



# Restitution of the proceeds of wrongdoing in the court-supervised reorganization and bankruptcy proceedings

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## **ABSTRACT**

In a context where the court-supervised reorganization petitions of companies involved in corruption schemes are being granted, with considerable chances of conversion from reorganization to bankruptcy, this article analyzes how the restitution of the proceeds of wrongdoing should occur in the court-supervised reorganization and bankruptcy proceedings. Such analysis is carried out by clarifying the main aspects and effects of confiscation on bankruptcy law, adjusting the doctrines of Law n. 11.101 / 2005, without affecting the internal coherence of its system. Based on this analysis, we conclude that the forfeiture of the proceeds of wrongdoing, as an immediate result of a judgment or a settlement applying such sanction, because it constitutes a true transfer of ownership in favor of the State, produces the exclusion



of such values from the scope of the court with exclusive jurisdiction over the bankruptcy estate. Therefore, they must be promptly restituted, by means of the proceeding analogous to the one established in Articles 85 to 93 of Law n. 11.101 / 2005.

**Keywords:** Economic Criminal Law. Court-supervised reorganization. Bankruptcy. Proceeds of wrongdoing. Confiscation. Ownership interest.

## INTRODUCTION

Originally aimed at the protection of credit and preservation of the company's activity (SALOMÃO FILHO, 2007, p. 43), Law n. 11.101 / 2005 did not anticipate that part of the assets and values initially held by companies in court-supervised reorganization or bankruptcy procedures could be the proceeds of wrongdoings by their agents in the performance of their business activities. The legal text has therefore not clearly stated how such values should be restituted in these procedures.

This legal gap is especially problematic in the context where the court-supervised reorganization petitions of companies involved in corruption schemes are being granted<sup>1</sup>, with considerable chances of conversion from reorganization to bankruptcy<sup>2</sup>. The main issue is that the effectiveness of the restitution of the illegally obtained values, aimed at discouraging these corruptive practices, in a literal reading, would be counter to the rules and proceedings of the court with exclusive jurisdiction over the bankruptcy estate.

Thus, in these situations and in all other cases when the company has unequivocally committed wrongdoings, the question is if the values corresponding to the proceeds of wrongdoing must be subject to the general legally established patrimonial management rules for court-supervised reorganization and bankruptcy. Alternatively, does the legal system impose a diverse treatment for this amount in relation to the credits dealt with by Law n. 11.101 / 2005? Which legal construction, from the systemic point of view, provides a better solution to fill that gap?

In view of these issues, this paper aims to analyze in detail the effects of the confiscation or forfeiture of goods and values that constitute proceeds of wrongdoing in the court-supervised reorganization and bankruptcy procedures, trying to check and promote their consistency with the doctrines of Law n. 11.101 / 2005, without affecting the internal coherence of its system. In order to facilitate the understanding of the legal problem, we adopt the background the specific hypothesis of companies in which: (i) the confiscation of the undue advantages obtained by means of corruption schemes has been determined, and (ii) a court-supervised reorganization or bankruptcy procedure is underway.

Based on extensive study of the legal categories involved, the conclusion is that, because it represents actual transfer of ownership in favor of the State, the forfeiture of the proceeds of wrongdoing as a direct result of a judgment or a settlement applying such sanction, affects the exclusion of such values from the scope of the court with exclusive jurisdiction over the bankruptcy estate. Therefore, they must be restituted promptly, whether by means of the proceeding analogous to the one set forth in Articles 85 to 93 of Law n. 11.101 / 2005 or by way of a third-party motion, provided for in the Code of Civil Procedure.



In order to achieve the proposed goal, the paper examines in the following chapter the nature and legal contours of the confiscation or forfeiture doctrine, as well as its immediate legal consequences for the other spheres of law. Next, the repercussions of the confiscation in the scope of the bankruptcy law and of the court with exclusive jurisdiction over the bankruptcy estate are investigated.

## ASPECTS OF CONFISCATION OR FORFEITURE OF THE PROCEEDS OF WRONGDOING

Although the confiscation or forfeiture of the proceeds of wrongdoing is a legal doctrine widely used to carry out the preventive and punitive functions of the State, little is said about the juridical contours of such doctrine in its interconnection with other spheres of law. For this reason, this chapter proposes to clarify these contours, further outlining specificities of the situations of confiscation set forth for fighting corruption.

### LEGAL CONTOURS AND EFFECTS OF THE CONFISCATION OF THE PROCEEDS OF WRONGDOING

In a risk society (BECK, 1998), the vast damaging potential of the economic and property crimes<sup>3</sup> urges the design of an effective criminal policy to fight them. For this reason, the Criminal Law has been forced to reformulate its traditional model of imprisonment to attack the true motivation of these crimes: the unlawful profit. In this context, the confiscation or forfeiture<sup>4</sup> of the proceeds of wrongdoing<sup>5</sup> showed to be the most adequate and efficient instrument to deter these illicit practices in the sense that the economic theory of crime prescribes (BECKER, 1992), by precisely capturing the undue advantage obtained that way<sup>67</sup>.

This is especially true in the case of criminal organizations that use legal entities to carry out and organize their activities<sup>8</sup>, since the consolidation of unlawful patrimonial situations, in spite of the orders for detention of the individuals involved, maintains the stimulus to the continuity of these practices. It also sends signals to the other individuals of the society that it is advantageous to engage in these types of crime, if compared to the lawful conduct, further considering also the shielding of assets provided by the establishment of the company<sup>9</sup>. Moreover, this situation allows this unlawful profit to circulate, stimulating other crimes and practices discouraged by the State.

It is in this context that the cases of confiscation and forfeiture of the proceeds of wrongdoing have multiplied in the Brazilian legal system, both as an effect of a conviction and as a sanction, reaching far beyond the Criminal Law<sup>10</sup>.

