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The Status of a Judicial Supervisor in Restructuring Proceedings

Status nadzorcy sądowego w postępowaniu restrukturyzacyjnym

ABSTRACT

In restructuring proceedings, supervision over the debtor's assets is exercised by a judicial supervisor, who performs duties of significant importance not only for the arrangement proceedings. The effects of the judicial supervisor's actions have an impact not only on the manner and timing of satisfying the debtor's creditors, but in certain situations may influence the possibility of even partial satisfaction of the creditors. Therefore, an important issue is to determine the powers and duties of the judicial supervisor and thus his character and legal position in the arrangement procedure. The subject of this article is the presentation of the above issues and an attempt to determine the role that has been assigned to it by the legislator in the arrangement procedure.

Keywords: restructuring proceedings; judicial supervisor; creditor; arrangement proceedings

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INTRODUCTION

In the light of Article 3 (1) of the Restructuring Law,[1] the purpose of the restructuring proceedings is to avoid the debtor's declaration of bankruptcy by enabling the debtor to pay off his/her liabilities and continue running the company by concluding an arrangement with creditors, and in the case of recovery proceedings – also by carrying out remedial measures, while securing the legitimate rights of creditors. The aim of the arrangement proceedings is therefore to restructure the debtor's liabilities with the consent of the appropriate majority of creditors. It should be emphasized that in these proceedings, the debtor, as a rule, does not lose his/her powers over his/her own property.

Supervision over the debtor's assets is exercised by a judicial supervisor who performs duties of significant importance not only for the arrangement proceedings. The effects of judicial supervisor actions have an impact on the manner and dates of satisfying the debtor's creditors, but in certain situations, it may in general affect the possibility of at least partially satisfying them. Therefore, an important issue is to define the powers and duties of the judicial supervisor, and thus his/her nature and legal position in arrangement proceedings. The aim of this article is the presentation of the above issues and an attempt to define the role that was assigned to judicial supervisor by the legislator in the arrangement procedure.

PASSIVE LEGITIMACY TO PERFORM THE FUNCTION OF A JUDICIAL SUPERVISOR

Passive legitimacy to perform the function of a judicial supervisor is granted to a natural person who has full legal capacity together with a restructuring advisor license, as well as a commercial company whose partners are liable for the company's obligations without limitation with all their assets, or members of the management board representing the company holding a restructuring advisor license (Article 24 (1) of the Restructuring Law). Additionally, it should be emphasized that the Act of 4 July 2019 amending the Act on the license of the restructuring adviser and certain other acts[2] introduced the obligation to appoint persons holding a restructuring advisor license with the title of a qualified restructuring advisor to perform the function of judicial supervisor, if in the restructuring proceedings there is, as a party, an entity of particular importance for the economy, labor market, defense and state security. According to Article 38 (1c) of the Restructuring Law, this obligation applies, among others, to a large entrepreneur, which means an entity that

[1] Act of 15 May 2015 – Restructuring Law (Journal of Laws 2022, item 2309).
[2] Consolidated text, Journal of Laws 2019, item 912.

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is an entrepreneur other than a micro, small or medium-sized entrepreneur within the meaning of Article 7 (1) of the Entrepreneurs' Law,[3] as well as companies of significant importance to the economy of the state, included in the list specified in the secondary legislation issued on the basis of Article 31 (2) of the Act of 16 December 2016 on the principles of state property management.[4]

In the justification of the government bill, it is indicated that such a solution is aimed at limiting the cases of improper conduct of complex restructuring and bankruptcy proceedings by persons who, due to the lack of sufficient experience, could lead to serious complications, including the responsibility of the State Treasury for improper judicial supervision over the pending proceedings.[5]

Therefore, the above changes should be assessed positively, because a qualified restructuring advisor, in order to be able to participate in a complicated restructuring procedure, is required to demonstrate relevant experience, which should significantly reduce the number of ineffective procedures. According to Article 16a of the Act of 15 June 2007 on the restructuring advisor license,[6] such confirmation of qualifications is done by submitting documents confirming the conduct of bankruptcy, restructuring proceedings or property management of at least medium-sized enterprises in the last 7 years. It should be emphasized that the number of necessary procedures was built in a variant way, taking into account reorganization and bankruptcy proceedings, with the possibility of concluding an arrangement. It is necessary to conduct at least one proceeding concluded with an arrangement, therefore experience in bankruptcy liquidation proceedings alone is not enough.

ACTIVE LEGITIMACY FOR THE APPOINTMENT OF A JUDICIAL SUPERVISOR

The judicial supervisor is appointed in two types of restructuring proceedings – in accelerated arrangement proceedings and arrangement proceedings; however, the judicial supervisor is not appointed in proceedings for approval of an arrangement[7]

[3] Act of 6 March 2018 – Entrepreneurs' Law (consolidated text, Journal of Laws 2023, item 221).

[4] Consolidated text, Journal of Laws 2023, item 973.

[5] See Uzasadnienie rządowego projektu ustawy o zmianie ustawy o licencji doradcy restrukturyzacyjnego, ustawy – Prawo upadłościowe oraz ustawy – Prawo restrukturyzacyjne, Druk sejmowy nr 2089, https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2089 (access: 10.4.2023).

[6] Consolidated text, Journal of Laws 2022, item 1007.

[7] See Article 224 (1) of the Restructuring Law, which provides that the arrangement supervisor exercises the powers of the judicial supervisor from the date of the decision approving the arrangement to the date it becomes final.

