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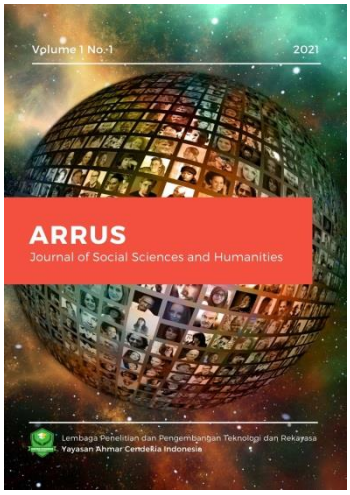

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RESEARCH ARTICLE

Responsibilities of Individual Guarantor (*Personal Guarantee*) Declared Bankrupt

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Abstract: The purpose of this research is to find out the liability of individual guarantors who are declared bankrupt. This research is normative juridical law research. The approaches used in this research are the Legislative Approach and the Conceptual Approach. The legal materials that will be used are primary, secondary, and tertiary legal materials. The method of collecting legal materials is carried out by studying documents in obtaining data from laws and regulations and other documents related to the author's problems related to decision Number 212K/Pdt.Sus-Bankrupt/2015. In the Supreme Court Decision Number 212K/Pdt.Sus-Bankrupt/2015, there is an imbalance between theory and practice. The non-implementation of Article 1824 BW in this decision is detrimental to the insurer. The non-implementation of Article 1824 BW in this decision is detrimental to the insurer. In the Deed of the Guarantor, if it is not expressly agreed that the guarantor is willing to go bankrupt if the debtor defaults, then the legal consequences of the guarantor cannot be filed for bankruptcy over the default committed by the debtor.

Keywords: Individual Guarantor, Personal Guarantee, Bankrupt

1. Introduction

In lending and borrowing to guarantee the certainty of repaying the debtor's debt, the creditor can ask for material guarantees and non-material or immaterial guarantees, such as *personal* or individual guarantees, if material guarantees are considered lacking. In an individual guarantee, the guarantor must complete the debtor's achievements if the debtor defaults (Miru, 2011).

Providing legal certainty regarding the settlement of debtor obligations for implementing an agreement with a debt guarantor is one way to maintain creditor security. The process of providing guarantees is divided into 2 (two) components, namely guarantees given by individuals and legal entities.

Individual guarantee refers to a form of guarantee given by an individual or a person to fulfill the debtor's obligations. Providing individual guarantees protects creditors when the debtor does not fulfill his performance against creditors. The insurer who waives his privileges is considered to replace the debtor's position so that if a default occurs, the insurer must be held responsible. This is expressly regulated in the Deed of Underwriting, while the insurer's bankruptcy is not included in the Deed of Underwriting but is often considered to be listed.

Government Regulation instead of Law (PERPU) Number 1 of 1998 concerning Amendments to the Bankruptcy Law was issued by the Indonesian government before Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. PERPU No. 1 of 1998 was officially stipulated as law by Law No. 4 of 1998 concerning the Stipulation of Government Regulations instead of Law No. 1 of 1998 concerning the Amendment of the Bankruptcy Law to Law.

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To avoid misunderstandings about the notion of bankruptcy and debt as a reference in practice, the drafters of this law have included the terms bankruptcy and debt as outlined in Chapter I Article 1 Law Number 37 of 2004. Therefore, scholars and practitioners of business law makes a definition of bankruptcy and debt which is used as a reference in practice (Muljadi, 2006) .

Since the enactment of the Bankruptcy and PKPU Laws, the guarantor or guarantor tends to experience unpleasant things as a result of the creditor requesting a court order to bankrupt the individual guarantor or borscht, *which* is usually demanded by the bank in the event of default, even though in the deed of underwriting there is absolutely no guarantor agreement to go bankrupt if the debtor defaults.

In certain circumstances, the role of an individual guarantor, which initially only acts as a third party to guarantee and guarantee the repayment of debts of debtors who are negligent in paying off their debts, can change to the same position as the main debtor who can be directly held accountable by creditors without having to confiscate assets from the main debtor, if this is agreed upon as stipulated in Article 1824 BW. However, the Supreme Court decision No. 212K/Pdt.Sus-Pailit/2015 granted the bankruptcy statement against Arifin, the guarantor of PT. Cemerlang Business Partners, where PT. Bank Mayapada Internasional, Tbk, as the Bankruptcy Petitioner, has filed a bankruptcy petition for the debts of the Bankruptcy Respondent, which are due and collectible.

Even though there is a release of privileges from the guarantor/guarantor as referred to in Article 1831 BW, this does not mean that the position of the guarantor can replace the position of the main debtor, which is not agreed upon in the guarantee deed as stipulated in Article 1824 BW. The provisions of Article 1832 BW only authorize the creditor to confiscate the assets of the guarantor/guarantor to pay off the debt of the main debtor (PT Mitra Usaha Cemerlang), and the guarantor loses his right to demand that the debtor's goods be confiscated first.

