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THE POSITION OF COLLATERAL ASSETS OWNED BY THIRD PARTIES IN THE MANAGEMENT AND ADMINISTRATION OF BANKRUPTCY ASSETS

Rufina Astuti Sitanggang*, Udin Silalahi, Jamin Ginting

Faculty of Law Universitas Pelita Harapan, Indonesia,
Faculty of Law Universitas Pelita Harapan, Indonesia,
Faculty of Law Universitas Pelita Harapan, Indonesia,
astuti_sitanggang@yahoo.co.id

Abstract

Collateral serves as a guarantee for debt, with third parties often acting as guarantors or providing collateral that is not the debtor's asset. When debtors file for bankruptcy, they may include third-party assets as collateral. The issue arises when these third-party assets are listed as bankruptcy assets, leading to conflicting court decisions—some include them as part of bankruptcy assets, while others do not. This dualism undermines legal certainty. The purpose of this research is to analyse the regulation regarding the position of collateral assets belonging to third parties in the management and administration of bankruptcy assets in Indonesia; the application of arrangements regarding collateral assets owned by third parties in the management and administration of bankruptcy assets in Indonesia; and legal certainty regulated over collateral assets belonging to third parties in bankruptcy in Indonesia. This research uses normative-juridical research with a statutory and conceptual approach with the analytical tools of agreement theory, legal certainty theory, and legal protection theory. Regulations regarding these issues are contained in Article 21 of Law Number 37 of 2004 and the guarantee agreement as an accessory agreement, Law Number 4 of 1996, Law Number 42 of 1999 and Book II and Book III of the Civil Code. The application of collateral payments owned by third parties in Indonesia's bankruptcy assets management and administration is currently has dualism. Pointing out that there are decisions that either declare collateral assets as bankruptcy assets or not, based on allegations and suspicions about ownership and the intention to accelerate the management and administration process. To address this, Article 21 of Law Number 37 of 2004 should be amended to clarify that bankruptcy assets are the assets of the bankrupt debtor and that collateral assets belonging to third parties are not included in bankruptcy assets as an affirmation of the previous provision.

Keywords: *Bankruptcy Estate; Collateral Assets Owned by Third Parties; Dualism*

1. INTRODUCTION

In the context of Indonesian bankruptcy law, the term 'bankruptcy' is derived from the word *'pailit'*, and the main concept is that of debt.[1] The notion of bankruptcy is inextricably linked to that of debt, as the former pertains to obligations that are both due and payable. The objective of this legislation is to provide formal guidance on the settlement of debts that are due and payable, particularly in instances where the debtor has multiple creditors.[1] One of the primary objectives of this legislation is to guarantee a fair and equitable distribution of payments among creditors, contingent on the extent and magnitude of the debtor's outstanding obligations.

It is therefore crucial to incorporate the definitions of bankruptcy and debt into a single legislative instrument that addresses this matter, namely Law Number 37 of 2004 on

Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as Bankruptcy Law). Prior to the enactment of the Bankruptcy Law, there was no comprehensive legislation governing bankruptcy law in Indonesia.[1]

In accordance with the stipulations set forth in the Bankruptcy Law, the following provisions have been established: those pertaining to the procedures for corporate and individuals insolvency, the role of the curator in the administration and management of assets within the context of a bankruptcy estate, and the mechanism for the settlement of debts owed by debtors to creditors.[2] In the event that a debtor has more than one creditor, it is probable that all creditors will endeavor to assume control of the debtor's collateral. The objective of the Bankruptcy Law is to prevent this situation and to provide protection and legal certainty for creditors in the settlement of debts owed by debtors. In order for an application for a bankruptcy declaration to be accepted, it must fulfil a number of predetermined conditions, including the existence of at least two creditors and one overdue debt. The commercial court is vested with the authority to accept or reject the application. The objective of bankruptcy is to safeguard creditors from unfair competition, guarantee the equitable distribution of debtors' assets in accordance with the *pari-passu* principle, prevent actions by debtors that cause harm to creditors, and provide avenues for debt restructuring.

Bankruptcy is the legal process by which a debtor who is unable to meet their financial obligations is declared bankrupt by a commercial court.[3] This decision results in the transfer of ownership of all assets and property belonging to the debtor to the bankruptcy estate, which is then used to settle debts owed to creditors in a fair and proportionate manner. Bankruptcy entails the public seizure of the debtor's assets by a curator under the supervision of a judge.

There are three distinct categories of creditors: separatist creditors, who hold property security rights; preferred creditors, who possess special rights; and concurrent creditors, who do not have special security rights. In the context of bankruptcy, separatist creditors are afforded priority in debt repayment, while concurrent creditors are entitled to receive the remaining proceeds subsequent to the satisfaction of the claims of separatist and preferred creditors.

The Bankruptcy Law additionally establishes the procedures for the registration and administration of bankruptcy assets by the curator. Furthermore, assets of debtor that have been pledged by third parties can also be included in the list of bankruptcy assets. The legislation confers upon creditors holding mortgage rights the right to execute their claims, even in the event of a debtor being declared bankrupt. However, this right is subject to a number of conditions, including a 90-day stay of execution.[4] It is the responsibility of the

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[1] Irfan Ferdiansyah Muis, Isis Ikhwansyah, and Tri Handayani, "Kedudukan Kreditur Separatis Terkait Jaminan Hak Tanggungan Yang Masuk Dalam Boedel Pailit Debitur," *Jurnal Poros Hukum Padjadjaran* 3, no. 2 (2022): 784, https://doi.org/10.23920/jphp.v3i2.784.

[2] Umu Luluk Atin Lu'lu'il Maknuun and Moch. Ichiyak Ulumudin, "Implementasi Prinsip 6C; Pembiayaan Griya dan Tingkat Pengembalian Angsuran Pada Bank Syariah Mandiri," *Jurnal At-Tamwil: Kajian Ekonomi Syariah* 4, no. 1 (2022): 1465, https://doi.org/10.33367/at-tamwil.v4i1.2527.

