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THE FIDEJUSSOR'S EARLY REGRESSION IN THE INSOLVENCY PROCEEDINGS

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Abstract: The early regression of the fidejussor implies his ability to "turn" against the debtor even before he pays something to the creditor „To turn against" in the sense of the new Civil Code, does not mean the right to actually receive a payment before the fidejussor has paid, at least in part, the claim of the creditor in whose favor he has guaranteed. The same principle applies in insolvency proceedings where the fidejussor, who has not paid anything yet, may exercise early regression, but his claim against the debtor will be a potential, conditional one, reason for which it will be included in the debt table under suspensive condition, without voting rights.
Keywords: insolvency, fidejussor, new Civil Code, debtor.

1. Introduction

A solution recently identified in national jurisprudence has been the starting point of this study. By the decision pronounced [1], the court has ordered the registration of a debtor's fidejussor in the receivables table of the insolvent debtor with a pure and simple claim, with voting right, considering the exercise of anticipated regression.

In this regard, the court held that a fidejussor exercising anticipated regression in insolvency proceedings must be enrolled in the receivables table with a pure and simple claim, meaning with a voting right besides the other creditors of the same debtor.

In motivation, it has been argued that art. 109 paragraph 2 of the Law no. 85/2014 is correlated with art. 2305 Civil Code, but independently of this, the legislator has provided a special situation of anticipated regression, when the fidejussor, even if he did not pay, can turn against the debtor, if he is in insolvency, as a means of protection, a situation expressly provided by art. 109 paragraph 2 of the Law no.85 / 2014.

It has also been shown that if the fidejussor were to have a claim under condition until he pays, it would come to an unnatural situation, because the institution of anticipated regression would make no sense. The court has also pointed out that the anticipated regression without the effective collection of the claim has no legal value and by this procedure no double payment is done, but only the fidejussor is protected. By the anticipated regression there is an actual, doubtless, liquid and

chargeable right of claim, so it is not necessary to register it under a suspensive condition in the table, without the right to vote.
The solution at which the court has stopped is not sheltered from criticism because the law does not provide the possibility of the fidejussor to actually collect the payment from the debtor in the exercise of the anticipated regression, but only the possibility of *"turning against it"* in three hypotheses expressly regulated by law.
Thus, according to art. 2312 Civil Code, the fidejussor which has obliged himself with the debtor's consent, may turn against him even before payment, *when prosecuted* for payment in *Court, when the debtor is insolvent* or *when he has obliged himself to release him from warranty within a certain period that has expired*".
It can be noticed that the legislator does not randomly use the phrase "*can turn against*". Nothing would have prevented the legislator from expressly stipulating the right of the fidejussor to claim and receive payment from the debtor in favor of whom he guaranteed in the exercise of this anticipated regression. Such a legislative solution would have been contrary to the functioning logic of this institution because suretyship is regulated in order to guarantee the satisfaction of the creditor's claim in the conditions in which the fidejussor has from the very beginning the quality of a co-debtor, assuming by contract *an obligation* and *not a right* (a claim). Out of the perspective of this quality of the fidejussor, that of a co-debtor and also of a *possible creditor* (from the moment of making a payment, even partial payment), the norm stipulated in art. 2312 of the Civil Code regulating the anticipated regression must be understood and interpreted.
Therefore, the contractual position of the fidejussor is that of a co-debtor who at the same time has the vocation to become a creditor against the main debtor, in so far as he will make a payment to the contractual creditor. Therefore, from the perspective of the regression right, the fidejussor appears to be only a possible future creditor, holding a future claim in the hypothesis of taking over the creditor's claim by law, to the extent that he will pay it to him voluntarily or forcibly.

2. The insolvency proceedings

Although he is not a veritable creditor under a suspensive condition, the fidejussor still has an almost similar position to the creditor, since his right of regression, seen as a right to claim, becomes effective and present only from the moment when the fidejussor pays, acquiring subrogation as creditor .
Thus, the rule laid down in Article 2312 of the Civil Code is nothing more than an effort of the legislator to institute in favor of the fidejussor a legal regime similar to the creditor under a suspensive condition, in accordance with the principle enshrined in Article 1409 of the Civil Code - *conservative acts*, according to which "the creditor may, even before fulfilling the condition, make any *act of preserving*

his right."

