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"Memperkuat Produktivitas untuk Ketahanan Ekonomi Nasional"

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The Curator Responsibility of the Loss of Wealth Bankrupt Limited Company

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Abstract

Curators can be personally liable if they make a mistake or negligence outside the provisions of the Bankruptcy Act and PKPU which causes losses to bankrupt assets. If the curator has carried out his duties in accordance with the provisions of the Bankruptcy Act and PKPU, then if a loss arises from bankruptcy, he does not have to be personally liable and the loss will be charged to the bankrupt assets. In connection with the personal responsibility of the curator, in addition to being able to be held accountable civilly it is possible for the curator's actions to be held criminally accountable. In addition, administrative sanctions can also be imposed on the curator. It should be borne in mind that as long as the curator carries out his duties and authorities in accordance with the provisions of the Bankruptcy and PKPU Law, he should not be sued either civilly, criminally or subject to administrative sanctions even if his actions cause losses to bankrupt assets.

Keywords: Curator; Bankrupt Assets; Criminally.

INTRODUCTION

The Curator of the profession and Board in Indonesia become popular when bankruptcy and PKPU routine often used since the monetary crisis that hit the Asian countries including Indonesia since mid in 1997. For the benefit of the business world in solving the problem of debt receivables fairly quickly, open and effective then the curator of the profession and Board is needed as the authorities to administrate of wealth Debitor who declared bankrupt or PKPU. The curator and Board also function as the guardian of the assets of Debtors over the possibility of their abusers the creditors who want to loot the Debitor in a malicious manner and harm other creditors. This is the logical consequence of the implementation of the provisions of Article 1132 of Civil Code which reads: "belong to guarantee together for all those who owe him; sales revenue of objects is divided according to the balance, namely according to the great small receivables each, except when in between the creditor had no valid reasons to take precedence." (Harahap, Agus Salim, 2018).

The Stipulation in the jurisdiction of bankruptcy popular referred to as the principle of Pari Passu Pro Average Parte, which means that the wealth of the debitor guarantee together to the creditors and the result must be shared proportionally among them, except if between the creditors were according to the law must take precedence in the receive payment invoice. View tasks and responsibilities of the curator and management which is so great that the Act 37/2004 give some authority to the curator and Board of them: (1) security bankruptcy estate; (2) Do the recording of bankruptcy estate; (3) selling bankruptcy estate; (4) filed a case with regard to the interests of the bankruptcy estate; (5) Continue Debitor business bankrupt; (6) filed a petition to the judge the supervisors to put the executive body of law, company

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commissioner who declared bankrupt in custody. Yet despite the tasks and authorities provided by the act is wide enough, in practice this is not a little curator and Board experience obstacles in running tasks and authority. The barriers that often faced. For example, (1) is not allowed by the Debitor bankrupt or were prevented from going to enter the office or the place of residence and threatened by the Debitor or the power of the law to be reported to the criminal has entered the garden is against the law (Article 167 Criminal Code); (2) reported by debtor to the Police on the basis of the enter a false statement because they had rejected the bill the creditors that according to the debitor is halting (Article 263 Criminal Code); (3) reported by the Debitor to police for libel over the announcement of bankruptcy by the curator (4) reported by the Debitor to the Police on the basis of fraud because it has been doing the sale of bankruptcy estate without approval.

According to the opinion of Andrew Keay, Professor of Corporate and Commercial Law from the University of Leeds in his book entitled The Law of Company Liquidation, Fourth Edition, Sydney: LBC Information Services, 1999, Curator is a representative of the court which is trusted by the court to carry out its obligations, according to his opinion as follows: "...a liquidator is a representative of the court and entrusted with the reputation of the court for this impartial dispatch of her or his duties." In the Court of Appeal of the State of California in the matter of the Mc Carthy v Poulsen (1985) and things Ostrowski v Miller explained the concept of the relationship between the curator/board with the Court where the curator/Board have "quasi-judicial immunity", where noted that the receiver cannot be sued without the its permissions of the receivership court. In the most recent case (Ramirez v. Pasternak, 2011 U.S. App. LEXIS 443 (9th Cir. Jan. 7, 2011)) stated also that: Pasternak bothered entitled to absolute quasi-judicial immunity for actions undertaken in his capacity as receiver that were "functionally comparable to training of judges. A judge will not be deprived of immunity do we stop? Because the action he sales at bothered in error, bothered done maliciously, or bothered in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.