[3] Titik Tejaningsih, *Perlindungan Hukum Terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit* (Yogyakarta: FH UII Press, 2016), 8.

[4] Sudargo Gautama, *Komentar atas Peraturan Kepailitan Baru untuk Indonesia* (Bandung: Citra Aditya Bakti, 1998), 8.

curator to ensure that all legal actions related to bankruptcy assets are conducted in accordance with the applicable regulations. Those acting in the capacity of curators who are found to have erred in the performance of their duties may face significant legal consequences.[5] The curator is obliged to record and manage the bankruptcy estate, which encompasses all assets belonging to the debtor, both those that existed prior to the bankruptcy process and those that will emerge during its course. Nevertheless, the role and actions of the curator must be performed with due care and under the supervision of a judge to ensure that the assets being managed are indeed those of the bankruptcy debtor and not those of a third party.

Despite the provisions of the Bankruptcy Law providing guidance on the roles and responsibilities of curators, the legislation does not contain explicit sanctions, meaning that it does not expressly set out criminal, administrative, or civil penalties directed specifically at curators who fail to perform their duties in accordance with the law. The absence of such explicit sanctions is a significant issue because it creates legal uncertainty regarding the accountability of curators in managing bankruptcy estates. In practice, the imposition of sanctions against curators who commit negligence or unlawful acts is contingent upon the general prosecution of unlawful acts under the Civil Code or the Criminal Code, rather than specific provisions in bankruptcy law. As a result, there is a regulatory gap: curators occupy a central position in safeguarding the rights of creditors and debtors, yet their liability is not clearly regulated in the bankruptcy framework itself. This lack of clarity may weaken creditor confidence, hinder the effectiveness of bankruptcy proceedings, and leave aggrieved parties reliant solely on general legal mechanisms to pursue claims of negligence or misconduct. Therefore, the absence of explicit sanctions within the Bankruptcy Law represents not merely a legislative omission, but also a structural problem in ensuring accountability and legal certainty in Indonesia's bankruptcy system.

2. RESEARCH METHODS

The research is of a normative-juridical legal nature, with a statutory and conceptual approach. Normative-juridical legal research is a methodology that integrates a normative approach to elucidate the practical application of legal provisions within a societal context.[6] This research uses the analytical tools of agreement theory, legal certainty theory, and legal protection theory. Regulations regarding the position of collateral assets belonging to third parties in the management and administration of bankruptcy assets in Indonesia are contained in Article 21 of the Bankruptcy Law, the guarantee agreement as an accessory agreement, Law Number 4 of 1996 on Mortgage Right (hereinafter referred to as Mortgage Right Law), Law Number 42 of 1999 on Fiducia Guarantee (hereinafter referred to as Fiducia Guarantee Law) as well as Book II and Book III of the Civil Code. The data collected through literature and documentation studies were then subjected to examination,

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[5] Hasan Basri and Ahmad Redi, "Moral Responsibility of Curators in the Liquidation of State-Owned Legal Entity Companies," *Asian Journal of Engineering, Social and Health* 3, no. 7 (2024): 1431–1443, https://ajesh.ph/index.php/gp/article/view/363/476.

[6] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)* (Jakarta: Rajawali Pers, 2018).

reconstruction, and systematic arrangement.[7] Moreover, the analysis is conducted qualitatively using the inductive method, with the objective of producing general conclusions based on the information that has been collected and analysed.

3. ANALYSIS AND DISCUSSION

3.1. Arrangements Regarding the Position of Collateral Assets Owned by Third Parties in the Management and Disposal of Bankruptcy Assets in Indonesia

A bankruptcy verdict results in the debtor's assets immediately becoming bankruptcy property or bankruptcy estate, which means that all of the debtor's assets are included in the bankruptcy. However, assets belonging to third parties that are used as collateral are not automatically included in the bankruptcy estate without the consent of these third parties and or without a court decision on ownership. The Bankruptcy Law and the Civil Code do not explicitly regulate the assets of third parties in the bankruptcy estate, but the provisions regarding the execution rights of creditors and the rights of third parties to their assets provide an overview of the protection of third parties' rights.

In bankruptcy law, assets included in the bankruptcy estate are assets of the debtor that can be used to fulfil debts to creditors. If there are assets belonging to third parties that are used as collateral, creditors have the right to execute these assets to pay off debtors' debts, but the remaining proceeds from the sale of these assets cannot be automatically handed over to debtors or other creditors without the consent of third parties. Who is a third party? A third party is not the debtor and has nothing to do with the creditor. The third party pledges its assets for the debtor's debt to the creditor so that if the debtor cannot fulfil its obligation to pay the debt to the creditor, the creditor can sell the third party's collateral assets and the proceeds are used to pay the creditor's receivables. The prudential principle in banking also requires banks to ensure that a clear and valid legal relationship between the third party and the debtor and the existence of benefit principle has been fulfilled before the asset is pledged as collateral.

Furthermore, a security agreement is considered an additional agreement that follows the credit agreement as the main agreement. This security agreement is accessory, meaning that if the main agreement (credit) is lost, the security agreement also becomes invalid. Both credit agreements and collateral agreements are regulated in Book Three of the Civil Code on Binding which is open in nature where the parties can determine the contents of the agreement as long as it does not violate public order and decency. While the guarantee agreement is regulated in Chapter Seventeen of Book Three of the Civil Code and because the guarantee in question is a material guarantee, Book Two of the Civil Code on Property becomes the rule of law that must be followed and obeyed because of its absolute or closed nature. And if the property concerns and is a land plot, then everything about the ownership of the land plot is subject to the Basic Agrarian Law.

Third parties in this study are owners of collateral assets who are not bankrupt debtors and are also legal subjects regulated in Law Number 40 of 2007 on Limited

[7] Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 30.