As for its definition, confiscation is a legal act through which the compulsory expropriation of assets and values unlawfully incorporated into the property of the wrongdoer is carried out, without the right to any indemnification (NUCCI, 2017, p.1027), according to the conceptions in the law and the opinion of jurists, as set out below:

The punishment of confiscation therefore has the legal nature of a pecuniary punitive sanction in so far as reaches **the ownership interest of the convict, imposing a reduction of property by means of the partial or total loss of their assets, creating an obligation to surrender them to the State.** (CORRÊA JÚNIOR, 2006, p. 38)



“Confiscation” shall mean the **permanent deprivation of property** by order of a court or other competent authority (Article 2 (b) of the United Nations Convention against Corruption)

Thus, the main conclusion drawn from the above is that the transfer of ownership of the specified assets and values to the Government takes place at the very moment of the conviction, act or agreement that anticipates its effects. So much so, that the civil-law doctrine understand confiscation as a special case of loss of ownership, subject to the legal regime of public law (PEREIRA, 2017, p. 223). In other words, the amounts related to the proceeds of wrongdoing,<sup>11</sup> which were subject to the confiscation, are no longer considered assets of the wrongdoer from the specified moments, becoming the property of the State.

It is therefore a State ownership right, which is not confused with the right to credit arising from business acts. Therefore, as a prerogative of its constitutionally protected ownership right, the State is responsible for proposing the applicable provisional remedies to guarantee the inalienability and proper restitution of these amounts<sup>12</sup>, even if they have been converted into other licit assets and values<sup>13</sup> or affect successors<sup>14</sup>.

All these specificities apply indiscriminately to the cases of confiscation of the proceeds of wrongdoing related to corruption, which will be analyzed in more detail below in this paper, as an illustration.

## 2.2. CONFISCATION OF THE PROCEEDS OF WRONGDOINGS RELATED TO CORRUPTION

In the context of corruption-related crimes, the confiscation of the proceeds of wrongdoing is provided for both in the international legal system and in national law.

For considering acts of corruption as practices widely discouraged by the international community, the United Nations Convention against Corruption<sup>15</sup> provided the confiscation of the proceeds of wrongdoing as an indispensable punishment to be adopted by the domestic legislation of the signatory countries. It also demanded the adoption of all necessary measures to make this confiscation feasible, such as the freezing, seizure of the respective assets, and any other means that ensure its free disposition by the lawful owners:

### Article 31 - Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, **such measures as may be necessary to enable confiscation of:**

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

2. Each State Party shall take such **measures as may be necessary to enable the identification, tracing, freezing or seizure** of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law,



such **legislative and other measures** as may be necessary to **regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.** (...)

Article 53 - Measures for direct recovery of property

Each State Party shall, in accordance with its domestic law:

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to **recognize** another State Party's claim as a **legitimate owner of property** acquired through the commission of an offence established in accordance with this Convention.

Article 57 - Return and disposal of assets

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, **including by return to its prior legitimate owners**, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to **enable its competent authorities to return confiscated property**, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

Since the opinion of jurists concerning the control of conventionality of laws (MAZZUOLI, MARINONI, 2013; FERREIRA, 2015; CONCI, 2014) set the understanding adopted by the Federal Supreme Court from RE 466.343 that the domestic legislation of the State signatory to international treaties and conventions must be in conformity with the provisions and objectives of these treaties and conventions, the Brazilian legal system cannot forgo adopting their provisions. This conformity involves not only the already provided events of confiscation of the proceeds of corruption-related wrongdoings (in the Anti-Corruption Act of 2013<sup>16</sup> and the Misconduct in Public Office Act<sup>17</sup>) (DI PIETRO, 2017, p 248)<sup>18</sup>, but also the harmonization with the international guidelines of the laws previous to the internalization, such as the Court-supervised Reorganization Act of 2005.

In fact, once an adverse judgment is rendered against companies involved in corruption schemes in which the loss of the proceeds of wrongdoing is recognized, or an act or agreement that anticipates its effects occurs, the amounts that they have received as a result of corruptive practices no longer belong to them. Examples of such amounts are the amounts referring to the surcharge and to the profit of an administrative contract that would not have been obtained without collusion, in the context of acts of corruption involving damage to the treasury.

In addition, the transfer of ownership as a result of confiscation produces immediate legal consequences for all other legal spheres and judicial instances, including for the court with exclusive jurisdiction over the bankruptcy estate in which the court-supervised reorganization or



bankruptcy procedure of the convicted company is pending<sup>19</sup>, under penalty of disrespecting the systemic nature of the legal system, in addition to producing inconsistencies and even ineffectiveness of the measures aimed at disincentives of unlawful acts, such as corruption. In this sense, the following chapter discusses the consequences on the court of the court-supervised reorganization and bankruptcy.

## **CONSEQUENCES OF CONFISCATION OF THE PROCEEDS OF WRONGDOING IN THE COURT-SUPERVISED REORGANIZATION AND BANKRUPTCY PROCEDURES**

To investigate the effects of confiscation on the provisions of Law n. 11.101 / 2005, first a brief consideration on (i) the interrelationship between the constitutional limits of the enjoyment of the ownership right, and the social function of the company, (ii) the distinction between ownership right and credit rights and (iii) the claim that “money has no smell”. Then, we address the repercussions of confiscation in the court-supervised reorganization and bankruptcy procedures.

### **CONFISCATION OF THE PROCEEDS OF WRONGDOING, OWNERSHIP RIGHT AND SOCIAL FUNCTION OF THE COMPANY**

The transfer of ownership of the proceeds of wrongdoing through confiscation in the situations presented herein is in line with the process of ensuring the public interest of the ownership right (PEREIRA, 2017, p.90). In other words, the free disposition of private property must yield to certain limits, beyond which considerable harm is inflicted on society, or it ceases to produce desirable social benefits, and the use of the private property must seek to converge to the social function<sup>20</sup> that is expected.

Thus, there are no constitutional grounds for safeguarding the ownership right when it is used as a subterfuge to commit crimes or wrongdoings<sup>21</sup>, since these practices do not serve the social function to which the ownership is destined. For this reason, it is not possible to raise a defense against the state confiscation with respect to everything that is acquired by unlawful means<sup>22</sup>.