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and remedial proceedings.[8] The participation of the supervisor in these proceedings is obligatory.[9]

The legislator provided three methods of appointing a judicial supervisor in restructuring proceedings. The first way is to appoint a judicial supervisor by the restructuring court in the decision to open arrangement proceedings (Article 38 (1) of the Restructuring Law). In such a situation, the substantive decision to appoint a specific person to act as a judicial supervisor rests solely with the court. The appointment of a judicial supervisor by a court decision results in the fact that upon the issuance of the order, the judicial supervisor is obliged to undertake actions assigned by law, under penalty of civil liability. In addition, the appointment does not result in a creation between the judicial supervisor (the entity designated as the judicial supervisor) and the court or the debtor or creditors of a civil law relationship the subject of which would be the provision of work or services.[10]

The second way is the appointment of a judicial supervisor by the court at the request of the debtor, with the consent of creditors having a total of more than 30% of the total amount of receivables, with the exception of the creditors referred to in Article 80 (3) and Article 116 of the Restructuring Law (Article 38 (2) of the Restructuring Law). The above method is an implementation of the assumption that in the restructuring proceedings creditors and the debtor should have a fundamental influence on the course of the proceedings, including the choice of the judicial supervisor. In many cases, the efficient and effective conduct of the proceedings requires that the function of the judicial supervisor be performed by a person with specific competences and experience (e.g. in the field of economic activity in which the debtor operates). The trust of the debtor and creditors in a specific person who will act as a judicial supervisor is also important for the effective conduct of the proceedings.[11] However, in this case the court has the right to refuse to appoint a person recommended by the debtor, if the candidate for a judicial supervisor does not guarantee the proper performance of duties.[12]

In addition to the above-mentioned methods, it is possible to appoint a judicial supervisor as a result of a resolution of the full board of creditors, when at least four members voted for, or as a result of a resolution of the board of creditors adopted in accordance with the debtor's request. In such a case, the court changes the judicial supervisor and appoints a person to perform this function who meets

[8] R. Adamus, *Prawo restrukturyzacyjne*. *Komentarz*, Warszawa 2019, p. 130.

[9] P. Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa 2020, p. 2007.

[10] P. Feliga, *Stanowisko prawne syndyka w procesie dotyczącym masy upadłości*, Warszawa 2013, p. 53.

[11] Uzasadnienie projektu ustawy – Prawo restrukturyzacyjne, Druk sejmowy nr 2824, https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2824 (access: 10.4.2023).

[12] R. Adamus, *op. cit.*, p. 130.

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the requirements referred to in Article 24 of the Restructuring Law, indicated by the creditors' council, unless it would be unlawful, grossly violate the interests of creditors or there is a reasonable assumption that the indicated person will not perform the duties properly. Only members of the creditors' council and the debtor may appeal against a court decision refusing to appoint a person indicated by the council (Article 133 (2) of the Restructuring Law). It is worth to emphasize that the above right of creditors is an expression of control, which they oblige to perform over the restructuring proceedings, and it is exercised only through the creditors' council, which must adopt a relevant majority resolution on this subject.[13]

LEGAL NATURE OF A JUDICIAL SUPERVISOR IN RESTRUCTURING PROCEEDINGS

The legislator distinguished three groups of entities appearing in the restructuring proceedings. In the second section from Article 14 to Article 21 of the Restructuring Law, the first group of entities was regulated, which included the court and the judge-commissioner, and possibly the deputy judge-commissioner. The entities from the first group are judicial authorities of the restructuring proceedings, although they have not been explicitly named as such. Then, the second group of entities is indicated in the third section from Article 23 to Article 64 of the Restructuring Law – it includes the arrangement supervisor, judicial supervisor and administrator, while the third group includes the debtor and creditors. The legislator clearly distinguished the last group of entities in the fourth section by describing them as "participants in the proceedings", not including entities from either the first or the second group. Thus, the judicial supervisor was placed by the legislator, without further specification, between the judicial authorities and the participants in the proceedings (from Article 38 to Article 50 of the Restructuring Law).

In the views of legal academics to determine the legal status of a judicial supervisor, theories relating to the legal position of a trustee were used, most of which were shaped in German legal literature at the turn of the 19th and 20th centuries. Two basic theories were developed: the theory of representation (direct replacement) and the theory of the office held.[14]

The first of them assumes that the deputy acts for and on behalf of the replaced person. Such a replacement may have two sources of authorization – it may be based on the act (statutory representation) or on a declaration of will represented (power

[13] P. Zimmermann, *op. cit.*, p. 1680.

[14] K. Korzan, *Stanowisko syndyka masy upadłości i jego kwalifikacje*, "Przegląd Prawa Handlowego" 1993, no. 5, p. 16.

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of attorney).[15] The position of a statutory representative differs from an attorney in that the represented person has essentially no influence on the appointment and election of a statutory representative, while the person represented decides about the choice and appointment of a plenipotentiary.[16] It should be noted that the judicial supervisor is not the debtor's attorney. A power of attorney as a legal act comes into effect through a declaration of will to be replaced. In turn, the appointment of a judicial supervisor is based on the actions of the court. The judicial supervisor cannot also be considered as the legal representative of the debtor, because the legal representative is obliged to act in accordance with the will of the replaced person, while the judicial supervisor, during performing statutory duties and exercising supervision, is independent of the debtor and may act against debtor's will, which is contrary to the essence power of attorney.[17] The judicial supervisor is also not the legal representative of creditors. The basis of the created theory of creditor substitution is the statement that since the judicial supervisor is to seek primarily to secure the interests of the debtor's creditors, it can be assumed that he/she thereby represents their interests and rights.[18] However, this theory should be rejected as it does not reflect the actual role and legal nature of the judicial supervisor in the proceedings, as the role of him/her is to act in the interests of both the creditors and the debtor.[19] After all, in restructuring proceedings we are dealing with a debtor who has ceased to pay debts as a result of objective and independent circumstances. There is therefore no justification for treating it differently than in the same way as creditors. At the same time, it also does not give grounds for recognizing that the role of the judicial supervisor is to represent and protect the interests of creditors in the restructuring proceedings.[20]

According to the theory of holding the office, the deputy takes steps in the proceedings on his/her own behalf, in the name of the replaced person (indirect substitution). One cannot agree with the statement that the judicial supervisor acts in such a role in arrangement proceedings, because, as it has already been shown before, the judicial supervisor does not act in court proceedings to represent the interests of creditors nor the debtor.

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[15] P. Feliga, *op. cit.*, p. 121.

[16] S. Rudnicki, [in:] *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, eds. S. Dmowski, S. Rudnicki, Warszawa 2003, p. 368.

[17] B. Jochemczyk, *Odpowiedzialność odszkodowawcza syndyka masy upadłości*, "Prawo Spółek" 2004, no. 10, p. 40; A. Hrycaj, *Syndyk masy upadłości*, Poznań 2006, p. 40.

[18] Cf. A. Szymański, *Stanowisko prawne zarządcy przymusowego*, "Polski Proces Cywilny" 1939, no. 7–8, p. 221 ff.