Liability Company (hereinafter refered to as LLC Law). Because this third party is closely related to collateral, Mortgage Right Law and Fiduciary Guarantee Law apply. Third parties, as owners of collateral assets, have the right to protect their assets and ensure that they are not transferred or used without their consent. In the context of insolvency, the rights of third parties to collateral assets must be recognised and respected, such that the assets cannot be made part of the bankruptcy estate unless they have complied with the applicable legal provisions and there is consent from the third parties.[8]

R. Subekti, states that an agreement is an event in which a person commits to another person, or two people commit to each other to carry out an action.[9] This classical definition highlights the consensual nature of contracts, emphasizing that an agreement is essentially a meeting of wills. Other legal experts, however, provide broader perspectives. Sudikno Mertokusumo considers an agreement not merely as a factual commitment but as a legal bond that gives rise to enforceable rights and obligations. Similarly, Mariam Darus Badrulzaman stresses that agreements function as a manifestation of private autonomy, allowing parties to regulate their legal relations within the boundaries of statutory law.[10] From a comparative perspective, legal scholars such as H.L.A. Hart and Rudolf von Jhering emphasize that agreements are not only private arrangements but also mechanisms to ensure social order and the fulfillment of legitimate expectations. Taken together, these expert views indicate that agreements are central instruments in balancing individual autonomy with legal certainty, thereby situating the issues discussed in this article within a broader doctrinal and theoretical framework. The legal relationship of wealth between two or more people, which gives the right to one party to obtain an achievement regulates about as well as obliges the other party to carry out the achievement.[11] Article 1338 of the Civil Code becomes the basis of the agreement between the parties and Book II of the Civil Code about the Agreement. However, Article 1315 of the Civil Code and Article 1340 of the Civil Code regulates that the agreement of the parties may also involve third parties and the agreement cannot harm third parties, which is known by the doctrine, the principle of personality or privity of contract.[12]

Gustav's theory of legal certainty emphasises the importance of clarity and logic in legal rules to achieve legal certainty, especially in the context of third-party asset guarantees in Indonesian bankruptcy law,[13] this principle is highly relevant. Creditors, debtors, and guarantors must clearly understand whether assets pledged by directors, commissioners, or shareholders will form part of the bankruptcy estate. Ambiguities in

[8] Sri Wahyuni and Rifki Khoirudin, *Pengantar Manajemen Aset* (Makassar: Nas Media Pustaka, 2020), 135.
[9] Fidelia Syahmin and Dedeng, *Hukum Perjanjian Internasional* (Palembang: UPT Penerbit dan Percetakan Universitas Sriwijaya (Unsri Press), 2019), 1.
[10] Muhammad Natsir Asnawi and Edi Hudiata, "Delimitation of Freedom of Contract Principle and Judge's Corrective Function in Assessing the Parties' Positions on an Agreement," *Mimbar Hukum* 29, no. 1 (2017): 150, https://doi.org/10.22146/jmh.16889.
[11] Fidelia Syahmin, *Op. Cit*.
[12] Article 1315 and 1340 of *Indonesian Civil Code.*
[13] Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Undang-Undang (Legisprudence), Volume I Pemahaman Awal* (Jakarta: Kencana Prenada Media Group, 2017), 292–293.

regulation create uncertainty, potentially undermining both creditor confidence and the stability of commercial transactions. Radbruch further identified three fundamental values of law: justice, legal certainty, and expediency. Legal certainty requires that the rules governing bankruptcy and asset separation are unambiguous, ensuring that the parties know in advance the legal consequences of their actions. Justice demands that the rights of guarantors who are legally distinct from the debtor are respected, so that their personal assets are not unfairly absorbed into the debtor's bankruptcy estate. Expediency, meanwhile, highlights the necessity for bankruptcy law to operate efficiently, balancing the swift settlement of debts with the protection of third-party rights. Thus, Radbruch's framework demonstrates that the absence of explicit provisions regarding third-party guarantees in the Bankruptcy Law creates a tension between these three values. Strengthening clarity in the legislation would not only enhance legal certainty but also promote fairness and efficiency in bankruptcy proceedings.

This principle ensures that the rights of debtors, creditors, and third parties are protected in credit or debt agreements, without harming other creditors. Relevant regulations, such as Article 21 of the Bankruptcy Law, Book I and Book II of the Civil Code, as well as Mortgage Right Law, govern the legal position of these assets, with concurrent creditors having no priority in claims against the debtor's assets, unless there is a special guarantee. Special guarantees give creditors preferential rights, allowing them to execute the security assets first if the debtor fails to fulfil its obligations. Guarantors or a third party owner of the collateral asset (third parties) may have a privilege that protects their assets until the debtor's assets are seized first, however this right can be waived under certain conditions, such as in the event of insolvency. According to Gustav Radbruch, a German legal philosopher, legal certainty is '*Scherkeit des Rechts selbst*' (legal certainty about the law itself), namely that the law is positive (*gesetzliches Recht*), based on facts (*Tatsachen*), empirical facts that indicate that the law is built based on existing realities, and the facts must be clearly formulated to avoid ambiguity in interpretation, but also easy to implement. The ease of change in positive law indicates that the law that has been established should not be changed easily.

Sudikno Mertokusumo argues that law functions as an instrument to protect society through the establishment of rules and norms. According to him, legal certainty is achieved when individuals who possess rights are those recognized and affirmed through legal decisions (*putusan hukum*). This opinion is highly relevant to the issue of bankruptcy law in Indonesia, particularly concerning the legal status of third-party guarantees. The absence of explicit provisions in the Bankruptcy Law regarding whether assets belonging to directors, commissioners, or shareholders pledged as collateral form part of the bankruptcy estate creates uncertainty. From Mertokusumo's perspective, such uncertainty undermines the protective function of the law, because neither creditors nor guarantors can predict with confidence how the courts will resolve disputes over these assets. Thus, ensuring legal certainty in this area is not merely a theoretical necessity but a practical demand to guarantee fairness, predictability, and protection for all parties involved in bankruptcy proceedings. Although legal certainty is closely related to justice, it is different; the law has general characteristics, binds every individual, generalises.

