De rol van de curator bij de aanpak van onregelmatigheden: een empirisch-juridisch onderzoek naar de rol van de curator in de praktijk bij de aanpak van onregelmatigheden voor en tijdens faillissement

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Summary

THE ROLE OF THE BANKRUPTCY TRUSTEE IN DEALING WITH AND REDRESSING IRREGULARITIES

An empirical legal study into the role of the bankruptcy trustee in practice in dealing with and redressing irregularities before and during bankruptcies

Every year, several thousand to more than 10.000 companies are declared bankrupt in the Netherlands, depending on the economic situation. The purpose of the bankruptcy proceeding is to distribute the assets of those companies among its creditors. The total value of the claims of the creditors almost always greatly exceeds the value of the company's assets. In approximately 25% of the bankruptcies irregularities have occurred that caused the bankruptcy or increased the deficit in the estate. The societal damage caused by these irregularities is estimated at more than one billion euros per year.

Therefore, addressing irregularities before and during bankruptcies has been the focus of the legislator for decades. In this context, the legislative program 'Recalibration Insolvency Law' was announced at the end of 2012. One of the three main pillars of this program was to address bankruptcy fraud by creating a clear legal framework how to deal with and redress irregularities before and during bankruptcies. The legislator has given the bankruptcy trustee a central role in identifying and redressing irregularities. However, the task of the bankruptcy trustee is not without controversy, mainly because the bankruptcy community does not agree with the legislator's assumption that the task of dealing with irregularities is an extension of the bankruptcy trustee's core task of liquidating the estate in the interest of the joint creditors. After all, it is not always in the interest of the joint creditors to address irregularities, because in some situations the costs of investigating and redressing irregularities do not outweigh the (potential) benefits.

Against this background, the main reason for this research is the lack of insight into the way bankruptcy trustees deal with and redress irregularities in practice. This lack of knowledge complicates a proper assessment of the anecdotal criticism of some practitioners. The aim of this research is to formulate recommendations for a legal system that is more in line with the ambition of the legislator to prevent irregularities before and during bankruptcies, based on evidence from practice.

In view of the above, the main research question is as follows:

> *How can the impeding factors experienced in practice by bankruptcy trustees in dealing with and redressing irregularities before and during bankruptcies be eliminated in order to (better) match the ambition of the legislator to prevent irregularities before and during bankruptcies?*

To answer this question, part I of this book contains a report of my research into the policy theory of the legislator, in which I examine the ambition of the legislator in dealing with irregularities before and during bankruptcies. Based on research of the legislative history, I conclude in Chapter 2 that the aim of the legislator in preventing irregularities before and during bankruptcies is to encourage trustees to investigate and redress irregularities in order to create a preventive effect so that irregularities will be less likely to occur. In order to encourage the trustee, the legislator has formalized the trustees' task to investigate and redress irregularities in the Dutch Bankruptcy Act (DBA). In this respect, the legislator assumed that the bankruptcy trustee will always investigate any irregularities, report any irregularities found to the bankruptcy judge and take steps to redress these irregularities (see article 68(2) DBA). In chapter 3, I examine the task of bankruptcy trustees to deal with irregularities more extensively and explain the expectations by the legislator of trustees in that regard. I then discuss pluralism of interests in dealing with irregularities by examining the potential conflict between the interests of the joint creditors and the interests involved in dealing with irregularities.

Part II of this book reports on the findings of three empirical studies I conducted to assess the legislator's assumptions. In chapter 4, I report the results of a qualitative interview study among 33 Dutch bankruptcy trustees in which I asked them about their modus operandi in dealing with irregularities. The interview study culminates in my theory, in which I explain which factors play a role in the decision-making process of the bankruptcy trustee in dealing with irregularities. I then test this decision-making theory in two empirical studies. In Chapter 5, I describe the results of a document analysis of 2134 official bankruptcy reports, in which I examined the extent to which the possibility of redress is related to the bankruptcy trustee's decision to redress irregularities. Then, in Chapter 6, I discuss the results of a survey study among 177 Dutch bankruptcy trustees (30% of all trustees in the Netherlands). This study demonstrates the factors that influence the willingness of trustees to deal with irregularities. Together, these three studies provide insight into the way in which trustees deal with irregularities and the obstacles they experience in doing so.

