from the act and was aware of the debtor's actions to the detriment of creditors; however, in the case of challenging gratuitous acts, *actio in factum* was used. The *interdictum* therefore led – after enforcement proceedings had been completed – to the removal of the still existing effects of the fraudulent act.[28] The effect of the interdict was annulment of the act and the return of anything that the parties had gained as a result of it.[29] Sometimes, following S. Solazzi, it is assumed in the literature that, even though only one of the creditors applied for an interdict, after recovering the object of the fraudulent act that creditor was obliged to settle proportionally with the other creditors participating in the enforcement proceedings.[30]

Finally, if the debtor assumed a liability in order to defraud creditors, the praetor refused the action (**denegatio actionis*) brought against the entity that had acquired the debtor's property in the course of enforcement (*bonorum emptor*).[31]

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[25] O. Lenel, *Das Edictum…*, op. cit., pp. 437–438; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 144.

[26] For more, see also G. Impallomeni, *Studi sui mezzi…*, op. cit., pp. 12–62; H. Ankum, 'Interdictum…', op. cit., pp. 779–784.

[27] Thus, e.g. F. Palumbo, *L'actio Pauliana nel diritto romano e nel diritto vigente*, Napoli, 1935, p. 95; see S. Solazzi, *La revoca degli atti fraudolenti nel diritto romano*, Vol. 2, 3rd ed., Napoli, 1945, p. 68; G. Impallomeni, 'Azione…', op. cit., p. 148; G. Impallomeni, *Studi sui mezzi…*, op. cit., pp. 75–79; M. Talamanca, 'Azione…', op. cit., p. 885; G. Impallomeni, 'Pauliana…', op. cit., cols 1014–1016.

However, differently, cf. X. d'Ors, *El interdicto…*, op. cit., pp. 152–159, according to whom this remedy could only be brought by the *curator bonorum*, and references to the rights of individual creditors supposedly originated only from the compilers.

[28] M. Kaser, *Roman…*, op. cit., p. 52; W. Litewski, *Rzymskie…*, op. cit., p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., pp. 144, 594.

[29] D. 42,8,10,19–22; D. 42,8,25,4.

[30] It seems that the basis for settlements could have been either *actio mandati* or *actio negotiorum gestorum*. See S. Solazzi, *La revoca…*, op. cit., pp. 69–70; M. Talamanca, 'Azione…', op. cit., p. 885.

[31] The text of the edict is presented in D. 42,5,25. Meanwhile, the second part of the fragment D. 12,2,9,5 sets out the facts justifying *denegatio actionis*. For more details, see G. Impallomeni, *Studi sui mezzi…*, op. cit., pp. 6–11; M. Talamanca, 'Azione…', op. cit., p. 884; J.A. Ankum, *De geschiedenis…*, op. cit., p. 60; H. Ankum, 'Denegatio actionis', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1985, pp. 453–469; W. Litewski, *Rzymskie…*, op. cit., p. 297.

3. STANDING TO BRING AN *ACTIO PAULIANA* UNDER JUSTINIAN'S LAW

The next stage in the development of creditor protection against debtors' fraudulent activities was Justinian's codification. Title 42.8 of the Digests and Title 7.75 of the Code contain regulations aimed at restoring the debtor's property (*quae in fraudem creditorum facta sunt ut restituantur*) in order for it to be used for the benefit of creditors.[32]

In Justinian's law,[33] the system of creditor protection was reorganised – *in integrum restitutio* and *interdictum fraudatorium* were replaced by a uniform *actio*.[34] The purpose of this *actio* was extremely important, as it was even deemed necessary that it be explained in a textbook for novice lawyers.

> I. 4,6,6: *Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis eis a creditoribus ex sententia praesidis possessis, permittitur ipsis creditoribus, rescissa traditione, eam rem petere, id est dicere eam rem traditam non esse et ob id in bonis debitoris mansisse.* [Similarly, if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor].[35]

The Institutes briefly indicated that the legal remedy was aimed at annulling the effects of the act making the debtor insolvent or even more insolvent, emphasising that it concerned acts performed with the intention to defraud creditors.[36] The effect of the action was therefore to annul the effects of the act and return the property to the debtor's estate. Much broader considerations on challenging fraudulent acts were contained in the Digests.