Legal protection also includes deterrence and sanctions, as well as the role of law enforcement institutions.[14] This theory supports that law serves to coordinate various interests in society, protecting one by restricting the other. On the other hand, security agreements provide certainty to creditors regarding the repayment of loans, while debtors and guarantors have moral and legal responsibilities to fulfil their obligations. In practice, creditors often hand over collateral belonging to third parties to the curator for auction sale under Article 6 of the Mortgage Right Law.[15] This process is carried out to pay off the debts of the bankrupt debtor.[16] However, it is important to note that only the proceeds from the sale of the debtor's assets are included in the bankruptcy estate, while third-party collateral assets are not considered part of the bankruptcy estate.[17]

There is an important difference between collateral assets owned by the bankrupt debtor and collateral assets owned by third parties.[18] Security assets belonging to the bankrupt debtor are subject to a certain waiting period before creditors can execute them, while assets belonging to third parties are not bound by this waiting period. A creditor holding a security interest in a third-party asset can immediately execute the security without the need to wait for the proceeds from the bankrupt debtor's assets.[19] In the case of a pledge, the third party pledging its assets loses its privilege if the debtor is declared bankrupt. This condition allows the creditor to immediately execute the third-party guaranteed assets to pay off the debtor's debt.[20] However, third-party security assets do not automatically become part of the bankruptcy estate, and creditors must still register their receivables in relation to these assets to ensure their rights are recognised in the bankruptcy process.[21]

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[14] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, "Investor Protection and Corporate Governance," *Journal of Financial Economics* 58, no. 1–2 (2000): 9, https://doi.org/10.1016/S0304-405X(00)00065-9.

[15] Sri Redjeki Slamet, "Perlindungan Hukum dan Kedudukan Kreditor Separatis dalam Hal Terjadi Kepailitan terhadap Debitor," *Forum Ilmiah* 13, no. 1 (2016): 108, https://ejurnal.esaunggul.ac.id/index.php/Formil/article/view/1394.

[16] M. Suyanto, *Multimedia Alat untuk Meningkatkan Keunggulan Bersaing* (Jakarta: Andi, 2012).

[17] M. Hadi Subhan, "Insolvency Test: Melindungi Perusahaan Solven yang Beritikad Baik dari Penyalahgunaan Kepailitan," *Jurnal Hukum Bisnis* 33, no. 1 (2014): 13, https://repository.unair.ac.id/100362/.

[18] Lila Kurniawati Khisni and Lathifah Hanim, "Implementasi Asas Droit De Preference Terhadap Jaminan Hak Tanggungan Oleh Pihak Perbankan Dalam Perjanjian Kredit," *Jurnal Akta* 4, no. 1 (2017): 99, http://dx.doi.org/10.30659/akta.v4i1.1750.

[19] Evie Christy, Wilsen Wilsen, and Dewi Rumaisa, "Kepastian Hukum Hak Preferensi Pemegang Hak Tanggungan dalam Kasus Kepailitan," *Kanun Jurnal Ilmu Hukum* 22, no. 2 (2020): 325, https://doi.org/10.24815/kanun.v22i2.14909.

[20] Aan Handriani, "Perlindungan Hukum Bagi Debitur Dalam Perjanjian Kredit Ditinjau Dari Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *Pamulang Law Review* 2, no. 2 (2020): 148, https://doi.org/10.32493/palrev.v2i2.5434.

[21] Annisya Dwi Rahmayani Putri and Lina Jamilah, "Perjanjian Jaminan Personal Guarantee dalam Terwujudnya Kepastian Hukum," *Bandung Conference Series: Law Studies* 3, no. 1 (2023): 553, https://doi.org/10.29313/bcsls.v3i1.5050.

The curator has a huge responsibility in ensuring that the assets included in the bankruptcy estate only include the bankruptcy debtor's property.[22] The curator must carefully segregate assets belonging to third parties from the bankruptcy estate. If there is an error in this separation, the curator may be personally liable in accordance with the provisions of the Bankruptcy Law. The curator can be sued both civilly and criminally.

Judicial interpretations regarding the position of collateral assets owned by third parties in bankruptcy proceedings remain inconsistent. In Supreme Court Decision Number 1240K/Pdt.Sus-Pailit/2023, the Court affirmed that such collateral may be considered within the scope of bankruptcy management provided that its inclusion rests on explicit legal grounds, particularly the rights of secured creditors under the Mortgage Right Law and the Bankruptcy Law. Meanwhile, Supreme Court Decision Number 1085 K/Pdt.Sus-Pailit/2019 illustrates the application of *actio pauliana* to annul transactions deemed to have been conducted in bad faith, thereby restoring the assets into the bankruptcy estate for the benefit of creditors. This divergence reflects the ongoing uncertainty in determining whether and under what conditions third-party collateral can be absorbed into the bankruptcy estate, thereby complicating risk assessments for creditors, debtors, and guarantors, while simultaneously undermining legal certainty and the protection of property rights in Indonesia's bankruptcy system.

3.2. Implementation of Regulations Regarding Collateral Assets Owned by Third Parties in the Management and Administration of Bankruptcy Assets in Indonesia

Bankruptcy is a legal process that transfers the right to manage and administer the assets of a bankrupt debtor to a curator, who is tasked with winding up and distributing the assets to creditors in proportion to their receivables. From the moment the bankruptcy verdict is pronounced, the debtor loses control of their assets, and the curator, who can be from the *Balai Harta Peninggalan* or natural person, is given full responsibility for managing the assets. The curator's main duties, which start from the bankruptcy judgment, include managing and disposing of the bankruptcy estate to maximise payments to creditors. The curator also has a legal responsibility to report all activities to creditors and the supervisory judge and is personally liable in the event of errors or omissions.[23]

In carrying out their duties, curators must be independent and must not have a conflict of interest with the debtor or creditors. The curator shall record and verify all debts and assets of the bankrupt debtor to ensure their validity and ownership. Assets belonging to third parties, even if they are related to a credit agreement, should not be included in the bankruptcy estate, except in cases where there is doubt and therefore the Court decides that the assets belong to the debtor. If the curator mistakenly includes a

[22] Khalid, "Tanggung Jawab Penjamin (Borg) yang Menandatangani Akta Pengakuan Hutang Dengan Memakai Jaminan," *Syntax Literate: Jurnal Ilmiah Indonesia* 8, no. 1 (2023): 459, https://doi.org/10.36418/syntax-literate.v8i1.11241.

