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THE AUTHORITY OF THE FINANCIAL SERVICES AUTHORITY REGARDING THE APPLICATION FOR POSTPONEMENT OF DEBT PAYMENT OBLIGATIONS FOR INSURANCE COMPANIES IN THE LEGAL CERTAINTY AND JUSTICE PERSPECTIVE

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Abstract

From a normative juridical perspective, the Financial Services Authority (OJK) grants the authority to apply for Postponement of Debt Payment Obligations (PKPU). On the basis of this authority, OJK has never given approval to creditors to apply for PKPU against debtor insurance companies. The research results show that normatively the space for creditors to apply for PKPU against insurance companies is closed and not possible. The Panel of Judges in PKPU Decision Number 389/Pdt.Sus-PKPU/2020/PN-Niaga.Jkt.Pst. applied the law as form of social control and social engineering. There is a need to update the PKPU application procedure which can be submitted by creditors. The main issues include the provisions regarding the bankruptcy application procedure in Law Number 40 of 2014 on Insurance apply *mutatis mutandis* to PKPU applications; Bankruptcy application procedures in OJK Regulation Number 28/POJK.05/2015 applies *mutatis mutandis* to applications PKPU; Addition of phrases to Article 2 paragraph (5) Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, namely "…….. or Creditors whose terms and conditions are regulated based on laws and regulations"; and Additional provisions in POJK Number 28/POJK.05/2015 , in the event that the OJK does not provide a response, the creditor can submit a PKPU or bankruptcy application directly to the Commercial Court.

Keywords: *Creditors; Application for Postponement of Debt Payment Obligations; Insurance Company*

1. INTRODUCTION

One of the instruments that can influence risk in using insurance is using insurance where it holds an important role, because aside from providing protection from possible losses that may occur, insurance gives a massive impetus towards the development of to other economic activities. The protection previously mentioned means that in the event of force majeurs such as: earthquakes, fires, war, strikes, along with others, then the risks mentioned will not become large losses which could cause the company to become bankrupt. This is one of the most important roles of insurance, in which it can provide protection against the outcomes of probable risks that threaten company owners/enterpreneurs in the future. As an indirect consequence of this protection, enterpreneurs do not hestitate in protecting their business or improving their capital, and thus, it provides a push to economic development in other fields.[1] In the face of rudimentary risks, the necessity for insurance services becomes increasingly noticeable, both by individual people and by the business field.[2]

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[1] Djoko Prakoso, *Hukum Asuransi Indonesia* (Jakarta: PT Rineka Cipta, 2004), 50.
[2] Santoso Poedjosoebroto, *Beberapa Aspek tentang Hukum Pertanggungan Jiwa di Indonesia* (Jakarta: Bharata, 1996), 82.

Insurance products are becoming more varied in nature in an effort to pull people's interest. Basic insurance has become less appealing as a risk-management tool despite it being insurance's main objective, due to people's preference for investments with guaranteed returns and future returns. Meanwhile, basic insurance is thought to only provide temporary protection. In the event of the risk of loss not occurring, the premium already paid will be forfeited. Insurance companies thought creatively in order to package insurance into more appealing forms, and thus Unit Link insurance was created — a fusion of insurance and investment. Investments in a Unit Link do not generate optimal growth when compared to separate investments, due to the high fees. Optimal investment within the first five years is not possible, because during that period of time investment returns are reduced by acquisition costs. Information pertaining to investment risks or to the costs incurred is often unknown to consumers, which happens due to agents who do not clearly explain crucial information to the insured. The higher the demand for link insurance, then the higher the risk sustained by the insured. The problems association with Unit Link insurance in Indonesia are significant, as seen in how in 2019, the Financial Services Authority (*Otoritas Jasa Keuangan*/OJK) received 360 complaints related to unit links, and the number of complaints increased by 65% to 593 in 2020, resulting in 2.4 million account holders having to close their insurance, and furthermore, out of 600 thousand insurance agents, around 200 agents were reported to be problematic.[3] One of the problems that occurred centered around PT Asuransi Jiwa Kresna, in which the Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang*/PKPU) issue against PT Asuransi Jiwa Kresna has pushed for change to be done, so norms for PKPU applications which were originally the authority of the OJK has become broader. This means that policy holders can now apply for PKPU and the PKPU application is granted by the judge. Another fact is that Anita Lie was a policyholder of PT Asuransi Jiwa Adisarana Wanaartha (AJDW), and AJDW has not disbursed Anita Lie's policy until September 11, 2020. For this reason, Anita Lie wrote to the OJK three times. However, these letters did not get responses, so Anita Lie sued the OJK at the State Administrative Court for their conduct. The lawsuit mainly states that OJK's conduct of not responding to Anita Lie's letter was a positive fictitious act in the sense that the OJK approves for Anita Lie to file for bankruptcy. Therefore, it is necessary to have new norms or additional norms to provide a legal umbrella for policyholders who want to submit PKPU applications.