When it comes to corporate ownership, the legal issue gains new and more complex contours<sup>23</sup>. because when criminal or civil liability is attributed to a company for commitment of wrongdoing, it is not the property of partners and shareholders that is subject to confiscation, but rather the property of the legal entity, who concentrates, by legal fiction, the ownership of the assets and rights registered in its accounting records. The ownership of these partners and shareholders is only indirectly affected<sup>24</sup>.

Thus, confiscation of corporate assets aims to limit both the business ownership right and the exercise of economic activities that do not fulfill their social function related to the performance of unlawful activities. Therefore, the company has no right to use, enjoy, dispose of and claim the proceeds of the wrongdoing, as of a conviction that recognizes the unlawfulness of part or the whole of its activities, or as of the act that anticipates its effects.

These findings have direct repercussions on bankruptcy law, since they imply a clear restriction on the power of the company, the court with exclusive jurisdiction over the bankruptcy estate, the bankruptcy trustee, and the creditors' meeting to dispose of the assets and values related to the



proceeds of wrongdoing, even though Law n. 11.101 / 2005 has conferred on them the powers to do so with the property of the company. In fact, once the proceeds of wrongdoing cease to constitute property of the company in crisis, there is no point in considering their submission to the proceedings specific to the court-supervised reorganization and bankruptcy procedures.

That is the case inasmuch as the prerogative of the company to file a reorganization petition in order to overcome crises and the prerogative of creditors to request the adjudication of bankruptcy to receive credits is only possible in the context of the lawful activities of the company, in line with its social function. With regard to unlawful activities, the company is socially unviable, and for that reason the risk of the activity cannot be transferred to the public entity directly aggrieved by these activities under the pretext of overcoming crises, in the same way that the economic unviability does not allow the transfer of risk to creditors.

To analyze the social importance of the company means to verify the importance that their activity has in the local, regional, or national economy. The idea is that the more relevant the company, the more important it will be to seek to overcome the crisis and maintain the activity. The greater number of interests surrounding the company justifies greater efforts in the search for reorganization, since the closure of a socially important company generates significant social losses. If the company practices unlawful activities, its social importance is counterbalanced by the social damages that it generates, and that is the reason why this portion should not be subject to court-supervised reorganization. Only viable companies are able to justify the sacrifices that will have to be made by creditors in the court-supervised reorganization, since the creditors will only make such sacrifices to protect more relevant interests. Thus, the court-supervised reorganization should only be used for viable companies.

Thus, just as in a procedure of liquidation of assets due to nonbusiness bankruptcy a stolen car must be returned after its confiscation with full preference to the real owner in relation to all other creditors of the wrongdoer, the State must have preference over the other classes of creditors of the company that is being reorganized or bankrupt. In other words, it would not be legitimate to pay employees and suppliers with “assets” derived from unlawful activities that do not meet the social function of the company, preventing the prompt restitution of such amount. That would violate the prerogative of the aggrieved Public Entity to recoup such amount from whoever unlawfully holds values of its property or detains them without title.

#### DISTINCTION BETWEEN OWNERSHIP RIGHT AND CREDIT RIGHT

In another respect, the ownership right of the Union is in no way confused with the rights of the other creditors of the company being reorganized or the bankrupt estate. Unlike the proceeds of wrongdoing, such credits are generally the result of business activities and normally fall within the list of creditors. These business creditors had the opportunity not only to assess the risk of a financial crisis that would lead the company against which credit was created to undergo a court-supervised reorganization or bankruptcy procedure, but also to price that risk, for example, by means of negotiated interests and required collateral. Caio Mário when analyzing the confiscation has already clarified this understanding:

[...] the cessation of the ownership legal relationship for the dominus, and the



integration of res in the state wealth. **It is not, therefore, a legal transaction, nor is it a purchase and sale (since it is forced), but a public law act generating the effect of the transfer of ownership.** (PEREIRA, 2017, p. 223)

The fundamental distinction is that workers, banks, suppliers, and other creditors of the company have never ruled out the possibility of mismanagement or financial crises leading to the filing of a court-supervised reorganization or bankruptcy petition. In the case of the Government, it could not anticipate either the practice of wrongdoings, such as corruption, or the possibility of not obtaining restitution for the proceeds of these wrongdoings, because of the granting of a court-supervised reorganization petition or the adjudication of bankruptcy of a company whose directors were convicted of such crimes.

In face of these specificities, there is no disregard for the principle of universality of the bankruptcy court, which means that all the creditors of the bankrupt, whoever they were, should concur at the court with exclusive jurisdiction over the bankruptcy estate, for the restitution of the proceeds of wrongdoings would not properly be a credit. Nor is there any distortion of the legal order of preferences among creditors, by favoring the more agile, since the right of restitution of the Government derives from its ownership right and not from a credit right.

#### MONEY HAS NO SMELL

Any benefit directly or indirectly obtained from corruptive practices is subject to be measured and restituted to the Public Power. In Criminal Case n. 5083351-89.2014.4.04.7000, an excerpt from the judgement deconstructs the argument that there would be hindrances to the restitution in cash of the values referring to the proceeds of wrongdoing, as quoted below:

396. There is no point in affirming that laundering has not occurred because the resources were lawful. If the company got the contract with Petrobrás through crimes of cartel and bid rigging, **the amounts paid under the contract constitute proceeds of these very crimes. Crimes do not generate lawful results.** [...]

400. In this case, however, the bribe destined to corrupting the Supply Office was **paid with dirty money, coming from other previous crimes, herein identified as cartel crimes** (art. 4, I, of Law n. 8.137 / 1990) **and bid rigging** (art. 90 of Law 8.666 / 1993)<sup>25</sup>.

Regarding assertions that it is impossible to recover the proceeds of wrongdoing because of its pecuniary nature, under the saying that “money has no smell”, it must be clarified that the very Law n. 11.101 / 2005 provides for hypotheses in which this restitution occurs in monetary form and not by returning a specific asset. Among these hypotheses, one can cite the right to restitution of assets that no longer exist at the time of the request (article 86, item I, of Law n. 11.101 / 2005) and of the amounts paid to managers of consortiums and of values resulting from the advance on foreign-exchange contracts for exports (article 86, item II, of Law n. 11.101 / 2005).