> D. 42,8,1 pr. (Ulpianus libro 66 ad ed.) – *Ait praetor: 'Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. idque etiam adversus ipsum, qui*

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[32] *Actio Pauliana* was constructed as an arbitrary complaint, hence a third party could return the obtained gain, but if they did not do so, they were ordered to pay a specified amount of money. J. Fiema, *O zaskarżaniu…*, op. cit., p. 12; B. Biondi, *Studi sulle actiones arbitrariae e l'arbitrium iudicis*, Roma, 1970, pp. 172–178; M. Pyziak-Szafnicka, *Ochrona…*, op. cit., p. 18; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch des Römischen Privatrechts*, Vol. 1–3, Tübingen, 2023, p. 487.

[33] There is no consensus in the literature as to when the *actio Pauliana* took its final shape. The prevailing view seems to be that the uniform action presented in the *Digests* is owed to the work of Justinian's compilers, but there are also views linking the emergence of the *actio Pauliana*, among others, with the activities of the praetor Lucius Aemilius Paulus (praetor in 191 BC) or Lucius Aemilius Lepidus Paulus (praetor in 53 BC). For more, see G. Impallomeni, 'Azione…', op. cit., p. 148; C. Willems, *Actio…*, op. cit., pp. 26–30.

[34] Also *denegatio actionis* was still maintained. See also J.A. Ankum, *De geschiedenis…*, op. cit., p. 63; G. Impallomeni, 'Pauliana…', op. cit., col. 1017.

[35] See https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0090 (accessed: 10 March 2026).

[36] J. Fiema, *O zaskarżaniu…*, op. cit., p. 13.

> *fraudem fecit, servabo'*. [The Praetor says: 'I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind, within the year in which he has a right to institute such a proceeding, where any act has been committed for the purpose of fraud with anyone who was not ignorant of said fraud, and I will also maintain this right of action against the party himself who committed it.'][37]

The action mentioned by Ulpian in D. 42,8,1 pr. is commonly identified with the *actio Pauliana* mentioned in D. 22,1,38,4.[38] In the Digests, the *actio Pauliana* took its mature shape, taking into account such elements as disposal (*alienatio*) with detriment (*eventus fraudi*),[39] the intention of the debtor to defraud creditors (*fraus*),[40] and the awareness of a third party (*participatio fraudis*).[41] A third party acting in good faith was liable only if they had received something free of charge, and their liability was limited to the enrichment obtained,[42] although there was probably a dispute among jurists on the latter issue.[43] It is believed that this action could be brought against *missio in bona*,[44] within one year from the date of *venditio bonorum*.[45]

For such an action to be effective, it required correct identification of both the person entitled to bring it and the person against whom it should be directed. While there is no doubt that the purchaser and the debtor himself had standing to be sued,[46] the issue of standing to sue raises many more questions. In classical law, the latter varied depending on the remedy that was available.

For an analysis of the issues of standing to sue that are of interest to us, the above-mentioned passage – *D.* 42,8,1 pr. – from Ulpian's commentary on the edict is important. The first thing that comes to mind is the clear indication that the action

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[37] See also D. 42,8,10 pr.

[38] W. Litewski, *Rzymskie…*, op. cit., p. 298; F. Longchamps de Bérier, 'Prawnospadkowe pochodzenie actio Pauliana? Na marginesie pracy C. Masi Doria "Bona libertorum". Regimi giuridici e realtà sociali, Napoli 1996', *Czasopismo Prawno-Historyczne*, 1998, No. 1, p. 302; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 594; A. Manzo, 'Curatori…', op. cit., p. 451; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch…*, op. cit., p. 509. However, differently, cf. E. Serafini, *Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Vol. 1, Pisa, 1887, pp. 79–83.

[39] See, e.g. J.A. Ankum, *De geschiedenis…*, op. cit., pp. 102–103.

[40] J. Fiema, *O zaskarżaniu…*, op. cit., p. 13.

[41] For more on the criteria of *actio Pauliana* in Roman law, see, for example, G. Impallomeni, 'Pauliana…', op. cit., col. 1017; G. Impallomeni, 'Azione…', op. cit., pp. 149–150; A.M. Alemán Monterreal, 'El fraus creditorum, ¿praesumptio?', in: Sánchez J.G. (ed.), *Fundamentos romanísticos del derecho contemporáneo*, Vol. 4, Madrid, 2021, pp. 1159–1168.

[42] D. 42,8,6,11; C. 7,75,5; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch…*, op. cit., p. 509; W. Litewski, *Rzymskie…*, op. cit., p. 298; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 144.