2. RESEARCH METHODS

This research will be arranged through normative juridical research, which is a research method focusing on examining the application of rules or norms in positive law.[4] This paper uses descriptive analytical research specifications which aim to provide a description and an analysis regarding the implementation of applicable legal provisions and to provide a description of how the reality of the state of the object or problem in order to analyze it and then draw a conclusion from it.[5] This research uses secondary data, namely library material

[3] Ketut Sendra, *Konsep dan Penerapan Asuransi Jiwa Unit-Link: Proteksi Sekaligus Investasi* (Jakarta: Penerbit PPM, 2004), 13.
[4] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2006), 12.
[5] Ashofa Burhan, *Metode Penelitian Hukum* (Jakarta: PT Rineka Cipta, 2001), 19.

which includes official documents, library books, laws and regulations, scientific papers, articles, and documents related to the research material. The secondary legal material includes three parts, namely:

1. Primary Data
   Primary data is data obtained from field research, which means data obtained directly on the field from the direct source, namely respondents and informants.
2. Secondary Data
   Secondary data as an information source can include primary legal material, secondary legal material, and tertiary legal material. This writing includes secondary data, meaning library material that includes official documents, library books, laws and regulations, scientific papers, articles, and documents related to the research material. The secondary legal materials include three parts, namely:
   i. Primary Legal Material
      Primary legal material is legal material that is binding. Primary legal material used in this research consists of the following laws and regulations:
      1. Law No 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations (Bankruptcy and PKPU Law);
      2. Law Number 11 of 2011 on the Financial Services Authority (OJK Law);
      3. Law No 40 of 2014 on Insurance (Insurance Law);
      4. Financial Services Authority Regulation (POJK) Number 28/POJK.05/2015 on Dissolution, Liquidation and Bankruptcy of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies and Sharia Reinsurance Companies.
   ii. Secondary Legal Material
      Secondary legal material provides explanations of primary legal material, such as law drafts, results of research, works of legal scholars, and so on.
   iii. Tertiary Legal Material
      Tertiary legal material is material that provides hints and explanations on primary legal material and secondary legal material, such as dictionaries and encyclopedias.

3. ANALYSIS AND DISCUSSION

3.1. Regulations regarding Postponement of Debt Payment Obligations Applications by the OJK based on Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations

The OJK is a relatively new institution designed to closely supervise financial institutions such as banks, capital markets, mutual funds, finance companies, pension funds, and insurance. The main objectives of establishing the OJK are to increase and maintain public trust in the financial services sector; to enforce laws and regulations within the financial services sector; to increase public understanding of the financial services sector; to protect the interests of financial services consumers. The end target is to prevent a repetition of the financial crisis that occurred during 1997–1998.[6] Article 68 of the Law Number 21 of 2011 on OJK (OJK Law) explains that since the transfer of functions, duties, and authorities referred to in Article 55 and Article 67 Paragraph (1) of the OJK Law states that decisions regarding the granting of business licenses, individual licenses, the effectiveness of registration of statements, registered letters, approval to conduct business activities, ratification and approval or determination of dissolution, and any decisions that have been set by Bank Indonesia, the Ministry of Finance, the Capital Market, and Financial Institutions Supervisory Agency based on previous financial service sector laws and regulations before the transfer of functions, duties, and authorities as referred to in Article 55, are declared to still be valid. Several years after the Bankruptcy and PKPU Law was enacted, there have been several changes in terms of arrangements regarding parties who can file bankruptcy applications. After the enactment, the function of regulating and supervising Insurance Companies shifted from the Minister of Finance to the OJK. As a result, the submission process of bankruptcy statement applications against Insurance Companies also shifted into the OJK's authority. Article 2 Paragraph (5) of the Bankruptcy and PKPU Law stipulates that provisions regarding applications for a bankruptcy statement against insurance companies and reinsurance companies can only be filed by the Minister of Finance. In addition to the absolute right to file for bankruptcy against insurance companies and reinsurance companies, Article 223 of the Bankruptcy and PKPU Law also states the Minister of Finance's absolute right to file for PKPU *mutatis mutandis*, thus in the Bankruptcy and PKPU Law, the Minister of Finance has attributively been given absolute rights as the only party entitled to file for bankruptcy and PKPU against insurance companies and reinsurance companies.

As time went on, the OJK Law was issued and became the basis for the establisment of OJK as an institution, as well as the basis for transferring some of the Minister of Finance's authorities, namely the functions, duties, and authority to regulate and supervise financial services activities in the Capital Market, Insurance, Pension Funds, Financing Institutions, and Other Financial Services Institutions sectors, from the Minister of Finance and the Capital Market and Financial Institutions Supervisory Agency to the OJK.[7]

The Minister of Finance's authority granted by the Bankruptcy and PKPU Law in submitting bankruptcy and PKPU applications against insurance companies and reinsurance companies as stipulated in Article 2 Paragraph (5) *juncto* Article 223 of the Bankruptcy and PKPU Law has been transferred to OJK based on Article 50 of the Insurance Law. The Insurance Law partially abolishes the validity of Article 2 Paragraph (5) of the Bankruptcy and PKPU Law, in which Article 90 of the Insurance Law states that the right of the Minister of Finance to file for bankruptcy of insurance companies and reinsurance companies is declared invalid and has been transferred over to the OJK. Based on the mandate of Article 51 Paragraph (4) of the Insurance Law,

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[6] Otoritas Jasa Keuangan, *Buku Saku OJK* (Jakarta: Otoritas Jasa Keuangan, 2015), 38.
[7] Sutan Remy Sjahdeini, *Hukum Kepailitan: Memahami Undang Undang Nomor 37 Tahun 2004 tentang Kepailitan* (Jakarta: PT Pustaka Utama Grafiti, 2010), 29.