2. Research Methods and Materials

This research is normative juridical law research, which means studying relevant theories to be used and seeing firsthand how the law is applied. The approach to be used in this study is the Legislative Approach and *the Conceptual Approach* .

The legal materials that will be used are primary, secondary and tertiary legal materials. Primary legal materials such as the Civil Code; Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt and Supreme Court Decision Number 212K/ Pdt.Sus -Bankrupt/2015. Secondary Legal Materials, namely writings or opinions of civil law experts regarding the legal principles of agreements, guarantees and dispute resolution through the Supreme Court, as well as writings or opinions of legal experts regarding the role of personal guarantees for debt *agreements* . Tertiary Legal Materials, namely materials that provide instructions and explanations of primary legal materials and secondary legal materials consisting of the Indonesian Language Dictionary and the Legal Terminology Dictionary.

The method of collecting legal materials is carried out by studying documents in obtaining data from laws and regulations and other documents related to the problems that the author obtained related to decision Number 212K/Pdt.Sus-Bankrupt/2015.

3. Results and Discussion

3.1. The position of the insurer who does not include himself willing to be bankrupt in the guarantee deed

The creditor's considerations when giving a loan to the debtor, in addition to material guarantees, a guarantor or *borg* as a third party can provide guarantees for fulfilling the debtor's debts to creditors. The guarantee agreement must be expressly stated in the Deed of Individual Guarantee made before a Notary in the form of a notarial deed between the

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Guarantor and the Creditor. The privileges for the insurer that have been regulated by BW in Article 1831 are as follows:

"The guarantor is not obliged to pay the debtor, except if the debtor is negligent, while the debtor's objects must first be confiscated and sold to pay off the debt."

If in the guarantee agreement the guarantor has released his privileges, the guarantor cannot sue the creditor to seize and sell the debtor's assets first to fulfill the debtor's achievements. In practice, the guarantor is often held accountable by the creditor if the debtor defaults in the event that the guarantor has relinquished his privileges. Because the relinquishment of these privileges also causes that there are often debtors who actually have sufficient assets to pay off their debts to creditors but do not want to pay so that creditors directly charge the debtor's debt to the guarantor (Man, 2019)

In general, those asked by creditors to act as guarantors are people or legal entities that have good credibility and sufficient financial strength so that the guarantor can take over debt obligations that should be fulfilled by the debtor. There are 2 (two) legal relations in the underwriting agreement, namely the main agreement in the form of a credit agreement between the creditor and the debtor and an additional agreement for individual guarantees that are economically capable of guaranteeing the debtor (Artama Putra et al., 2014) . According to Virna Sari Nasti, Notary and PPAT in Makassar City, credit agreements with individual guarantees can occur due to family, friend or business relationships. Business or economic interests can occur because debtors and third parties both have business interests to advance a company. Meanwhile, a *borg* cannot bind himself beyond the more stringent conditions of the debtor's agreement.

With the existence of a guarantee agreement between the creditor and the guarantor, legal consequences are born in the form of certain rights and obligations that must be considered by both the guarantor and the creditor. Even though the guarantee agreement appears to only impose obligations on the guarantor because the guarantor binds himself to fulfill the performance/debt of the debtor for the benefit of the creditor, in this legal relationship it also creates rights for the guarantor.

The rights granted by law to the insurer are a form of protection for the insurer against creditor actions that can be burdensome for the insurer. These provisions are given by law as stipulated in several articles regarding underwriting in BW will apply to the insurer, unless the parties agree otherwise.

In individual guarantees, achievement fulfillment can be maintained against certain people, namely the debtor and the guarantor . Apart from being *accessoir in nature* , the underwriting agreement when viewed from the way it is fulfilled is a subsidiary or a replacement. This can be seen from the provisions of Article 1820 BW which stipulates that the guarantor binds himself to fulfill the debtor's debt, if the debtor himself does not fulfill it.

Given that this underwriting guarantee is *accessoir* and only as a reserve, a *borg* is given special privileges regulated by law. The privilege that is owned by a guarantor exists because the guarantor only acts as a reserve, meaning that if the debtor does not pay off his debt, the guarantor has an obligation to pay off the debt.

So from these provisions it can be concluded that the guarantor is only bound in a subsidiary manner when the debtor cannot fulfill his achievements and at the last level only the debtor is obliged to fulfill the debt. An individual guarantee agreement (*personal guarantee*) that is bound is the ability of a third party to pay off the debtor's debt (jurist., 1985) . In the individual guarantee agreement it is not clear what objects belonging to third parties will be used as collateral, so that general guarantee provisions will apply here which are born by law and only give equal position among creditors, namely as concurrent creditors.

