

Action oblique, setting aside collusive dispositions

1. Action oblique (creditor's derivative action)

- A creditor may exercise debtor's rights, if the debtor does not diligently pursue them and if their exercise is necessary to ensure satisfaction of the creditor's claim. Art 404
- Art. 1166 of French Civil Code: Les créanciers peuvent exercer tous les droits et actions de leur débiteur, à l'exception de ceux qui sont exclusivement attachés à la personne.

When?

- The debtor must be "insolvent", or,
- the creditor's claim must be closely connected to the debtor's right which is to be exercised by the creditor.
- un-assignable rights of the debtor are not to be exercised by the creditor

Features

- The creditor may not exercise rights which the debtor himself cannot exercise
- The creditor may exercise the debtor's rights against the wishes of the debtor.
- If, however, the debtor already exercises his rights, the creditor may not intervene.
- The creditor's right must exist and become due. (however, see Art 404(2))
- 67Da2440 (If the chain of real estate transaction collapses, the buyer at the end of the chain may claim damage from the seller at the beginning of the chain, on behalf of intervening parties), 83Gahap4501 (Assignee of the claim for key money may bring an eviction suit

against the tenant), 79Da1928(Purchaser of unregistered building may bring an eviction suit against squatters on behalf of the building owner)

- Res judicata, 74Da1664 (if debtor knew about the suit between his creditor and his debtor, the debtor shall be bound by the judgment of that suit.)
- Negotiorum gestio, Art 743 ff.

2. Setting aside collusive dispositions

- Transactions entered into by the debtor
 - after the creditor acquired the claim
 - which renders the debtor insolvent
 - (if the debtor is already insolvent) prefers only one or a few of the creditors above the others
 - any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court
- debtor's intent to prejudice creditors must be proven; however, the intent will be inferred once the objective nature of the transaction is demonstrated. 97Da57320
- the beneficiary is presumed to have the knowledge of the prejudicial nature of the transaction; but this is rebuttable presumption: the beneficiary of the debtor's disposition may resist the creditor's attempt to have the transaction set aside by demonstrating his good faith.
- if the beneficiary knowingly transfers the goods to a third party in good faith, the beneficiary will be required to disgorge the benefit (the transaction between the debtor and the beneficiary will be set aside).
- The creditor must bring a lawsuit against the beneficiary or the third party who, with the knowledge

that it would prejudice creditors, received the goods from the beneficiary.

- The lawsuit must be brought within a year from the date the creditor had the knowledge of the impeachable disposition (or, in any case, within 5 years from the transaction). Art. 406(2)
- 99Da2515(Registering the option will be regarded as impeachable disposition)