OJK has issued POJK Number 28 /POJK.05/2015, which specifically regulates the procedures for filing bankruptcy applications against insurance companies and reinsurance companies.

After analyzing the laws and regulations governing Bankruptcy and PKPU, especially against insurance companies, there is a legal vacuum found as there is no specific regulation regarding the process of filing PKPU applications against insurance companies and reinsurance companies. This can be seen in the Insurance Law and POJK Number 28/POJK.05/2015 which only focuses on the bankruptcy of insurance companies. Not regulating the submission of PKPU applications against insurance companies and reinsurance companies by OJK shows friction between the Bankruptcy and PKPU Law and Insurance Law. The Bankruptcy and PKPU Law has regulated PKPU applications against insurance companies, but according to the Insurance Law, there are no rules governing the procedures for PKPU applications against insurance companies by the OJK. Therefore, the rules of POJK Number 28/POJK.05/2015 also do not regulate in detail the procedures for PKPU applications against insurance companies and reinsurance companies. This situation can be categorized as a form of disrespancy inbetween the formation of laws and regulations. Given the functions and objectives of laws and regulations in all types and hierarchies must be interrelated, harmonious, in line, and with no overlap to realize a legal construction that is intact, effective, efficient, and comprehensive.

As part of the national legal system, the legislation must function to manifest a certainty of the law itself (legal certainty, *rechtszekerheid*) and all elements of the national legal system must ultimately support and synchronize with each other, with the aim of preventing and resolving problems that arise within nation, state, and society.[8] With the existence of regulatory disrespancies, the legal vacuum regarding PKPU applications against insurance companies and procedures for institutions authorized to apply for PKPU against insurance companies and reinsurance companies, can cause legal uncertainty for creditors of insurance companies, especially on the matter of settling debt problems fairly, quickly, openly, and effectively. On one hand, the presence of the Bankruptcy and PKPU Law, which was originally expected to act as an alternative legal tool in resolving problems between insurance and reinsurance companies, has not been able to provide space for a simple, fair, and certain settlement of legal problems between insurance companies and creditors of insurance companies. Thus, it is still necessary for the law to improve, and to add to the provisions for filing PKPU against insurance companies, including the parties authorized to submit PKPU applications as well as the procedures by taking into account the needs and legal developments in the community.

[8] Nomonsen Sinamo, *Ilmu Perundang-undangan* (Jakarta: Jala Permata Aksara, 2016), 3.

3.2. Implementation of Postponement of Debt Payment Obligation Applications by the Financial Services Authority against Insurance Companies

In modern society, insurance plays an important role in transferring risks, both business risks and non-business risks. The unpredictability of life requires a means of security for its actors, so that losses suffered due to risks (losses, loss of assets, accidents, and others) can be transferred to third parties as insurers. Insurance in modern society has increasingly been recognized for its benefits, due to large losses, both due to calculation errors and other factors, such as natural disasters. To ensure insurance companies can fulfill the rights of the insured, strict supervision by regulators is required. This is intended to increase public trust in insurance companies considering that in general the insured community is generally less knowledgeable on subjects relating to insurance. Regulators with their knowledge and authority manifest a climate that aims to provide protection for the insured and certain business continuity. In the institutional aspect, among others, regulators need to ensure that insurance companies are run by proper management as to ensure that there are directors who are responsible for managing company assets (which are insured public funds) with prudent principles so as not to jeopardize the company's financial health. In the aspect of business operations, regulators need to ensure the existence of healthy business practices.[9]

The OJK, as an institution with the authority to carry out the regulatory and supervisory functions of the financial services sector, also has independence in carrying out its duties. This is because it oversees financial services activities and financial transactions by business entities with potential conflicts of interest with other parties, including the government. For this reason, in carrying out their duties and authorities, regulatory institutions and the financial services sector, of course, are in a legal corridor that also ensures this independence can be held accountable.

The supervisory system carried out by OJK is an integrated regulatory and supervisory system, meaning all financial services activities carried out by the various financial institutions are subject to the OJK's regulatory and supervisory system in accordance with Article 5 of the OJK Law. Supervision activities of insurance companies are carried out by OJK on a regular basis using off-site inspection and on-site inspection supervision methods.

OJK has the authority to file for PKPU and Bankruptcy against insurance companies. OJK exercised the authority to file for bankruptcy against PT Asuransi Jiwa Bumi Asih Jaya (AJBAJ) based on Decision Number 04/PDT-SUS-Bankruptcy/2015/PN NIAGA JKT PST *juncto* Number 27/Pdt.sus.PKPU/2015/PN Niaga Jkt Pusat. Its authority is based on Article 2 Paragraph (5) of the Bankruptcy and PKPU Law *juncto* Article 55 paragraph (1) of the OJK Law *juncto* Article 90 letter b of the Insurance Law to file a bankruptcy petition against the Insurance Company. This case clearly shows that OJK only exercises its authority in conducting bankruptcy applications. This means until now OJK has never exercised its authority to submit a

[9] Badan Pembinaan Hukum Nasional Departemen Hukum dan Hak Asasi Manusia RI, *Laporan Akhir Pengkajian Hukum tentang Aspek Hukum Pemailitan Perusahaan Asuransi di Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional Departemen Hukum dan Hak Asasi Manusia RI, 2005), 48.

