LEGAL ANALYSIS OF AUTHORIZED PARTIES TO FILE BANKRUPTCY AND THE POSITION OF POLICYHOLDERS IN RELATION TO OTHER PREFERRED CREDITORS OF INSURANCE COMPANIES

THESIS

By:

MUHAMMAD ISMAIL

Student Number: 18410527

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY PROGRAM IN LAW

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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LEGAL ANALYSIS OF AUTHORIZED PARTIES TO FILE BANKRUPTCY AND THE POSITION OF POLICYHOLDERS IN RELATION TO OTHER PREFERRED CREDITORS OF INSURANCE COMPANIES

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MUHAMMAD ISMAIL

Student Number: 18410527

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بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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2. Anggota	:	Lucky Suryo Wicaksono, S.H., M.Kn., M.H.	.....
3. Anggota	:	Inda Rahadiyan, S.H., M.H.	.....

Mengetahui:
Universitas Islam Indonesia
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Dekan,

Prof. Dr. Budi Agus Riswandi, S.H., M.H.
NIK. 014100109

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ORIGINALITY STATEMENT

ORIGINALITY STATEMENT

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ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR
MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA
Bismillahirrahmanirrahim

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Nama : **MUHAMMAD ISMAIL**

NIM : **18410527**

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Fakultas Hukum Universitas Islam Indonesia untuk mempergunakan karya tulis ini.

Selanjutnya berkaitan dengan hal diatas (terutama pernyataan butir nomor 1 dan nomor 2), saya sanggup menerima sanksi baik administrative, akademik, bahkan sanksi pidana, jika saya terbukti secara kuat dan menyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersikap kooperatif untuk hadir, menjawab, membuktikan, melakukan terhadap pembelaan hak-hak dan kewajiban saya, di depan,, "Majelis" atau ,, "Tim"" Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan fakultas, apabila tanda-tanda plagiat disinyalir/terjadi pada karya ilmiah say aini oleh pihak Fakultas Hukum Universitas Islam Indonesia.

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Yogyakarta, 14 Januari 2023

Yang Membuat Pernyataan,

MUHAMMAD ISMAIL

NIM: 18410527

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CURRICULUM VITAE

1. Name : Muhammad Ismail
2. Place of Birth : Rembang
3. Date of Birth : June 26th, 1999
4. Gender : Male
5. Address : Padaran, Rembang District, Central Java
6. Parents Identity
   a. Father : Kalim
      Occupation : Entrepreneur
   b. Mother : Musikah
      Occupation : Entrepreneur
7. Education
   a. Elementary School : SD N Padaran
   b. Junior High School : SMP N 3 Rembang
   c. Senior High School : MAN 1 Rembang
8. Hobby : Do anything makes me happy

MOTTO

““Only do what your heart tells you.””

““Whatever you are, be a good one.””

DEDICATION

This thesis is wholeheartedly dedicated to:

Allah *Subhanallahu wa ta'ala*,
Thanks Allah SWT who always gives me iman, patience, health, and knowledge which made it possible to complete my thesis;

My Beloved Parents, and Family,
Who always provided me love, continuous support and affection;

My Alma Mater,
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All my lectures of Faculty of Law, Universitas Islam Indoneisa,
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All My Friends,
Who always be on my side in easy and hard times;

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During the process of making this thesis, the writer realized that the thesis will never be finished without any contribution, assistance, guidance, and support from various parties. All gratitude shall be honored to:

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Finally, the author realized that there are still a lot of things that need to be improve, hence any kind of suggestion will be gladly accepted and considered for better future knowledge. Hopefully this thesis can be useful for anyone who reads this.

Yogyakarta, January 14th, 2023

Author,

Muhammad Ismail

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ABSTRACT

Filing for bankruptcy against an insurance company poses problem where the Financial Services Authority can only submit becomes a problem when the application submitted by the creditor does not get a response or approval from the Financial Services Authority. Another problem arises in the order in which the bankruptcy estate is distributed to the preferred creditors such as tax payables, wages owed by workers/labors, and the rights of policyholders. Thus, in this study, the author wants to know who are the legitimate parties to apply for bankruptcy of an insurance company if there is no response or approval from the Financial Services Authority? What is the policyholder's position to other preferred creditors in an insurance company that is declared bankrupt? This type of research is normative legal research conducted by examining library or secondary materials. This study concludes that if the Financial Services Authority remains silent within thirty days after it receives the complete application, the application is considered granted. Meanwhile, regarding the position of the preferred creditors, concerning each of the laws governing this matter, it does not determine which party has its rights to be paid first, so that the order of distribution of bankrupt assets is guided by in the Constitutional Court Decision No. 67/PUU-XI/2013 which decided that wages owed by workers/labors must be paid first before paying the tax bill and the rights of the policyholder. Furthermore, the tax bill has a position that precedes the rights of the policyholder.

Keywords: Bankruptcy, Insurance, Rights, Position, Policyholder.

CHAPTER I

INTRODUCTION

A. Background of Study

Paragraph IV in the Preamble of the 1945 Constitution of the Republic of Indonesia states that the Government of the Republic of Indonesia protects the entire Indonesian nation, promotes public welfare, and educates the nation's life.[1] Based on this Indonesia basic law, public welfare is a fundamental right that the Indonesian government must protect. This follows Article 4 of the Law Number 11 of 2009 on Social Welfare, which states that the state is responsible for implementing social welfare.[2]

Social welfare can be realized properly if legal certainty exists in the applicable laws and regulations. Vice versa, if there is no legal certainty, one of the causes is conflict or incompatibility of one law with another law, then the principle of legal certainty will be difficult to achieve. This is also included in the bankruptcy law, the regulation of which is contained in several laws and regulations, such as Civil Code, Commercial Code, Bankruptcy Law, and other relevant laws must state the same statement. If there are differences in statements or exceptions, they must be stated clearly for the purpose of legal certainty.

One of the efforts of the Indonesian government to realize social welfare was to establish Law Number 40 of 2014 on Insurance. Insurance is a

[1] Paragraph IV in the Preamble of the 1945 Constitution of the Republic of Indonesia.
[2] Article 4 of the Law Number 11 of 2009 on Social Welfare.

way of transferring the risk of loss from one entity to another based on an agreement. The insurance company acts as the insurer for the possibility of the risk of loss arising in the future from the policyholder with the provision of sharing the risk through the payment of a certain amount of premiums. Thus, insurance is a fair transfer of the risk of a loss from one entity to another by dividing the risk through payment in amount premiums.

In this case, before an insurance company becomes the insurer for the risks arising from the insured party, there must first be a binding legal relationship between the two parties. The legal relationship here is not only based on a consensual agreement, but the law also orders this legal relationship to be stated in a written agreement in the form of an underhand deed called a policy to facilitate evidence in the event of a dispute between the two parties.[3] The policy deed becomes the legal basis for parties with the possibility of suffering the risk of loss (policyholder/insured party) can delegate the possible risks that arise to other parties willing to accept the risk transfer (the insurer). Insurance companies as actors in economic activities, do not always have good financial conditions. This condition can cause insurance companies to be unable to fulfil their obligations to other parties, which allows insurance companies to seek bankruptcy protection.

Bankrupt is a condition when a debtor cannot make payments on debts to its creditors as they come due.[4] The condition of being unable to pay is usually caused by financial distress from the debtor's business that has

[3] Subekti, *Pokok-Pokok Hukum Perdata*, Intermasa, Jakarta, 2003, p. 219.

[4] Titik Tejaningsih, *Perlindungan Hukum Terhadap Kreditor Separatis Dalam Pengurusan Dan Pemberesan Harta Pailit*, First Printing, FH UII Press, Yogyakarta, 2016, p. 1.

experienced a setback.[5] Bankruptcy is a condition of debtor who cannot make payments on their debts to their creditors. Article 1 point 1 of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that "bankruptcy is a general confiscation of all assets of a bankrupt debtor…"[6] The general confiscation can only be carried out if in the trial process the bankruptcy petition does not reach an amicable way (*homologation*) between the debtor and the creditors. The general confiscation must be in the nature of *conservatoire*, which means it is a depositary for the benefit of all the creditors concerned. [7] As a result of the bankruptcy declaration decision issued by the court, the provisions in Article 24 paragraph (1) of the Law Number 37 of 2004 shall apply, which stipulates that the bankrupt debtor by law loses the right to control and manage his assets which are included in the bankruptcy estate from the date the bankruptcy decision was pronounced.[8]

The main purpose of bankruptcy is to use the proceeds of the sale of assets to pay all debts of the bankrupt debtor proportionally (*prorate parte*) and follow the level or ranking of unsecured creditors.[9] This can be interpreted that bankruptcy law is a guide to protect creditors so that their rights to their receivables are guaranteed. Meanwhile, a debtor get protection

[5] M. Hadi Shubhan, *Hukum Kepailitan (Prinsip, Norma, dan Praktik di Peradilan)*, Kencana Prenada Media Group, Jakarta, 2008, p. 1.

[6] Article 1 point 1 of the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

[7] Sunarmi, *Hukum Kepailitan*, Edition 2, Softmedia, Medan, 2010, p. 94.