In these circumstances, the phrase "*can turn against*", found in the content of Article 2312 Civil Code should be interpreted in relation to the *position of the fidejussor as possible creditor* being unable to efficiently and effectively achieve the regression at the time when he could claim payment. In other words, this phrase - "*can turn against*" - only signifies the possibility of the fidejussor to undertake any judicial or extrajudicial acts of preservation, intended to protect his or her possible claim and to make it possible to satisfy it in the future, thus trying to avoid the hypothesis so that it becomes illusory in time, impossible to achieve in a concrete and effective way. This additional right granted to the guarantor – fidejussor under Art. 2312 of the Civil Code, in order to protect his possible claim, arises from the moment when the execution of the fidejussor by the contractual creditor becomes imminent and probable, the fidejussor being found in one of the three cases listed by the legislator under Article 2312 of the Civil Code.

In relation with this interpretation, the fidejussor exercising early regression shall have the right to sue the debtor in order to obtain an executory title with anticipation, he may require taking some precautionary measures or any other measures by which he will be able to guarantee his regress, he may even intervene in a forced execution (having a different owner than the creditor) in order to preserve his claim right until the suspensive payment condition is fulfilled.

However, to consider that the fidejussor, which exerts early regression, would be entitled to claim the payment, would mean recognizing that the fidejussor has a claim born, certain, liquid and due, which is obviously false because the only holder of a claim having all these features, is the creditor, the fidejussor becoming the holder *of the same claim* only by his subrogation to the rights of the creditor, a legal operation that occurs lawfully only through the payment made to it.

The recognition of the fidejussors right to obtain the payment itself, even in the absence of an execution on his part, would generate a whole series of consequences in a logical disagreement with the whole institution of fidejussion. For example, once the payment is done by the fidejussor to the debtor (even voluntary), this payment would discharge the debtor's obligation towards the creditor, because the debtor could not be required to pay twice.

The consequence would be that, although the creditor would not cash anything, he would find that although he had two debtors at the time of birth of the legal relationship, only one remained, because the principal debtor was released by paying the other debtor (the fidejussor)! Equally, if the right of the fidejussor to cash the claim itself and to receive payment were recognized, there would be no grounds for it to be allowed to trigger the debtor's forced execution, even in competition with the creditor, and to obtain, to the detriment of the creditor or besides him, the payment in whole or in part of a claim which, however, he does

not have.

The institution of early regression is not a legislative novelty brought by the new Civil Code. It can be observed that the provisions of the Civil Code of 1864 have regulated similar assumptions through the content of the former art. 1673, establishing the right of the fidejussor, even without paying, to claim indemnification from the debtor in 5 cases expressly enumerated by the law [2]. Analyzing that text of the law, the legal doctrine of the epoch rightly underlined that" (...) it *is obvious that the fidejussor can not claim from the debtor the payment of the amount for which he guaranteed, because he did not make any payment to the creditor; however, fearing that the debtor will not fulfill his obligation, thus causing a pursuit against him (of the fidejussor), and thus a diminution of his patrimony, he (the fidejussor) has the right to ask the debtor to record the amount of money affected to pay its debt to the creditor or to force him to make another guarantee (fidejussion, pledge, mortgage) on the fulfillment of his obligation"* [3].

Another famous author [4] of the old doctrine considered that the provisions of the former article 1673 of the Civil Code of 1864 would allow the fidejussor, who exercises early regression, to claim from the debtor at most a real guarantee or other personal guarantee, or the recording of an amount of money as guarantee to its disposal.

In other legislation, we also identify the institution of early regression, but the terminology used is much clearer and leaves no room for interpretation and in no way does it induce the idea that by exercising early regression, the fidejussor who did not pay could still demand and obtain the payment from the debtor for which he guaranteed. For instance, in the Italian Civil Code we find a provision similar to that of former article 1673 Civil Code of 1864, entered in article 1953 (*Rilievo del fideiusore*), according to which the fidejussor, even before paying, *can act* against the debtor so that he releases him from the obligation or in the absence of this possibility, to provide the guarantees necessary to ensure the effective satisfaction of any possible regression in the 5 cases listed by the law [5].