Lastly, we should mention the restitution claim in cases of money held by the bankrupt of which they



cannot dispose. In certain cases, by virtue of the law or even of a contract, the bankrupt has money in their hands but cannot dispose of it and, therefore, restitution will be admissible. Such an event very much resembles the general restitution claim, but involves the ownership of the deposited money.

#### EFFECTS ON COURT-SUPERVISED REORGANIZATION

In the context of the court-supervised reorganization procedure, the main effect of the transfer of title of the amounts related to the proceeds of wrongdoing is the recognition that they cannot be part of the reorganization plan, since they do not constitute property of the company being reorganized.

Accordingly, such amounts should not even be included in the reorganization petition as a credit, under the terms of article 51, item III, of Law n. 11.101 / 2005, since items I and II of that article require that the real wealth of the debtor be shown, through the financial statements, not including the assets and values owned by the Union:

Art. 51. The reorganization petition shall be accompanied by:

I - an explanation of the real causes of **debtor's wealth** and of the reasons for the economic and financial crisis;

II - the financial statements related to the last 3 (three) fiscal years and those specially prepared to instruct the petition, made in strict compliance with the applicable corporate law and necessarily composed of:

- a) balance sheet;
- b) statement of retained earnings;
- c) income statement since the last fiscal year;
- d) management report of cash flow and of its projection;

III - the complete nominal list of creditors, including those for obligation to do or to give, with the indication of the address of each one, the nature, the classification and the adjusted value of the credit, distinguishing its origin, the respective maturity regime and the indication of the accounting records of each pending transaction;

Art. 53. The reorganization plan shall be submitted in court by the debtor within the non-extendable term of 60 (sixty) days from the publication of the order granting the processing of the court-supervised reorganization process, under penalty of conversion from reorganization to bankruptcy, and shall contain: [...]

II - demonstration of its economic viability; and

III –a report of economic-financial nature and of appraisal of the **goods and assets of the debtor**, signed by a duly licensed professional or by a specialized company.

In this circumstance, the court-supervised reorganization procedure should not be able to manage assets and values owned by the Union. It should not be able to distribute them with primacy to other creditors to make it possible to overcome the economic and financial crisis of the debtor, in order to allow the maintenance of its source of production, labor claims and the



interests of creditors, by means of the proceeds of wrongdoing.

This is because, as already outlined, the preservation of the company, its social function and the stimulus to economic activity must be promoted through financial sources and profit margins derived from lawful activities of the company and not through those values resulting from unlawful activities, largely discouraged and fought by the international community and the national legal system.

Under the same logic of respecting the ownership right of third parties, Superior Court of Justice precedents have also ruled that it is not up to the court of the court-supervised reorganization to decide on the search and seizure of third-party agricultural products deposited in the warehouse of a company being reorganized. The restitution of these products must therefore occur in the terms determined by the civil court with jurisdiction to preside over and judge the *actio depositi directa*:

CIVIL PROCEDURE. POSITIVE CONFLICT. *ACTIO DEPOSITI DIRECTA*. ADMISSIBILITY. SEARCH AND SEIZURE ACTION. GENERAL WAREHOUSE. CLASSICAL DEPOSIT OF FUNGIBLE GOODS. TYPICAL CONTRACT. DIFFERENTIATION OF ATYPICAL DEPOSIT. SOYA GRAINS. RESTITUTION NO SUBMISSION TO THE COURT OF THE COURT-SUPERVISED REORGANIZATION. JURISDICTION OF THE COURT OF THE JURISDICTION CHOSEN IN THE CONTRACT. DECREE 1.102 / 1903. LAW 9.300 / 2000. DECREE 3.855 / 2001. CIVIL CODE, ARTS. 627 AND FOLLOWING. LAW 11.101 / 2005. PRECEDENT 480/STJ. [...] 7. **It being, accordingly, property of a third party whose title was not transferred to the company being reorganized is not subject to the regime established in Law 11.101 / 2005.** Incidence of Precedent 480 of the STJ. 8. Conflict of jurisdiction entertained to declare the jurisdiction of the Court of Law of the 5th Civil Court of São Paulo. The present case is similar, and it is necessary to establish the same legal solution regarding the determination of the court with jurisdiction over the judgment of this demand. In view of the foregoing, I entertain the present conflict of jurisdiction to declare the COURT OF LAW OF THE 8th CIVIL COURT OF UBERLÂNDIA - MG with jurisdiction to preside over and judge the action of depositi directa n. 0788488-56.2015.8.13.0702 filed by ABC INDÚSTRIA E COMÉRCIO S/A ABC INCO and, consequently, to determine any measures related to the assets discussed therein. The judicial authorities in conflict must be informed and the parties must be given notice of this decision. Brasília (DF), May 23, 2017. JUSTICE PAULO DE TARSO SANSEVERINO Judge-Rapporteur.

The precedents of the State Justice Courts have also been respecting the right of third parties in the sphere of court-supervised reorganization and bankruptcy as, for example, in the case where the 26<sup>th</sup> Civil Chamber of the State Justice Court of Rio de Janeiro upheld a judgement that ordered the company to refund an amount improperly debited from a client. It is worth analyzing the *ratio decidendi* for this judgement:

It is clear that while the company is being reorganized, any payment due to the creditors must observe what is defined by the wills of the debtor and creditors in an environment of extensive debate. Otherwise, a differential treatment



would be conferred to a certain creditor to the detriment of the others who are equated to the first. It is certain that the legal means for this is related to the proof of claim, whether timely or not, according to art. 7 of Law n. 11.101 / 05.

Yet, **the present case reveals an exceptional situation which, as such, also deserves differential treatment.** The company being reorganized recognized and confessed that the amount of R\$ 16,721.85 (sixteen thousand, seven hundred and twenty-one reais and eighty-five cents **was unduly subtracted from the legal sphere of the appellee.** The “systemic” error confessed by the company being reorganized, **justifies the upholding of the judgement, under penalty of a greater evil that could compromise the financial health of the creditor, who did not contribute to the situation revealed by the record.**

Likewise, the effects of the confiscation arise from the undue subtraction of amounts from the juridical sphere of the aggrieved Government, recognized by the judgment that determined the confiscation or by the negotiating act, which anticipates such effects.