[8] Article 24 paragraph (1) of the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

[9] M. Hadi Shubhan, *loc. cit.*

through debt relief. Ideally bankruptcy law is an umbrella to protect creditors and debtor.[10]

Submission of bankruptcy applications by creditors is important to seek legal certainty against which parties are legally entitled to file for an insurance company bankruptcy. The PT Asuransi Jiwa Kresna case was declared PKPU based on Decision No. 389/Pdt. Sus-PKPU/PN. Niaga. Jkt. Pst., dated January 22, 2021, after the request from the creditors.[11] Meanwhile, the Supreme Court Decision No. 647 K/Pdt.Sus-Pailit/2021, stated that Decision No. 389/Pdt. Sus-PKPU/PN. Niaga. Jkt. Pst. is defective and declared null and void because it contradicts the provisions of Article 223 *Juncto* Article 2 paragraph (5) of Law no. 37 of 2004 concerning Bankruptcy and PKPU.[12] This means that PKPU applications against insurance companies may not be submitted directly by creditors or debtors. Supreme Court Decision No. 647 K/Pdt.Sus-Pailit/2021, also decided to grant the cassation request from the cassation applicants, in which the cassation applicants stated in their *petitum* point 3 that "cancel the PKPU Decision and/or Homologation Decision of PT Asuransi Jiwa Kresna and declare the Debtor Bankrupt."[13] Based on the Supreme Court Decision, the Supreme Court granted the creditor's request to declare the insurance company bankrupt, in this case PT Asuransi Jiwa Kresna.

[10] Munir Fuady, *Hukum Pailit Dalam Teori Dan Praktek*, Edition VI, Citra Aditya Bakti, Bandung, 2017, p. 2.
[11] The Supreme Court Decision No. 647 K/Pdt.Sus-Pailit/2021, p. 11.
[12] *Ibid.*, p. 13.
[13] *Ibid.*, p. 9.

In the event that the insurance company is in a state of being unable or unwilling to pay its debts to creditors that have matured, then the party who can submit a petition for declaration of bankruptcy is the Minister of Finance, this is in line with Article 2 paragraph (5) of the Law Number 37 of 2004 on Bankruptcy and Obligation to Postpone Debt Payments, which states that in the event that the debtor is an insurance company, reinsurance company, pension fund, or state-owned enterprise operating in the field of public interest, a petition for a declaration of bankruptcy can only be submitted by the Minister of Finance.

In regards to the enactment of the Article 5 of Law Number 21 of 2011 on the Financial Services Authority has been stated that the Financial Services Authority has the function of organizing an integrated regulatory and supervisory system for all activities in the financial services sector, thus the authority to file bankruptcy applications against insurance companies, sharia insurance companies, reinsurance companies and sharia reinsurance companies which were originally proposed by the Minister of Finance based on Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations are transferred to the authority of the Financial Services Authority based on Article 50 of Law Number 40 of 2014 on Insurance. Thus, the only party that can apply for bankruptcy to an insurance company is the Financial Services Authority.

Based on Law Number 30 of 2014 on Government Administration, the authority to file an application for bankruptcy is not only held by the

Financial Services Authority. However, creditors of insurance companies are also given the authority to apply for bankruptcy against insurance companies under the provisions stipulated by law. Article 53 paragraph (3) of the Law Number 30 of 2014 on Government Administration explains that government agencies and/or officials do not determine and/or take decisions and/or actions at the time stipulated by law, then the application is considered legally granted.[14] Judging from the explanation of the Articles of the Government Administration Act, in the event that the creditor of the insurance company asks the Financial Services Authority (OJK's authority to apply for bankruptcy against the insurance company) to apply for bankruptcy against the insurance company concerned, but within the time limit determined by the Financial Services Authority law does not stipulate and/or make decisions and/or actions, the application is considered legally granted. Meanwhile, if the Financial Services Authority refuses to make the application, the insurance creditor may sue the Financial Services Authority at the State Administrative Court with the aim of the State Administrative Court ordering the Financial Services Authority to carry out the request. This is in accordance with Articles 1 point 16 and point 18 of the Government Administration Law, which states that the dispute resolution process carried out within the government administration environment as a result of the issuance of adverse decisions and/or actions is filed in the State Administrative Court.

[14] Article 53 paragraph (3) of the Law Number 30 of 2014 on Government Administration.

Article 2 paragraph (1) of the Law Number 37 of 2004 on Bankruptcy and Suspension of Obligations for Payment of Debt, the subtantive requirements for submitting for bankruptcy in Indonesia are simple, namely having at least 2 (two) creditors and the existence of debts that have matured. In the process of bankruptcy proceedings, the concept of debt is very decisive, therefore without debt bankruptcy cases cannot be examined.[15] Without this debt, the essence of bankruptcy does not exist because bankruptcy is a legal system to liquidate debtors' assets to pay their debts to creditors.[16] Meanwhile, the debt criteria according to Article 1 point 6 of the Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that debt is an obligation that is or can be stated in the amount of money both in Indonesian currency and foreign currency, either directly or which will arise in the future or contingent, arising from an agreement or law and must be fulfilled by the debtor and if it is not fulfilled, it gives the creditor the right to obtain fulfilment from the debtor's assets. The debt that can be used as the basis for applying for bankruptcy has 3 (three) elements namely, the debt has matured, the debt can be collected, and the debt is not paid in full.[17]

The explanation of Article 2 of the Bankruptcy Law explained that in bankruptcy, creditors are divided into 3 (three) categories. First, preferred creditors refer to Article 1139 and Article 1149 of the Civil Code, namely, creditors who priorities elevating their receivable rights over other creditors.

[15] Titik Tejaningsih, *Op. Cit.*, p. 53.
[16] M. Hadi Shubhan, *Op. Cit.*, p. 34.
[17] *Ibid.*, p. 91.

Second, separatist creditors are creditors who hold material guarantee rights for their claims. Third, concurrent creditors mean creditors who do not have special rights from the law and do not hold collateral for their receivables. The classification of these creditors aims to determine the level of each creditor to be given credit rights first than other creditors. Based on the description, the curator according to his duties must compile a list of the distribution of bankrupt assets to each creditor based on their level. The position of creditors in bankruptcy is the same (*paritas creditorum*). Therefore, the creditors have the same rights over the results of the execution of the bankruptcy estate following the amount of their respective receivables (*pari passu prorate parte*). However, this principle recognizes exceptions, namely creditors who have special rights under the law and creditors who hold material guarantee rights. Thus, the principle of *paritas creditorum* only applies to concurrent creditors.[18]

The Indonesian Civil Code divides preferred creditors into 2 (two) types, namely special preferred creditors as regulated in Article 1139 of the Civil Code and general preferred creditors as regulated in Article 1149 of the Civil Code. According to Article 1138 of the Civil Code, the payment priority is the special preferred creditor between the two preferred creditors. Article 1149 of the Civil Code states that workers are included in the general preference creditors. While the payment of taxes and court fees is included in the special preference creditor, and between the two, according to Article

[18] Rudy A. Lontoh (ed), *Menyelesaikan Utang-Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001, p. 128.

1137 of the Civil Code, it is stated that tax payments take precedence over court fees.

Regarding the payment of wages owed to workers/labors, the Constitutional Court's Decision Number 67/PUU-XI/2013, states that the payment of wages for workers or Labors owed takes precedence over all types of creditors, including claims for separatist creditors, claims for state rights, auction offices, and public bodies established by the government, while payments for the rights of other workers/labors take precedence over all claims including claims for state rights, auction offices, and public bodies established by the government, except claims from separatist creditors.[19] In the *posita* of the Constitutional Court's decision, the petitioners stated that workers should be prioritized over insurance policyholders because the dependence of insurance policyholders on insurance funds is not as vital as labor severance rights because insurance is intended to cover possible risks for policyholders.[20] In contrast, severance pay is used for the livelihood of workers.[21] Judging from the decision of the Constitutional Court, the payment of wages owed to workers/labors has the position of a special preferred creditor because the payment of receivables takes precedence over other creditors, including claims for state rights. This states that the Constitutional Court's decision is contrary to the Indonesian Civil Code. However, the Constitutional Court Decision Number 67/PUU-XI/2013 is in line with

[19] The Constitutional Court's Decision Number 67/PUU-XI/2013 on Labor Wages Payable in Bankruptcy, p. 45.

[20] *Ibid.*

[21] *Ibid.*

Chapter IV on Manpower Article 81 point 33 of the Law Number 11 of 2020 on Job Creation, which stipulates that in the event that a company is declared bankrupt or liquidated, the wages of the Labors/worker's pay precedence before payments to all creditors.[22]

In contrast to Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance, it stipulates that in the event that an insurance company, sharia insurance company, reinsurance company, or sharia reinsurance company is bankrupt or liquidated, the rights of the policyholder, the insured, or participants in the distribution of their assets have a higher position than the rights of other parties.[23] Judging from the provisions of the article, which the regulation on insurance bankruptcy has more specific characteristics than ordinary bankruptcy, the policyholder belongs to the special preferential creditor class whose receivables payment takes precedence over other creditors, including the payment of wages for workers/labors.

The Indonesian Civil Code states that the payment of state bills takes precedence over court fees, both of which fall into the category of special preferred creditors. The Constitutional Court Decision Number 67/PUU-XI/2013 and the Law Number 11 of 2020 on Job Creation explain that payment of workers' wages is a priority over other creditors. Meanwhile, Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance states that the policyholder takes precedence in distributing bankrupt assets over other creditors. Based on these provisions, a legal conflict will create legal

[22] Article 81 point 33 of the Law Number 11 of 2020 on Job Creation.
[23] Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance.

uncertainty in the distribution of bankrupt assets among preferred creditors in the event of bankruptcy of the insurance company. This legal uncertainty will negatively impact social welfare, which is one of the goals of the Republic of Indonesia mentioned above. Thus, in this research, the author will analyze "Legal Analysis of Authorized Parties to File Bankruptcy and The Position of Policyholders Against Other Preferred Creditors in Insurance Companies".