PKPU application, the conduct of OJK never exercising its authority over PKPU applications, there is the fact that creditors can submit PKPU applications against insurance companies as per Decision Number 389/Pdt.Sus-PKPU/2020/PN-Niaga.Jkt.Pst, where Lukman Wibowo as a PKPU Applicant submitted a letter requesting permission to a PKPU against PT Asuransi Jiwa Kresna to the Chairman of the OJK Board of Commissioners through a letter dated August 11, 2020, where in essence the letter asked the OJK Commissioner for permission in applying PKPU against PT Asuransi Jiwa Kresna, but he was not given a reply within the period specified by the OJK Law. Based on this decision, the panel of judges granted the PKPU application against PT AJK through Temporary PKPU for 45 (forty five) days. The OJK responded to the verdict through a Press Release Explanation of the Decision on Postponement of Debt Payment Obligations Against PT Asuransi Jiwa Kresna, which states that it objects to the verdict and will continue to supervise and oversee the financial restructuring process of PT AJK and the settlement of PT AJK policyholders' claims in order to continue to providing protection to its policyholders. Looking at the details, the OJK has only then exercised its authority to submit bankruptcy applications, when it has never exercised its authority to submit PKPU applications. It should be noted that PKPU has two fundamental aspects, namely that the debtor's assets cannot be forced or executed to directly pay the creditor's debt, and within the delay period the debtor can restructure the debt written in the settlement plan.[10] PKPU is a period of time given to debtors in delaying the payment of their debts. It gives the debtor great hope of repaying their debts. This is a contrast to a bankruptcy declaration, which reduces the value of the company, with a tendency to harm the company's creditors. Therefore, by giving the debtor an opportunity to restructure its debts, the debtor is able to carry out a composition (by rearranging the composition/its shareholder members) or reorganize in order to continue their business, so that they may pay off their debts and avoid bankruptcy.[11]

PKPU is a good solution not only for debtors to avoid bankruptcy, but also a social and economical solution for their employees and other creditors. With the successful restructuring of debts for debtors through the PKPU mechanism, the debtor's business will be able to continue operating, so at the very least employees are still able to work and not lose their livelihoods.

In the Bankruptcy and PKPU Law, Insurance Law and POJK Number 28/POJK.05/2015 clearly regulate the procedures for bankruptcy applications against insurance companies, including the division of authority of both creditors and OJK. Despite this, there is still a legal vacuum caused by the lack of rules governing the PKPU application process against insurance companies. Certainly, the regulations regarding PKPU are only regulated in the Bankruptcy and PKPU Law. This creates a disrespancy between the regulation and its implementation regulation, especially

[10] Darminto Hartono, *Economic Analysis of Law Atas Putusan PKPU Tetap* (Jakarta: Lembaga Studi Hukum dan Ekonomi Fakultas Hukum Universitas Indonesia, 2009), 1.
[11] Syamsudin M. Sinaga, *Hukum Kepailitan Indonesia* (Jakarta: PT Tatanusa, 2012), 281.

between the Bankruptcy and PKPU Law, the Insurance Law and POJK Number 28/POJK.05/2015.

Substantively, the provisions of Article 222 of the Bankruptcy and PKPU Law regarding the granting of PKPU also impose limitations as stipulated in Article 2 paragraph (1), namely, as PKPU applicants, the Debtors and Creditors must still be able to prove that there are more than one Creditors in the PKPU.

Thus, a PKPU application can be filed by one Creditor if they can still prove the existence of other Creditors who own receivables against the debtor. This conclusion is in line with the main principles contained in the Bankruptcy and PKPU Law, namely the *Paritas Creditorium* Principle, meaning that Creditors have the same position and rights to all assets of the Debtor.

The principle of parity creditorium also means that all assets of the debtor, whether in the form of movable or immovable property, as well as assets currently owned by the debtor and those that will be owned by the debtor in the future, are bound to the debtor's settlement.

Substantially, Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst, shows that the Panel of Judges has made a legal discovery in stating that the Applicant as an individual is authorized to file a PKPU application against PT Asuransi Jiwa Kresna.

This is clearly contrary to the provisions of Article 223 of the Bankruptcy and PKPU Law as well as the Insurance Law and POJK Number 28/POJK.05/2015, which stipulates that OJK is the only party entitled to submit bankruptcy and PKPU applications against insurance companies. With this decision, there is uncertainty regarding OJK as an institution authorized by law to submit PKPU applications.

Furthermore, when analyzing the Panel of Judges in deciding Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst, they adjudicated and poured effort in providing justice for all parties. The Panel of Judges examined the truth of the events submitted to it, considered an assessment of the event, and connected it with the applicable law before providing a conclusion by imposing the related laws on the case.[12] Laws made by legislators are generally abstract or contain some vagueness. Ideally, the law states the matter concretely, clearly, and in accordance with the development of society. When connected with Decision Number 389/Pdt.Sus-PKPU/2020/PN-Niaga.Jkt.Pusat, the judge granted the PKPU application submitted by the creditor against PT Asuransi Jiwa Kresna Company.

This decision is not in accordance with Article 223 *juncto* Article 2 paragraph (5) of the Bankruptcy and PKPU Law, even though Decision Number 389/Pdt.Sus-PKPU/2020/PN-Niaga.Jkt.Pusat has been annulled by Supreme Court Decision Number 647K/Pdt.Sus-Bankruptcy/2021. What is certain is that the decision has provided a new perspective in that creditors can apply for PKPU even if they do not respond to letters from creditors requesting permission to file PKPU against insurance companies.