The current doctrine developed on the new Civil Code seems to maintain the same line of direction, the opinion being already expressed that the "early regression" established by art. 2312 of the new Civil Code is not an act of regression itself, since the right to regress was not yet born, as long as the fidejussor did not pay [6]. It has also been shown that early regression could be considered a "equity repair action" [7], or even a "preventive action exercised *in proprio nomine"* [8].

We consider that we have presented sufficient arguments that lead to the conclusion that the phrase used by article 2312 of the Civil Code – *may turn against the debtor, even before payment* - confers the fidejussor the right to take any conservative measures in order to ensure the effective realization of the regression, if that be the case, but he will only be able to claim the actual payment

in so far as the contractual co-debtor becomes a creditor. Such a metamorphosis can only occur by voluntary or forced payment by the creditor of the claim to which he is entitled (in whole or in part), with the payment of the fideusor subrogating, within the limit of the amount paid, to the rights of the creditor and becoming in turn a creditor of the debtor in whose favor he guaranteed. Such a metamorphosis can only occur by voluntary or forced payment by the fidejussor to the creditor of the claim to which he is entitled (in whole or in part), with the payment of the fidejussor subrogating, within the limit of the amount paid, to the rights of the creditor and becoming in turn a creditor of the debtor in whose favor he guaranteed [9].

Neither the provisions contained in the Insolvency Law lead to the conclusion that the early regression in the insolvency proceeding precludes the consideration of the fidejussor as a holder of a pure and simple claim that would attract his enrollment in the claim table with a voting right. In fact, a careful reading of the insolvency law will lead to the conclusion that, in principle, a fidejussor will not justify any legitimate interest in being enrolled in the debtor's claim table for the mere fact that he is not a creditor.

He will acquire the capacity of a creditor *only by payment* as a consequence of the subrogation of law established by art. 2305 new Civil Code, the paid creditor's claim, up to the amount paid, being transferred to the patrimony of the fidejussor and constituting the basis of the regress.

It can be noticed that the national law of insolvency - Law no. 85/2014 - regulating the rules for drawing up the table of claims, expressly refers to the fidejussor only within article 109, paragraphs 1, 2 and 3 [10], from the interpretation of which some conclusions can be deduced:

- Only the creditors can be enrolled in the claim table, for the simple reason that only claims are enrolled in this table and only creditors are holders of claims. The fidejussor is a debtor who has the vocation to become a possible creditor, overtaking by subrogation, as a payment effect, in whole or in part, the creditor's claim;
- if, however, prior to the registration of the claim statement, the creditor has received a partial payment from the fidejussor within the limit paid, by virtue of the legal subrogation, the fidejussor has become the debtor's creditor and will itself have to make a statement of claim. This results from the interpretation of the rule from art. 109 paragraph 1 of the law, which allows the creditor to file a claim statement only for the remainder of the unpaid debt;
- in the event that the fidejussor makes a voluntary or forced payment in favor of the creditor, the latter will have to report to the insolvency practitioner (administrator / liquidator, as the case may be) receipt of the amount, within 3 days of receipt. The consequence of this creditor's report is that the insolvency

practitioner will automatically have to update the claim table by properly adjusting the creditor's claim or by removing it from the table if it has been paid in full and proceeding to the ex officio filing of the fidejussor with the amount paid to the creditor. This operation is justified to be carried out automatically because in reality it is one and the same claim that has not been satisfied from the estate of the debtor, but whose holder has been changed by the effect of legal subrogation established by art. 2305 Civil Code.

In relation to these conclusions drawn from the text examined, it is easy to observe that the fidejussor, in his capacity as co-debtor, does not hold any claim that would allow him to apply for his entry in the table nor justify any interest in seeing himself in the table of receivables, with an eventual claim *assimilated to the one under a suspensive condition*, as long as its enrollment in the table will be done *ex officio*, to the extent that it will pay the creditor and as soon as he / she reports the receipt.