B. Problem Formulation

1. Who are the legitimate parties to apply for bankruptcy of an insurance company if there is no response or approval from the Financial Services Authority?
2. What is the policyholder's position to other preferred creditors in an insurance company declared bankrupt?

C. Research Objectives

1. To analyze the legitimate parties to apply for bankruptcy of an insurance company if there is no response or approval from the Financial Services Authority.
2. To analyze the policyholder's position to other preferred creditors in an insurance company declared bankrupt.

D. Originalities of Research

No	Sources	Discussion
1.	Sari Rezeki Indra, Peran Otoritas Jasa Keuangan dalam Permohonan Kepailitan Perusahaan Asuransi (Analisis Putusan Nomor 1016 K/Pdt.Sus-Pailit/2016), Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Sumatera Utara, 2018.[24]	**Problem Formulation** 1. How to regulate the role of the Financial Services Authority in an insurance company bankruptcy application? 2. What is the Financial Services Authority role in insurance company bankruptcy applications? 3. What are the legal consequences of declaring an insurance company bankrupt (Case Study Decision Number 1016 K/Pdt.Sus-Pailit/2016)? **Conclusion** 1. The regulation of the role of the Financial Services Authority in the application for bankruptcy of insurance companies is as follows: The application for a declaration of bankruptcy against an insurance company,

[24] Sari Rezeki Indra, "Peran Otoritas Jasa Keuangan dalam Permohonan Kepailitan Perusahaan Asuransi (Analisis Putusan Nomor 1016 K/Pdt.Sus-Pailit/2016)", Thesis, Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Sumatera Utara, Medan, 2018.

		sharia insurance company, reinsurance company or sharia reinsurance company can only be submitted by the Financial Services Authority. Creditors apply to the Financial Services Authority to apply for a declaration of bankruptcy to the Commercial Court. The Financial Services Authority approves or rejects the application submitted by the creditor no later than 30 (thirty) days after the complete application is received. If the Financial Services Authority rejects the application submitted by the creditor, the refusal must be made in writing along with the reasons. 2. The role of the Financial Services Authority in the application for bankruptcy of insurance companies is as follows: The system that is made centrally in the regulation and supervision of financial and financing services, including the submission of a petition for a declaration of bankruptcy for financial services and

		financing institutions, including insurance companies by the Financial Services Authority, basically aims to guarantee the interests of all parties to create a stable economic system through the financial services sector and financing as well as insurance companies. 3. The legal consequences that arise when an insurance company is declared bankrupt are as follows: a. Resulting in the general confiscation of all assets of the bankrupt debtor so the bankrupt debtor loses his civil rights to control and manage his assets which are included in the bankruptcy estate, from the date the bankruptcy declaration decision is pronounced. b. For reciprocal insurance agreements, the policyholder can ask for certainty about the continuation of the agreement's implementation. Suppose there is no agreement, and the curator does not answer or is unwilling to continue the

		agreement. In that case, the agreement ends, and the policyholder can claim compensation and be treated as a concurrent creditor. c. All legal actions taken by the debtor before the declaration of bankruptcy that is considered detrimental to the creditor's interests can be requested for cancellation. d. The bankruptcy of a company is often accompanied by the dissolution of the company due to the condition of the company that is no longer solvent.
2.	Lolla Audina Wanasari, Kedudukan Pemegang Polis Pada Perusahaan Asuransi Yang Cabut Izin Usahanya Oleh Otoritas Jasa Keuangan (Studi Kasus Likuidasi Akibat Pencabutan	**Problem Formulation** What is the policyholder's position in an insurance company whose business license has been revoked by the Financial Services Authority? **Conclusion** In the case of liquidation due to the revocation of a business license by PT Asuransi Raya, the

	Izin Usaha di Bidang Asuransi Umum Atas PT. Asuransi Raya), Program Sutdi S1 Ilmu Hukum, Fakultas Hukum, Universitas Islam Indonesia, 2018.[25]	policyholder's position is higher than other parties for the distribution of assets as regulated in Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance after the liquidator has paid the tax debt as regulated in Article 21 paragraph (3a) of the Law Number 28 of 2007 on General Provisions and Tax Procedures. The position of creditors holding material guarantees as regulated in Article 1134 of the Civil Code, which is general and Policyholders as regulated in Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance is based on the legal principle of *lex specialist derogate legi generalis*, namely laws and regulations that are specifically, overriding general laws and regulations, can be concluded that the position of the policyholder has priority over the position of the creditor holding the material guarantee. The position of workers or workers as

[25] Lolla Audina Wanasari, "Kedudukan Pemegang Polis Pada Perusahaan Asuransi Yang Cabut Izin Usahanya Oleh Otoritas Jasa Keuangan (Studi Kasus Likuidasi Akibat Pencabutan Izin Usaha di Bidang Asuransi Umum Atas PT. Asuransi Raya)", Skripsi, Program Sutdi S1 Ilmu Hukum, Fakultas Hukum, Universitas Islam Indonesia, Yogyakarta, 2018.

		regulated in Article 95 paragraph (4) of the Law Number 13 of 2003 on Employment and policyholders as regulated in Article 52 paragraph (1) of the Law Number 40 of 2014 Insurance is based on the legal principle of *lex posterior derogat legi priori* namely the new legislation overrides the old legislation, for this reason, it must be considered when the legislation is promulgated. Article 95 paragraph (4) of the Law Number 13 of 2003 on Manpower was promulgated in 2003, but Article 52 paragraph (1) of the Law Number 40 of 2014 was promulgated in 2014, so the interpretation of Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance is newer (posterior) than Law Number 13 of 2003 on Manpower, so it can be concluded based on the principle of *lex posterior derogat legi priori* if there is a conflict of interest over the payment of the proceeds of liquidation, the liquidator must prioritize payments to the policyholder before any other rights, namely Labors or workers.

		Shareholders receive payment after the liquidator makes payments for all obligations of the insurance company, but if there is a conflict of interest between the shareholders and the policyholder, the party whose payment is prioritized is the policyholder, which is expressly regulated in Article 49 paragraph (2) of the Law Number 40 of 2014 on Insurance. Therefore, based on the results of the research that has been done, can be concluded that in settlement of wealth due to liquidation, the policyholder's payment is prioritized after the liquidator makes payments on the tax debt.
3.	Sheila Miranda Hasibuan, Kedudukan Mendahulu Tagihan Pajak Pada Proses Kepailitan (Studi Putusan-Putusan Pengadilan Niaga), Program Studi Magister Ilmu	**Problem Formulation** 1. What is the position of prior rights in the laws and regulations related to bankruptcy? 2. How is the collection of tax debts against taxpayers who are declared bankrupt? 3. How is the preemptive right to tax debts applied to insolvent taxpayers based on court decisions? **Conclusion**

	Hukum, Fakultas Hukum, Universitas Sumatera Utara, 2019.[26]	1. The laws and regulations governing the prior rights of creditors to the debts of bankrupt debtors are scattered in many laws, which creates legal uncertainty. This situation causes the position of creditors to be blurred and uncertain. In contrast, the purpose of the law itself prioritizes legal certainty, namely certainty in the formulation of legal norms and principles that do not conflict with one another, both from the articles of the law as a whole and in relation to other articles that are outside the law. Therefore, adjustments should be made between the laws and regulations. 2. Taxpayers who are declared bankrupt, either individuals or entities assigned to make settlements, are prohibited from distributing the assets of the taxpayer in bankruptcy before using the assets to pay the tax debt of the taxpayer concerned. After the taxpayer is sentenced to

[26] Sheila Miranda Hasibuan, "Kedudukan Mendahulu Tagihan Pajak Pada Proses Kepailitan (Studi Putusan-Putusan Pengadilan Niaga)", Thesis, Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Sumatera Utara, Medan, 2019.

		bankruptcy, tax collection with a forced letter cannot be applied in the bankruptcy process because with this forced letter it cannot be justified to confiscate and sell the assets of the bankrupt debtor (taxpayer). Fiskus must follow the provisions in the bankruptcy process because the taxpayer has been declared bankrupt. So that when a taxpayer is declared bankrupt, the law that must be applied is the law on general provisions of taxation based on the principle of *lex specialis derogat lex generalis.* 3. The application of pre-emptive rights on tax debts to taxpayers who are declared bankrupt based on court decisions has multiple interpretations, on the one hand recognizing the state's position as the owner of pre-emptive rights, but in other decisions the state's pre-emptive rights position is set aside. Putting the state's interests over other creditors' interests can lead to injustice and vice versa.