In Indonesia, Act 37/2004 actually also adopted the terms above, as Article 1 Number 5 of Act on 37/2004 stating the curator is the porch of the Heritage property or an individual who was appointed by the Court to manage and deal with wealth Debitor Bankrupt under the supervision of Judges Supervisors. One of the experts in the law of bankruptcy and PKPU Indonesia, Sutan Remy Sjahdeini expressly in his opinion related to the relationship of the curator and the Court stated that the: (1) the intervention of third parties with the implementation of the curator is contempt of court, because the curator appointed by the court niaga and perform tasks for the benefit of the court; (2) the curator could not be reviewed because it has been running the laws/statutory obligations-him and; (3) the curator can only be reviewed when did not carry out his statutory obligations -.

The curator and board as a party which represents the judgment in running the judicial authority is already should not be get the intervention/intervention from outside the body of the judicial power, let alone to get the criminalisation efforts made by the police or the office of the Attorney General which is the domain of the government/executive. The conception in terms of the Act on 37/2004 indeed have the right provides the setting of efforts to fight against the curator by the party who feel wronged by using the mechanism of the stipulation of Article 77 with filed an objection to the Judge Supervisors, or using a mechanism that is often referred to as "Lawsuit others as regulated in Article 3 paragraph 1 of Law 37/2004 which reads: "its decision on the petition bankruptcy statements and other things related and or regulated in this law, decided by a court of law area covers the area where the position of the law the Debitor." Setting the terms of the stipulation within the Act on 37/2004 is to provide protection to the stakeholders in the process of bankruptcy and PKPU, either Debtor, creditors or other parties who

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wished to actions that are performed by the curator and Board in accordance with the terms of the Law of judicial authority which must be completed in the area of judicial authority is not from the outside.

From all the exposure that has been presented by the author in this article can be concluded as follows: (1) Rights Professional Immunity curator and Executive born automatically because of his position as a representative of the court that these two rws judicial authority for acting in statutory obligations-him; (2) to strengthen the position of the right of immunity curator and professional management of socialization needs to be done about the tasks and authorities curator and manager of the law enforcement agencies especially the police and judiciary or in the long term the government together with the Parliament can design special law and Board of curator profession in order to assert the right of immunity curator and Board. Sri Rahayu Wilujeng. (2017).

DISCUSSION

The science of the law to know the two kinds of the subject of the law that is the subject of personal law (the individual), and the subject of the law in the form of the body of law. For each of the subject of the law apply the terms of the law which is different to the other, although in certain matters of both can be applied a general rules. One of the special characteristics that distinguish the subject of personal law with the subject of the law the body of law is when the emergence of the subject of the law, which in the end will determine when the emergence of the rights and obligations for each of the subject of the law. According to Article 1 paragraph (2) the Book of Act civil law ,on the subject of personal law, the status of the subject of the law is considered to have been there even when the individual personal was in the womb . While in the body of the law of the existence of the status of the body of the new laws obtained after he had received endorsements from the officials who authorized that give the rights, obligation and wealth itself for the body of the law, regardless of the rights and obligations of the wealth of the founders, shareholders and the stewards. Article 7 paragraph (4) UUPT stated that "company acquired the status of the body of law after the deed of establishment authorized by the Minister".

In the book of the Law on the law of trademarks is not one article in which stated that the company as a body of law, but in UUPT expressly stated in Article 1 point 1 that the company is the body of law. This means that the company is eligible scholarly qualifications as a supporter of the rights and obligations among others have wealth founder or stewards.

As a body of law, the company meet the elements of the body of law as defined in the Act on Limited Company. The elements are :

1. The organization that regularly

In the Article 1 Bullet 2 Act on Limited Company, we can see from the existence of an organ of the company which consists of the General Meeting of Shareholders (RUPS), the Board of Directors and Commissioners.

2. Wealth itself

According to the Article 31 and 32 UUPT, wealth itself is a basic capital that consists of all the nominal value of the shares that consists of cash money and wealth in the form of another.

3. Do the relationship of the law itself

As the body of the law of the company to its own legal relations with third parties represented by the management which is called the Board of Directors and Commissioners. The Board of Directors are solely responsible for the interests and objectives of the company and represents the company both inside

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and outside the court. In carrying out its activities, directors under the supervision of the Board of Commissioners which in certain things that help the board of directors in running the task.

4. Have a separate purpose

These goals are defined in the Articles of Association of the company because the company running the company and the main objective of the company is to gain/ spider.