[43] The existence of a dispute between jurists is indicated by D. 42,8,9.

[44] D. 42,8,6,7. See also M. Pyziak-Szafnicka, *Ochrona…*, op. cit., p. 18; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch…*, op. cit., p. 488.

[45] D. 42,8,6,14; J.A. Ankum, *De geschiedenis…*, op. cit., p. 101; C. Willems, *Actio…*, op. cit., p. 31.

[46] D. 42,8,9; D. 42,8,25,7; M. Talamanca, 'Azione…', op. cit., pp. 885–886; J.A. Ankum, *De geschiedenis…*, op. cit., p. 82; W. Litewski, *Rzymskie…*, op. cit., p. 298; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 144.

could be brought by the *curator bonorum distrahendorum*,[47] who managed the property in the creditors' possession. As part of his duties, the *curator* liquidated the debtor's property[48] on behalf of creditors and could request that an act detrimental to creditors be annulled. Therefore, the competence of the *curator bonorum* is beyond doubt, also in light of the institution of *in integrum restitutio*, which already existed in the classical period. It also fits perfectly with the characteristic trend of Roman law to protect all creditors of a debtor; moreover, it emphasises the role of the *curator*. Finally, it represents efforts to simplify proceedings when it is not necessary to conduct them with participation of numerous competing creditors.[49]

Apart from the aforementioned curator, Justinian's compilers also mentioned a person referred to as *ei, cui de ea re actionem dare oportebit*,[50] that is, anyone else to whom it is necessary to grant the right to institute such a proceeding. It is hard not to notice that this wording is exceptionally enigmatic and unclear. Undoubtedly, the purpose of this interpolation was to enable other entities affected by the debtor's fraudulent actions, apart from the *curator bonorum*, to institute proceedings.[51] It was a reference to the solution previously used in the case of *interdictum fraudatorium*, which was reserved precisely for creditors who had suffered detriment.

The intention behind the change introduced by the compilers was to standardise and extend protection previously granted to creditors, while the very general wording they chose allows us to conclude that the person who should be granted the right to institute proceedings should be a creditor who takes action:

– if the *curator bonorum* is inactive;
– if no curator has been appointed;
– when, after completion of *distractio bonorum*, the curator has terminated their function and the creditor's claim has not been satisfied.[52]

Finally, standing to bring an *actio Pauliana* must also have been granted to the creditor's heirs as parties directly interested in the enforcement of the inherited claims.[53]

Since the act was challengeable because it had been performed with the intention of defrauding creditors, those who became creditors of the debtor after the fraudulent act did not have the right to bring an action unless the funds transferred by them were used to satisfy earlier creditors or it could be demonstrated that the debtor

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47 G. Impallomeni, 'Pauliana…', op. cit., col. 1017.

48 S. Solazzi, *La revoca…*, op. cit., p. 16.

49 C. Ferrini, *Di una…*, op. cit., p. 6; G. Impallomeni, *Studi sui mezzi…*, op. cit., p. 28.

50 This fragment is almost universally considered to be an interpolation; see C. Ferrini, *Di una…*, op. cit., p. 6; O. Lenel, *Das Edictum…*, op. cit., pp. 436–437; F. Palumbo, *L'actio…*, op. cit., p. 95; S. Solazzi, *La revoca…*, op. cit., pp. 16, 72; G. Impallomeni, *Studi sui mezzi…*, op. cit., pp. 27–28; F. Eisele, 'Exceptio rei iudicatae vel in iudicium deductae', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1990, p. 7.

51 W. Litewski, *Rzymskie…*, op. cit., p. 298; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch…*, op. cit., p. 509; A. Manzo, 'Curatori…', op. cit., pp. 464–465.

52 S. Solazzi, *La revoca…*, op. cit., p. 17; J.A. Ankum, *De geschiedenis…*, op. cit., pp. 44–45; G. Impallomeni, 'Azione…', op. cit., p. 148; C. Willems, *Actio…*, op. cit., p. 36.