[12] Wantjik Saleh K., *Kehakiman dan Peradilan* (Jakarta: Simbur Cahaya, 1976), 97.

In this Kresna Life Insurance case, the Panel of Judges with Decision 389/Pdt.Sus-PKPU/2020/PN-Niaga.Jkt.Pusat has made a legal formation based on the development of society, especially the current era developments of the insurance business.

3.3. Conception of an Ideal Arrangement Regarding the Application for Postponement of Debt Payment Obligations Against Insurance Companies

The insurance field's development followed is followed by the increasing use of insurance among the public. Of the many insurance companies standing in Indonesia as of now there are approximately hundreds of insurance companies with OJK licenses, as of December 31, 2015, insurance companies with OJK licenses consist of List of General Insurance Companies, Life, Reinsurance, Mandatory Insurance and Social Insurance. With details as follows:[13]

1. General Insurance = 76 (seventy-six) companies
2. Life Insurance = 50 (fifty) companies
3. Reinsurance = 6 (six) companies
4. Compulsory Insurance = 3 (three) companies
5. Social Insurance = 2 (two) companies

The characteristics of socialization in a society, especially the current modern society, require an institution or body that is willing to take care of the risks of society, both individual risks and collective risks. Rapid technological advances affect human life which can lead to increasingly expanding risks as well. Insurance Institution is one of the Institutions or bodies with the capability of taking over the risks of other parties. In today's modern society, insurance companies have very broad roles and a wide reach, because insurance companies heavily relate to social interests. In addition, it can also reach individual interests and community interests, and both individual risks and collective risks.[14] The importance of the rights of insurance companies' customers and insurance companies' other creditors means they need to be protected for several reasons, namely because of the large role the customers play in raising the insurance industry (with the collection of premiums) and the rights of other creditors that have not been fulfilled by insurance companies, then it is reasonable if the attention and legal treatment of customers and other creditors are put in a proper and fair place of importance. So far, the state of customers and other creditors has not received proportional attention in accordance with its role in keeping the insurance industry alive, as the position of customers and other creditors is weak in many situations due to the dominance of the insurer (insurance company) in determining the terms and specific promises in the insurance agreement with the default contract. In addition, customers and other creditors of insurance companies need legal certainty for the settlement of the obligations of

[13] "Daftar Perusahaan Asuransi Umum, Jiwa, Reasuransi, Asuransi Wajib Dan Asuransi Sosial," Otoritas Jasa Keuangan, accessed March 5, 2023, https://www.ojk.go.id/id/kanal/iknb/berita-dan-kegiatan/publikasi/Pages/Daftar-Perusahaan-Asuransi-Umum,-Jiwa,-Reasuransi,-Asuransi-Wajib-Dan-Asuransi-Sosial.aspx.

[14] Sri Redjeki Hartono, *Hukum Asuransi dan Perusahaan Asuransi* (Jakarta: Sinar Grafika, 2001), 8.

insurance companies. The issuance of the Bankruptcy and PKPU Law is the right momentum to strengthen the position of customers and other creditors of insurance companies with all its importance, both concurrent creditors and preferred creditors. The Bankruptcy and PKPU Law, Insurance Law, and POJK Number 28/POJK.05/2015 regulate the procedures for creditors who wish to settle their payment of obligations by insurance companies through bankruptcy. In its current implementation, the filing of a bankruptcy application against an insurance company is regulated in Article 2 Paragraph (5) *juncto* Article 223 of the Bankruptcy and PKPU Law. After the enactment of the OJK Law, which regulates the delegation of authority of the Minister of Finance to the regulation and supervision, especially of insurance companies, the authority to file PKPU and Bankruptcy applications has been transferred over to the OJK. The authority of the OJK is also emphasized in Article 50 of the Insurance Law which regulates the OJK as the only party entitled to apply for a bankruptcy statement. Article 50 Paragraph (2) of the Insurance Law provides that the rules regarding the procedures in applying for a bankruptcy statement are carried out in accordance with the provisions of laws and regulations, in this case the Bankruptcy and PKPU Law. Meanwhile, the procedures and requirements for creditors of insurance companies in submitting applications to the OJK are further regulated in OJK regulations, namely in POJK Number 28/POJK.05/2015. In this case, the customer is required to submit a request to the OJK so the OJK can then apply for a bankruptcy statement against the insurance company. OJK will then conduct an assessment and examination of the customer's application before deciding whether to approve or reject the customer's application.