The only hypothesis that might justify an interest of the fidejussor to be entered in the table (unless he has already become a creditor by the partial or total payment of the claim before the opening of insolvency proceedings) would be the one in which the creditor himself would neglect its inclusion in the table by failing to make a statement of claim in due time, thus being able to affect the effectiveness of the fidejussor's regress. Theoretically, in such a case, the fidejussor may be recognized an interest in being entered in the table with *a possible claim*, assimilated to the *claim under condition* expressly referred to in Law no. 85/ 2014, although, in principle, in the case of its pursuit by the creditor, the fidejussor may oppose to it the exemption of his obligation based on the fault of the creditor, according to the art.2315 of the new Civil Code [11]. Therefore, in his capacity as debtor guarantor, the fidejussor has not recognized the vocation to be entered in the claim table, than at the time in which he becomes a creditor by subrogation, making a full or partial payment to the contractual creditor.

Even if the provisions of art.109 paragraph 3 of the Law no. 85/ 2014 refer to the assurance of the regress of the fidejussor, these legal provisions envisage a particular hypothesis and do not establish the right of the fiduciary who exerts the anticipated regression of being entered in the table with some amount of money.

The provisions of art. 109 par. 3 of Law no. 85/2014 do only provide a preferential clause in favour of the creditor in the insolvency proceedings. The legal text considers the situation when the fidejussor guaranteeing a debtor secures from the very moment of the conclusion fidejussion (or even before or after this time), a real security or other preferential cause concerning a good of the debtor's patrimony, in order to guarantee at his turn the success of the regress if it will end up paying the creditor instead of the debtor. In other words, the legal provision takes into account the hypothesis in which the contractual creditor does not have a real guarantee or a

cause of preference over a certain item of the debtor's patrimony, but such a cause of preference exists on a good of the debtor in favor of the fidejussor. This is the premise to which the text of the law refers and in relation to which the provisions of art. 109 paragraph 3 find justification in the law of insolvency.

If there weren't the provisions of article 109 paragraph 3 of the Law no. 85/2014, following the sale of the good on which the preferential cause is made or the guarantee in favor of the fidejussor, no distributions could be made in insolvency proceedings, but the whole amount would remain unavailable until it is known whether or not that preference clause will be activated or not in favor of the fidejussor. Or, it could be activated only if the fidejussor would pay the creditor. This would result in a blockage: the creditor could not be paid although he is the holder of a pure and simple claim against the debtor, as the sum would be written to the insolvency practitioner and pending a possible activation of the preferential clause of the fidejussor, which does not yet have the status of a creditor, but that of a co-debtor. The provisions of art. 109 par. 3 of the Insolvency Law are intended to solve such a situation. In the sense of this legal text, the fidejussor is called to compete at the credential table, which means that he will be registered ex officio in the claim table. But this enrollment will not be done in order to make him a payment, considering an alleged early regression, but that the cause of preference of the fidejussor may be capitalized in favor of the creditor.

3. Conclusions

Practically, the ex officio "enlistment" of the fidejussor in the insolvency proceedings, in the conditions of art. 109 paragraph 3 of Law no. 85 / 2014, allows that the price obtained from the sale of the asset which bears preference to be distributed directly to the creditor, thus extinguishing in the limit of the part of the claim covered by the payment, both the principal obligation of the debtor and the fidejussor's obligation towards the creditor. In this way, the unsecured hypothetical creditor would only benefit from the preference clause of the fidejussor, in the sense that he would receive the entire amount obtained from the sale of the good, without bearing the concurrence of the other unsecured creditors. The legislative measure analyzed also benefits the fidejussor whose interest is not to obtain any sum from the debtor, but to see as soon as possible the fully satisfied creditor's claim, a hypothesis which would equate to his release from the guarantee obligation assumed under the fidejussion agreement. Therefore, in relation with these considerations, we may conclude that the early regression does not entitle the fidejussor to either pretend or obtain from the debtor the effective payment of the claim instead of the creditor. Only the payment made to the creditor by the fidejussor gives him the capacity of a creditor entitled to demand at his turn a payment by way of regress, including in insolvency proceedings.