Another situation in which the immediate restitution of the values is determined, without them being integrated into the bankrupt estate, is that of the appropriation of assets. According to art. 31-F of Law n. 4.591 / 1964, with the new wording of art. 53 of Law n. 10.931 / 2004, “the effects of the adjudication of business or nonbusiness bankruptcy of the real estate developer do not reach the assets appropriated for a certain purpose, and the land, accessions and other assets, credit rights, obligations, and charges subject to the development do not integrate the bankruptcy estate”. This consequence is due to the provision that the assets and rights submitted to the appropriation regime “will remain separated from the property of the developer and will constitute appropriated assets, destined to the achievement of the corresponding real estate development and the delivery of the real estate units to the respective purchasers”.

In a similar situation, the Superior Court of Justice sustained to promisor-buyers of a real estate unit whose person in charge of construction was declared bankrupt the right to restitution of the installments paid:

SPECIAL APPEAL - ARTS. 1.062 OF THE CIVIL CODE OF 1916 AND 1 OF DECREE-LAW 86.649 / 81 - ABSENCE OF PREQUESTIONING, AND FILING OF A MOTION FOR CLARIFICATION FOR SUCH PURPOSE - APPLICATION TO THE CASE OF PRECEDENTS N. 282 AND 356 OF STF - ACTION FOR DAMAGES PECUNIARY AND NONPECUNIARY LOSSES - PROMISE OF PURCHASE AND SALE OF REAL ESTATE UNDER CONSTRUCTION SIGNED WITH THE BANKRUPT COMPANY ENCOL, WITH THE PARTICIPATION OF THE SUCESSOR CARVALHO HOSKEN - UNILATERAL TERMINATION OF THE CONTRACT BY CARVALHO HOSKEN AND TRANSFER OF THE REAL ESTATE TO A THIRD PARTY - **RETURN IN WHOLE OF THE INSTALLMENTS PAID BY THE PROMISOR-BUYER AND RESTITUTION OF THE STATUS QUO ANTE** - NEED - PRECEDENTS OF STJ - SPECIAL APPEAL DENIED. I - The matters related to arts. 1.062 of the Civil Code of 1916 and 1 of Decree-law n. 86.649 / 81 were not addressed by the appealed decision and no motion for



clarification was filed demanding a decision by the State Appellate Court on such matters. So, the necessary prequestioning is absent, being applicable Precedents 282 and 356 of STF; II - The return in whole of the amounts paid due to the termination of the promise of purchase and sale of real estate under construction signed with the bankrupt company ENCOL, with the participation of the appellant CARVALHO HOSKEN, is not admitted only in the event forbearance or nonpayment by the purchaser of the real estate restituted to the constructor who, as a refund for the administrative expenses, is entitled to a percentage of the amount paid.; III - In the case, however, the plaintiff/appellant made the full payment of the real estate even before the term established for its delivery and the default was by the appellant CARVALHO HOSKEN, who unilaterally terminated the promise of purchase and sale of real estate and transferred the property to a third party, and the plaintiff/appellee received nothing; IV - **Thus, it is nonsense that the appellant, which expressly assumed the obligations of the developer ENCOL, becoming both a developer and a constructor, retains part of the installments paid, since it was such part that gave rise to the termination. Precedents.** V - Special appeal denied<sup>26</sup>.

In light of the principles and objectives of the court-supervised reorganization, the precedents of the Superior Court of Justice have been acknowledging the jurisdiction of the court presiding over the court-supervised reorganization only for any measure that may affect the property of the companies being reorganized, given its universality and indivisibility. It should be noted, that such attractive force only occurs from the decision granting the processing of the reorganization<sup>27</sup> and lasts until the end of the procedure.

On the subject, Justice Castro Meira said:

In this case, the fate of the defendant company's property in the procedure of court-supervised reorganization cannot be reached by decisions rendered by a court other than that of the Reorganization, otherwise the operation of the place of business would be prejudiced, jeopardizing the success of the reorganization plan. That is the case even if the legal term of suspension provided in Paragraph 4 of art. 6, of Law n. 11.101 / 05 is exceeded, otherwise it would violate the principle of business continuity<sup>28</sup>.

In the same vein, Justice Luis Felipe Salomão said:

[...] is consolidated within the Second Section of this Court, which recognizes that it is the court where the court-supervised reorganization is presided-over that has jurisdiction to judge the cases in which **interests and assets of the company being reorganized are involved**, including for the continuation of the execution actions, even if the credit is prior to the granting of the court-supervised reorganization, and must therefore submit to the plan, otherwise it will make the reorganization<sup>29</sup> unviable.



The very STF declared:

Thus, in the bankruptcy procedure there is the court with exclusive jurisdiction over all claims and issues related to the estate, which attracts all actions that may affect the property of the company in the bankruptcy or court-supervised reorganization procedure. In short, it is the court with jurisdiction to preside over and judge all the demands that require a uniform decision and to be binding *erga omnes*<sup>30</sup>.

This attractive force, however, is not the same as the bankruptcy one. It should be interpreted more narrowly, that is, the court for the reorganization will have jurisdiction to decide on the issues that may affect the property of the debtor being reorganized, that is, only the assets belonging to this very debtor. It is also for this reason that the Superior Court of Justice issued Precedent 480, which states that “*the court with jurisdiction over the court-supervised does not have jurisdiction to decide on the constriction of assets not covered by the company’s reorganization plan*”, in the sense that property other than that of the company being recovered should not be managed by the court with jurisdiction over the reorganization. Thus, proceeds of wrongdoing that do not belong to the debtor being reorganized will not be subject to the reorganization procedure, nor to the respective court.

In cases of eviction lawsuits (asset belonging to the lessor and not to the debtor being reorganized), STJ has been repeatedly recognizing the lack of jurisdiction of the reorganization court, stating that “*the eviction lawsuit filed by the lessor owner against a company being reorganized is not subject to the jurisdiction of the court where the reorganization is pending*”<sup>31</sup>. The same reasoning applies to the proceeds of wrongdoing committed by the debtor, since those proceeds do not belong to them. They are property of the Union, due to the confiscation arising from a judgement or a settlement that anticipated such effects.