To implement the provisions in Article 51 Paragraph (4) of the Insurance Law, the OJK issued POJK Number 28/POJK.05/2015. Article 52–53 of POJK Number 28/ POJK.05/2015 explains that based on the Creditor’s assessment on the insurance company meeting the requirements for bankruptcy in accordance with the Law on Bankruptcy and PKPU, submit an application to OJK addressed to the Chairman of the OJK Board of Commissioners with a copy sent to the Chief Executive of the Insurance Supervisor, Pension Funds, Financing Institutions, and Other Financial Services Institutions of the OJK so that the OJK can apply for a bankruptcy statement to the commercial court. PKPU applications by creditors to the OJK must be equipped with evidence of which supports the bankruptcy statement of the respondent insurance company. The application must be in writing, as well as submitted in digital format through electronic mediums such as a compact disk or things similar. The application shall be addressed to the Chairman of the OJK Board of Commissioners with a copy sent to the OJK's Chief Executive of the Insurance Supervisor, Pension Funds, Financing Institutions, and Other Financial Services Institutions. If the application is incomplete, the OJK will notify the creditor of what else must be fulfilled in the application, and the Creditor must revise the application within no later than 10 (ten) days since the notice was sent. If the application is still not completed, then the application will be considered void and then the OJK will return the application files to the creditor. Juridically, the options based on Article 55 Paragraph (3) of POJK Number 28 of 2015 still do not provide certainty and justice for creditors of insurance companies that have had their applications rejected by the OJK. Therefore, creditors whose rights have not been fulfilled still need legal remedies, one of which is to attempt administrative remedies through the State Administrative Court, as the author found within Jakarta State Administrative Court Decision Number 20/P/FP/2020/PTUN-JKT dated November 26, 2020 between the applicant Anita Lie, S.H., against the Financial Services Authority of the Republic of Indonesia (OJK) c.q. OJK Board of Commissioners.

To put briefly the background of the problem in the Jakarta Administrative Court Decision Number 20/P/FP/2020/PTUN-JKT, as a customer of PT Asuransi Jiwa Adisarana Wanaartha, the Applicant submitted a policy disbursement application to PT AJAW, but the applicant's policy never got disbursed; leading to the Applicant submitting a letter requesting that the OJK file a bankruptcy application against PT AJAW 3 (three) times, namely on September 11, 2020, September 24, 2020, and October 15, 2020. However, all these letters of request were not responded to by OJK, so following up on the provisions in Article 53 Paragraph (4) of Law Number 30 of 2014 on Government Administration, the applicant submitted an application to the State Administrative Court to obtain a decision agreeing to the application so that the OJK will file a bankruptcy application against PT AJAW.

Furthermore, Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst has become a means of legal reform, especially in regulations regarding the right and authority to file a PKPU application against insurance companies. This means that the judge has made law or carried out legal reform. To a certain extent, the order regarding the rights and obligations of the community can be engineered in accordance with the living legal values and sense of justice of the community.

And so there are laws and regulations that can fill the legal vacuum, such judicial decisions which can be categorized as legal rulings, especially in the meaning of 'law' as a means in reforming society.[15] One of the considerations is that the PKPU application was submitted by the creditor with the aim of both parties reconciling with each other, considering the condition of the debtor who will still be able to run his business properly so that he can fully fulfill his creditor obligations. Furthermore, the Panel of Judges in their consideration saw that between the Debtor and the Creditor there was an agreement plan to reconcile with each other which would later be outlined in a Settlement Proposal so that the Debtor will not become bankrupt. In further development, Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst was annulled by the Supreme Court based on Decision Number 647 K/Pdt.Sus-Bankruptcy/2021. The basis of consideration is that the Creditor who filed the PKPU application cannot be accepted because the Creditor does not have the authority to file an application (legal standing). The relation to the discovery of law is clearly mentioned by the Supreme Court. In essence, although the Judges have the authority to interpret law, such interpretation can only be justified if the norm of the provision is unclear and therefore needs interpretation.

When referring to Supreme Court Decision Number 647K/Pdt.Sus-Bankruptcy/2021, it is clear that the Supreme Court Judges' judgement is normative. This

[15] Bagir Manan, *Menegakkan Hukum Suatu Pencarian* (Jakarta: Asosiasi Advokat Indonesia, 2009), 169.

means that the Panel of Judges merely applies the legislation's provisions as they are to legal events. If the judge only applies the law as it is to the legal events that occur. If the judge only applies the law as it is, there will be no *rechtvinding* or legal discovery emerging from the court table. In practice, there is an idea that if the judge does not find a provision in accordance with the legal events, then they must ask for the opinion of legislators. This is not in line with the principle of law, as judges are prohibited from refusing to examine and decide cases on the grounds that there is no law, or the law is unclear.[16] Applying the law as it is in the context of law enforcement can be interpreted as a form that emphasizes procedural justice, where judges still emphasize aspects of regularity and the application of legal formalities alone. Substantive justice as a source of procedural justice is still partial and has not fully reached the ideas and realities that should be an intrinsic part of the concept of justice enforcement. As a result, law enforcement becomes lacking, or even unable to resolve the real crux of the problem. In the perspective of empirical studies, there are facts that PT Asuransi Jiwa Kresna and PT Asuransi Jiwa Adisarana Wanaartha did not pay their obligations, namely policy disbursements to policyholder customers. On that basis, the policyholder creditors submitted a request letter to the OJK against PT Asuransi Jiwa Kresna and PT Asuransi Jiwa Adisarana Wanaartha, but there was no response from the OJK. In accordance with their duties, the Panel of Judges, in adjudicating the two cases above should explore, follow, and understand the sense of justice that lives in society. If legal norms become no longer relevant to the development of society, then judges as law enforcers must create justice for society. Moreover, in the event that the legal norms become irrelevant to the development of society, judges must interpret the law themselves and find legal discoveries.

The judge's task in adjusting the rule of law to concrete events or the reality occuring in society (*Werkelijkheid*) is not easy, especially as it must properly place the three values of law, namely justice, legal certainty, and expediency.