The Responsibility of the Board of Directors When the Bankruptcy Act on Limited Company According to the Provisions of Law No 40 Year 2007. In the case of bankruptcy of the company and not by a priori directors personal responsibility over the company. but rather the board of directors must be free from the responsibility of bankruptcy limited company. The responsibility of the board of directors of its subsidiaries activity plummeted bankrupt, in principle is the same with the responsibility of the board of directors of the company do not experience bankrupt. Further settings from the responsibility of the board of directors can be seen from certain conditions. On the principle of the board of directors is not responsible for personally against the works that are done in the name of the company that ilakukan based on the authority that he possessed. This is because the act of the board of directors is seen as an act of limited company that is the subject of the law. But there are a few things the board of directors can be for his consignment personally in bankruptcy limited company. Article 104 verse (2) UUPT. "In the case of bankruptcy as mentioned in paragraph (1) happens because of an error or negligence of the Board of Directors and the bankruptcy estate is not enough to pay all obligations of the company in bankruptcy, each member of the Board of Directors by 20.000.000 responsible for all obligations that do not recover from the bankruptcy estate is".

From this setting, then there are actually the red thread between the responsibility of the board of directors of limited liability company is not in the bankrupt and the responsibility of the board of directors in the case of limited company experienced bankrupt. Thus the theory of the responsibility of the board of directors above can be used to measure the responsibility of the board of directors in the case of limited company experienced bankruptcy. While the Article 104 Paragraph (2) UUPT is a judicial implications of the nature of colleague from the board of directors in which all the directors responsible Tumpuk Renteng (jointly and severely). So for the members of the board of directors that decides to remove the responsibility of Tumpuk Renteng, then the members of the board of directors is obligated to prove about it. Colleague aspects or called with the responsibility by Tumpuk Renteng can create injustice from members in performing certain acts but can be prompted for accountability. To bridge the question of this injustice, the opinion of the Rudhi Prasetya very precise stating that "Actually important terms in the articles of association of governing board of directors meeting institutions actually implemented and do not simply made the decoration. In order for the board of directors in taking the reason that felling which in between those responsible.

Article 398 Criminal Code states: "A board or commissioners limited company, airlines also contributes to Indonesia, or the assembly of cooperation declared bankrupt or which settlement olch judgment was commanded; 1) when the corresponding row help or allow to perform the deeds of the contrary to losses suffered by the company, airlines, 2). When concerned with the intent to suspend the bankruptcy or the settlement of the company, mas flames started, 3) when he can be blamed, does not meet to Article 27 Paragraph 1 ordinance about an airline contributed indonesia, or that the books and letters which contain notes and writings which are stored according to Article, cannot be outward bravery in a state is not changed. While the Article 399 Criminal Code states: "Board or commissioners limited company, Maskapai Contributed Indo resolution by the court was commanded, threatened with imprisonment 7 (seven) years when the corresponding reduce fraudulent pemiutangan rights on the

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company, airlines, or assembly to: 1) make expenditure does not exist or is not posted revenue or interesting things from the boedel goods; 2) has facililities together anything with free of charge or clear under the price; 3) with a profitable way one creditor at the time of the bankruptcy or settlement or on when he knew that the bankruptcy or earlier settlement cannot be prevented again; 4) does not fulfill its obligation nto make note according to Article 6 paragraph the first KUHD or Article 27 (1) the ordinance about an airline contributed indonesia, and about the store. From the terms of such as mentioned in the second article this can be deduced that both members of the board of directors and the co has caused the loss of the creditors limited company and may be imposed imprisonment of one year and four months if they participate in or give approval of per limited fall bankrupt, or participate in or give approval for the loan with the requirements which weighed with the meaning of delay the bankruptcy PT, or negligent in held in accounting as required by UUPT and articles of association of PT Will the bankruptcy can criminal prosecution and imposed imprisonment of seven years when engineer/spending with the meaning of debt reduce in a malicious manner the rights of the creditors PT or redirect the wealth of PT with free of charge or with the price far below Fairness. The authority given by the Act of Bankruptcy and PKPU to the curator is very broad so that cause a legal consequences for a curator to be careful in performing their duty and responsible for all the action he did with regard to administrate bankruptcy estate. So in the bankruptcy limited company, when before bankruptcy occurs, the party responsible for the wealth management company limited is the board of directors and after the bankruptcy, parties that are responsible for is the curator. The curator can be done against the law. Therefore, he is responsible for personal against the loss suffered by a third party. This is if the actions of the curator to the disadvantage of the bankruptcy estate and the third party is the action outside of the curator of the authority given to it by the law could not burden on bankruptcy estate, and is the responsibility of the curator personally. On the contrary, curator actions made in accordance with the authority given to him by law and done with goodwill. But because of the things outside of the authority of the curator turns to harm the bankruptcy estate, it shall not be answerable personally to the curator and loss can be placed on the bankruptcy estate. (Pramono, Nindyo, 2017)