The restitution of the amounts that constitute the proceeds of wrongdoing, that are not part of the court-supervised reorganization, could occur both according to the proceeding set forth in articles 85 to 93 of Law 11.101 / 2005 and through the procedural instrument of third-party motion to stay execution, provided for in Articles 674 or 681 of the Code of Civil Procedure:

Art. 93. In cases in which a restitution claim is not applicable, the right of the creditors to file a third-party motion to stay execution is ensured, observing the civil procedural law.

As in court-supervised reorganization, the restitution of the proceeds of wrongdoing is applicable in bankruptcy procedure as will be explained in the following section.

## EFFECTS ON BANKRUPTCY

The collective nature of bankruptcy means that it comprehends all the creditors of the bankrupt and should also comprehend all of the bankrupt’s assets. In order to collectively satisfy the creditors, the assets of the debtor must be gathered and subject to the bankruptcy procedure. All existing assets of the bankrupt, or those eventually acquired during the bankruptcy process, are subject to the bankruptcy procedure.



Since the property of the debtor assures the fulfilment of their obligations (CPC / 2015 - art. 789) and in bankruptcy there shall be an attempt to pay all the obligations of the bankrupt, the natural consequence is that all of their property must be subject to the bankruptcy procedure. However, such a rule admits that the law provides for restrictions, that is, certain assets may be excluded from the reach of creditors. In this regard, article 832 of CPC / 2015 provides that “The assets considered immune from distraint or inalienable are not subject to execution.”

Thus, the effect of subjecting all assets of the bankrupt to the bankruptcy procedure will also admit exceptions. That is, assets that are absolutely immune from distraint and assets appropriated for a certain purpose are not subject to the procedure. Therefore, the assets that do not belong to the bankrupt will not be subject to the effects of bankruptcy even if such assets are in the possession of the bankrupt.

In a similar situation, in the case of adjudication of bankruptcy, the legislator protected the right of the owner of assets and values collected in the bankruptcy procedure or held by the debtor on the date of the adjudication of the bankruptcy by providing for the restitution claim, regulated in articles 85 to 93 of Law n. 11.101 / 2005:

Art. 85. The owner of the asset collected in the bankruptcy procedure or which is in the possession of the debtor on the date of the adjudication of bankruptcy may file a restitution claim.

It is clear from the wording of this article that the sole requirement is the existence of a right of ownership of amounts unduly collected or held by the bankrupt at the time of the adjudication of bankruptcy. It is a legal prerogative of the holder of the ownership right to exercise it in the context of the bankruptcy procedure, to which the public entity aggrieved by acts of corruption is entitled, in relation to the proceeds of wrongdoing, through adjustments of the bankrupt estate.

The main objective to be sought in the bankruptcy procedure is the satisfaction of as many creditors as possible within a legal order of preferences. In this search, the collection measures, liability actions and even declarations of ineffectiveness are included, with the adjustments imposed by the restitution claims and the third-party motions.

The restitution claim should be analyzed not as an isolated fact, arising from a casual situation, but as **a fact that makes the property consistency of the debtor’s assets anomalous, and may even lead to inconsistency**. It is worth noting that the legal truth about the title of the assets of the debtor’s property cannot be derived solely from a mere presumption arising of the simple detention by the debtor at the moment of the adjudication of the bankruptcy. **For this reason, it is necessary to deplete or allow to be depleted the debtor’s property from values that do not belong to them, that may appear as if they were in the act of collection or in the processing, and that could falsely add value to the bankruptcy estate if transferred.** (ALMEIDA, 2007, p.379) (Emphasis added)



In both cases, the discussion is centered on the **exclusion of the bankruptcy estate of everything that is not of the debtor's property**, in order to avoid its realization made by someone who is not the owner - *a non domino* (ALMEIDA, 2007, p.380) (emphasis added)

In this sense, the Federal Supreme Court issued Precedent 417, which provides that *"in bankruptcy, money held by the bankrupt, received in the name of another, or of which, by law or contract, the bankrupt would not have the availability, can be subject to restitution"*. If from the conviction, the sentenced party does not have these values available, as explained above, they are not subject to the bankruptcy procedure.

In addition, the right of restitution cannot be an opposition to the fact that the proceeds of wrongdoing consist of values and not of individually identified assets, according to the reasoning already presented above.

## CONCLUSIONS

Accordingly, the effective fight against economic and property crimes, such as corruption, required that the legal system provide for hypotheses of confiscation of the proceeds of wrongdoing. In addition, the transfer of ownership to the Government aggrieved by the unlawful conduct shall occur as of the conviction or act that anticipates its effects. Thereafter, the powers of the offender to dispose of the confiscated assets and values cease, and the prerogative of recovering them from those who unduly hold them passes to the new owner.

We therefore concluded that companies who had a share of their property confiscated by the practice of wrongdoings cannot include such amounts in the court-supervised reorganization plan or in the bankrupt estate, since they are no longer their property. Should this occur by mistake, the Government has the prerogative of receiving restitution with total primacy over the other creditors of the wrongdoer, as such prerogative derives from its ownership right and not from a credit right.

The central assumption of Law n. 11.101 / 2005 is that business entities that are subject to these procedures fulfill their social function in performing licit economic activities, and that is the reason why it would be desirable for society to preserve them. In this sense, the doctrines of Law n. 11.101 / 2005 do not seem to be subterfuges to elide, postpone, or prevent the restitution of the proceeds of wrongdoings committed by the companies.

From a practical point of view, if court-supervised reorganization and bankruptcy become the means to contravene measures aimed at fighting corruption-related wrongdoings, there will be inconsistencies in the legal system as well as distorted incentives for the continuity of corruption practices. In this situation, one of the indirect benefits foreseen from the current position is the incentive for agents to interact or negotiate with companies that require the adoption of rules and mechanisms of compliance sufficient to mitigate the risk that companies are involved in corruption schemes.



