



Vlasic, 26th and 27th May 2005

Sale of Bankruptcy Debtor's Presumed Property

Impossible to Determine Bankruptcy Debtor's Property

- Real estates are not registered in the LR
- There is no documentation on real estates or moveable property
- Is there a presumption that property in possession of bankruptcy debtor, without clear documentation on ownership of other, is considered to be in ownership of bankruptcy debtor, and as such it can be sold in bankruptcy procedure?

Solution?

- In that direction: let extraction creditors report their claims themselves, for they are obliged, according to art. 46 and 110, par. 6, to report their extraction claims (after announcement of the order on opening of bankruptcy)
- In case an extraction creditor **fails all together** to report its claims in bankruptcy proceedings (request for extraction of property from the possession of bankruptcy debtor), can trustee, as conscientious person, sell that property under founded presumption that bankruptcy debtor is its owner?

Status of Extraction Creditors I

- Extraction creditors, however, by not reporting their right at all, or by not reporting them on time, in bankruptcy proceedings do not lose those rights (extraction of their property from bankruptcy estate)
- According to article 56 of the BL, only bankruptcy creditors must exercise their rights in bankruptcy proceedings, and they are not allowed to exercise their rights in any other procedure (litigation or enforcement)
- Therefore, untimely reporting of claims by bankruptcy debtors in bankruptcy proceedings leads to loss of their rights (art. 113, par. 4)
- Extraction creditors are not bankruptcy creditors (art. 37, par. 1), the provision of article 56 of the BL does not apply to them, and they can file civil and enforcement actions in order to exercise their rights apart from the bankruptcy proceedings

Status of Extraction Creditors II

- Extraction creditors, therefore, cannot lose their ownership rights merely by failure to act (not even by failure to report in bankruptcy), since they can exercise their ownership rights apart from bankruptcy procedure, by regular rules of the civil law (owner's suit and enforcement procedure)
- Article 37, par. 1 of the BL prescribes that extraction right is regulated by a special law
- Is it a future law yet to be drafted, or is it one of the existing laws (ZOSVO/ZOSPO – as the general law regulated owners' rights)?

Sale of Real Property By the Rules of the LEP

- According to the rules of art. 113 of the LEP, in enforcement procedure, judgment (bankruptcy) debtor's real property can be sold even if it is unregistered in the LR, thus it is not entirely certain that the judgment debtor is the owner of the subject of enforcement, since ownership is acquired by registration in the LR (art. 5 of the Law on Land Registry)
- Sale, according to article 113, is performed by composing the seizure inventory list first, then it is posted on the court notice board and two daily newspapers of the entity, with invitation to all parties with rights on that real property to report to the court the reasons why that property cannot be sold (art. 113, par. 6, 7, and 8)
- However, such sale mechanism is applied only “if the registration of that real property would be against the law” (art. 113, par. 6)
- Is registration of bankruptcy debtor's real property in the LR against the law if bankruptcy debtor does not have ownership documentation for that real property, i.e. does not have necessary permits prescribed by construction regulations (urban permit, construction permit, use permit)



Sale of Personal (moveable) Assets by the Rules of the LEP

- Article 120, par. 3 of the LEP prescribes that judgment (bankruptcy?) debtor can be considered the owner of property in its possession, if third parties do not inform the enforcement court, within the enforcement procedure, of their rights, and if they do not prove those rights
- According to art. 51 of the LEP, any third party has the right to file an objection (third party objection) requesting termination of the sale procedure because the judgment debtor is not the owner of property (applies to both moveable and real property)
- Third parties can use these rights of theirs only for the duration of the enforcement procedure
- If they fails to use their rights, buyer in enforcement procedure has acquired ownership, and the buyer is protected on the basis of article 36 of the ZOVPO/ 31 ZOSPO (acquisition of ownership right from non-owner in public sale), and the earlier owner only has the right to return of property with compensation, a year after the sale has been executed
- Having in mind the abovementioned provisions of the LEP, bankruptcy debtor could be considered the owner of property is the moveable property in its possession, for which it is uncertain if they are in debtor's ownership, are sold according to the rules of the enforcement procedure

Why Sale of Property by the Rules of the LEP

- The only possibility to perform the sale of property with presumed ownership of bankruptcy debtor
- If the sale of real property in bankruptcy was performed by some other rules, the buyer could never become the owner, because the ownership is acquired from non-owner
- Owner's suit, and suit for determining a legal transaction void have no statute of limitation, thus an extraction creditor could one day appear in a court case with both of these claims, and request its real property back, unless the maturity conditions for adverse possession have been met
- After sale of real property by the rules of the LEP, the old owner could not appear with the owner's suit since it failed to use its rights prescribed by the LEP
- With moveable property the situation is a bit different due to institutes of acquisition of ownership from non-owner in a public sale (and adverse possession periods are shorter as well)

Report of Claim by Extraction Creditor

- If the extraction creditor reports its claim in bankruptcy proceedings, in accordance with article 36, par. 4, 46, par. 1, and 110, par. 6, bankruptcy trustee must make a statement on that in the investigation hearing
- If bankruptcy trustee contests the claims of the extraction creditor, bankruptcy judge will instruct the party to initiate a civil case (extraction creditor or bankruptcy trustee), in accordance with the general rules of the bankruptcy procedure
- If the civil case is filed within given deadline, that item should not be sold, since the trustee is not conscientious (art. 37, par. 5) and can be held liable for the damages that occur

Late Reaction of Extraction Creditor in Bankruptcy

- If the extraction creditor is late reporting its claim to the bankruptcy court, such claim is to be rejected in accordance with article 113, par. 4 of the BL
- In that case, according to the rules of the civil law, bankruptcy trustee decides on handover of property as the legal representative of the bankruptcy debtor
- In case the trustee refuses to handover the property, the extraction creditor can file a civil case on the basis on the owner's suit, or to respond with the third party objection, if the property within bankruptcy procedure is sold by the rules of the enforcement procedure (art. 51 of the LEP)