[23] Imran Nating, *Peranan dan Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit* (Jakarta: Raja Grafindo Persada, 2005), 84.

third party's assets in the bankruptcy estate, the legal liability may extend to the curator's personal assets, especially if the action harms other parties.[24]

The curator must also consider the consent of the relevant parties, appropriate timing, and ways that are in accordance with the law and social norms in carrying out his duties. The principle of integration in the Bankruptcy Law requires the curator to link various legal rules in the management of the bankruptcy estate, and act holistically without violating the law. Curators are legally responsible for any actions that harm the bankruptcy estate or interested parties, and their reports must be transparent and open to the public.[25]

The Article 14 paragraph (1) of the LLC Law stipulates that legal acts on behalf of a company that is not yet a legal entity must be carried out by all members of the board of directors, founders, and board of commissioners jointly, and they are jointly and severally liable. After the company obtains the status of a legal entity in accordance with Article 14 paragraph (3), the legal responsibility shifts to the company. This reflects the principle of separate entity and limited liability between the assets of the company and the personal assets of the members of the board of directors, commissioners and shareholders.

The Board of Directors is the main organ in a limited liability company that is responsible for the management and representation of the company both inside and outside the court, in accordance with the articles of association. The Board of Directors is also fully responsible for carrying out its duties in good faith and must avoid actions outside the aims and objectives of the company, which is called the *Ultra Vires* principle. If directors violate this principle or make mistakes that cause bankruptcy, they can be held liable up to their personal assets.

The principle of fiduciary duty requires directors to perform their duties in good faith and with full responsibility for the interests of the company. If bankruptcy occurs due to the negligence of the directors, they are jointly and severally liable.

In addition, the LLC Law confirms that shareholders are not personally liable for the company's commitments, except under certain conditions that trigger the application of the doctrine of piercing the corporate veil, which allows the company's responsibility to shift to shareholders, directors, or commissioners. Piercing the corporate veil is a legal doctrine that allows shareholders or directors to be personally liable if it is proven that there was a violation or abuse of authority that caused harm to the company. This applies when their actions deviate from the principle of limited liability, which should protect them from personal liability for the company's actions. In such instances, the liability of directors and/or commissioners and shareholders is not necessarily contingent upon a court decision.

The LLC Law confirms that the assets of directors, commissioners and shareholders are separate from the assets of the company. However, if there is evidence of abuse of authority that causes losses, their personal assets can be held liable. Proof of this offence

[24] M. Hadi Subhan, *Hukum Kepailitan Prinsip, Norma, dan Praktik di Peradilan* (Jakarta: Kencana, 2014), 108.
[25] Nindyo Pramono, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2023), 15.

must be made in accordance with the provisions of the Civil Code and requires a judge's decision to transfer liability from the company to the individual.

Collateral assets belonging to third parties are often used to support the debtor's obligations. The third party pledges its assets to the financial institution to give the bank confidence that the debtor will fulfil its obligations. In the case of a debtor's bankruptcy. In bankruptcy cases, Article 21 of the Bankruptcy Law states that all of the debtor's assets are included in the bankruptcy estate, however collateral assets belonging to third parties do not automatically become part of the bankruptcy estate unless a judge's decision so states. The insurer's or guarantor's privilege, as stipulated in the Civil Code, can also be waived, allowing third-party security assets to be executed without necessarily becoming part of the bankruptcy estate.

Curators and legal scholars hold divergent views on whether third-party security assets may be included in the bankruptcy estate. Proponents argue that such assets can become part of the bankruptcy estate if the guarantor explicitly waives its privilege or if the third party is simultaneously declared bankrupt. This perspective is grounded in the principle of creditor protection and efficiency, ensuring that creditors have broader access to assets for debt repayment and thereby increasing the effectiveness of bankruptcy proceedings.

By contrast, other experts emphasize that third-party collateral cannot be incorporated into the bankruptcy estate without a clear statutory basis and a specific judicial decision. They argue that including third-party assets risks violating fundamental principles of property rights, fairness, and the doctrine of legal separation between the debtor and the guarantor. According to this view, any attempt to subsume third-party collateral into the bankruptcy estate without explicit legal authorization would undermine legal certainty and could expose the system to potential abuse.

In practice, the implementation of provisions regarding the use of third-party collateral has revealed several legal issues. The absence of explicit rules in the Bankruptcy Law has led to inconsistent judicial interpretations, where some courts accept third-party collateral as part of the estate under certain circumstances, while others categorically reject it. This dualism creates uncertainty for creditors, debtors, and guarantors alike. As a result, many scholars suggest that legislative reform is necessary. Amending the bankruptcy law to provide clear guidance on the legal status of third-party collateral would enhance legal certainty, protect property rights, and promote fairness and transparency in the administration of bankruptcy estates.

This reflects the complexity and uncertainty in legal practice regarding third-party security assets in bankruptcy cases. Bankruptcy, which is regulated in the Civil Code and Bankruptcy Law, is a mechanism to settle debts that cannot be paid. Under Article 1132 of the Civil Code, the debtor's property becomes joint security for all its creditors, with the proceeds of the sale divided according to the proportionality of the receivables, unless there is a legitimate priority for some creditors. Article 1131 states that the debtor's entire property is used as security for debts, and if there are multiple creditors, debts are paid collectively. Article 1133 regulates privileges, pledges, and mortgages, which have a higher priority than privileges.