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## NOTES

- 1 This is the case of UTC, available at: <<https://goo.gl/U3Muaq>>; of OAS, available at: <<https://goo.gl/EciRhb>>; of Mendes Júnior, available at: <<https://goo.gl/t48DWR>>; of Galvão Engenharia, available at: <<https://goo.gl/M42MbL>>.
- 2 In this respect, refer to the news available at: <<https://goo.gl/cfrkkn>>.
- 3 Economic crimes are defined as those that aim at unlawful profit - whether profit in economic terms or commercial, and competitiveness advantages in a market. Thiago Bottino do Amaral sums up that “Economic crime causes non-individualizable, irreparable, uncontrollable damages and subject to a differentiated social perception. The goal is the economic profit, a commercial advantage, or the dominance of a market. The possibilities and facilities offered by the technological advance give rise to the appearance of conducts engaged on a large scale by complex organizations and of great damaging potentiality. The conducts engaged are difficult to identify. In some cases, the unlawful profit is disguised and regularized (“laundered”) in the financial system and other formal instances, acquiring the appearance of legality, hindering the determination and punishment of the crimes”(AMARAL, 2015, p.8).
- 4 “The metaphor “loss or forfeiture of assets” that the legislator chose is nothing more than the old “confiscation” that dates back to Ancient Rome and was maintained in some Brazilian constitutions and prohibited in other ones”. (Pereira, 2017, page 227).
- 5 “As regards the proceed of crime, it is what was directly achieved with the commission of the crime, such as the money subtracted from the bank or the collection of weapons taken from a collector. In addition to the proceed, it is possible for the offender to convert into other assets or values what he earned on account of the crime, giving rise to the confiscation. In this case, one speaks of the benefit of crime. E.g. the apartment purchased with the money stolen from the bank. In both situations, the forfeiture is automatic, resulting from a mere adverse judgement against who owned the proceed or benefit, regardless of whether the judge has pronounced himself in that respect (art. 91, II, b, CP)” (NUCCI, 2017, p.1028).
- 6 “The effective fight against this organized and globalized criminality requires the disablement of the unlawful profit, especially when this profit shows the appearance of legality, since this profit feeds and stimulates criminal organizations, allows the emergence of new delinquents attracted by the easy enrichment and can also generate corruption in the structure of the State. However, as pointed out above, classical criminal law has proved insufficient to respond effectively to this type of criminality, especially with regard to the traditionally used punishment system, that is to say, based exclusively on imprisonment or on the imposition of a fine. In this risk society, the punishment of confiscation shows to be an adequate and useful criminal measure, as well as very effective in fighting the unlawful profit derived from criminal activities”(CORRÊA JÚNIOR, 2006, p. 24).



- 7 This perception is clear in the excerpt from the opinion the judge-rapporteur of which was Justice Luiz Fux in the Extraordinary Appeal n. 638491, in which he ruled on confiscation in the context of crimes related to drug traffic: "In comparative law the confiscation is a doctrine of great applicability in the crimes of economic repercussion, under the bias that "crime should not pay", a perspective adopted not only by the Brazilian constitutional conventioneer but also by the Federative Republic of Brazil that internalized several international acts aimed at severely repressing drug traffic " (RE 638491, Judge-rapporteur: Judge LUIZ FUX, En banc court, judgement on 17/05/2017, ELECTRONIC APPELLATE DECISION GENERAL REPERCUSSION - MERITS DJe-186 DISC. 22-08-2017 PUB. 23-08-2017).
- 8 On the subject, specifically in the case of corruption, Fábio Ulhoa points out that "who provides the resources for corruption and who benefits the most from its results is the legal entity, generally a company" (COELHO, 2015, p.292).
- 9 "The punishment of loss of assets and values, provided for in the Federal Constitution (CF / 1988) and regulated by Law 9.714 / 1998, appears in this scenario as an appropriate penal alternative to some cases of economic and patrimonial crimes, in addition to those practiced by legal entities, among others, since it imposes a legal consequence that can be individualized, proportional, and similar in nature to the aggrieved legal interest. In addition, the enforcement of the above-mentioned punishment also encourages the compliance with the social rules in so far as annuls the benefit obtained from the unlawful conduct and further imposes an asset loss corresponding to the desired advantage" (CORRÊA JÚNIOR, 2006, p.33).
- 10 Article 91 of the Penal Code provided for the forfeiture of the proceeds of crime as generic extra-criminal effects of the conviction: "Art. 91 - The effects of the conviction are: II - the loss in favor of the Union, except for the right of the victim or a third party in good faith: (...) b) of the proceeds of the crime or any asset or value that constitutes a gain obtained by the agent with the practice of the criminal act". Based on this rule, the confiscation takes effect immediately and automatically after the entry of the adverse judgement that recognizes that any crime foreseen in the Brazilian legal system was committed and that the accused committed it, or from the performance of any settlement act by the State that legally anticipates the effects of the judgment, regardless of whether they are explicitly stated. These effects are maintained even with the termination of punishability by the revocation of the crime, and also reach the amounts equivalent to what initially constituted the proceeds of wrongdoing. It should be emphasized that the discussion about whether or not it is possible the execution of the sentence in the second degree of jurisdiction is limited to prison sentences and does not apply to the effects of the conviction.
- 11 The Penal Code provides for the possibility of confiscation not only of assets, but also of pecuniary values, even because the Code started to allow, after Law n. 12.694, of 2012, the decreeing of the loss of "values equivalent to the proceeds or benefit of crime when they are not found or when they are located abroad", in accordance with Article 91, Paragraph 1.
- 12 Penal Code: "Art. 91 (...)Paragraph 2 - In the events of Paragraph 1, the provisional remedies provided for in the procedural legislation may include equivalent assets or values of the suspect or accused for subsequent decree of loss" (Included by Law n. 12.694, of 2012).
- 13 The unlawful source of the resources to be confiscated matters. The United Nations Convention against Corruption provides: "Article 31 (...) 4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds. 5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds".