On the limited company, in certain matters of the board of directors must be responsible for personally when because of an error or neglect limited company losses and declared bankrupt. So it is with the curator, Article 72 of Act of Bankruptcy and PKPU determine that the curator is responsible for an error or negligence in running the task management and/or pemberesan that cause loss of wealth bankrupt. Based on the terms that the curator has the responsibility of that very heavy because the curator is not only responsible for the works that are done with deliberately, but also because of neglect. See Article 72 of Act on Bankruptcy and PKPU. When it is found the fact that the curator to do a mistake or negligence that cause loss of wealth bankrupt then the curator can be reviewed by the civil and must make restitution. The Act of Bankruptcy and PKPU does not explain more information about understanding and an error or negligence referred to in Article 72 of Act of Bankruptcy and PKPU, so that in this case it is difficult to determine the parameters of the error and negligence.

Jerry Hoff revealed that the responsibility of the curator is not greater weight or even the same with provisions in Article 1365 KUH (Jerry Hoff, 2000). Based on Article 1365 KUH Civil, curator actions can produce change loss when meets the elements of action against the law are elements against the law (onrechtmatige daad), error, the existence of losses caused and the existence of the relationship kausal (for the consequences) between works and losses that arise. In other words, curator of action is considered to have the elements against the law (onrechtmatige daad) when the curator does not carry out its task in accordance with the specified by the Bankruptcy Act and PKPU.

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One of the elements of the action against the law is the existence of the apparent loss caused. Losses caused by the action against the law can be in the form of a judicial review and loss imateriil loss. In the implementation of the task, curator required responsible when his actions in the management and pemberesan bankruptcy estate loss for other stakeholders in bankruptcy especially for the creditors and debtors bankrupt. In an action against the law is presupposed the existence of the relationship between kausal action against the law with losses that arise. Related to the actions of the curator, Article 72 of Act of Bankruptcy and PKPU also argued that there is a relationship between kausal errors or negligence that is made by the curator with losses caused against the bankruptcy estate. Thus, because the Article 72 of Act of Bankruptcy and PKPU not regulate about the sanctions that will be applied to the curator of the actions that harm the bankruptcy estate and Article 1365 KUH Civil Liability can be used as a legal basis to determine sanctions on an error or negligence that is done by the curator in relation with the task of organizing bankruptcy estate.

Moegni Djojodirjo (2018) in the case of the curator to do a mistake or negligence that harm the bankruptcy estate and the curator can be asked to change the loss. There are several possible related to the change of the loss, including is compensation in the form of the return on the state of the situation. Therefore, a curator appointed to administrate in a process of bankruptcy should have a good financial situation. A curator can also asked for accountability is criminal for errors and neglect. Elements of the error or negligence is included in the scope of the criminal law. Elements of the error in the criminal law in the form of deliberate (dolus) or negligence (culpa). In the criminal law a person can be called to account if he has an element of error in accordance with the principle of no criminal without error. This is emphasized in Article 6 paragraph (2) of Act No. 4 of 2004 on Judicial Power that no one can be condemned criminal, except when the court, because the proof is valid according to the laws, get the belief that someone who is considered responsible, has been guilty of the actions that can be charges relate to themselves. In addition to the civil and criminal sanctions, curator can also imposed sanctions in relation to the administration of his profession as a curator. In running his profession as a curator there are professional code of ethics of the Association of the curator and Board of Indonesia (AKPI) who became edoman for someone curator in carrying out their tasks. In the rules of professional ethics, there are conditions that each of the members must comply with and implement truly- indeed all the settings related to the bankruptcy and PKPU.Professional Standards and Board of Indonesia, No. 100 Numbers 03. Thus if the curator perform an action contrary to the Act of Bankruptcy and PKPU, he may be imposed sanctions.

CONCLUSION

The curator may incur personal responsibility for when doing a mistake or negligence outside the terms of the Act of Bankruptcy and PKPU so that the cause of the loss of wealth bankrupt. When the curator has been running duties in accordance with the provisions of Law Bankruptcy and PKPU, then when arising out of loss of wealth bankrupt, he does not have to be responsible for personally and this loss will be charged against the bankruptcy estate. In relation to the personal responsibility of the curator, besides can be prompted for accountability in civil liability not covered the possibility for the actions of a curator to asked for accountability in criminal. In addition administrative sanctions can also be imposed on the curator. It needs to be remembered that during the curator running tasks and authority in accordance with the provisions of the Act of Bankruptcy and PKPU then it should not be reviewed both civil and criminal, administration sanctions even though his actions caused losses in the bankruptcy estate.

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