Collateral assets belonging to third parties are often used to support the debtor's obligations. The third party pledges its assets to the financial institution to give the bank confidence that the debtor will fulfil its obligations. In the case of a debtor's bankruptcy, according to Article 21 of the Bankruptcy Law, all of the debtor's assets become the bankruptcy estate, but the third party's collateral assets are not included in the bankruptcy estate and remain under the ownership of the third party. Article 34 of the Bankruptcy Law states that agreements transferring rights to land, vessels, or fiduciary guarantees that have been entered into previously cannot be executed after the bankruptcy verdict.

The curator has an obligation to comply with Article 21 of the Bankruptcy Law and safeguard the rights of third parties. If the debtor's bankruptcy estate is insufficient, third-party security assets may be considered. The principle of privity of contract and the principle of speciality are set out in the Civil Code, which ensures that rights and obligations apply only to the parties to the agreement. Security laws, including material security such as pledge, fiduciary and mortgage, provide additional protection for third parties. Article 6 of the Mortgage Right Law allows the holder of a mortgage right to sell the object of the mortgage right if the debtor is in default, and the proceeds of the sale are taken to settle the debt before other creditors.

The principle of limited liability in corporate law, which is regulated in the LLC Law, protects third-party security assets also includes when the third party in question is the individual directors or commissioners and/or shareholders. The principle of separate entity and limited liability ensures that shareholders are not personally liable for the company's debts beyond the shares owned. This provides protection for shareholders and facilitates investment without risk to their personal assets. With these principles in place, the assets of the company remain separate from the personal assets of the shareholders, supporting investment security and compliance with legal obligations in the context of insolvency.

The occurrence of ‘piercing the corporate veil’ as well as *ultra vires* actions shows that directors, commissioners and shareholders are personally liable for the losses of their creditors if they exceed their authority and act outside the mission and purpose of the company. The principles of ‘separate entity’ and ‘separate liability’ support the need for banks or financial institutions to trust debtors with adequate debt collateral. On the other hand, banks must be cautious in accepting collateral assets from third parties that have no direct relationship with the debtor. In the context of banking law, the precautionary principle requires banks to conduct an in-depth analysis of the debtor and the collateral provided, including collateral belonging to third parties. Guarantees from third parties are often accepted because of the relationship of benefit between the debtor and the third party, which adds to the bank's confidence in granting credit. Various court decisions show that collateral assets belonging to directors, commissioners, or shareholders cannot be categorised as bankruptcy estate. For example, in the cases of PT Tripanca Group, PT Bangkit Pangan Indonesia, PT Vtech Mould Indonesia, and PT Skycamping Indonesia, the court refused to include personal assets in the bankruptcy estate, indicating that personal assets do not automatically belong to the bankrupt company unless there is evidence to the contrary by the court.

In Supreme Court Decision Number 1240K/Pdt.Sus-Pailit/2023, the Court acknowledged the existence of third-party collateral in bankruptcy proceedings but emphasized that its inclusion in the bankruptcy estate must be grounded in explicit legal provisions, particularly the rights of secured creditors under Mortgage Right Law and the Bankruptcy Law. Meanwhile, in Supreme Court Decision Number 1085 K/Pdt.Sus-Pailit/2019, the Court applied *actio pauliana* to annul a transaction between the debtor and a third party that was deemed to have been carried out in bad faith, thereby returning the disputed assets into the bankruptcy estate for the benefit of creditors. These rulings demonstrate that while third-party guarantees are often utilized in banking practice due to the relationship of interest between guarantor and debtor, the courts maintain that collateral belonging to directors, commissioners, or shareholders cannot be absorbed into the bankruptcy estate without a clear statutory basis, and that annulment through *actio pauliana* is only possible when bad faith is proven.

In other bankruptcy-related matters, such as an *actio pauliana* lawsuit, which can be filed to invalidate a debtor's legal actions that are detrimental to creditors, must follow the same procedure as a bankruptcy petition and must be filed in the jurisdiction of the bankrupt debtor. *Actio pauliana* allows the curator to cancel transfers of the debtor's assets that could potentially harm creditors. In addition, a lawsuit against the bankruptcy estate register can be brought by a party who feels their rights have been impaired to resolve disputes regarding the placement of assets as bankruptcy estate. The regulation of third party guarantees in bankruptcy is inadequate and still invites various interpretations. The curator must face the challenge of determining whether the estate belongs to a third party. The current regulation does not clearly regulate the execution and recording of claims from creditors holding third-party security, indicating the need for more detailed regulation in the future. This lack of clarity is problematic because it creates uncertainty in practice and opens space for inconsistent judicial interpretation. Scholars such as Sutan Remy Sjahdeini have criticized the Bankruptcy Law for failing to provide comprehensive guidance on the treatment of third-party collateral in bankruptcy, thereby weakening creditor protection and leaving guarantors vulnerable. Similarly, Mariam Darus Badrulzaman emphasizes that legal certainty requires explicit rules to avoid conflicting interpretations that may unfairly harm creditors or guarantors.

The legal gap lies in the absence of explicit provisions in the Bankruptcy Law regarding whether, and how, third-party collateral can be executed or recorded as part of the bankruptcy process. Although the Civil Code (Articles 1131–1133) and the Mortgage Law regulate guarantees in general, these provisions are not integrated into the bankruptcy framework, resulting in ambiguity. Consequently, courts have produced divergent decisions some allowing third-party collateral to be treated within bankruptcy proceedings, while others exclude it unless the guarantor is also declared bankrupt. This inconsistency undermines legal certainty, demonstrating the need for legislative reform to harmonize the rules and provide clear guidance on the execution and recording of claims involving third-party collateral.