In this topic it must be recognized that Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst is a breakthrough and a discovery of new law, because according to it Creditors can submit PKPU Requests against insurance companies, even if the decision was eventually overturned by the Supreme Court. The rejection of the lawsuit filed by Anita Lie at the Jakarta Administrative Court does not change the facts that there are insurance companies that do not carry out their obligations and that the Creditor's request to the OJK did not get an immediate response. In this case, Decision Number 389/Pdt.Sus-PKPU/2020/PN is an advancement that reflects the legal values and sense of justice that exists in society. This decision has the characteristics of a progressive legal discovery; visionary and courageous in rule-breaking done by foreseeing future developments in society.[17] It was noted that there was a legal vacuum in filing PKPU against insurance companies, based on the PKPU decision against PT AJK. In this particular case, laws and regulations that are unclear, incomplete, static, and unable to

[16] Bagir Manan, *Menegakkan Hukum,* 168.
[17] Muladi, *Hak Asasi Manusia: Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat* (Bandung: Refika Aditama, 2007), 47.

keep up with the development of society have allowed a legal vacuum to exist, one that has to be filled by the judges discovering the proper law. This can be done by explaining, interpreting, or completing the laws and regulations. The discovery of law by the judges does not solely concern the application of laws and regulations to concrete events, but also in creating law and forming its law at the same time. The vacuum of legal norms arising in the filing of PKPU against insurance companies by their creditors as well as the absence of authority and procedures regulated by the OJK against actual problems that needs to be solved.

An ideal form of regulation regarding PKPU applications against insurance companies must be based on the values of fairness and legal certainty. The OJK's authority based on the OJK Law needs to be stipulated, including the bankruptcy process which originally could be submitted by Bank Indonesia, the Capital Market Supervisory Agency, and the Minister of Finance. Article 55 Paragraph (1) of the OJK Law states that all functions, duties, and authorities for regulating and supervising financial services activities in the Capital Market, Insurance, Pension Funds, Financing Institutions, and other Financial Services Institutions sectors are transferred from the Minister of Finance, the Capital Market, and Financial Institutions Supervisory Agency to the OJK. Likewise, the bankruptcy filing process by Bank Indonesia is now also the authority of the OJK. This authority has been confirmed in POJK Number 28/POJK.05/2015.

The OJK's authority to file PKPU and Bankruptcy against insurance companies needs to be strengthened in order to create legal certainty, so that there will be no more court decisions such as Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst. Therefore, it is necessary to amend the relevant laws and regulations. With legal certainty, the insurance industry will be more orderly and well managed. The authority given only to the OJK in applying for PKPU and Bankruptcy against insurance companies must be reviewed to increase legal certainty for insurance company customers or creditors. In accordance with Article 28D of the Constitution of the Republic of Indonesia, customers of insurance companies or their creditors are entitled to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law. In this case, the OJK's authority to file PKPU and bankruptcy against insurance companies can create discrimination against customers or creditors if in the future insurance companies do not carry out its obligations as stated in the agreement, which is a legal relationship between the insurance company and its customers or creditors.

In essence, PKPU aims to encourage settlement between debtors and their creditors and avoid debtors who have or will go through insolvency from bankruptcy. To apply for PKPU and bankruptcy against insurance companies, it is necessary to pay attention to the legal relationship between insurance companies and their customers or creditors based on the agreements that bind them. There is a necessity to provide the right for customers or creditors to file legal remedies against acts of default or negligence of the insurance company. In practice, the authority to submit PKPU applications against insurance companies is only given to the OJK. Institutionally, the OJK's authority to apply for PKPU and bankruptcy against insurance companies needs to be improved, changed, and added by giving rights to insurance company customers or creditors. The goal is that if the insurance company defaults on the customer, the customer should be able to take various forms of legal action. The ideal concept in filing a PKPU application against an insurance company can be constructed by adding more rules in the procedure. Among them is delegating the authority to apply for bankruptcy and PKPU from OJK to creditors of insurance companies. The basis of justification is the legal relationship between insurance companies and creditors based on the agreements that give rise to rights and obligations to each party. Bankruptcy and PKPU adhere to principles of these agreements, so the right of creditors to file a petition must be recognized and confirmed. This is a means of resolving debt and credit problems or obligations that arise and are not fulfilled by insurance companies. In the Bankruptcy and PKPU Law and the Insurance Law, the authority of creditors to file for bankruptcy and PKPU against insurance companies must be regulated and explicitly confirmed in norms. In other words, the authority becomes part of the rights and obligations arising between the insurance company and the creditor of the insurance company in accordance with the principle of agreement, which is the basis for the legal relationship of the parties as stipulated in Article 1338 of the Civil Code.

This means that every creditor has the right to recognition, guarantee, protection, and legal certainty that is fair and equal before the law, as stipulated in Article 28D of the 1945 Constitution of the Republic of Indonesia. What is certain is that from the perspective of creditors, the Bankruptcy and PKPU Law and the Insurance Law do not offer equal rights in filing for PKPU legal remedies, while legal remedies are basic rights owned by every citizen.