[19] A. Jarocha, *Sytuacja prawna nadzorcy sądowego w postępowaniu układowym*, Poznań 2003, p. 122.

[20] *Ibidem*.

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The views of the scholars and commentators, according to which the judicial supervisor is the body of restructuring proceedings, deserve the approval.[21] It should be clarified that the judicial supervisor is an extrajudicial body involved in the conduct of proper arrangement proceedings. The structure of the Restructuring Law speaks in favor of qualifying a judicial supervisor to the authorities of restructuring proceedings. Since the judicial supervisor is neither a judicial authority nor a participant in the restructuring proceedings, he/she should be included in the extrajudicial authorities of the restructuring proceedings, next to the arrangement supervisor and the administrator.[22]

The judicial supervisor is also a private entity performing official functions. The private nature of a judicial supervisor results from the legal status of the entity designated as a judicial supervisor, which may be a natural person or a commercial company, while the official quality of the function of a judicial supervisor should not be equated with an office, but with the competences of a judicial supervisor bearing the hallmarks of officiality.[23]

The science of law rightly emphasizes that the judicial supervisor – as the body performing official functions in relation to the debtor in restructuring proceedings – pursues the interest of the proceedings, which similarly like a lens, focuses the rightful interests of the debtor and creditors.[24] The judicial supervisor has no legal interest in ending the restructuring proceedings in favor of the debtor because he/she performs the function of an extrajudicial body for restructuring proceedings, which is related to perform on his/her own, defined by the act, supervisory and control powers, aimed at achieving the objectives of these proceedings. Ultimately, these goals come down to securing the legitimate interests of creditors and the debtor himself/herself for the duration of the arrangement proceedings. Expressing the consent of the judicial supervisor for the debtor to perform specific activities exceeding the scope of ordinary activities, in addition to assessment and reporting activities, is a form of security for participants in arrangement proceedings.

The above remarks make it possible to distinguish the legal status of a judicial supervisor (judicial supervisor as an extrajudicial body for restructuring proceedings) and the legal status of the entity designated as a judicial supervisor (judicial supervisor as a private entity performing official functions on an official basis).[25] Therefore, it can be concluded that in theoretical and legal terms, a judicial supervisor is characterized by a dualism of its legal position.

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[21] P. Zimmermann, *op. cit.*, p. 1463.

[22] As in S. Cieślak, *Czynności komornika sądowego w postępowaniu upadłościowym*, "Problemy Egzekucji" 2002, no. 20, p. 6.

[23] Cf. P. Feliga, *op. cit.*, p. 131.

[24] P. Filipiak, *Prawo restrukturyzacyjne*. *Komentarz*, Warszawa 2017, p. 181.

[25] *Ibidem*, p. 399.

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CONTROL AND SUPERVISORY COMPETENCES OF THE JUDICIAL SUPERVISOR

By definition, the main activities to which the judicial supervisor is appointed relate to the supervision of the debtor's actions with regard to his/her property, including the enterprise which is part of the arrangement estate (Article 38 (1) of the Restructuring Law). As part of supervisory activities, judicial supervisor is obliged to personally check the condition of the debtor's assets and the manner of securing the property against damage or removal by third parties. In order to fulfill this obligation, the judicial supervisor has the right to enter the debtor's real estate, view all books and documents, and demand from the debtor any explanations regarding his/her property and the state of the enterprise.[26] On the other hand, when it is found that the manner of the debtor's management does not guarantee the performance of the arrangement or irregularities in securing the property, the judicial supervisor should immediately notify the judge-commissioner, as he/she does not have the means of coercion.[27]

As part of the control performed, the judicial supervisor is obliged to verify the information provided by the debtor, in particular when there are reasonable doubts as to its truthfulness, in accordance with the properly applied Article 41 of the Restructuring Law.[28] Well-founded doubts may be indicated both by the content of the presented information and discrepancies in the documents presented by the debtor, deficiencies in the documentation, traces of its modification, as well as doubts and reservations reported by creditors. Obviously, this does not mean that the judicial supervisor is obliged to verify every single piece of information provided by the debtor, as it would be difficult within the time frame of the proceedings. It is about a thorough analysis and not ignoring the need to clarify the circumstances that raise doubts.[29]

The activities undertaken as part of supervision also include the consent to the activities of the debtor exceeding the scope of day-to-day management of the enterprise.[30] In accelerated arrangement proceedings and in arrangement proceedings, the management board is generally exercised by the debtor under the supervision of the judicial supervisor. Supervision is primarily manifested in the fact that after the appointment of a judicial supervisor, the debtor may only perform ordinary management activities, while the consent of the judicial supervisor is required to perform

[26] S. Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa 2020, p. 1119.

[27] F. Zedler, [in:] *Prawo upadłościowe i naprawcze*. *Komentarz*, eds. A. Jakubecki, F. Zedler, Warszawa 2010, p. 433.

[28] W. Gewald, [in:] *Prawo restrukturyzacyjne. Komentarz*, eds. A. Torbus, A.J. Witosz, A. Witosz, Warszawa 2016, p. 132.

[29] P. Zimmerman, *op. cit.*, p. 1473.

[30] *Ibidem*, p. 1469.

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activities exceeding the scope of day-to-day management, unless the law provides for the consent of the board of creditors (Article 39 (1) of the Restructuring Law).

Therefore, it should be considered that the judicial supervisor is not the administrator of the debtor's assets. The legal position of the judicial supervisor is characterized by a different role and scope of competence than, e.g., of a receiver appointed in bankruptcy proceedings. Hence, it can be assumed that the legal position of the judicial supervisor determines the type of restructuring proceedings in which it is established.[31]

The term "day-to-day management" appears in many legal acts. The science of law has not managed to create a uniform definition of this concept. In the doctrine, it is generally assumed that day-to-day management activities should be understood as dealing with current matters related to the normal operation of things and keeping them in a non-deteriorated condition within its current purpose.[32] Other activities should be included in the category of activities exceeding the scope of day-to-day management.

