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The new core of liability of board members of limited liability company for failure to acts of diligence

The recent amendments to the Code of Commercial Companies (Journal of Laws of 2013 item 1030 with further amendments) and Insolvency Law (Journal of Laws of 2015 item 233) introduced into the Polish legal system many significant changes. One of them is the introduction of strict liability of board members of limited liability companies for failure to acts of diligence. That strict liability of board members is the result of the amended Article 23 paragraph 1 Insolvency Law and in the future may change the practice of suing for failure to acts of diligence. In line with current practice in the case of a failure by the board members of LLC of acts of diligence, the liability of these people was based primarily on Article 299 § 1 of the Commercial Companies Code, as follows:

'If the execution against the company proves ineffective, board members jointly and severally liable for its obligations.'

The above-mentioned structure designed to protect creditors introduces personal liability of board members, among others in case of failure to submit a bankruptcy motion in a timely manner or if at the same time was not issued a decision on the opening of restructuring proceedings or on the arrangement's approval in the arrangement approval procedure. Other acts of a failure of diligence are activities involving culpable failure to submit a bankruptcy motion, or as a result of failure to submit the bankruptcy motion and the failure to issue a decision on the opening of restructuring proceedings or not approving an arrangement in the arrangement approval procedure, the creditor suffered damage. It is also worth mentioning that the very nature of liability normalized in the art. 299 CCC is debatable, both in doctrine and in case law. While the majority of the doctrine is in favour of a **guarantee nature of the liability** of board members, the courts take the **compensatory nature** (see the judgment of the Supreme Court of November 7, 2008, file no. III CZP 72/08).

The consequences of such a decision are important due to the fact that the compensatory liability of board members of limited liability company depends on the demonstration by the creditors of **the existence of the company's liabilities and ineffective execution of the company's assets** and the relationship of cause and effect relationship between the failure of this particular obligation and harm in the form of ineffective enforcement (it is worth noting that in the case of adoption of the nature of the guarantee liability of the board members of limited liability company, the creditor is required only to demonstrate the same ineffectiveness of the execution of the company's assets).

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It should be pointed out that the creditors despite fulfilment of the conditions indicated above will not be able to assert the liability of board members in case if that are not in possession of the writ of execution against the company itself. **Only the acquisition of such writ of execution updates the joint and several liability of board members**.

However, as indicated above, this practice may change and professional representatives will prove the existence of liability of the board members of the limited liability company, as a result of failure to acts of diligence for the ineffectiveness of execution in the company's assets on the amended Art. 21 paragraph 3 Insolvency Law, which on January 1, 2016 gained the following shape:

'The persons referred to in paragraph 1 and 2 (in the case of a legal person comes to anyone under the act, the memorandum of association or articles of association shall have the right to manage the affairs of the debtor - the company and to represent it, alone or jointly with others), they are responsible for damage caused as a result of failure to submit a motion within the period specified in paragraph 1, unless they are not at fault. These people can be released from liability, in particular if they can demonstrate that within the period specified in paragraph 1 restructuring proceedings were opened or arrangement in arrangement approval procedure was approved.'

In accordance with Article 21 paragraph 1 Insolvency Law the debtor shall not later than thirty days from the date on which the cause of the bankruptcy occurred, submit to the court a motion for bankruptcy. Basis for submitting such motion arises in situations where the debtor as a legal person or organizational unit without legal personality, which separate legal act recognizes the legal capacity, is **insolvent also when its monetary obligations exceed the value of its assets, and the state is maintained for a period exceeding twenty-four months.**

This provision seems to be much more convenient to invoke the liability of board members from at least several reasons. Firstly, on the basis of the quoted provision, the legislature decided to introduce the structure of liability based on fault implied. In short, this means shifting the burden of proof on the board members to demonstrate that in fact these people do not take liability for damage caused as a result of failure to submit the motion for a declaration of bankruptcy.

Secondly, this regulation **does not require a writ of execution against the company**, which would justify the responsibility of persons who have the right to manage the affairs and the right to represent the debtor - company.

Thirdly, the liability of board members in this case is not solidarity, but individual, which means greater opportunities to satisfy the creditors. Moreover, in the case of compensation of the creditor of the insolvent debtor (limited liability company) art. 21 paragraph 3a introduces a presumption amount of damage in the form of **unsatisfied claims of the creditor against the debtor**:

'In the case of compensation of the creditor of the insolvent debtor it is presumed that the damage referred to in paragraph 3 (damage caused as a result of failure to submit the motion for bankruptcy), includes the amount of unsatisfied claims of the creditor against the debtor.'

In conclusion, the introduction of strict liability of board members of companies in the art. 21 paragraph 3 Bankruptcy Law is a more convenient alternative to sue for failure to acts of diligence. In the next few months remains to be seen whether creditors actually take advantage of this opportunity, however, will remain at the art. 299 § 1 of the CCC.

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