53 D. 42,8,10,25 (Ulpianus libro 73 ad ed.): *Haec actio heredi ceterisque successoribus competit: sed et in heredes similesque personas datur.* See also S. Solazzi, *La revoca…*, op. cit., p. 29.

had acted deliberately with the intention of also defrauding those creditors whose claims would arise later.[54]

Referring to the relationship between the rights of the *curator* and the creditors, G. Impallomeni indicated that priority was given to the *curator*, and that only if no *curator* had been appointed were the creditors granted the right.[55] However, this assumption does not seem reasonable, primarily because there is no such reservation in the text provided in *D.* 42,8,1 pr. If the compilers modifying Ulpian's original statement had intended to introduce such a restriction, there was nothing to prevent them from stating it explicitly. Moreover, the presumption of such a restriction on creditors' standing to sue would largely undermine the purpose of expanding the circle of entities who had the right to bring an *actio Pauliana*.

4. CONTEMPORARY LAW

Actio Pauliana survived the fall of the Western Roman Empire and its significance is entrenched in legal systems of European countries, as well as outside Europe.[56] During the Middle Ages, only minor useful clarifications were made regarding the scope of protection granted: the presumption that a person who went bankrupt acted with the intention of defrauding creditors was accepted, and the principles protecting creditors if the debtor's refusal to accept an inheritance, bequest or donation were consolidated.[57]

Legal remedies to protect creditors which stem from Roman traditions are currently regulated as part of civil codes (French, Belgian, Italian and Polish law) or separate statutes (German, Swiss and Austrian law). In modern legal systems, a clear distinction can be made between protection accorded to individual creditors who bring an *actio Pauliana* and protection accorded to all creditors, available (generally) in bankruptcy proceedings. Against the background of this distinction, there is a natural preference for protection of all creditors over protection sought individually. However, this preference may manifest itself in different ways when it comes to specific solutions, in particular with regard to the question of whether the possibility of the receiver seeking Pauliana protection on behalf of all creditors completely excludes the possibility of individual protection being sought by a particular creditor, or whether the possibility of individual protection remains available to some extent, especially if the receiver considers seeking protection to be pointless or, for any other reason, refrains from using the remedies that are available to them. A good illustration of differences between these solutions can be provided by a comparison of solutions adopted in German and Polish law, following the recent change in the case law of the Polish Supreme Court.

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[54] E. Serafini, *Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Vol. 2: *Dell'azione Pauliana*, Pisa, 1889, pp. 167–172.

[55] G. Impallomeni, *Studi sui mezzi…*, op. cit., pp. 30–31.

[56] C. Willems, *Actio…*, op. cit., p. 15, with references.

[57] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., pp. 594–595. For more, see, for example, J.A. Ankum, *De geschiedenis…*, op. cit., pp. 104–187.

5. GERMAN LAW

In the German legal system, individual Pauliana protection of creditors is regulated in a separate act, whose full title is the *Act on Challenging Debtor's Juridical Acts Outside Bankruptcy Proceedings* (hereinafter referred to as 'the AnfG').[58] The scope of application of this statute is clear from its title alone – it enables challenging, outside bankruptcy proceedings, juridical acts performed by the debtor that are detrimental to creditors (§ 1(1) AnfG). As a rule, an act performed by the debtor no earlier than ten years prior to the challenge can be challenged if it was performed with the intention of defrauding creditors and the other party was aware of the debtor's intention at the time the act took place (§ 3(1) AnfG). The basic effect of a ruling issued as a result of the challenge of the debtor's act is that everything that has been removed from the debtor's estate as a result of that act must be made available to the creditor to the extent necessary to satisfy the creditor's claim (§ 11(1) AnfG).

In contrast, Pauliana protection in bankruptcy proceedings in the German legal system is regulated by §§ 129–147 of the *Insolvency Act* (hereinafter referred to as 'the InsO').[59] On this basis, juridical acts that were performed before the commencement of bankruptcy proceedings, to the detriment of creditors who reported their claims in the bankruptcy proceedings, can be challenged by the receiver. Apart from the case, resulting from § 133 InsO, where the debtor's acts are challenged in situations similar to those provided for in the aforementioned § 3(1) AnfG, German insolvency law also provides for further specific situations in which such acts may be challenged (§§ 130–132 and 134–137 InsO).[60] When the challenge is successful, as a rule, everything that has been removed from the debtor's estate as a result of the act must be returned to the bankruptcy estate.

German legal scholars emphasise that the remedies provided for in insolvency law go further, as they allow the receiver to take over the entire object of the fraudulent act, whereas a creditor seeking individual protection does not usually have this option.[61] The purpose of the *actio Pauliana* in bankruptcy proceedings is partly different from that of an individual action, as it involves ensuring equal treatment of all creditors,[62] while an individual action brought by one creditor is aimed at satisfying that creditor on a priority basis.[63] However, the similarities between the regulations in many cases support the adoption of similar principles of interpretation.[64]

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[58] *Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens*, dated 5 October 1994 (BGBl. I S. 2911).