Undoubtedly, activities exceeding the scope of day-to-day management include the granting of proxy,[33] the renunciation of ownership of the real estate, sale or encumbrance of real estate or lease it, sale or encumbrance of premises, sale of the ownership right to a cooperative premises, sale or encumbrance of the enterprise, sale of means of production as fixed assets.[34]

In the literature – on the background of the previous legal status – the opinion was expressed that in case of doubts as to the nature of management activities, it should be assumed that a given activity exceeds the scope of day-to-day management.[35] However, in the opinion of S. Gurgul, in the area of bankruptcy law, the concept of activities exceeding the scope of day-to-day management should be understood more restrictively than in other areas of law due to the need to protect the interests of creditors.[36] This view also appeared in court jurisprudence, as the Supreme Court decided that in a situation where the debtor's obligations exceed his/her property several times, taking out loans in a significant amount in the course of the arrangement proceedings in order to expand the business activity, e.g. for new investment projects, is an activity beyond the scope of day-to-day management.[37] In

[31] P. Feliga, *op. cit.*, p. 399.

[32] See A. Kidyba, *Prawo handlowe*, Warszawa 2019, p. 251; F. Zedler, [in:] *Prawo upadłościowe i naprawcze…*, pp. 171–172; D. Zienkiewicz, [in:] *Prawo upadłościowe i naprawcze*. *Komentarz*, ed. D. Zienkiewicz, Warszawa 2006, p. 187.

[33] B. Kozłowska, *Udzielenie prokury*, "Przegląd Prawa Handlowego" 1996, no. 5, p. 25.

[34] S. Gurgul, *op. cit.*, p. 1117.

[35] F. Zedler, [in:] *Prawo upadłościowe i naprawcze…*, p. 172.

[36] S. Gurgul, *op. cit.*, p. 1117.

[37] Decision of the Supreme Court of 21 December 1998, III CKN 982/98, OSNIC 1999, no. 5, item 103.

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any case, the assessment of the nature of a given activity should be made in relation to the case, taking into account all circumstances, and not only the nature (name) of the activity, because the same activity (factual or legal) may, depending on the specific circumstances, be considered as an activity of day-to-day management or an activity exceeding the scope of day-to-day management.[38]

The legal doctrine assumes that the consent of the judicial supervisor is the consent of a third party within the meaning of Article 63 of the Civil Code.[39] Such consent may be expressed both before performing the action and after performing the action within 30 days from the date of its performance. If the judicial supervisor gives such consent in time, it should be assumed that the statement of the judicial supervisor has retroactive effect from the date of the debtor's actions. Moreover, if a special form is required for the validity of a legal transaction, the consent of the judicial supervisor should be submitted in the same form. It should also be assumed that an ordinary written form[40] is sufficient to refuse to consent to a specific legal transaction (e.g. refusal to consent to the conclusion of a real estate sale agreement).[41] The same effect has an ineffective expiry of the period of 30 days from the date of the act.[42] The consequence of the lack of consent of the supervisor is the invalidation of the legal act. In addition to the nullity of an activity beyond ordinary management, undertaken without the required consent, an additional sanction may arise against the debtor.[43] According to Article 239 (1) of the Restructuring Law, the court may, *ex officio*, repeal the debtor's own management and appoint an administrator, if the debtor, even unintentionally, violated the law in the management of the debtor, which resulted in harm to the creditors or the possibility of such harm in the future.

The consent of the judicial supervisor to the performance of the activities by the debtor does not exclude the need to comply with the obligation to obtain consent to perform the activities in accordance with the procedure resulting from the bankrupt's constitutional act (e.g. limited liability company agreement) or from the bill. For example, in accordance with Article 15 § 1 of the Commercial Companies Code the conclusion by a capital company of a credit, loan, surety or other similar agreement with a member of the management board, supervisory board, audit committee, commercial proxy, liquidator or for the benefit of any of these persons requires the consent of the shareholders' meeting or the general meeting, unless the law provides otherwise. According to Article 17 § 1 of the Commercial Companies

[38] S. Gurgul, *op. cit.*, p. 1117.

[39] P. Zimmerman, *op. cit.*, p. 1467.

[40] Cf. K. Mularski, Z. Radwański, [in:] *Prawo cywilne – część ogólna*, eds. A. Olejniczak, Z. Radwański, Warszawa 2019, pp. 387–398.

[41] P. Zimmerman, *op. cit.*, p. 1468.

[42] *Ibidem*, pp. 1467–1468.

[43] W. Gewald, *op. cit.*, p. 139.

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Code performing such an action without the required resolution causes its nullity. Appropriate consent may be given before or after the company submits the declaration, but not later than within 2 months from the date the company submits the declaration. The confirmation expressed after the declaration has been submitted has a retroactive effect from the moment the legal act is performed (Article 17 § 2 of the Commercial Companies Code). As a consequence, if the management board of a capital company under restructuring performs a legal transaction without the required resolution of the company's decision-making body with the consent of the judicial supervisor, then the legal transaction will be invalid.[44]

ASSESSMENT AND REPORTING COMPETENCES OF A JUDICIAL SUPERVISOR

The supervision performed by the judicial supervisor is accompanied by duties and powers in the area of assessment and reporting activities. The basic assessment and reporting obligations of a judicial supervisor are set out in Article 40 of the Restructuring Law. These obligations include notifying creditors about the opening of restructuring proceedings and drawing up a restructuring plan, with the minimum formal requirements of which are set out in Article 10 of the Restructuring Law and the list of receivables. The legal doctrine assumes that the restructuring plan should be prepared in a way that will enable creditors, supervisors and the court to analyze the restructuring proposal in the context of their feasibility, degree of risk and degree of compliance with the condition of the debtor's enterprise.[45]

The list of receivables is prepared in each restructuring procedure. The judicial supervisor prepares the list of claims in accordance with the requirements set out in Articles 76–86 of the Restructuring Law, based on the list of creditors submitted by the debtor together with the application for opening arrangement proceedings (Article 227 (1) (8) in conjunction with Article 265 of the Restructuring Law). However, it is required to verify it with the debtor's books and available documentation, because as a result of this verification, it may come to the conclusion that it should include claims that the debtor has not recognized. In such a case, the judicial supervisor should include these claims in the list of claims.[46] The debtor will then have the right to object to the claim being entered in the list.