Curators and academics have different views on whether third-party security assets can be included in the bankruptcy estate. While some experts argue that such assets can become part of the bankruptcy estate if the guarantor waives its privilege, others argue that such assets cannot be included without a clear legal basis and a judge's decision. This reflects the complexity and uncertainty in legal practice regarding third-party security assets in bankruptcy cases. Bankruptcy, which is regulated in the Civil Code and Bankruptcy Law, is a mechanism to settle debts that cannot be paid. Under Article 1132 of the Civil Code, the debtor's property becomes joint security for all its creditors, with the proceeds of the sale divided according to the proportionality of the receivables, unless there is a legitimate priority for some creditors. Article 1131 states that the debtor's entire property is used as security for debts, and if there are multiple creditors, debts are paid collectively. Article 1133 regulates privileges, pledges, and mortgages, which have a higher priority than privileges. The law is constantly evolving to achieve the desired ideal, involving the interpretation and effective application of the law. Courts have an important role in realising legal certainty, justice and expediency through their decisions.[26] Judges, as law enforcement officials, must be independent and free from external influences, and are only bound by relevant facts and legal rules. Judges' decisions, ideally, should not cause new problems and should prioritise justice and expediency, taking into account legal considerations and conscience.[27]

In the judicial system, the judge's decision is only binding on the litigants and not third parties, as stipulated in Article 1917 of the Civil Code. However, in practice, judgements often impact third parties, particularly in bankruptcy cases. M. Yahya Harahap notes that creditors often raise objections if assets belonging to third parties are included in the bankruptcy estate.[28] Courts tend to ignore these objections, arguing that third parties can raise objections through lawsuits or other legal remedies.

According to Article 3 paragraph (1) of the Bankruptcy Law, the court authorised to handle bankruptcy cases is the court in the area of the debtor's legal domicile. This process follows the applicable civil procedural law, including in terms of third-party interests. The Bankruptcy Law also provides an opportunity for debtors to improve their situation before being declared bankrupt, if there are still business prospects. This is also the case for curators who suspect or have doubts whether assets belonging to third parties belong to the bankruptcy debtor as per Article 1866 of the Civil Code, thus filing a lawsuit under Articles 1915 and 1916 of the Civil Code. However, in bankruptcy practice, there is a dualism of judgement regarding the status of collateral assets belonging to third parties. Some courts decide that such assets can be included in the bankruptcy estate, while others refuse. This difference often revolves around whether or not the third parties have waived their privileges. Article 1313 of the Civil Code defines an agreement as a legal act to give rise to legal consequences, and Article 1338 paragraph (1) provides freedom in making agreements.

[26] HM. Soerya Respationo and M. Guntur Hamzah, "Putusan Hakim: Menuju Rasionalitas Hukum Refleksif Dalam Penegakan Hukum," *Yustisia Jurnal Hukum* 2, no. 2 (2013): 43, https://doi.org/10.20961/yustisia.v2i2.10194.
[27] Ahmaturrahman, *Hukum Acara Perdata di Indonesia* (Indralaya: Universitas Sriwijaya, 2020), 107.
[28] Fidelia Syahmin, *Op. Cit*.

Creditors and/or debtors and curator in a security agreement cannot claim the remaining proceeds from the sale of the security assets without third parties consent, as explained in the doctrine of privity of contract. Article 1381 and Article 1340 of the Civil Code stipulate those agreements are only valid between the parties that make them and cannot harm third parties. Similarly, Article 11 and Article 12 of the Mortgage Right Law regulate the obligations and rights in the deed of granting mortgage rights, which must comply with procedures and do not automatically cause the assets to become the property of the debtor. In the context of a security agreement, third parties have special rights regulated in Article 1831 of the Civil Code, which states that the debtor's assets must be seized and sold first before paying the creditor. The obligation of responsibility in Articles 1278 to 1295 of the Civil Code also affects the handling of debt obligations and creditor responsibilities, where third-party assets are only used to cover the value of the lien according to the agreement.

A securitisation creditor is entitled to collateral that is an asset of the debtor, and often this collateral is provided by a third party when the debtor's assets are insufficient for the value of the collateral. Although this practice generally does not cause problems, debtors are usually more serious in fulfilling their obligations due to moral responsibility towards third parties. If the debtor fails to fulfil its obligations, the creditor can execute the third-party guarantee without having to execute the debtor's guarantee first. However, the assets of the third-party guarantee do not automatically belong to the creditor. Third parties are individuals or entities such as directors, commissioners, shareholders, or their families who provide security for the debts of the debtor. The separate entity principle in the LLC Law ensures that the legal entity is separate from the shareholders, protecting them from personal liability for the company's debts. However, this principle can be violated if shareholders or directors engage in unlawfulness or abuse of authority.

The precedent system provides legal certainty and minimises decisions based on subjective factors. In bankruptcy cases, there is often a conflict as to whether collateral assets belonging to third parties are included in the bankruptcy estate. Some opinions assert that such assets do not belong to the bankruptcy estate, while others argue that if third parties waive their privileges, such collateral assets may be considered part of the bankruptcy estate. The different interpretations regarding third-party security assets in bankruptcy create legal uncertainty. Most opinions state that security assets belonging to third parties are not included in the bankruptcy estate, but creditors still have the right to execute the security. To resolve this uncertainty, amendments to Article 21 of the Bankruptcy Law are required to provide a clear definition of "all of the debtor's assets in the later date" and specific rules regarding third-party security assets.