[59] *Insolvenzordnung* dated 5 October 1994 (BGBl. I S. 2866).

[60] On the need for more broadly defined grounds for *actio Pauliana* applied in bankruptcy, see A. Weinland, *Münchener Kommentar zum Anfechtungsgesetz*, 2nd ed., München, 2022, margin number (mn.) 8 before § 1.

[61] Ibidem, mn. 9 before § 1.

[62] Ibidem, mn. 7 before § 1.

[63] L. Haertlein, in: Kindl J., Meller-Hannich C. (eds), *Gesamtes Recht der Zwangsvollstreckung. ZPO – ZVG – Nebengesetze – Europäische Regelungen – Kosten. Handkommentar*, 4th ed., Baden-Baden, 2021, mn. 3 before § 1 AnfG.

[64] A. Weinland, *Münchener…*, op. cit., mn. 12 before § 1. For a comparison of the application of both measures, see also W. Zenker, 'Geltendmachung der Insolvenz- und der Gläubigeranfechtung', *Neue Juristische Wochenschrift*, 2008, No. 15, pp. 1038 et seq.

The principle of absolute preference for legal remedies protecting all creditors in bankruptcy proceedings over individual legal remedies is set out in §§ 16–18 of the AnfG. According to these provisions, in the case of the debtor's bankruptcy, the receiver may continue proceedings in which an individual creditor has challenged the debtor's act; in this context the creditor is only entitled to claim reimbursement of the costs incurred in the legal dispute from the amount obtained as a result of the action (§ 16(1) AnfG). If proceedings initiated by a creditor's action are pending at the time when the debtor is declared bankrupt, they are suspended and may be resumed with the participation of the receiver (§ 17(1) AnfG), who is then entitled to extend the claim so that it corresponds to the effects of declaring the act ineffective as provided for in insolvency law (§ 17(2) AnfG). If the receiver refuses to join the pending proceedings, such proceedings may be resumed at the request of either party, but will then continue only with regard to the costs of those proceedings. The receiver's refusal to join the proceedings initiated by the creditor does not preclude the receiver from making a separate claim based on the provisions of insolvency law (§ 17(3) AnfG). This is because, when the receiver joins the proceedings, they are bound by the status of those proceedings at the time of joining and may consider it more advisable to bring a separate action.[65] If, at the time of the declaration of bankruptcy, several sets of proceedings are pending which were brought by creditors to have the same juridical act declared ineffective, the receiver may join only one of them and should refuse to join the others.[66]

This regulation is understood in German literature to mean that during bankruptcy proceedings an individual creditor cannot seek Pauliana protection, except in special situations, e.g. when the object of the fraudulent act cannot be included in the bankruptcy estate.[67] Any individual action brought by a creditor after the declaration of bankruptcy would be dismissed as inadmissible,[68] which is equivalent to rejection of a claim in Polish civil proceedings.[69] Pending cases may either be taken over by the receiver or their scope may be limited solely to the costs of the proceedings. In any case, they cannot be continued in their current scope by the creditor who brought the action, regardless of whether the receiver decides to join the proceedings instituted by the creditor or refuses to do so.[70] This means

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[65] L. Haertlein, in: *Gesamtes…*, op. cit., mn. 11 on § 17 AnfG; A. Weinland, *Münchener…*, op. cit., mn. 16 on § 17.

[66] L. Haertlein, in: *Gesamtes…*, op. cit., mn. 6 on § 17 AnfG; A. Weinland, *Münchener…*, op. cit., mn. 15 on § 17.

[67] L. Haertlein, in: *Gesamtes…*, op. cit., mn. 3 on § 16 AnfG; A. Weinland, *Münchener…*, op. cit., mn. 8 and 10 on § 16.

[68] 'Ist als unzulässig abzuweisen' (L. Haertlein, in: *Gesamtes…*, op. cit., mn. 6 on § 16 AnfG; decision of the Regional Court (*Landgericht*) in Neuruppin, of 24 April 2008, 4 T 147/07, ECLI:DE:LGNEURU:2008:0424.4T147.07.0).