Certain duties of the judicial supervisor are directly related to the conclusion of an arrangement with creditors. An important duty of the judicial supervisor in this respect is the assessment of arrangement proposals. Objective assessment of

[44] R. Adamus, *op. cit.*, p. 137.
[45] P. Zimmerman, *op. cit.*, p. 1391.
[46] *Ibidem*, p. 1470.

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arrangement proposals is made by the judicial supervisor in terms of legality and the possibility of their implementation, taking into account the actual financial capacity of the debtor and the assumptions of the restructuring plan. In the event that the assessment of arrangement proposals is negative, the scope of duties of the judicial supervisor is extended to advise on changing the proposal in order to ensure compliance with the law and the possibility of its implementation.[47]

The judicial supervisor is also obliged to take steps to ensure that creditors submit as many valid votes as possible. The wording of the legal provision indicates that this applies to votes submitted by creditors in writing. In such a case, the role of the judicial supervisor is limited to the control of the written ballots in terms of their formal status, if they contain the name and surname or the name of the voting person and whether the vote is for or against the resolution and whether it is cast in accordance with the rules of representation, in the case of legal entities. However, the wording "taking action" indicates that the legislator assigns supervisors a more active role in obtaining votes from creditors.[48]

Additional responsibility of the judicial supervisor is participation in the meeting of creditors, during which the judicial supervisor presents the main assumptions of the restructuring plan and submits an opinion on the possibility of implementing the arrangement. The opinion on the feasibility of the arrangement should contain information about the financial situation of the debtor and the possibility of implementing the arrangement to the extent that is needed to make a rational, economically justified decision to vote in favor of accepting or rejecting the arrangement proposals. Taking into account the fact that the restructuring plan is entered in the register, it should be considered whether the opinion on the feasibility of the arrangement should not be made available to creditors in this way.[49] It should be emphasized that the statement, theses and conclusions of the judicial supervisor constitute the basis for the creditors' decisions. It is obvious that creditors carry out their own analysis at the same time, but due to the lack of access to detailed information about the debtor's situation, it is the opinion of the judicial supervisor that may have a decisive influence on the position of the participants of the creditors' meeting.

Reporting competences are also connected with submitting to the judge-commissioner a report on the performed activities, as a rule, for each month of performing the function.[50] The minimum elements of the technical report are set out in Article 31 (2) of the Restructuring Law, but certain requirements may also be established by the judge-commissioner.[51]

[47] W. Gewald, *op. cit.*, p. 132.
[48] *Ibidem*.
[49] *Ibidem*, pp. 132–133.
[50] P. Zimmerman, *op. cit.*, p. 1449.
[51] R. Adamus, *op. cit.*, p. 119.

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Such a report shall at least include an indication of, i.a., whether the debtor pays the liabilities arising after the opening of accelerated arrangement proceeding or arrangement proceeding. It means providing information about the timely performance of obligations. In arrangement proceedings, this information is important from the point of view of the condition for discontinuation of the proceedings, as defined in Article 326 (2) of the Restructuring Law; in the case of accelerated proceedings, this information is important to determine whether they are not conducted to the detriment of creditors, which may constitute a condition for discontinuing the proceedings under Article 325 (1) (1) of the Restructuring Law.[52] The report of the judicial supervisor should also contain presented by the debtor the proceeds and expenses and the amount of cash in hand and in bank accounts at the beginning and at the end of the reporting period. These data, in particular, may illustrate the scope of the debtor's current operations, the effects of restructuring measures or exceptional events that took place in the reporting period. They also provide data on the debtor's financial condition.[53] The obligatory element of the report is also information on activities exceeding the scope of day-to-day management, for which the judicial supervisor has consented. The legal provision does not require providing the premises guided by the supervisor when consenting to given activities. In the event that the judge-commissioner has doubts as to the legitimacy or legality of a given activity, as part of the supervision he/she is exercising, the judge-commissioner will call the judicial supervisor to show in detail the legal grounds and motives which he/she was guided by when giving the consent.[54]

It should be emphasized that the report of the judicial supervisor, as a person not involved in the dispute between the creditor and the debtor, and therefore independent of them, is an important source of information. Thanks to the reports, both the court and the participants in the proceedings obtain reliable information about the debtor's assets.

THE ROLE OF THE JUDICIAL SUPERVISOR IN COURT PROCEEDINGS

The legal position of the judicial supervisor in proceedings relating to the composition estate is set out in Article 277 of the Restructuring Law. It shows that the judicial supervisor, by law definition, enters court, administrative, court-administrative and arbitration proceedings regarding arrangement estate. In civil cases, the judicial supervisor has the powers of a sideline intervener or a participant in proceedings to which the provisions on uniform participation apply accordingly

[52] A. Hrycaj, [in:] *Prawo restrukturyzacyjne. Komentarz*, eds. P. Filipiak, A. Hrycaj, Warszawa 2017, p. 211.

[53] M. Mozdżeń, [in:] *Prawo restrukturyzacyjne…*, p. 103.

[54] *Ibidem*.

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(Article 277 (2) of the Restructuring Law), while in administrative, court and administrative proceedings and before arbitration courts, the judicial supervisor has the rights of the party (Article 277 (3) of the Restructuring Law).

It should be noted that the law provisions of the restructuring law do not specify whether the judicial supervisor, when entering a civil case involving a debtor as a sideline intervener, uses the law of a sideline intervener on the basis of self-existent intervention or ordinary (non-self-existent) intervention. The distinction between these two institutions is so important that it has an impact on determining the effectiveness and scope of impact of activities undertaken by the supervisor.

The law provision of Article 277 of the Restructuring Law does not grant a judicial supervisor the legal status of a sideline intervener within the meaning of Article 76 of the Civil Procedure Code.[55] The statutory assumption of the institution of the auxiliary intervention[56] is to enable a third party to actively participate in the process taking place between two parties in order to protect its interest in the upcoming settlement of a civil case. The sideline intervener becomes an assistant to the party in relation to which – according to his/her interest – should be adjudicated favorably. Thus, the action of a sideline intervener in the trial may bring benefits not only to himself/herself, but also to the party to which the sideline intervener joined.[57] On the other hand, the judicial supervisor has no legal interest of his/her own, including that the case was resolved in favor of the debtor, which in the light of Article 76 of the Civil Procedure Code is a proper target for an auxiliary intervention.