In part III of this book, I address the fact-value gap. Chapter 7 contains the synthesis of the research. Firstly, the results show that there is a lack of consistency how bankruptcy trustees deal with irregularities. The trustees carry out their task of dealing with irregularities in (substantially) different ways

and do not agree on the way in which they should deal with irregularities. Roughly speaking, two groups of trustees can be distinguished: on the one hand, a group that does not consider dealing with irregularities to be part of their task and therefore only tackles irregularities if that is in the interests of the joint creditors, and on the other hand, a group that considers dealing with irregularities as core part of their task, even when this is not directly in the interests of the joint creditors. Secondly, the results of the studies show that the likelihood of irregularities being addressed depends on three dimensions: i) the financial situation of the estate, ii) the person of the bankruptcy trustee, and iii) the supervisory court and its bankruptcy judges. The chance that irregularities will be redressed depends on the possibilities of redress from the person who has acted unlawfully and the financial state of the estate in a specific bankruptcy (first dimension). In addition, a bankruptcy trustee's view of his duties, his financial position (within his firm) and his previous experience with the available instruments and with the follow-up of reporting fraud by the authorities determine to what extent the bankruptcy trustee is prepared to deal with irregularities (second dimension). Finally, the extent to which the supervising court and its supervisory judges encourage the bankruptcy trustee to deal with irregularities is related to the bankruptcy trustee's willingness to do so. In addition, the better the relationship between the court and the trustee, the more willing the trustee is to follow the view of the court.

On the basis of the obstacles encountered by bankruptcy trustees, I drew up recommendations in Chapter 8 to facilitate and stimulate trustees in dealing with irregularities. Firstly, I propose to ensure adequate compensation for the bankruptcy trustees' activities in dealing with irregularities, in order to prevent the financial state of the estate and the available remedies from becoming an obstacle for the trustees to tackle irregularities. I also see opportunities to facilitate bankruptcy trustees by placing less emphasis on efficient settlement and at the same time investing in a good relationship between the court and the bankruptcy trustee. As long as the courts assess the trustees in bankruptcy on their ability to maximize the assets of the estate at the lowest possible cost in the shortest possible time, the bankruptcy trustee will not always feel encouraged and facilitated to deal with irregularities. Secondly, I propose to encourage trustees to deal with irregularities by introducing guidelines for how they should deal with irregularities. These guidelines could include a protocol for conducting cause investigations and clarify which behavior qualifies as irregular and in addition explain when the bankruptcy trustee is expected to report fraud (possibly in addition to a civil proceeding). Clear and directional guidelines can prevent unwanted inconsistency and bias in the way irregularities are handled. In addition, guidelines ensure that the bankruptcy trustee's discretionary power is limited, resulting in less inconsistency in the way in which bankruptcy trustees deal with irregularities and less room for different perceptions of the task of the bankruptcy trustees. After all, the

current situation in which one trustee tries to address irregularities at all costs, while the other is not that committed, is undesirable.

In the concluding remarks of my research in Chapter 8, I suggest that encouraging bankruptcy trustees to take into account social interests, including dealing with irregularities, seems pointless if the Bankruptcy Act makes it impossible for trustees in practice to not only take those interests into account, but also allow these to be decisive in certain circumstances. In order to encourage bankruptcy trustees to take into account interests that conflict with the interests of the joint creditors, a fundamental revision of the primacy of creditors in bankruptcies seems necessary. As long as the efficient use of money and resources is a valid argument for bankruptcy trustees to refrain from dealing with irregularities, the aim of the legislator will never be achieved.