		Meanwhile, the law is required to be fair by carrying out the orders of the law in the public interest. This also follows the theory of justice, which focuses on equality or proportionality. The inaccuracy of the tax office is also seen in the case in this study because many bills have expired and delays in filing objections, both bankrupt claims and objections when submitting a request for review, so that it becomes the basis for the loss of pre-emptive tax rights against bankrupt taxpayers.
4.	Wahyu Andi Asmara, Analisis Yuridis Kedudukan Pekerja Perusahaan Asuransi Yang Mengalami Kepailitan, Program Studi Sarjana Ilmu Hukum, Fakultas	**Problem Formulation** 1. What is the legal position of company employees with policyholders in insurance companies that experience bankruptcy? 2. How to fulfill the rights to bankruptcy assets fairly for insurance employees who experience bankruptcy? **Conclusion**

	Hukum, Universitas Brawijaya, 2018.[27]	1. The legal position of an insurance employee whose company is bankrupt is as a preferred creditor, namely a creditor with the privilege to precede, and a policyholder when the same thing occurs, namely bankruptcy, then his position is also as a preferred creditor, this is in accordance with the written law, namely between Article 95 paragraph (4) of the Law Number 13 of 2003 on Manpower with Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance, which in each of these articles prioritizes the rights of employees and policyholders against bankruptcy cases, but with the decision of the Constitutional Court No. 67/PUU/XI/2013 provides a differentiator to the wages of workers, and their fulfillment in the bankruptcy code. 2. Fulfillment of rights to bankruptcy assets in a fair manner for employees/Labors who

[27] Wahyu Andi Asmara, "Analisis Yuridis Kedudukan Pekerja Perusahaan Asuransi Yang Mengalami Kepailitan", Skripsi, Program Studi Sarjana Ilmu Hukum, Fakultas Hukum, Universitas Brawijaya, Malang, 2018.

		experience bankruptcy. So to realize the main fulfillment of employee wages is through a debt matching meeting when the curator will classify the types of bills from various creditors, at that moment the unions can use the Constitutional Court's decision as a strong basis to claim their rights.

E. Literature Review

The principles of bankruptcy under the Indonesian legal system are as follows:

1. Principle of Equal Treatment of All Creditors (*Parity Creditorium*), means that all assets of a bankrupt debtor, whether in the form of movable or immovable property, where the assets are already owned by the debtor or which will become the property of the debtor in the future, are bound to settle the debtor's obligations.[28] However, this principle recognizes exceptions, namely the group of creditors who hold collateral rights over objects and the group of creditors whose rights take precedence under the Bankruptcy Act and other laws and regulations.

[28] Rudhy A. Lontoh (ed), *Op. Cit.*, p. 168.

Thus, the principle of *parity creditorium* applies only to concurrent creditors.[29]

2. Principle of *Concursus Creditorum,* can be seen in Article 1132 of the Civil Code, which stipulates that the object is a joint guarantee for all those who owe it. The income from the sale of these objects is divided according to the balance, that is, according to the size of the respective receivables, except if there are valid reasons for taking precedence among the debtors. Therefore, creditors must act together in accordance with this principle.[30]
3. Principle of *Pari Passu Prorata Parte* is to determine the equal or equal classification of the debtor's assets among the creditors.[31] The classification of the assets of debtors who have gone bankrupt is carried out according to a series of priorities where creditors with lower positions get a final classification and then are divided together on a *pro-rata* basis after creditors with a superior position to other creditors get their share[32].
4. Principle of *Structured Prorata* is a principle that classifies and categorizes various types of creditors according to their respective

[29] *Ibid.*, p. 128.

[30] Titik Tejaningsih, *Op. Cit.*, p. 9.

[31] Monitacia Kamahayani, "Penerapan Asas Pari Passu Pro Rata Parte Terhadap Pemberesan Harta Pailit PT Dhiva Inter Sarana Dan Richard Setiawan (Studi Kasus Putusan Mahkamah Agung Republik Indonesia Nomor: 169 PK/Pdt/Sus-Pailit/2017)", *Adigama Law Journal*, Volume 3 No. 1, 2020, Fakultas Hukum Universitas Tarumanegara, Jakarta, 2020, p.73.

[32] Man S. Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2010, p. 127.

classes, namely separatist creditors, preferred creditors and concurrent creditors.[33]

5. Principle of Debt Collection is a principle that emphasizes that debts from debtors must be repaid with the assets owned by the debtor as soon as possible to avoid bad intentions from the debtor by hiding or misappropriating all his property which is a general guarantee for creditors.[34]

Furthermore, definition of insurance is explained in the general provisions of Article 1 point 1 of the Law Number 40 of 2014 on Insurance which explains that insurance is an agreement between two parties, namely the insurance company and the policyholder, which is the basis for receiving premiums by the insurance company in return for:

1. provide compensation to the insured or policyholder due to loss, damage, costs incurred, loss of profit, or legal liability to third parties that may be suffered by the insured or policyholder due to the occurrence of an uncertain event; or
2. provide payments based on the insured's death or payments based on the insured's death or payments based on the life of the insured with benefits whose amount has been determined and/or based on the results of fund management.[35]

[33] Herry Anto Simanjuntak, "Prinsip-Prinsip Dalam Hukum Kepailitan Dalam Penyelesaian Utang Debitur Kepada Kreditur", *Justiqa Journal,* Volume 2 No. 2, Universitas Quality, Medan, 2020, p. 24.

[34] *Ibid.*, p. 25.

[35] Article 1 point 1 of the Law Number 40 of 2014 on Insurance.

To support special insurance agreements and to maintain a system of insurance agreements, it is necessary to have principles that have binding and coercive power.[36] These principles are:

1. Good Faith Principle. In an insurance agreement, the element of mutual trust between the insurer and the insured is very important. The insurer believes that the insured will provide all the information correctly. Meanwhile, the insured also believes that if an incident occurs, the insurer will provide or pay compensation.[37]
2. Indemnity Principle. The indemnity principle as deduced from Article 246 of the Commercial Code, is a compensation agreement. This compensation means that the compensation from the insurer must be balanced with the actual loss suffered by the insured.[38]
3. Insurable Interest Principle. The insurable interest principle means that every party who intends to enter into an insurance agreement must have an insurable interest, meaning that the insured party has such involvement with the consequences of an event that is not certain to occur and the person concerned suffers a loss.[39]

[36] M. Suparman Sastrawidjaja and Endang, *Hukum Asuransi Perlindungan Tertanggung Asuransi Deposito Usaha Perasuransian*, Alumni, Bandung, 1993, p. 55.

[37] Siswandi, "Prinsip-Prinsip Hukum Dalam Praktik Asuransi Sebagai Solusi Menghindari Kerugian Atas Peristiwa Yang Terjadi Pada Lembaga Perasuransian", *Ummul Qura Journal*, Volume XI, No. 1, Fakultas Ekonomi dan Bisnis Institut Pesantren Sunan Drajat, Lamongan, 2018, p. 154-155.

[38] *Ibid.*, p. 155.

[39] A. Djunaedy Ganie, *Hukum Asuransi Indonesia*, Sinar Grafika, First Printing, Jakarta, 2011, p. 86.

4. Subrogation Principle. The principle of subrogation explains that if the insured has obtained the right to compensation, then the insured may no longer get the rights of the third party who has caused the loss.[40]

Article 1 point 22 of the Law Number 40 of 2014 on Insurance explains that: [41]

> *Policyholder is a party who binding himself based on an agreement with an insurance company, sharia insurance company, reinsurance company, or sharia reinsurance company to obtain protection or management of risks for himself, the insured or other participants.*

Therefore, if the insurance company goes into bankruptcy, the position of the policyholder must be guaranteed by law to protect the rights owed to the insurer in this case is the insurance company. Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance states that:[42]

> *In the event that an insurance company, sharia insurance company, reinsurance company, or sharia reinsurance company is bankrupt or liquidated, the right of the policyholder, the insured, or the participant to the distribution assets have a higher position than the rights of other parties.*

Basically, there are legal principles used to resolve conflicts between laws and regulations, namely:[43]

1. *Lex specialis derogate legi generali*. This principle states that more specific regulations override more general regulations. The principle

[40] Arsel Idrajad and Nico Ngani, *Profil Hukum Perasuransian Di Indonesia*, Liberti, Yogyakarta, 1985, p. 22.

[41] Article 1 point 22 of the Law Number 40 of 2014 on Insurance.

[42] Article 52 paragraph (1) of the Law Number 40 of 2014 on Insurance.

[43] Valerie Augustine Budianto, "3 Asas Hukum: Lex Superior, Lex Specialis, dan Lex Posterior Beserta Contohnya", https://www.hukumonline.com/klinik/a/3-asas-hukum--ilex-superior-i--ilex-specialis-i--dan-ilex-posterior-i-beserta-contohnya-cl6806, accessed on September 3, 2022.

of lex specialis derogat legi generali only applies to two regulations that are hierarchically equal and regulate the same material.

2. *Lex superior derogate legi inferiori*. This principle means that lower regulations must not conflict with higher regulations. Thus, higher rules will override lower ones. This principle only applies to two hierarchically unequal and conflicting regulations.
3. *Lex posterior derogate legi priori*. This principle states that the new regulations override the old regulations. This principle aims to prevent legal uncertainty that may arise when two equal regulations are based on a hierarchy.

F. Research Method

The method used in this research is as follows:

1. Type of Research

   The type of research used is normative legal research. This is by the research conducted by the author, namely the author examines "Legal Analysis of Authorized Parties to File Bankruptcy and The Position of Policyholders Against Other Preferred Creditors in Insurance Companies", which is based on the provisions of applicable laws and is relevant to the legal issues analyzed.

2. Method of Approach

In this research, the author will use an approach method in the type of normative legal research approach, such as:

a. Statute Approach

This approach is carried out by examining all laws and regulations related to the legal issue being studied.[44] In this approach, the author will examine all laws and regulations related to the study research.

b. Analytical Approach

This approach intends to find out the meanings contained by the terms used in the laws and regulations conceptually, as well as to find out their application in practice and legal decisions.[45]

3. Object of Research

The object of this research is filing an application for bankruptcy at the insurance company and the policyholder's position to other preferred creditors at the insurance company declared bankrupt.