Until payment to the creditor, the fidejussor's right to claim over the debtor is *a possible, conditional right,* which does not justify the receipt of any amount of money from the debtor. Even if the fidejussor would justify an interest to act in insolvency proceedings by invoking early regression (that is, prior to any payment to the creditor), his claim to the debtor would also be an eventual, conditional one, reason for which it only could be registered table of claims under suspensive condition, without voting rights. At the same time, the existence of a preferential cause in favor of the fidejussor over a good of the debtor, will allow his ex officio registration in the claim table with an eventual, conditional claim, but not for an effective payment, but for that the preferential case may be harnessed in the interest of the creditor-holder of the claim.

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9. P. Vasilescu, *Civil Law. Obligations – in the regulation of the New Civil Code*, Hamangiu Publishing House, Bucharest 2012;
10. E. Veress, *Suretyship agreement*, C.H. Beck Publishing House, Bucharest 2015.

Notes

1. Court of Appeal Timişoara, civil decision no. 465/27 June 2017, file no. 6802/30/2016/a1
2. According to art. 1673 Civil Code of 1864, „The fidejussor, without having paid, may claim indemnification from the debtor:
   1. when he is sued in Court to pay;
   2. when the debtor is bankrupt or in a state of insolvency;;
   3. when the debtor has indebted itself in order to release him from warranty within a specified period and that period has expired;
   4. when the debt became payable by the arrival of the due date specified;
   5. after 10 years, when the main obligation has no fixed due date, but the principal obligation would not have been such that it could not be extinguished before a certain period of time, such as guardianship, or because the contrary was not stipulated".

3. Radu I.Motica, Ernest Lupan, *The general theory of the civil obligations,* Lumina Lex Publishing House, Bucharest 2008, p.284.
4. Dimitrie Alexandresco, *Theoretical and Practical Explanation of Civil Law*, Tomul X, Atelierele grafice Socec & co. Publishing House, Bucharest, 1911, p.159
5. Art. 1953 Codice civile italiano – "Rilievo del fideiussore"
Il fideiussore, anche prima di aver pagato, può agire contro il debitore perché questi gli procuri la liberazione o, in mancanza, presti le garanzie necessarie per assicurargli il soddisfacimento delle eventuali ragioni di regresso (1179), nei casi seguenti:
1. quando è convenuto in giudizio per il pagamento;
2. quando il debitore è divenuto insolvente;
3. quando il debitore si è obbligato di liberarlo dalla fideiussione entro un tempo determinato;
4. quando il debito è divenuto esigibile per la scadenza del termine;
5. quando sono decorsi cinque anni, e l'obbligazione principale non ha un termine, purché essa non sia di tal natura da non potersi estinguere prima di un tempo determinato.
6. See Cristiana Irimia, in Fl. Baias, R. Chelaru, R.Constantinovici, I. Macovei (coordinators), *the New Civil Code – comments on articles art.1-2664*, C.H. Beck Publishing House, Bucharest 2012, p.2248.
7. See Paul Vasilescu, Civil Law. Obligations – in the regulation of the New Civil Code, Hamangiu Publishing House, Bucharest 2012, p. 129.
8. See Emod Veress, Suretyship agreement, C.H. Beck Publishing House, Bucharest 2015, p.187.
9. According to Art.2305 Civil Code, „The fidejussor who has paid the debt is subrogated by law in all the rights which the creditor had against the debtor".
10. According to art.109 of Law no.85/2014:
„par.1 - A creditor who, prior to the filing of an application for admission of claims, has received a partial payment of his claim from a co-debtor or a fidejussor of the debtor, may have the claim entered in the claim table only for the part he has not received yet. The creditor has the obligation to report any amount received within 3 days of receipt.
par.2 - A co-debtor or *a fidejussor who is entitled to restitution* or indemnification from the debtor for the amount paid, *shall be recorded in the claim table with the amount he has paid to the creditor*. In this case, the joint creditor has the right to demand that he be paid, until full payment of his claim, the share due to the co-debtor or fidejussor, remaining creditor only for the unpaid amount.
par.3 – The co-debtor or fidejussor of the debtor *which, in order to ensure its regress, has a preferential cause on its property*, competes at the credential table in order to make this right possible, but the price obtained from the sale of the encumbered goods will be attributed to the creditor, decreasing from the amount due".
11. According to art.2315 of the New Civil Code "If, as a result of the creditor's deed, the subrogation would not benefit the fidejussor, the latter is released within the limit of the amount that he could not recover from the debtor."