On the above background, there is a problem of the nature in which the judicial supervisor should be heard. M. Allerhand expressed an unequivocal view on this matter, pointing out that although the supervisor is not an intervener or a party, he/she should be heard as a party, and if the judicial supervisor is not involved in the proceedings, he/she should be heard as a witness.[58] J. Jodłowski took a similar position, pointing out that the judicial supervisor uses the rights of a party in the trial, and therefore may be questioned as a party.[59] The position expressed by M. Allerhand seems justified, because according to Article 259 (4) of the Civil Procedure Code witnesses cannot be uniform participants, therefore the judicial supervisor cannot be a witness and should be heard as part of the evidence from the hearing of the parties.

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[55] Act of 17 November 1964 – Civil Procedure Code (consolidated text, Journal of Laws 2021, item 1805), hereinafter: CPC.

[56] See Articles 76–83 CPC.

[57] K. Flaga-Gieruszyńska, A. Zieliński, *Kodeks postępowania cywilnego*. *Komentarz*, Warszawa 2019, p. 186.

[58] M. Allerhand, *Prawo o postępowaniu układowym. Komentarz*, Bielsko-Biała 1995, p. 63.

[59] J. Jodłowski, *Czy pod rządem prawa o postępowaniu układowym nadzorca sądowy może być przesłuchany jako strona w sprawie osoby znajdującej się pod nadzorem?*, "Polski Proces Cywilny" 1935, no. 20, p. 636.

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The above-mentioned doubts do not mean that the legal status of the judicial supervisor is undefined. The judicial supervisor pursuant to Article 277 (2) of the Restructuring Law is the subject of civil proceedings which, in the arrangement proceedings with the participation of the debtor, occupies a legal position similar to that of a self-existent sideline intervener. Such a view was expressed by A. Jakubecki on the basis of Article 138 of the Bankruptcy and Reorganization Law, pointing out that the judicial supervisor appointed in composition proceedings has the status of a self-existent sideline intervener in civil proceedings, referred to Article 81 of the Civil Procedure Code.[60] It should be recognized that the judicial supervisor is primarily the debtor's procedural assistant,[61] but also obliged to guard in the trial, as well as in any other proceedings involving the debtor as a party, the interests of all creditors who are participants in the arrangement proceedings.[62]

This approach is also valid based on Article 277 (1) of the Restructuring Law. In particular, the considerations that the judicial supervisor has no legal interest of his/her own in settling the case in favor of the debtor remain valid. Therefore, it is correct to believe that granting a judicial supervisor the powers of a sideline intervener only means that his/her procedural status is determined by the provisions of the Civil Procedure Code on self-existent side intervention.[63] The basis for a judicial supervisor to enter the proceedings is not the protection of his/her own interest, as in the case of a sideline intervener.[64]

Another doubt concerns the way of understanding the term "ascends by virtue of law" contained in Article 277 (1) of the Restructuring Law. In the literature, this expression is considered a "right"[65] or "obligation".[66] Both views seem to be incorrect. The ascending of a judicial supervisor to proceedings relating to the arrangement estate may not be considered as a right or an obligation by operation of law. The permission to join the process should not be analyzed in the context of the permission to exit the process. The first situation takes place under the action of the court, and therefore regardless of the will of the judicial supervisor, and the second one is based on the statement of the judicial supervisor in the form of a withdrawal

[60] A. Jakubecki, [in:] *Prawo upadłościowe*..., p. 314.

[61] J. Klimkowicz, *Interwencja uboczna według kodeksu postępowania cywilnego*, Warszawa 1972, p. 11.

[62] S. Gurgul, *op. cit.*, p. 1224.

[63] A similar view was also expressed by M. Allerhand (*Prawo układowe. Komentarz*, Warszawa 1991, p. 65) and F. Zedler (*Prawo upadłościowe i układowe*, Toruń 1999, p. 337). These views remained valid despite the change in the legal status.

[64] A. Hrycaj, [in:] *Prawo restrukturyzacyjne*..., p. 904.

[65] D. Zienkiewicz, *op. cit.*, p. 331. The author, opting for the first view, assumed that such an approach was justified by the content of Article 65 of the Bankruptcy and Reorganization Law, which gave the judicial supervisor the right to withdraw from these proceedings.

[66] P. Zimmerman, *op. cit.*, p. 2007. In the opinion of this author, joining by operation of law is an obligation, and such a thesis is justified by the wording of the word "ascend".

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from the trial.[67] For the same reasons, it cannot be argued that joining the trial is the responsibility of the judicial supervisor.[68] The legislator has categorically assumed that joining the trial is not of a discretionary nature.[69]

In view of the above wording, doubts have arisen as to whether the judicial supervisor is obliged to submit a declaration of joining the case. According to S. Gurgul, the phrase "ascends by virtue of law" means that the judicial supervisor does not have to submit a declaration of joining the case, and the court does not have to issue any decisions in this regard. Accession takes place automatically by taking the first action required according to the status of the case or by appearing at the hearing.[70] However, in the opinion of P. Zimmerman, it is necessary not only for the judicial supervisor to submit an appropriate declaration of accession, but also for the procedural order to be considered desirable to issue an order admitting the supervisor to intervene.[71] The judicial supervisor will make such a declaration of joining the case because, according to the Author, it is his/her duty to join the proceedings. P. Zimmerman does not, however, decide what will happen if the supervisor does not submit a written statement. The question then arises whether the court may apply coercive measures to the judicial supervisor or the only action it may take in relation to such a supervisor is to notify the judge-commissioner about the failure to perform the duties by the judicial supervisor.