Along with the right of creditors to conduct PKPU legal remedies against insurance companies, it is also necessary to develop a mediation process by the OJK. In this case, if the insurance company defaults on its creditors, it will be necessary to first conduct mediation through the OJK. The OJK's role as a mediator is very much in line with its duties and functions to supervise and regulate insurance. If in mediation, a settlement agreement occurs, it can be confirmed in the agreement between the creditor and the insurance company. The OJK's incumbent role as a mediator is an available function based on the law for the settlement of debts and receivables of insurance companies against their creditors. The settlement agreement must fulfill the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code. In its implementation, the agreement must also be imposed with the principles of agreement law, one of which is the principle of the binding force of the agreement (*pacta sunt servanda*) as stipulated in Article 1338 of the Civil Code. The principle of *pacta sunt servanda* is considered as law by the parties to the agreement.[18] Therefore, it is necessary to improve the rules relating to:

1. Bankruptcy applications under the Insurance Law apply as *mutatis mutandis* to PKPU applicants;

[18] Purwanto, "Keberadaan Asas Pacta Sunt Servanda dalam Perjanjian Internasional," *Jurnal Mimbar Hukum* 21, no. 1 (2009): 157. https://doi.org/10.22146/jmh.16252.

2. Bankruptcy applications in POJK Number 28/POJK.05/2015 apply *mutatis mutandis* to PKPU applications;
3. Amendment to Article 2 paragraph (5) of the Bankruptcy and PKPU Law by adding a phrase, in which the meaning become as follows: "In the event that the Debtor is an Insurance Company, Reinsurance Company, Pension Fund, or State-Owned Enterprise engaged in the public interest, the application for bankruptcy declaration may only be submitted by the Financial Services Authority or Creditors whose terms and conditions are regulated under the laws and regulations";
4. The addition of provisions in POJK Number 28/POJK.05/2015, of which confirms that if a creditor's request to file a Bankruptcy or PKPU application against an insurance company as stipulated in Article 54 Paragraph (1) does not get a response from OJK, then the creditor can submit a PKPU or Bankruptcy Application directly to the Commercial Court; and
5. The addition of provisions in POJK Number 28/POJK.05/2015 that PKPU application efforts can be submitted in groups with the same interests.

All of them are intended to provide legal certainty for creditors of insurance companies and insurance companies. The thought is based on the consideration in the meaning of PKPU is to strive for insurance companies to continue business activities and certainty of payments to insurance creditors as outlined in the peace proposal. Thus, in addition to legal problems that can be resolved properly, creditors are given the opportunity to submit PKPU applications to insurance companies in order to obtain justice and legal certainty.

4. CONCLUSION

In a juridical normative approach, the OJK was established to organize all activities in the financial services sector in an orderly, fair, transparent, and accountable manner. Based on the OJK Law, a set of authority of the Minister of Finance is transferred to the OJK. One of these authorities is the authority to apply for PKPU against insurance companies. The Bankruptcy and PKPU Law also emphasizes that PKPU applications to insurance companies and reinsurance companies are the authority of the Minister of Finance, which has now been transferred to the OJK. This provision limits the right for creditors and customers of reinsurance companies to directly apply for PKPU and Bankruptcy if there is ever an act of default or negligence committed by the insurance company. With the development of the insurance business in Indonesia and to provide protection to insurance customers, especially in order to build a level of public trust in insurance companies, if the insurance company commits an act of default, creditors and customers need a legal basis in order to make legal efforts to file a PKPU application. In this regard, because the application for PKPU against insurance companies normatively can only be submitted by the OJK, the legal space for PKPU applications against insurance companies by creditors or insurance customers is legally closed or impossible.

In line with the development of the insurance field in Indonesia, there are many insurance companies that commit acts of default against their customers and creditors.

Therefore, customers need to be able to take legal remedies in various forms. Referring to the Court Decision on the PKPU case of PT Asuransi Jiwa Kresna, it is apparent that the panel of judges has made legal findings as a form of social control as well as social engineering. Creditors or insurance customers are allowed by law to apply for PKPU through the court decision, and even though the decision of the commercial court was canceled by the Supreme Court, there is still an urgent need to regulate the rights and authority of creditors or insurance customers to apply for PKPU if their interests are threatened by insurance companies comitting default.

In terms of its purpose, the PKPU instrument is basically not intended for the benefit of the debtor alone, but also for the benefit of its creditors. Therefore, the authority to apply for PKPU should not only be given to the OJK. In this regard, several cases have risen due to OJK's conduct of not responding appropriately to PKPU applications submitted in writing by insurance creditors. Among them are Creditors of PT AJAW and Creditors of PT AJK, who have sent letters 3 times to the OJK, but did not receive any response. The OJK's conduct made the creditors of PT AJAW file a lawsuit to the State Administrative Court, but it was rejected because the case was not under the State Administrative Court's authority (Decision Number 20/P/FP/2020/PTUN-JKT). Meanwhile, PT AJK's creditors filed a PKPU application with the Central Jakarta Commercial Court (Commercial Court Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst) on the grounds that PT AJK had committed an act of default. Although the Commercial Court Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst has been annulled based on the Supreme Court Decision Number 647K/Pdt.Sus-Bankruptcy/2021, this does not eliminate the existence of legal uncertainty in the insurance field in Indonesia, especially in the event of default by the insurer, namely not paying premiums to policyholders. It should be noted that before being overturned by the Supreme Court, the decision of the commercial court was a form of legal discovery in the PKPU application procedure, which originally by law could only be submitted by the OJK, based on the Court's decision it could be submitted by Creditors or insurance customers. What is certain is that the Decision Number 389/Pdt.Sus-PKPU/2020/PN Niaga Jkt.Pst can be a rationale for providing legal standing to creditors or insurance customers to submit PKPU applications against insurance companies through the needed regulatory amendments.

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