The position of the guarantor is not the same as the position of the debtor so that the guarantor will act according to his capacity as the guarantor when the debtor's obligations

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have been carried out first. It is unfair if the position of the debtor is considered equal or the same as the guarantor at the time of fulfilling his debt. Problems in the practice of making individual guarantees, the special rights owned by the guarantor are abolished in the interests of one of the parties to the agreement or the creditor. As for the consequences of the insurer relinquishing the privileges he can have, it is like the debtor, if the debtor does not pay his debt, the insurer can be billed to pay off the debtor's debt first without having to confiscate and sell the debtor's property. This situation is certainly contrary to the implementation of BW, especially articles 1831 and Article 1833 BW which should be implemented in order to protect the role of the insurer (Annisya Dwi Rahmayani Putri & Lina Jamilah, 2023; Bitca & Andon, 2023).

Keep in mind that the guarantor is not a debtor or a party that has debt. In a guarantee agreement, the party acting as guarantor expresses his willingness to be responsible for paying debts or obligations from the debtor if the debtor does not fulfill them. In this case, the guarantor acts as additional collateral to protect the party receiving the loan/debt. As for the requirements if you want to apply for bankruptcy to the guarantor, namely the applicant must be able to prove that the status of the guarantor has changed to that of a debtor because only debtors can be bankrupt .

The guarantor in a bankruptcy case is the party that is obligated to bear the debtor's debt. The guarantor's assets will only be used to fulfill debts to creditors when the debtor's assets have been confiscated and auctioned first but the proceeds are insufficient to pay the debt or the debtor no longer owns any assets (Lenny Nadriana, 2018; Pratiwi & Saraswati, 2021). However, the fact is that many creditors and judges impose performance burdens or obligations which are actually the debtor's responsibility to the guarantor by ignoring the debtor's assets. In *a personal guarantee* there are no objects bound in the agreement, but what is bound in the agreement is the ability of the third party/guarantor to fulfill the obligations of the debtor in fulfilling his debt. *A personal guarantee* is an additional/follow-up agreement so that it can only be maintained for the person who is bound by the agreement (Celandine, 2021; Roeroe, 2017).

Regress right which is the right of the insurer itself, here the insurer has the right to claim back not only the debt he has paid, but can also claim compensation for losses arising from the legal consequences of the sale of the insurer's property. The right to claim such compensation does not exist with the guarantor who replaces the position of the creditor. Conversely, if the guarantor replaces the creditor's rights due to subrogation , he can obtain the creditor's rights against the debtor, including guarantees attached to the rights of the creditor he replaced (Ciobanu & Bitca, 2023; Lenny Nadriana, 2018; Yunianti & Budhisulistyawati, 2020).

Until now, there are no specific and concrete provisions to provide legal protection for the insurer. Legal protection is needed in the process of providing an Underwriting Guarantee if it refers to one of the principles of the agreement, namely the principle of good faith, that the person making the agreement must be made in good faith. In subjective terms, good faith is defined as someone's honesty when a legal action is taken. While good faith in the objective sense that the implementation of an agreement must be based on compliance norms or what is deemed appropriate and proper in society (Sutarno, 2009) .

Borgtocht or the insurer is generally protected by law which aims to ensure that the insurer is not harmed in the engagement he made and can sue the insured party or the debtor in the event of default or inability to pay off debts or obligations (Sangkai, 2022; Susanti, 2018).

3.2. Adjustment of Supreme Court Decision Number 212K/ Pdt.Sus -Bankrupt/2015 Against Legislative Provisions

In the case of bankruptcy, a guarantor cannot be forced to fulfill the debtor's debt even though the debtor has been declared bankrupt, unless the guarantor is also bankrupt or there are assets from the guarantor that are specifically burdened with mortgage rights to guarantee

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payment of the debtor's debt to the creditor. As for the application for bankruptcy for the guarantor, it must be stated explicitly in the deed of guarantee in accordance with the application of Article 1824 BW. One of the guarantor bankruptcy cases in practice is the submission of a bankruptcy application by Bank Mayapada which is the creditor of Arifin which is the guarantor of PT. Mitra Usaha Cemerlang as a debtor who has received a credit facility from the bankruptcy applicant personally guaranteed by Arifin.

In addition to having debts to creditors who filed for bankruptcy, the guarantor also has debts to other creditors, namely Bank CIMB Niaga Tbk Jakarta Falatehan Branch, Bank ANZ Indonesia Sudirman Branch, Bank Central Asia Jakarta and Gorontalo Branches, Bank Mega Tbk Menara Bank Mega and Bank Danamor Indonesia Tbk .