4. Sources of Research Data

The source of research data used is secondary data. Secondary data is data obtained from library research in the form of legal materials.[46] The legal materials used in this study are as follows:

[44] Muhaimin, *Metode Penelitian Hukum*, Mataram University Press, First Printing, Nusa Tenggara Barat, 2020, p. 56.

[45] *Ibid.*

a. Primary Legal Material

Primary legal materials are binding legal materials, consisting of statutory regulations, official treatise, court decisions and official state documents.[47] The legal materials include:

1) 1945 Constitution of the Republic of Indonesia.
2) Indonesian Civil Code (*Burgelijk Wetboek*).
3) Indonesian Commercial Code.
4) Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.
5) Law Number 21 of 2011 on the Financial Services Authority.
6) Law Number 40 of 2014 on Insurance.
7) Law Number 30 of 2014 on Government Administration.
8) Law Number 11 of 2020 on Job Creation.
9) Law Numer 51 of 2009 on the Second Amandment of Law Number 5 of 1986 on the State Administrative Court.
10) Law Number 7 of 2021 on Harmonization of Tax Regulations.
11) Law Number 13 of 2003 on Manpower.
12) The decision of the Constitutional Court of the Republic of Indonesia Number 67/PUU-XI/2013 on Labor Wages Payable in Bankruptcy.

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[46] Soerjono Soekanto and Sri Mammudji, *Penelitian Hukum Normatif, Pengantar Singkat*, Rajawali Press, Jakarta, 1990, p. 14.

[47] *Ibid.*, p. 13.

b. Secondary Legal Materials

Secondary legal materials are legal materials used to support primary legal materials, including library books, journals, research results and the views of legal experts that can be used as references to support this research.

c. Tertiary Legal Materials

Tertiary legal materials are legal materials supporting primary and secondary legal materials derived from legal dictionaries and legal terminology related to research.

5. Method of Data Collecting

The method of collecting secondary data in normative legal research is carried out by studying literature on legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials related to research.[48]

6. Method of Data Analysis

The data analysis method used is descriptive-qualitative. This method is carried out by classifying and selecting the data obtained based on their quality and truth, then analyzed based on a literature study to obtain conclusion on the formulations of the problems in this study.

[48] Muhaimin, *Op. Cit.,* p. 65.

G. Structure of Writing

The writing of this research is structured by dividing into 4 (four) chapters, as follows:

Chapter I is an Introduction, consisting of Background of Study, Problem Formulation, Research Objectives, Originalities of Research, Operational Definition, Literature Review, Research Methodology, and Writing Structure.

Chapter II is Theoretical Review. This chapter will discuss in detail the theories related to the formulation of the problem in this research, including an overview of Bankruptcy, Insurance Companies and Insurance Policyholders.

Chapter III is Findings and Results. This chapter will answer 2 (two) problem formulations in this study. First, how is the process of applying for bankruptcy to an insurance company. Second, what is the policyholder's position against other preferred creditors in an insurance company.

Chapter IV is Conclusion and Recommendation. In this chapter the conclusions will be drawn from the summary of answers to the analysis of the two problem formulations in this study. Meanwhile, the recommendation will be made based on the author's thoughts after analyzing and finding conclusions from the two problem formulations.

CHAPTER II

GENERAL OVERVIEW ABOUT BANKRUPTCY AND INSURANCE

A. Overview about Bankruptcy

1. Definition about Bankruptcy

Bankruptcy comes from the word "bankrupt". If we explore more fundamentally, the word "bankruptcy" can be found in several treasuries of languages in the world, including Dutch, French, Latin, and English, with different terms. In Dutch, bankruptcy comes from the term "*failliet*", which has a double meaning as a noun and adjective. In French, bankruptcy comes from the word "*faillite*", which means a strike or payment jam, while people who strike or stop paying in French are called "*lefaili*". In English, the word "to fail" has the same meaning. In Latin, it is called "failure". In English-speaking countries, the meanings of bankruptcy and insolvency are represented by the words "bankrupt" and "bankruptcy".[49]

In the literature, Algra defines bankruptcy as quoted by Titik Tejaningsih as "*Faillissementis een gerechtelijk beslag op het gehele vermogen van een schuldenaar ten behove van zijn gezamenlijke schuldeiser*". The translation is that bankruptcy can be defined as a general confiscation towards the debtor's total assets to pay off his debts

[49] Zainal Asikin, *Hukum Kepailitan dan Penundaan Pembayaran Utang di Indonesia*, PT Raja Grafindo Persada, Jakarta, 2001, p. 26-27.

to creditors.[50] Henry Campbell Black defines bankruptcy as a statutory procedure by which a (usu. insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization of liquidation of the debtor's assets for the benefit of creditors.[51] Based on Henry Cambell's understanding, bankruptcy is a court decision that declares an insolvent debtor to liquidate all of his assets for the benefit of his creditors.

A more comprehensive definition of bankruptcy was put forward by Jerry Hoff, who described bankruptcy as "Bankruptcy is a general statutory attachment encompassing all the assets of the debtor. The bankruptcy only covers the assets. The personal status of an individual will not be affected by the bankruptcy; he is not placed under guardianship. A company also continues to exist after he declaration of bankruptcy. During the bankruptcy preceedings, act will regard to the bankruptcy estate can only be performed by the receiver, but other acts remain part of the domain of the debtor's corporate organs".[52]

Bankruptcy is a commercial solution to get out of the debt problem crushing a debtor, where the debtor can no longer pay his debts to creditors. If the debtor is aware of the inability to pay the obligations that have matured, then the step to apply for the determination of bankruptcy status against him (voluntary petition for self-bankruptcy) becomes a possible step, or the resolution of bankruptcy status by the

[50] Algra, *Inleiding tot Het Nederlands Privaatrecht*, Tjeenk Willink, Groningen, 1974, p. 425.

[51] *Ibid*.

[52] Jerry Hoff, *Indonesian Bankruptcy Law*, Tatanusa, Jakarta, 1999, p. 11.

court against the debtor if later found evidence that the debtor has indeed been unable to pay his debts that are due and collectible (involuntary bankruptcy petition).[53] Henry Campbell Black in Black's Law Dictionary states that bankruptcy is:[54]

> "*The state or condition of a person (individual, partnership, corporation, municipality) who is unable to pay its debt as they are or become due. The term includes a person against whom an involuntary petition has been filled, or who has filed a voluntary petition, or who has been adjudged a bankrupt."*

Meanwhile, the definition of bankruptcy according to Article 1 point (1) of Law Number 37 of 2004 on Bankruptcy and Postponement of Obligation for Payment of Debt states that:

> *"Bankruptcy is a general confiscation of all assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge as regulated in this law."*

Thus, bankruptcy is a condition in which debtors are unable or unwilling to fulfill their obligations in paying their debts to creditors that are due and collectible. Bankruptcy is a court decision resulting in the general confiscation of all assets of the bankrupt debtor, both existing and existing in the future. The curator carries out the management and settlement of bankrupt assets under the supervision of a supervisory judge with the primary objective of using the proceeds from the sale of

[53] Ricardo Simanjuntak, "Esensi Pembuktian Sederhana dalam Kepailitan", in Emmy Yuhassarie (ed), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Kajian Hukum, Jakarta, 2005, p. 55-56.

[54] Herry Campbell Black, *Black's Law Dictionary*, West Publishing Co., St. Paul Minnesota, 1974, p. 134.

such assets to pay all debts of the bankrupt debtor on a prorate parte basis and following the creditor structure.

Islamic law recognizes bankruptcy as *at-Taflis*. Etymologically, *at-Taflis* means bankrupt, overdrawn, or falling into poverty. The bankrupt person is called *Muflis*, a person who is overdrawn, whose debt is greater than the assets he owns. Meanwhile, regarding fiqh experts, *at-Taflis* (determination of bankruptcy) is a judge's decision prohibiting a person from taking legal action on his assets.[55] Ibn Rusyd explains at-Taflis as a condition where the debtor has a more considerable amount of debt when compared to his assets or the debtor has no assets.[56] Thus, if a person cannot pay his debts and the judge determines that person as *Muflis*, he is not authorized to take legal action on his assets.

2. Purpose on Bankruptcy

According to Radin in his book The Nature of Bankruptcy, the purpose of all bankruptcy laws is to provide a forum to sort out the rights of various collectors against a debtor's assets that are not of sufficient value (debt collection system). Thus, the purpose of bankruptcy law is to liquidate assets owned by debtors for the benefit of their creditors. The Bankruptcy Act is a vital instrument for reorganizing and continuing the

[55] Abdullah bin Abdurrahman Al Bassam, *Syarah Bulughul Maram*, Second Edition, Pustaka Azzam, Jakarta, 2006, p. 504.

[56] Ibnu Rusyd, *Bidayatul Mujtahid*, Volume II, Darul Fikri, Andalusia, p. 213, translated by Abu Usamah Fakhtur Rokhman, Pustaka Azzam, Jakarta, 2007.

debtor's business when experiencing financial difficulties in reorganizing debt and assets.[57]

Meanwhile, Elizabeth Warren in her book Bankruptcy Policy stated that:[58]

> *"In bankruptcy, with an inadequate pie to devide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be devided. Distribution among creditors is no incidental to other concerns; it is the center of the bankruptcy scheme."*

Based on the opinion of Radin and Elizabeth Warren, it can be argued that bankruptcy law, both past and present is "a debt collective system", although bankruptcy is not the only debt collection system. In short, it can be stated that the purpose of bankruptcy is to distribute the debtor's wealth by the curator to all creditors by considering their respective rights.