The only argument for accepting the obligation of the judicial supervisor to submit a written declaration of joining as a sideline intervener may be provided in Article 77 of the Civil Procedure Code, the obligation to report an auxiliary intervention in writing. On the other hand, it is difficult to agree with the statement that the need to inform the other participants about joining the trial by a sideline intervener justifies issuing an order admitting a judicial supervisor to participate as a sideline intervener, because the provisions of the Civil Procedure Code do not provide for the necessity to issue an order in the event of admitting a sideline intervener to participate in the trial. However, it is sufficient to allow the intervener to act in the case.[72]

When attempting to clarify the legal nature of a judicial supervisor's accession to the trial by virtue of the law itself, it should be emphasized that it is different thing for a judicial supervisor to join a *de jure* trial, and to join a *de facto* trial.[73] Joining the *de jure* process means that the judicial supervisor becomes the subject of civil proceedings relating to the arrangement estate upon the issuance of an order to open arrangement proceedings and remains so until the proceedings are legally

[67] P. Feliga, *op. cit.*, p. 403.
[68] *Ibidem*.
[69] *Ibidem*.
[70] S. Gurgul, *op. cit.*, p. 1225.
[71] P. Zimmerman, *op. cit.*, p. 1567.
[72] As in A. Malmuk-Cieplak, [in:] *Prawo restrukturyzacyjne…*, p. 705.
[73] P. Feliga, *op. cit.*, p. 405.

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terminated or until the judicial supervisor submits an application for a change of the person performing this function (Article 28 (1) (1) of the Restructuring Law).[74]

Joining the trial *de facto* constitutes a real participation of the judicial supervisor in the trial and takes place when the judicial supervisor actually takes part in it; it lasts until the judicial supervisor ceases to be the subject of civil proceedings.[75] The accession of a judicial supervisor to the process by virtue of the law itself is a procedural event consisting in the fact that on the date of the decision to open arrangement proceedings in which the management of the property still remains in the hands of the debtor, the judicial supervisor becomes the subject of civil proceedings relating to the arrangement estate, regardless of his/her will, taking a legal position on the debtor's side in these proceedings similar to that of a self-existent sideline intervener.[76]

Supervision performed by a judicial supervisor is reflected in the right to consent to the recognition, waiver of a claim, concluding a settlement or granting circumstances relevant to the case by the debtor in court, administrative, court-administrative and arbitration proceedings regarding arrangement estate.

Article 277 (4) of the Restructuring Law imply that the performance of actions such as recognition of a claim, waiver of a claim, conclusion of a settlement or granting of circumstances relevant to the case by the debtor without the consent of the judicial supervisor, does not have legal effects. It is about both substantive and procedural effects.[77] If the debtor performs a procedural act without the consent of the judicial supervisor in the form of recognition or waiver of the claim or the granting of circumstances relevant to the case, the court shall not take any action.[78] The court should continue the proceedings as if the declaration had not been submitted.[79] However, in the justification of the decision, it should explain why the procedural act undertaken by the debtor has no legal effects (Article 328 § 1 of the Civil Procedure Code). The situation is slightly different when the debtor intends to conclude a court settlement without the consent of the judicial supervisor. In such circumstances, the court should make an order declaring the settlement inadmissible, which is a challengeable complaint.[80]

It should be emphasized that the judicial supervisor, while exercising the intervener's rights, remains the judicial supervisor, whose task is, i.a., to consent to the debtor making dispositive acts. At the same time, the judicial supervisor cannot

[74] *Ibidem*, p. 403.
[75] *Ibidem*, p. 405.
[76] *Ibidem*, p. 403.
[77] A. Jakubecki, *op. cit.*, p. 315.
[78] P. Feliga, *op. cit.*, p. 405.
[79] P. Nazarewicz, *Stanowisko nadzorcy sądowego w procesowym postępowaniu cywilnym*, "Przegląd Prawa Handlowego" 1997, no. 5, p. 16.
[80] Resolution of the Supreme Court of 18 June 1985, III CZP 28/85, OSNC 1986, no. 4, item 48.

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perform these activities on his/her own, as the judicial supervisor is not a party to the trial.[81] Therefore, even with the approval of the parties and the court, it cannot take the place of the party.[82]

LIABILITY OF THE JUDICIAL SUPERVISOR

Another element enabling the status and legal nature of the entity performing certain functions or positions to be established is the issue of its legal liability. Pursuant to Article 25 (1) of the Restructuring Law, the judicial supervisor is responsible for damage caused as a result of improper performance of duties. In the literature on the subject, the prevailing position is that the legal basis for the liability of a judicial supervisor is the provisions about tort in Article 415 and ff. of the Civil Code.[83]

This is justified by the fact that it is a liability for improper performance of statutory obligations. In support of this position, there is also an argument that the judicial supervisor is not in any contractual relationship with either the debtor or the creditor, therefore the contractual liability regime is not applicable (Article 471 of the Civil Code). In his/her activities, the judicial supervisor is independent of both the debtor and the creditors, and in the performance of his/her functions the judicial supervisor is subject only to the supervision of the judge-commissioner. It follows that the basis of liability here is the principle of guilt, and this is a reprehensible decision of the perpetrator of the damage, referring to his/her unlawful act or omission.[84] Responsibility for improper performance of duties covers both intentional and unintentional fault, which means recklessness and carelessness.

Due to the fact that the issue of the liability of the judicial supervisor and the administrator has been regulated in the restructuring law in the same way as the liability of the receiver in bankruptcy law, it is worth referring to the position of the Supreme Court expressed on the basis of the Bankruptcy and Reorganization Law, which stated that the liability of the trustee in bankruptcy estate is responsible for tort, based on Article 160 (3) of the Bankruptcy and Reorganization Law. This provision made the liability of the receiver in bankruptcy conditional only on the fact of causing damage, if it was a consequence of improper performance of duties by the receiver (this is a liability based on the principle of fault).[85]

[81] P. Nazarewicz, *op. cit.*, p. 17.
[82] A. Jarocha, *op. cit.*, p. 96.
[83] P. Zimmerman, *op. cit.*, p. 1436.
[84] Z. Radwański, *Prawo zobowiązań*, Warszawa 1986, p. 151.
[85] Judgment of the Supreme Court of 12 May 2011, III CSK 222/10, LEX no. 964472.