3.3. Legal Arrangements with Legal Certainty for Guaranteed Assets Owned by Third Parties in Bankruptcy in Indonesia

A legal rule is deemed to possess philosophical strength or philosophical validity when it aligns with the adopted legal ideals (*rechtsidee*). The fundamental tenet of a guarantee agreement is to facilitate the debtor's ability to repay their financial obligations and the creditor's capacity to assert their legal rights. The third party represents an extension of the debtor's ability to fulfil their obligation to pay debts to certain creditors. The philosophy of the debtor's assets being the target of general confiscation for the settlement of bankruptcy debts and receivables is consistent with the principle of parity creditorium, as set forth in Article 1131 of the Civil Code. The philosophy of collateral is to provide assets as collateral for debts, thereby ensuring that if the debtor fails to fulfil its obligations, the collateral assets can be sold and the proceeds used to settle the debt. The philosophy of the formation of national law, as stated in the general explanation of the Bankruptcy Law, is to realise a just and prosperous society based on Pancasila and the 1945 Constitution by preventing the arbitrary seizure of a debtor’s assets by individual creditors. This philosophy means that bankruptcy must be resolved collectively under court supervision to ensure fairness among creditors and protection for debtors. In this paper, it serves as a normative foundation to assess the position of third-party collateral, balancing creditor rights with justice, legal certainty, and economic stability.

The sociological foundations of regulations illustrate that they are formed to fulfil the needs of society in all aspects. The inclusion of collateral assets belonging to third parties in the bankruptcy estate has resulted in legal uncertainty for creditors holding such security rights. The collateral held by a third party, which is intended to be used to settle the creditors' claims, is instead used to discharge the debtor's liabilities. These are subsequently distributed among the creditors, with the deduction of the curator's fee and bankruptcy costs. Furthermore, the inclusion of third-party collateral assets in the bankruptcy estate has a sociological impact on investment, as investors are unprotected by the dualism of the decision. The protection of assets belonging to third parties is also a consideration in this case, given that, in accordance with Article 21 of the Bankruptcy Law, such assets are not included in the bankruptcy estate.

The legal foundation pertains to the legal issues pertaining to the substance or material regulated, thereby necessitating the formulation of new laws and regulations. The regulations pertaining to third-party collateral assets have been widely disseminated; the question at hand is whether we wish to implement them in accordance with the prescribed rules or not. Conversely, the extant regulations are inadequate for addressing the status of third-party collateral assets in bankruptcy, resulting in disparate interpretations among judicial authorities, which engenders inconsistency in rulings and impairs legal certainty. This discrepancy arises from the fact that Article 21 of the Bankruptcy Law only encompasses the debtor's assets, excluding those belonging to third parties. Conversely, numerous legal precedents have established that third-party assets may be included within the bankruptcy estate. However, in Supreme Court Decision Number 1240K/Pdt.Sus-Pailit/2023, the Court affirmed that third-party collateral may be recognized within bankruptcy proceedings, provided its inclusion is based on explicit legal provisions, particularly concerning the protection of secured creditors’ rights.

No express rule requires the curator to execute third-party guarantees. Nevertheless, there are divergent views concerning the separatist status of creditors who hold property security rights. The interpretation of Articles 1131 and 1132 of the Civil Code differs depending on whether holders of collateral assets belonging to third parties are considered separatist. The latter view holds that any collateral held by creditors holding property security rights belonging to third parties is part of the bankruptcy estate.

It is evident that the regulation of the position of third-party security assets is required in order to provide legal certainty to all parties involved, including the manner in which third-party security assets are to be included in the bankruptcy estate/*boedel*, as well as the list of bankruptcy assets/*boedel* prepared by the curator. Alternatively, this determination may be made by the supervisory judge or through a lawsuit/application for other matters. It is thus evident that an amendment to Article 21 of the Bankruptcy Law is required, with the inclusion of a new paragraph addressing the status of third-party security assets within the aforementioned legislation.

4. CONCLUSION

Third-party collateral assets are not included in the bankruptcy estate and their regulation in Indonesia, as stipulated in Article 21 of the Bankruptcy Law, Books II and III of the Civil Code, as well as the Mortgage Right Law and the Fiducia Guarantee Law. However, this arrangement is still lacking as there are differences in judges' decisions on collateral assets belonging to third parties disregard for legal rules in insolvency proceedings can lead to payment delays and disputes. The philosophy of security is to auction assets to fulfil the debtor's debt obligations, not to transfer ownership. Protection of third-party rights is important to ensure fairness, legal certainty and economic stability in insolvency proceedings.

The application of arrangements regarding third-party security assets in the management and administration of bankruptcy assets in Indonesia shows dualism, with some judges' decisions including third-party assets in the bankruptcy estate and others not. This dualism arises from different interpretations of Article 21 of the Bankruptcy Law, which does not provide a clear definition of 'everything acquired during bankruptcy.' To resolve this uncertainty, a reformulation of Article 21 is required to make it clearer and more consistent.

To overcome the dualism in the handling of collateral assets belonging to third parties in the management of bankruptcy assets in Indonesia, several steps need to be taken. First, the application of the legal theory of covenants and guarantees should be enforced by referring to the Mortgage Right Law and the Fiducia Guarantee Law. The Supreme Court should encourage its members to issue decisions based on the law and avoid following previous inconsistent decisions. Considering and remembering the urgent need to create legal certainty and legal protection for stakeholders, short-term measures such as focus group discussions, the creation of Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung*/SEMA) or Regulation of Supreme Court (*Peraturan Mahkamah Agung*/PERMA), and the development of an integrated information system are necessary to prevent disparity in judgements and avoid dualism.

Furthermore, reinforcing the rules regarding the authority and duties of curator in relation to third-party collateral assets is an important short-term solution. The curator must verify and segregate these assets and if there is any doubt or suspicion, the curator must report the alleged ownership status to the Meeting of Creditors. The curator's mistakes and violations in performing his duties are violations of professional standards that are the basis for consideration by the Honour Council of his professional organisation in addition to the burden of losses to his personal property.

In addition, the supervisory judge should utilise data from the Financial Information Service System (*Sistem Layanan Informasi Keuangan*/SLIK) to ensure the accuracy of information regarding the debtor and its assets. The Ministry of Law and Human Rights together with relevant institutions must formulate specific rules to provide legitimacy and legal clarity regarding the management of bankruptcy assets. Reformulation of Article 21 of the Bankruptcy Law is needed to clarify that collateral assets belonging to third parties are not included in the bankruptcy estate.

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