Louis E. Levinthal stated that the main objectives of bankruptcy law are as follows:[59]

> *"All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure and equitable division of the insolvent debtor's property among all his creditors, and in the second place, to prevent on the part of the insolvent debtor conducts detrimental to the interests of his creditors''.*
> *In other words, bankruptcy law seeks to protect the creditors,*

[57] Radin in his book "The Nature of Bankruptcy", as quoted by Titik Tejaningsih, *Perlindungan Hukum terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit*, First Edition, FH UII Press, Yogyakarta, 2016, p. 42-43.

[58] Elizabeth Warren, *Bankruptcy Policy*, in et al. Bankruptcy St. Paul, West Publishing Co., Minnesota, 1993, p. 2.

[59] Louis E. Levinthal, *The Early History of Bankruptcy law*, in Jordan, et.al., Bankruptcy, Foundation Press, New York, 1999, p. 17.

first, from one another and, secondly, from their debtor. A third object the protection of the honest debtor from his creditors, by mens of the discharege, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."

Based on the opinion above, it can be seen that the objectives of bankruptcy are:

a. To guarantee the distribution of the debtor's assets in accordance with the rights of each creditor.
b. Prevent debtors from taking actions that can harm the interests of creditors.
c. Protect debtors who have good faith from their creditors in the form of debt relief.

The General Elucidation of Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations states several factors for the need for regulation regarding bankruptcy and postponement of debt payment obligations:

a. To avoid the seizure of the debtor's assets if at the same time several creditors collect their receivables from the debtor.
b. To avoid the existence of creditors holding material security rights who demand their rights by selling the debtor's property without paying attention to the interests of the debtor or other creditors.
c. To avoid any fraud committed by a creditor or debtor. For example, the debtor tries to give an advantage to one or several creditors so

that other creditors are harmed, or there is a fraudulent act from the debtor to run away all his assets to release his responsibilities to the creditors.

Sutan Remy Sjahdeini in his book Bankruptcy Law: Understanding Law Number 37 Year 2004 on Bankruptcy, stated that the objectives of bankruptcy law are:[60]

a. Protecting concurrent creditors to obtain their rights in connection with the application of the guarantee principle that "all debtor assets, both movable and immovable, both existing and those that will exist in the future, become collateral for the debtor's engagement," namely by providing facilities and procedures for them to meet their bills against debtors. According to Indonesian law, the principle of guarantee is regulated in Article 1131 of the Civil Code.
b. Ensuring that the distribution of debtor's assets among creditors is carried out proportionally based on the consideration of the size of the claim and the position of each creditor, the principle of proportional distribution is guaranteed by Article 1132 of the Civil Code.
c. Preventing debtors from taking actions that can harm the interests of their creditors. When a debtor is declared bankrupt, the debtor no longer has the authority to manage and transfer his assets. The

[60] Sutan Remy Sjahdeni, *Hukum Kepailitan: Memahami Undang-Undang Nomor 37 Tahun 2004 tentang Kepailitan*, Pustaka Utama Grafiti, Jakarta, 2010, p. 29-31.

court's bankruptcy decision gives the legal status of the debtor's assets under general confiscation.

d. According to United States bankruptcy law, an individual debtor will be released from his debts after the settlement or liquidation of his assets is completed. For debtors whose assets after being liquidated by the liquidator are insufficient to pay off all their debts to creditors, they are no longer required to pay off these debts. The debtor is allowed to get a fresh financial start. A fresh financial start is only given to individual bankrupt debtors and not legal entity bankrupt debtors. Meanwhile, according to Law Number 37 of 2004 on bankruptcy, a fresh financial start is not given to bankrupt debtors, either individual bankrupt debtors or legal entity bankrupt debtors. That is if after the bankruptcy estate has been settled by the curator and it turns out that there are still outstanding debts, the debtor is still obligated to settle his debts. The general explanation of Bankruptcy Law states that "bankruptcy does not relieve a person who is declared bankrupt from the obligation to pay his debts".

e. Punish the management who because of his mistake has resulted in losses to the bankrupt estate he is.

f. Provide opportunities for debtors and creditors to discuss and make agreements regarding debt restructuring. In the Indonesian Bankruptcy Law, the opportunity for debtors to reach an agreement

to restructure their debts with creditors is regulated in Chapter III on Suspension of Debt Payment Obligations (PKPU).

3. Principle of Bankruptcy

a. Principle of *Paritas Creditorium*

The principle of *paritas creditorium*, the principle of *pari passu prorata parte*, and the principle of structured prorate are the main principles of debt settlement from debtors to creditors.[61] The principle of *paritas creditorium* (equality of position of creditors) determines that creditors have equal rights to all debtor's assets. If the debtor cannot pay his debt, then the debtor's assets become the creditor's target.[62] The principle of *paritas creditorium* implies that all debtor's assets, whether in the form of movable or immovable goods and assets that are now owned by the debtor and assets that the debtor will own in the future, are bound to the settlement of the debtor's obligations.[63]

Suppose a debtor has only one creditor, and the debtor does not pay his debts voluntarily. In that case, the creditor will civilly sue the debtor to the competent district court, and all of the debtor's assets become the source of repayment of his debt to the creditor. If

[61] M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan*, Seven Edition, Kencana, Jakarta, 2021, p. 27.

[62] Mahadi, *Falsafah Hukum: Suatu Pengantar*, Alumni, Bandung, 2003, p. 135.

[63] Kartini Muljadi, "Kreditor Preferen dan Kreditor Separatis dalam Kepailitan", in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 168.

the debtor has many creditors and the debtor's assets are insufficient to pay off all creditors, the creditors will compete with all means to get their bills paid off first. Creditors who come later to claim their receivables from the debtor will suffer losses because the debtor's assets have been exhausted; this is very unfair and detrimental. Based on these reasons, a bankruptcy institution arose which regulates a fair procedure for paying creditors' bills.[64]

The philosophy of the *paritas creditorium* principle is that it is an injustice if the debtor owns property while the debtor's debts to his creditors are not repaid. The law guarantees that the debtor's assets are legally guaranteed for his debts even though the debtor's assets are not directly related to these debts. Another meaning of the *paritas creditorium* principle is that the general guarantee for debtors' obligations is only limited to their assets, not other aspects, such as personal status, political rights, and other rights outside of assets that are not affected at all by the debtor's debts.[65]

However, the principle of *paritas creditorium* is a response to this injustice. If the code of *paritas creditorium* is applied letter-wise, it will lead to further injustice. The location of the unfairness of the principle of *paritas creditorium* is that the creditors are equal between one creditor and another creditor. The *paritas creditorium* does not differentiate the treatment of creditors' conditions, both with

[64] Kartini Muljadi, *Pengertian dan Prinsip-Prinsip Umum Hukum Kepailitan*, Makalah, Jakarta, 2001, p. 1-2.

[65] M. Hadi Shubhan, *Op. Cit.*, p. 28.

large and small receivables, with creditors who hold guarantees, and with creditors who do not have warranties. From the unfairness of the *paritas creditorium*, this principle must be coupled with the *pari passu prorate parte* and the principle of structured creditors.[66]

b. Principle of *Pari Passu Prorata Parte*

The principle of *pari passu prorata parte* means that the debtor's assets are joint guarantees for the creditors, and the proceeds must be distributed proportionally between them unless there are creditors who according to the law, must take precedence in receiving the payment of the bill. This indicates that the distribution of bankrupt assets to creditors is more equitable following the proportions (pond-pond gewijs) and not distributed equally.[67]

Suppose the principle of *paritas creditorium* aims to provide justice for all creditors without distinction of condition to the debtor's assets even though the debtor's assets are not directly related to the transactions they carry out. In that case, the *pari passu prorata parte* principle provides justice to creditors with the concept of proportional justice, where creditors who have larger receivables will get a more significant portion of the payment of receivables from debtors than creditors who have more minor receivables than them.

[66] *Ibid.*, p. 29.

[67] Kartini Muljadi, "Actio Pauliana dan Pokok-Pokok tentang Pengadilan Niaga", in Rudhy A. Lontoh et.al., *Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001, p. 300.

If the position of creditors is generalized regardless of the size of the receivables, it will cause an injustice.[68]

The unfair distribution of creditorium parity in bankruptcy will arise when the assets of the bankrupt debtor are less than the debtor's total debts. If the assets of the bankrupt debtor are greater than the total amount of the debtor's debts, then the application of the *pari passu prorata parte* principle becomes less relevant. Likewise, the use of bankruptcy law institutions against debtors who have assets greater than the total amount of their debts is inappropriate and lacks relevance. Bankruptcy will occur if the assets are less than the liabilities.[69]

c. Principle of Structured Creditors

The use of the principle of parity creditorium, which is complemented by the *pari passu prorate parte* principle in the context of bankruptcy, still has a weakness if the creditors are not equal in position; it is not a matter of the size of the receivables but not the same position because some creditors hold material guarantees and/or creditors who have preferential rights provided for by law. If the legal position between creditors holding material guarantees is equated with creditors who do not have material guarantees, then the existence of a guarantee legal institution

[68] M. Hadi Shubhan, *Op.Cit.*, p. 30.
[69] *Ibid.*

becomes meaningless. Likewise, creditors who are given special rights by law in the form of preferential rights in paying off their debts, if their position is equated with creditors who are not given preference by law, will cause an injustice.[70] Therefore, the principle of structured creditors (structured prorate) is needed to overcome this injustice.[71] The principle of structured creditors is a principle that classifies and categorizes various types of debtors according to their respective classes. In bankruptcy, creditors are classified into three types, namely separatist creditors, preferred creditors, and concurrent creditors.[72]

Jerry Hoff describes each creditor in bankruptcy law as follows:

1) Secured Creditors

The right of secured creditors is security interests are in rem right that vest in the creditor by agreement and subsequent performance of certain formalities. A creditor whose interests are secured by an in rem right is usually entitled to cause the foreclosure of the collateral, without a judgement, to satisfy his claim from the proceeds with priority over the other creditors.