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The provisions of the Act – Restructuring Law (similarly to the provisions of the Act – Bankruptcy Law) do not specify to whom the supervisor is responsible for the damage caused. However, it should be considered that it is liable to the arrangement estate, on behalf of which the debtor or the next administrator may submit a claim for damages. Such claims may also be made by the trustee in bankruptcy in the event of the debtor's bankruptcy. According to the circumstances, this liability may also arise in relation to the debtor himself, his creditors and creditors of the remedial estate. An individual creditor may, however, demand remuneration only for the damage that was caused only to him. The administrator (the successor of the person causing the damage) has the broadest powers, as he can sue for losses in relation to the entire property of the estate. Such claims may also be made by the bankruptcy trustee in the event of the debtor's bankruptcy.[86]

On the other hand, the judicial supervisor is not responsible for the truthfulness of the information provided to him/her by the debtor, instructed on criminal liability for providing false information for use in restructuring proceedings and for concealing information significant for the restructuring proceedings. However, this does not release the judicial supervisor from the obligation to reliably verify the information provided, in particular when there are reasonable doubts as to its truthfulness (Article 41 of the Restructuring Law). This provision imposes an obligation on the judicial supervisor to carefully check the information provided by the debtor. Attention should be paid to the lack of symmetry between the obligation of the debtor and the duty of the judicial supervisor. The debtor is obliged to provide true and complete information. This obligation cannot be fulfilled "partially" – the information provided by the debtor is either true and complete or does not have these qualities, which means that the debtor did not fulfill the obligation. In some ways, this obligation is similar to a commitment to effect. The duty of the judicial supervisor is the reliability of their verification, which should be associated with due diligence in the actions of the judicial supervisor. In this case, the model of performing diligence by a judicial supervisor is expressed in Article 355 §§ 1 and 2 of the Civil Code and the provision of Article 41 of the Restructuring Law indicating there are reasonable doubts as to the accuracy of the information.[87]

It is worth paying attention to the last sentence of Article 41 of the Restructuring Law, which stipulates that reliable verification of information by the judicial supervisor should take place in every case, and not only in the event of justified doubts. From the above, it is necessary to infer a higher degree of diligence of the judicial supervisor. The Restructuring Law indicates that the doubts of the judicial supervisor concern in particular the truthfulness of the information, while it seems to remain silent about the second required criterion of information provided by

[86] P. Zimmerman, *op. cit.*, p. 1436.
[87] W. Gewald, *op. cit.*, p. 134.

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the debtor, which is its completeness. The above can be assessed as an oversight by the legislator or an expression of a pragmatic view of economic information, limited cognitive possibilities in relation to the economic situation of the debtor. There should be no doubts that the analysis and reliable verification of information by the judicial supervisor also covers the issue of completeness of information, which may be difficult to determine.[88]

CONCLUSIONS

The judicial supervisor is an out-of-court judicial body of accelerated arrangement proceedings and arrangement proceedings, the powers of which mainly fall in two spheres: undertaking assessment and reporting activities as well as supervising and controlling the activities of the debtor. The debtor, as a rule, does not lose the authority over his/her own property, therefore the judicial supervisor cannot be regarded as the administrator of the debtor's property.

The primary task of the judicial supervisor is to present constant care over the debtor's affairs and property, as well as over the legitimate interests of creditors. As part of supervisory activities, the judicial supervisor is obliged to personally check the condition of the debtor's assets and the manner of securing the property against damage or removal by third parties. In order to fulfill this obligation, the judicial supervisor has the right to enter the debtor's real estate, view all books and documents, and demand from the debtor any explanations regarding his/her property and the state of the enterprise.[89] The activities undertaken as part of supervision include consenting to the activities of the debtor exceeding the scope of day-to-day management of the enterprise,[90] as well as the obligation to verify the information provided by the debtor, in particular when there are reasonable doubts as to its truthfulness.[91]

In civil proceedings, the judicial supervisor has the status of a self-existent sideline intervener, referred to Article 81 of the Civil Procedure Code, but is not an intervener. Granting the judicial supervisor the powers of a sideline intervener only means that his/her procedural status is determined by the provisions of the Civil Procedure Code on self-existent auxiliary intervention.[92] The basis for a judicial supervisor to enter the proceedings is not, as in the case of a sideline intervener, the protection of his/her own interest, but the performance of the function of an

[88] *Ibidem*.
[89] S. Gurgul, *op. cit.*, p. 1119.
[90] *Ibidem*, p. 1469.
[91] W. Gewald, *op. cit.*, p. 132.
[92] Similar opinion was also expressed by M. Allerhand (*Prawo układowe…*, p. 65) and F. Zedler (*Prawo upadłościowe i układowe…*, p. 337).

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organ of the proceedings.[93] It should be acknowledged that the judicial supervisor is primarily the debtor's procedural assistant,[94] but also obliged to guard in the trial, as well as in any other proceedings involving the debtor as a party, the interests of all creditors who are participants in the arrangement proceedings.[95]

The judicial supervisor is responsible for causing damage as a result of improper performance of his/her duties. The basis of its responsibility is the principle of guilt. Regardless of the above, it can be noted that the creation of a separate legal profession of judicial supervisor could contribute to the improvement of the quality level of the performance of duties by supervisors. It seems that an effective method of controlling the judicial supervisors, apart from judicial control, is to entrust the controlling to the supervisors operating within the self-government, which – apart from supervision – could also provide training and raising professional qualifications.

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[93] A. Hrycaj, [in:] *Prawo restrukturyzacyjne…*, p. 904.
[94] J. Klimkowicz, *op. cit.*, p. 11.
[95] S. Gurgul, *op. cit.*, p. 1224.

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ABSTRAKT

W postępowaniu restrukturyzacyjnym nadzór nad majątkiem dłużnika sprawuje nadzorca sądowy, który wykonuje obowiązki o istotnej doniosłości nie tylko dla postępowania układowego. Efekty jego działań mają wpływ na tryb i terminy zaspokojenia wierzycieli dłużnika, ale w określonych sytuacjach mogą w ogóle wpływać na możliwość choćby częściowego ich zaspokojenia. Wobec tego ważną kwestią jest określenie uprawnień i obowiązków nadzorcy sądowego, a tym samym jego charakteru i pozycji prawnej w postępowaniu układowym, a także zakresu jego odpowiedzialności za szkody, jakie może wyrządzić przy pełnieniu swojej funkcji. Przedmiotem niniejszego artykułu jest przedstawienie kluczowych kwestii wiążących się ze stanowiskiem prawnym nadzorcy sądowego oraz próba określenia roli, jaką przyznał mu ustawodawca w postępowaniu układowym.

Słowa kluczowe: postępowanie restrukturyzacyjne; nadzorca sądowy; dłużnik; postępowanie układowe

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