[69] In German civil procedure, if there are no grounds for initiation of proceedings, the court issues a so-called 'procedural judgment' (*Prozessurteil*), dismissing the claim without examining its merits; see, e.g. H.J. Musielak, A. Hüntemann, in: Krüger W., Rauscher T. (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, Vol. 1, §§ 1–354, 7th ed., München, 2025, mn. 7 on § 300; similarly, L. Rosenberg, K.H. Schwab, P. Gottwald, *Zivilprozessrecht*, 18th ed., München, 2018, p. 558.

[70] L. Haertlein, in: *Gesamtes…*, op. cit., mn. 5 on § 16 AnfG.

that any creditor who challenges an act of an insolvent debtor before the debtor is declared bankrupt bears a certain risk, as another creditor who files for bankruptcy proceedings may nullify the effects of the individual *actio Pauliana*.[71] Even if the creditor who reported a debt in bankruptcy proceedings has already obtained satisfaction or security under their *actio Pauliana* claim before the declaration of bankruptcy, they must return whatever they have obtained to the bankruptcy estate pursuant to § 130 InsO. In principle, this means an obligation to return if the security or satisfaction took place within three months before the bankruptcy petition was filed and, at that time, the debtor was insolvent and the creditor was aware of this (§ 17(2) AnfG).

Individual creditors regain the right to bring a Pauliana action which could have been brought by the receiver only upon the conclusion of bankruptcy proceedings; this does not apply to situations where, in the course of such proceedings, effective objections have been raised against the receiver's claim (§ 18(1) AnfG). This applies both to cases where the creditor had initiated the relevant proceedings before the bankruptcy proceedings were instituted and to situations where they had not been instituted at all.[72]

Taking into account the presented regulation, German case law assumes that an individual creditor's right to challenge the debtor's acts temporarily expires upon the declaration of bankruptcy, but may be revived upon the conclusion of bankruptcy proceedings. This is sometimes explained by stating that, although during bankruptcy proceedings these rights do exist, they are non-actionable.[73]

6. POLISH LAW

The *actio Pauliana* was adopted into the Polish legal system following the model of Roman law,[74] with inspiration drawn from German and Austrian law as well as French practice and scholarship.[75] In Polish law, protection against fraudulent acts is provided for both in the Civil Code and in the Act of 28 February 2003 – Bankruptcy Law, and many detailed principles resemble the way German law regulates this matter. For example, Polish law also expressly provides for the possibility of a receiver joining Pauliana proceedings initiated by an individual creditor prior to the declaration of bankruptcy.

However, as regards the relationship between protection of individual creditors and protection granted to all creditors jointly at the request of the receiver, the position of Polish law has recently evolved and is now not as radical as the approach adopted in German law.

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71 A. Weinland, *Münchener…*, op. cit., mn. 10 before § 1.

72 Ibidem, mn. 8 et seq. on § 18.

73 L. Haertlein, in: *Gesamtes…*, op. cit., mn. 5 on § 16 AnfG and the literature cited therein.

74 R. Longchamps de Bérier, 'Uzasadnienie projektu Kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu Kodeksu', in: Zakrzewski P., Misztal-Konecka J. (eds), *Roman Longchamps de Bérier. Dzieła wybrane*, Vol. II, Lublin, 2020, p. 401.

75 W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo…*, op. cit., p. 595.

According to the older view, presented in the context of the Regulation of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law, after the declaration of bankruptcy, only the receiver could claim Pauliana protection.[76] At least with regard to actions brought after the declaration of bankruptcy of the debtor, this was clearly justified in the first sentence of Article 57(1) of that Regulation, which expressly stated that 'the right to bring an action is reserved to the receiver'. Even then, however, legal scholars maintained that a creditor could continue proceedings initiated before the declaration of bankruptcy if the receiver decided not to join them.[77]

The new Polish Act of 28 February 2003 – Bankruptcy Law no longer contains an express provision making the receiver the only person with the right to bring an *actio Pauliana* after the declaration of bankruptcy. Article 132(1) of this Act merely states that 'the action may be brought by the receiver', and the difference in relation to the first sentence of Article 57(1) of the 1934 *Bankruptcy Law* is that the word 'only' is not used. Despite this, traditional views, stemming from the formerly applicable laws, continued to be represented in the literature[78] and, to some extent, in case law.[79] At the same time, however, a different position was also evident in case law,[80] while the fundamental shift came about after the resolution adopted by seven Supreme Court judges of 14 June 2023.[81] According to this resolution, if the debtor is declared bankrupt, this does not result in the creditor losing the right to bring an action to declare the debtor's juridical act ineffective under the Civil Code. In the justification for this position, the Court relied primarily on the assumption that until the *actio Pauliana* is granted, the object of the challenged act is not part of the bankruptcy estate, and therefore there is no formal obstacle to an individual creditor seeking satisfaction of their claim against that object.