[70] Jodi Gardner, "Bankruptcy Reform in Singapore: What Can We Learn?", Research Policy Report, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, 2016, p. 284.

[71] M. Hadi Shubhan, *Op., Cit.*, p. 31.

[72] Sutan Remy Sjahdeni, *Op. Cit.*, p. 280.

This right to foreclose without judgement is called the right of immediate enforcement.[73]

2) Preferred Creditors

The preferred creditors, who have a preference because they agreed upon this with their debtor, the preferred creditors have a preference for their claim. The preference issue is only relevant if there is more than one creditor and if the debtor's assets are insufficient to pay all the creditors (there is a concursus creditorum). Preferred creditors must present their claims to the receiver for verification and charge a prorate parte share of the bankruptcy costs. There are several categories of preferred creditors:

a) Creditors who have statutory priority;

b) Creditors who have non-statutory priority;

c) Estate creditors.[74]

3) Unsecured Creditors

The unsecured creditors do not have priority and will therefore be paid if any proceeds of the bankruptcy estate remain after all the other creditors have received payment. Unsecured creditors are required to present their claims for

[73] Jerry Hoff, *Op. Cit.*, p. 96.
[74] *Ibid.*, p. 111-112.

verification to their receiver and are charged a prorate parte share of the bankruptcy costs.[75]

The division of creditors into these three classifications differs from the division of creditors in the general civil law regime. General civil law distinguishes creditors only into two types, namely preferred creditors, and concurrent creditors. Preferred creditors, in general civil law, can include creditors who have material security rights and creditors who according to the law must take precedence in payment of their receivables. Meanwhile, in bankruptcy law, preferred creditors are only those who according to the law must take precedence over their receivables, such as privilege rights holders, retention rights holders, and other rights. Meanwhile, creditors with material guarantees under bankruptcy law are classified as separatists.[76]

d. Principle of Debt

In the process of bankruptcy proceedings, the concept of debt is very decisive because a bankruptcy case cannot be examined without debt. Without these debts, the essence of bankruptcy does not exist because bankruptcy is a legal institution to liquidate debtors' assets to pay their debts to creditors.[77] Ned Waxman said,

[75] *Ibid.*, p. 117.
[76] M. Hadi Shubhan, *Op. Cit.*, p. 33.
[77] *Ibid.*, p. 34.

"The concept of a claim is significant in determining which debts are discharged and who share in distribution".[78]

United States bankruptcy law calls debt a claim. Robert L. Jordan defines a claim as:[79]

1) Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
2) Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Ned Waxman distinguishes between claims and debts. A claim is defined as quoted by Robert L. Jordan, "Claim is a right to payment, even if it is unliquidated, unmatured, disputed, or contingent. It also includes the right to an equitable remedy for breach of performance if such breach gives rise to right to payment". While debt is defined as "a debt is defined as liability an a claim".[80] Based on this, if the debtor's obligation does not result in a right to payment, the debtor's obligation cannot be classified as a claim.

[78] Ned Waxman, *Bankruptcy*, Gilbert Law Summaries, Harcourt Brace Legal and Profesional Publication Inc., Chicago, 1992, p. 6.
[79] M. Hadi Shubhan, *Op. Cit.*, p. 34.
[80] Ned Waxman, *Op. Cit.*, p. 6-7.

Likewise, with the concept of debt in the bankruptcy law applicable in Indonesia, that debt is a form of obligation to fulfil performance in an engagement. Fred B.G. Tumbuan states that if someone because of his actions or not doing something results in that he has an obligation to pay compensation, to give something or not to give something, then at that time he also has a debt, has an obligation to make achievements. So, debt equals achievement.[81]

Obligations or debts can arise either out of contract or out of law (article 1233 CC). There are obligations to give something, do something, or not do something (article 1234 CC). the creditor is entitled to the performance of the obligation by the debtor. The debtor is obliged to perform. From the debtor's perspective, these obligations are his debts. From the creditor's perspective, these obligations are his claim.[82]

Principle of debt in addition to the limitations of the definition of debt, there is a concept of the amount of debt that can be submitted as the basis for an application for bankruptcy. The Singapore Bankruptcy Act states that:[83]

> *"In order to be entitled to present a bankruptcy petition against a debtor, the creditor must satisfy the following:*
> *1) There must be a creditor-debtor relationship;*

[81] Fred B.G. Tumbuan, "Mencermati Makna Debitor, Kredit, dan Utang Berkaitan dengan Kepailitan", in Emmy Yuhassarie, *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 7.

[82] Jerry Hoff, *Op. Cit.*, p. 15-16.

[83] Dennis Campbell, *International Corporate Insolvency Law*, Butterworth & Co (Publisher) Ltd, London, 1992, p. 492-493.

2) *The debt owed to the petitioning creditor is not less than S$10,000 or such other sum prescribed by the minister;*
3) *The debt is liquidated and payable immediately;*
4) *If the debt was incurred outside Singapore, there is a judgment or award which is enforceable by execution in Singapore, and*
5) *The debtor is unable to pay the debt."*

Based on the Singapore Bankruptcy Law, the minimum debt that can be used as the basis for filing for bankruptcy is S$10,000 (ten thousand Singapore dollars). Meanwhile, the Hong Kong Bankruptcy Act states that:[84]

"The creditor can only present a petition if the following conditions are satisfied:
1) *The debt owed by the debtor to the petitioning creditor or two or more petitioning creditors in aggregate must be at least HK$5,000; and*
2) *The debt is a liquidated sum payable immediately or at some specific time in the future; and*
3) *The act of bankruptcy relied on must have occurred within three months of the presentation of the petition; and*
4) *The debtor has or had the requisite nexus with Hongkong:*
   a) *The debtor is domiciled in Hongkong; or*
   b) *Within a year before the presentation of the petition either ordinarily resided in Hongkong, or has a dwelling-house or place of business in Hongkong, or carried on business in Hongkong either personally or by an agent; or*
   c) *Within a year before the presentation of the petition was a member of a firm or partnership which carried on business in Hongkong."*

According to the Hong Kong Bankruptcy Law, it can be seen that the limitation on the minimum debt value as the basis for filing a bankruptcy application is HK$5,000 (five thousand Hong Kong dollars).

[84] *Ibid.*, p. 259.

Limitation of the nominal amount of debt as the basis for filing a bankruptcy application is intended to limit the application for bankruptcy to creditors who have obligations below the minimum and determine the scale of bankruptcy. The limitation on the minimum debt value is only related to legal standing in judicio (the authority to file a case), while recognising creditors who have receivables below the minimum value in distributing bankrupt assets is the same as other creditors proportionally.[85]

e. Principle of Debt Collection

The principle of debt collection has a meaning as the concept of retaliation from creditors against bankrupt debtors by collecting their claims against the debtor or the debtor's assets.[86] Bankruptcy law is needed as a tool for collective proceedings. Without a bankruptcy law, each creditor will compete individually to claim the debtor's assets for their respective interests. Therefore, bankruptcy law overcomes the so-called collective action problem arising from each creditor's individual interests. The bankruptcy law can provide a mechanism where creditors can jointly determine whether the debtor company should continue its business as a going concern or

[85] M. Hadi Shubhan, *Op. Cit.*, p. 37.
[86] *Ibid.*, p. 38.

not, and can force minority creditors to follow the scheme because of the voting procedure.[87]

The principle of debt collection functions from bankruptcy to function as a means of coercion to realize the rights of creditors through the liquidation process of the debtor's assets. Douglas G. Baired stated that bankruptcy law aims to be used as a tool for collective proceedings.[88] The debt collection principle is a principle that emphasizes that debts from debtors must be paid with assets owned by the debtor as soon as possible to avoid bad intentions from the debtor by hiding and misappropriating all of his property which is a general guarantee for his creditors. Manifestations of the principle of debt collection in bankruptcy are the provisions for clearing assets using fast and definite liquidation, the code of simple proof, the application of bankruptcy decisions immediately (*uitvoerbaar bij voorraad*), the provision of a waiting period for holders of material guarantees, and a curator. as executor of management and management.[89]

[87] Emmy Yuhassarie, "Pemikiran Kembali Hukum Kepailitan Indonesia", in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. xix.

[88] Douglas G. Baired, "A World Without Bankruptcy", in Jagdeep S. Bhandari and Lawrence A. Weiss (ed.), *Corporate Bankruptcy: Economic and Legal Perspectives*, Cambridge University Press, New York, 1996, p. 29.