In its decision , namely the decision of the Central Jakarta Commercial Court Number 49/ Pdt.Sus -Pailit/2014/ PN.Niaga.Jkt.Pst on January 29 2019 the judge stated that he would accept the bankruptcy application for the insurer, in his consideration that the Panel of Judges was of the opinion that the three requirements for filing bankruptcy petition has been fulfilled. Then the insurer felt disadvantaged by the decision, then submitted a cassation request to the Supreme Court against Bank Mayapada with decision Number 212K/ Pdt.Sus -Bankrupt/2015 but the lawsuit was rejected and the insurer still bankrupted .

Basically, in the case of underwriting or *borgtocht* , the principle must be upheld that the guarantor is forever the guarantor for payment of the debtor's debt if the debtor does not pay or is unable to pay his debt to the creditor. The civil status of the debtor cannot be transferred to the guarantor outside of the demand for payment of the debtor's debt. Therefore, the guarantor cannot be asked for bankruptcy for defaults committed by the debtor. The guarantor only plays a role around fulfilling the debtor's debt.

The provisions of Article 21 of the Bankruptcy Law and PKPU are almost the same as Article 1131 BW, only the provisions of Article 1131 BW are wider because they cover existing and future assets . Whereas in Article 21 of the Bankruptcy Law and PKPU only wealth at the time of the bankruptcy statement decision (Man, 2019) .

The bankrupt debtor only loses his civil rights to manage and control his wealth. Meanwhile, to carry out other civil acts , such as getting married to himself, receiving grants (even if the grant is legally part of the bankruptcy estate), managing the assets of other parties and becoming the attorney of other parties to carry out legal actions and on behalf of the giver. power (Muljadi, 2006) .

The assets of the bankrupt debtor that are included in the bankruptcy estate are under general confiscation (general confiscation), meaning that the confiscation applies to anyone, not only applies to certain parties such as collateral confiscation that is decided by a civil judge regarding the plaintiff's application in a civil dispute. In Article 21 of the Bankruptcy Law and PKPU, bankruptcy assets include all of the debtor's assets at (Nadriana, 2017)

In principle, money loans contain risks in their implementation so that both creditors, debtors and guarantors (if there is additional collateral in the form of individual guarantees) must apply the precautionary principle. To minimize risk, creditors usually require debtors to provide guarantees. Collateral is an affirmation from the debtor to carry out his obligations, to do or not to do what has been specified in the agreement.

The problem is when individuals or companies are unable or even inappropriate to take advantage of capital loans to creditors. Instead of giving hope for the company's profits from the results of its business, the individual or the company will find it difficult to return the loan funds. Often creditors ask for additional guarantees in the form of individual guarantees to ensure that the debtor can be trusted to carry out the obligations agreed upon.

Often the guarantor becomes the injured party, especially in the event that the debtor does not fulfill the achievements in his engagement . Filing a bankruptcy petition to the insurer, on the one hand, is detrimental to the insurer himself, but on the other hand, this is

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considered a legal consequence of relinquishing the insurer's privileges. However, it must be remembered that filing a bankruptcy statement for the insurer must be strictly regulated in the deed of guarantee. Several bankruptcy cases that befell the guarantor in their decisions did not pay attention to the application in 1824 BW which bankruptcy should have been regulated and agreed strictly in the deed of guarantee. If it is not agreed upon, a guarantor cannot submit a bankruptcy statement on the debt from the debtor. In Article 1831 BW itself it has been regulated that in the event that the debtor fails to fulfill the performance, the new guarantor is obliged to pay the debt to the creditor after demanding that the debtor's property be confiscated and auctioned to pay off the debt (Brown & Saunders, 2020; Honjo et al., 2022).

4. Conclusion

The guarantor or *borgtocht* generally does not understand the legal consequences of the guarantee agreement, but if the guarantor does not promise himself to be bankrupt if the debtor defaults, then the guarantor cannot apply for bankruptcy by the creditor as stipulated in 1824 BW with the quote "it is not permissible to extend the guarantee to exceed the provisions -the conditions that become conditions when holding it. In practice, the guarantor is often directly held accountable by the creditor if the debtor is negligent/ defaults in fulfilling his performance. This is because the guarantor has relinquished his privilege to sue the creditor to seize and sell the debtor's assets in advance to fulfill his debt. In addition, the release of privileges by the guarantor often causes the debtor who actually has sufficient assets to pay off his debts to the creditor but directly burdens the debtor's debt to the guarantor. If privileges can be regulated explicitly in the deed of guarantee as well as with bankruptcy.

In the Supreme Court Decision Number 212K/ Pdt.Sus -Bankrupt/2015 there is an imbalance between theory and practice. The non-implementation of Article 1824 BW in this decision is certainly detrimental to the insurer. In the Deed of the Guarantor, if it is not expressly agreed that the guarantor is willing to go bankrupt if the debtor defaults, then the legal consequences of the guarantor cannot be filed for bankruptcy over the default committed by the debtor.

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