The above position merits approval, even though it was met with a mixed response from legal scholars.[82] Avoiding repetition of detailed dogmatic arguments

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[76] See, e.g. judgments of the Supreme Court of 24 May 2002, III CKN 998/99, and of 5 July 2007, II CSK 118/07.

[77] M. Allerhand, *Prawo upadłościowe. Prawo układowe. Komentarz. Orzecznictwo sądów polskich z lat 1936–1998. Wzory pism w postępowaniu upadłościowym. Przepisy wykonawcze i związkowe*, Bielsko-Biała, 1998, p. 208; D. Altman, *Prawo upadłościowe. Komentarz*, Warszawa, 1936, p. 74; G. Lauter, *Prawo upadłościowe i prawo o postępowaniu układowem. Komentarz*, Warszawa, 1935, p. 65.

[78] R. Adamus, *Prawo upadłościowe. Komentarz*, Warszawa, 2021, mn. 2 to Article 132; D. Chrapoński, in: Witosz A.J. (ed.), *Prawo upadłościowe. Komentarz*, Warszawa, 2021, mn. 1 on Article 132; A. Jakubecki, in: Jakubecki A., Zedler F., *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2010, mn. 1 on Article 132; D. Zienkiewicz, in: Zienkiewicz D. (ed.), *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2006, mn. 1 on Article 132

[79] Judgments of the Supreme Court of 3 October 2008, I CSK 93/08; of 28 May 2021, III CSKP 28/21; and, as a side note to the main line of reasoning, judgment of the Supreme Court of 23 February 2022, II CSKP 199/22.

[80] Judgments of the Supreme Court of 9 December 2021, V CSKP 276/21; procedural judgment of the Court of Appeal in Wrocław of 23 August 2012, I ACz 1515/12.

[81] III CZP 84/22, OSNC 2024, No. 2, item 13.

[82] Critical commentaries on this resolution were presented by R. Adamus ('Legitymacja wierzyciela do wytoczenia powództwa pauliańskiego po ogłoszeniu upadłości dłużnika – glosa do uchwały (7) SN z 14 czerwca 2023 r., III CZP 84/22', *Monitor Prawa Bankowego*, 2024, No. 3, pp. 63–70) and K. Ochocińska ('Legitymacja do wytoczenia powództwa pauliańskiego w postę-

based on applicable Polish regulations, which were presented in another study,[83] it should only be pointed out that an individual creditor retaining the right to file an *actio Pauliana* also during the debtor's ongoing bankruptcy proceedings does not in any way violate the rights of all creditors, which may be exercised by the receiver. Pursuant to Article 133 of the 2003 Bankruptcy Law, the receiver, if they so wish, still has the option of taking over the proceedings instituted by the creditor, or more precisely, of substituting the claimant in a case initiated by a creditor who has challenged the acts of the bankrupt. The receiver may also bring a separate action, and if it is granted, the object of the challenged act will be transferred to the bankruptcy estate with priority over any rights of the individual creditor who might independently seek Pauliana protection.

All this means that the solution whereby the creditor retains the possibility of maintaining an *actio Pauliana* even after the debtor has been declared bankrupt may in fact only have a practical effect if the receiver is passive and not interested in challenging the debtor's act. This interpretative result merits approval, as it preserves the priority of all creditors to obtain proportional satisfaction from the object of the fraudulent act, without depriving an individual creditor of their chances if, for any reason, all creditors represented by the receiver do not wish to seek satisfaction by means of a Pauliana action. It also seems that this solution is closer to the Roman tradition, in which individual creditors were not deprived of their rights to seek satisfaction, not only when no *curator bonorum* was appointed, but also when he remained inactive.

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[83] J. Misztal-Konecka, M. Krajewski, 'Bezskuteczność czynności w stosunku do masy upadłości a jej zaskarżenie przez wierzyciela', *Przegląd Ustawodawstwa Gospodarczego*, 2024, No. 6, pp. 25–33.

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