- 14 Federal Constitution: "Art. 5. (...) XLV - no punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and executed against them, up to the limit of the value of the assets transferred".
- 15 Also known as the Merida Convention, this Convention was internalized through Decree 5.687, dated January 31, 2006. In this regard, the preamble to the United Nations Convention against Corruption should be considered. Available in: <https://goo.gl/HqdSkm>.
- 16 Law n. 12.486 / 2013: Art. 19 Due to the practice of acts set forth in art. 5 of this Law, the Union, the States, the Federal District, and the Municipalities, through their respective General Counsels or judicial representation bodies, or the equivalent, and the Prosecution Office, may file an action to apply the following sanctions to the wrongdoer legal entities: I - forfeiture of assets, rights or values that represent the advantage or benefit directly or indirectly obtained from the offense, except for the right of the victim or a third party in good faith".
- 17 Law 8.429, of June 2, 1992: "Art. 12. Irrespective of the criminal, civil and administrative sanctions provided for in the specific legislation, the person responsible for the misconduct is subject to the following punishments, which may be applied alone or cumulatively, according to the gravity of the fact: I - in the event of art. 9, loss of assets or values unlawfully added to the property, full compensation for damages, when applicable, loss of the civil service, suspension of political rights from eight to ten years, payment of a civil fine of up to three times the value of the increase in the property, and prohibition of contracting with the Government or receiving benefits or fiscal or credit incentives, directly or indirectly, even through an intermediary legal entity of which they are a majority partner, for ten years".
- 18 In addition to these situations, it is worth mentioning the Decree-Law n. 3.240, dated May 8, 1941, which subjected to sequestration the assets of persons indicated for crimes that result in damage to the tax authority, with the possibility of also reaching assets held by third parties since they had acquired them unlawfully (DI PIETRO, MARRARA, 2017, 248).
- 19 It is also possible to foresee situations in which the partners have been convicted, as long as there is commingling of assets or interference of their unlawful activities in the activities of the company.
- 20 From the 1946 Constitution to the present constitutional order, there are provisions with respect to this relativization of the ownership interest (art. 5, XXIII, 170, 182, Paragraph 2 and art. 186).
- 21 "In addition, one cannot forget that freedom is a fundamental right of the human being, and yet it has always been subject to criminal intervention, and there is no reason to justify the inviolability of the ownership interest in the event of a criminal offense. It seems reasonable that although ownership should be the object of legal protection and guarantee, it cannot be broadly or more rigorously guaranteed than freedom or life. However, as already mentioned, freedom continues to be subject to criminal intervention by the State through imprisonment [...]" (CORRÉA JÚNIOR, 2006. p.195).
- 22 "Obviously, the ownership interest, especially when it has a business nature, must be subject to specific restrictions with which it shall comply, in accordance with the requirements of the common good, and will be subject to obligations that restrict it in order to restrain its misuse (Civil Code, art. 1.228, Paragraph 1)" (Pereira, 2017, p 108).
- 23 On the subject, Caio Mario describes the trend towards fragmentation of ownership interest: "Confronting the ownership interest in its Roman aspect with the conceptions that day to day take place, it is clear that a trend is concretely formulated in current opinion of jurists, distancing today's notions from classical concepts and



emphasizing a notorious line of evolution for an ownership regime unequivocally different from what it was in the past. In the midst of such trends, modern law knows a new ownership type, that of business ownership. With the concentration of economic power, it became necessary to give the ownership greater flexibility, allowing it to adapt to conditions of easier capital mobilization, reduction of tax charges, etc. On the other hand, certain ventures require enormous availabilities. As a result of all this, the company has been instituted as an economic organization, within which the rights of each are fragmented, and instead of the investor presenting himself as owner of assets of immense value, the *ius dominii* moves to the company, dispersed into a number of partners, or more commonly shareholders, and the rights expressed in securities represent a kind of naked ownership. In this way, property remains a subjective right and, without losing its individual characteristics, it is fragmented in turn. The company, which is managed by a controlling group, owns the stock of assets, sometimes of immeasurable value, while the individuals who contributed for the formation of financial resources have their rights restricted to the enjoyment of advantages, or reduced to the perception of a certain profitability (kind of usufruct). The ownership multiplies in terms of value while concentrated in the company; and at the same time diffuses in the faculty of fruition"(PEREIRA, 2017, pp. 91-92).

- 24 The event of direct access to shareholders' property depends on the occurrence of disregard of the legal entity.
- 25 Regional Federal Appellate Court of the 4th Region - 13th Federal Court of the Judicial District of Curitiba. Criminal Action N. 5000553-66.2017.4.04.7000, judgement, p. 113.
- 26 STJ - REsp: 1087447 RJ 2008/0191494-0, Rapporteur: Justice MASSAMI UYEDA, Judgment Date: 18/03/2010, T3 - THIRD PANEL, Publication Date: DJe 14/04/2010
- 27 STJ-AgRg in CC 117.216 / DF, Rapporteur Justice NANCY ANDRIGHI, SECOND SECTION, judgement on 12-6-2013, DJe 17-6-2013.
- 28 STJ - CC 79.170 / SP, Rapporteur Justice CASTRO MEIRA, FIRST SECTION, judgement on 10-9-2008, DJe 19-9-2008.
- 29 STJ - CC 106.768 / RJ, Rapporteur Justice LUIS FELIPE SOLOMÃO, SECOND SECTION, judgement on 23/09/2009, DJe 2-10-2009. In the same sense, STJ - AgRg in the EDcl in CC 99.548 / SP, Rapporteur Justice SIDNEI BENETI, SECOND SECTION, judgement on 23-2-2011, DJe 10-3-2011.
- 30 STF - RE 583.955, Rapporteur: Justice RICARDO LEWANDOWSKI, Full Court, judgement on 28-5-2009, GENERAL REPERCUSSION - MERITS DJe-162 DISC. 27-8-2009 PUB. 28-8-2009 REPORTS VOL-02371-09 PP-01.716 RTJ VOL-00212-PP-00570.
- 31 STJ-CC 148.803/RJ, Rapporteur Justice NANCY ANDRIGHI, SECOND SECTION, judgement on 26/04/2017, DJe 02/05/2017.