[89] M. Hadi Shubhan, *Op. Cit.*, p. 41.

f. Principle of Debt Pooling

The principle of debt pooling is the principle that governs how the assets of the bankrupt must be divided among its creditors. In distributing these assets, the curator will adhere to the principle of creditorium parity, *pari passu prorate parte* principle, and the principle of structured creditors.[90]

The principle of debt pooling also articulates the specific characteristics inherent in the bankruptcy process, both about the characteristics of bankruptcy as an unusual collection (*oneigenlijke incassoprocedures*) and a court that handles explicitly bankruptcy with its absolute competence related to bankruptcy and other issues arise in bankruptcy.[91]

g. Principle of Debt Forgiveness

The principle of debt forgiveness means that bankruptcy is not identical only as an institution of blasphemy against the debtor or only as a means of pressure (pressie middle), but can mean the opposite, namely as a legal institution that can be used as a tool to ease the burden that must be borne by the debtor because as a result of financial difficulties, he is unable to make payments on his debts by the original agreement and even reaches forgiveness of his debts so that the debts are entirely written off. The implementation of the

[90] *Ibid.*
[91] *Ibid.*, p. 43.

debt forgiveness principle in the legal norms of bankruptcy is the granting of a moratorium on debtors or known as the postponement of debt repayment obligations for a specified time, the exclusion of several debtor assets from the bankruptcy estate (asset exemption), discharge of indebtedness, the granting of fresh-starting status for debtors, rehabilitation of debtors if the bankruptcy scheme has been completed, and other reasonable legal protections for bankrupt debtors.[92]

Giving forgiveness to bankrupt debtors is a counterweight to the bankruptcy system itself. Pardon is a form of solution to the debtors' unpaid debts.[93]

In Indonesian bankruptcy law, a debt write-off scheme for the debtor's remaining debts cannot be unpaid after the settlement of all bankrupt assets. Although the bankruptcy has been revoked because the bankrupt's assets are insufficient to cover the debtors' debts, the remaining obligations of the bankrupt debtors still follow the debtor. Suppose the bankrupt debtor is a legal entity such as a limited liability company. In that case, if the bankrupt debtor's assets are insufficient to pay the debts of the bankrupt debtor, by law, the bankrupt limited liability company is dissolved. In Indonesian bankruptcy law, there is also no fresh-starting principle which is a manifestation of the debt forgiveness principle. This fresh-starting

[92] *Ibid.*

[93] Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, Yale University Press, New Haven-Connecticut, 1997, p. 244.

concept gives the bankrupt debtor the status of being completely clean of his debts and able to start his business again without being burdened with his old debts. In Indonesian bankruptcy law, the debt of the bankrupt debtor will continue to follow him, and he may even be bankrupt more than once. Indonesian bankruptcy law only provides legal institutions within the framework of the principle of debt forgiveness in the form of a debt moratorium known as Debt Payment Obligation Suspension. The concept of rehabilitation is rehabilitation after all debtor's debts are settled, not rehabilitation in the form of fresh-starting.[94]

h. Principle of Universal and Territorial

The universal principle in bankruptcy implies that the bankruptcy decision is from a court in a country; the bankruptcy decision applies to all debtor's assets domestically where the bankruptcy decision is made or to the debtor's assets located abroad. This principle emphasizes the international aspect of bankruptcy, or what is known as cross-border insolvency.[95]

Based on this, the territorial principle will cause a problem if the assets of the bankrupt debtor are located abroad. In general, it can be said that most of the legal systems adopted by countries in the world do not allow their courts to execute the decisions of foreign

[94] M. Hadi Shubhan, *Op. Cit.*, p. 156.
[95] M. Hadi Shubhan, *Op. Cit.*, p. 47.

courts. The rejection of execution of foreign court decisions is closely related to the concept of state sovereignty. A sovereign state will not recognize a higher institution unless it voluntarily submits itself. Considering that a court is a tool in a country, it is natural that the court will not execute foreign court decisions.[96] Rahmat Bastian also stated that foreign court decisions could not be directly implemented in the territory of another country based on the principle of territorial sovereignty. This principle is also related to the principle of the rule of law in which each principle, foreign decisions cannot be implemented in the territory of another country.[97]

The problem of not being able to execute the assets of the bankrupt debtor who is abroad, Hikmahanto Juwana provides a solution by stating that in order to execute the bankrupt debtor's assets, prior efforts must be made to establish an agreement between countries.[98] With the agreement between these countries, the related countries can open the door to each other to implement decisions without national borders. If there is a clash between the universal and territorial principles, the territorial principle will override the universal principle because the sovereignty of a country is above any

[96] Hikmahanto Juwana, "Relevansi Hukum Kepailitan dalam Transaksi Bisnis Internsional", in Emmy Yuhassarie (ed.), *Kepailitan dan Transfer Aset Secara Melawan Hukum*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 290-291.

[97] Rahmat Bastian, "Prinsip Hukum Kepailitan Lintas Yuridiksi", in Emmy Yuhassarie Yuhassarie (ed.), *Kepailitan dan Transfer Aset Secara Melawan Hukum*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 299.

[98] Hikmahanto Juwana, *Op. Cit.*, p. 292.

legal force. Meanwhile, the territorial principle will be set aside if international agreements exist, or a country adheres to the universal code.

4. Requirement of Filling Bankruptcy

M. Hadi Shubhan stated that the material requirements that must be met in filing a bankruptcy petition are the existence of 1 (one) debt that has matured and is collectable and the debtor has at least 2 (two) creditors.[99] Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that:[100]

> *"A debtor who has two or more creditors and does not pay off at least one debt that has matured and is collectible, is declared bankrupt by a court decision, either at his own request or at the request of one or more creditors."*

Thus, the conditions for a person or legal entity to be declared bankrupt are as follows:

a. The debtor Has Two or More Creditors

According to Article 2 paragraph (1) of the Bankruptcy Law, one of the conditions must be met is that the debtor has 2 (two) or more creditors. This means that it is only possible for a debtor to be declared bankrupt if the debtor has at least 2 (two) creditors. The requirement for the existence of at least two creditors or more is

[99] M. Hadi Shubhan, *Op. Cit.*, p. 1.

[100] Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

known as the principle of *concursus creditorum*.[101] This emphasizes that debtors must have at least two or more creditors. If the debtor has only one creditor, then there is no need to divide the bankruptcy estate among the creditors.

If a debtor who has only one creditor is allowed to apply for a declaration of bankruptcy against him, then the debtor's assets which according to the provisions of Article 1131 of the Civil Code are debt guarantees, it is not necessary to regulate the distribution of the proceeds from the sale of their assets because all proceeds from the sale of such assets are the sole source of repayment for the creditor. Thus, there is no fear of seizing the debtor's assets because there is only one creditor.[102]

Thus, in bankruptcy, a general confiscation of all debtor's assets is followed by forced liquidation. Then the proceeds from the forced liquidation are divided prorate among the creditors unless any of the creditors, according to the law, prioritises fulfilling the right to the debt.[103]

[101] Sutan Remy Sjahdeni, *Op. Cit.*, p. 64.

[102] Setiawan, "Ordonansi Kepailitan Serta Aplikasi Kini", in Rudy A. Lontoh (ed), *Menyelesaikan Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001, p. 122.

[103] Titik Tejaningsih, *Perlindungan Hukum Terhadap Kreditor Separatis dalam Pengurusan dan Pemberesan Harta Pailit*, First Edition, FH UII Press, Yogyakarta, 2016, p. 61.

b. There Must Be Debt

Basically, bankruptcy stems from debts that debtors do not pay to creditors. Therefore, one of the conditions that must be met in filing a bankruptcy application is the existence of a debt. Article 1 point 6 of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations explains debt as follows:

> *"Debt is an obligation that is stated or can be stated in the amount of money both in Indonesian currency and foreign currency, either directly or that will arise in the future or contingent, arising from an agreement or law and must be fulfilled by the debtor and if not fulfilled, gives the creditor the right to obtain fulfilment from the debtor's assets."*

Based on the understanding of the article, the debtor's assets that are collateral for the receivables owned by the creditor are not only limited to the debtor's existing assets but also the debtor's assets that will arise in the future. If the debtor's existing assets are insufficient to fulfil his obligations, the debtor's assets that will arise in the future will become collateral for the shortage of the creditor's receivables.

In connection with Article 1 point 6 of the Bankruptcy Law, the Supreme Court, in its Judicial Review Decision Number 05PK/N/1999, states that the debt is principal and interest debt, so what is meant by debt here is on the legal relationship of borrowing money or obligations to pay a certain amount of money as a special form of various forms of engagement in general.[104]

[104] J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-undang*, First Edition, Citra Aditya Bakti, Bandung, 1993, p. 88-89.

According to Tri Harnowo, there are three meanings of debt, namely:[105]

a) The definition of debt in a narrow sense, namely that debt only arises from money-lending agreements;
b) The definition of debt in a broad sense, namely debt does not only arise from a money-lending agreement but also arises because of an obligation that requires the debtor to pay, which arises from an agreement;
c) The definition of debt in a very broad sense, namely debt does not only come from an agreement but also comes from the law and even does not only arise as a result of an obligation to pay but because there is also an obligation to do something or not to do something, namely based on Article 1234 of the Indonesian Civil Code.

Elucidation of Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations states the meaning of "debt that has matured and is collectable" is "the obligation to pay debts that have matured, either because of an agreement, due to acceleration the collection time as agreed upon, due to the imposition of sanctions or fines by the competent authority, or due to court decisions, arbitrators, or arbitral tribunals."

[105] Tri Harnowo, "Kreditor Preferen dan Separatis", in Emmy Yuhassarie, *Undang-undang Kepailitan dan Perkembangannya: Proseding Rangkaian Lokakarya Terbatas Masalah-masalah Kepailitan dan Wawasan Hukum Bisnis Lainnya Tahun 2004*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 129.

Bankruptcy law, in using the term debt adheres to the definition of debt broadly. The concept of debt in a broad sense which is used as the basis for applying a declaration of bankruptcy must meet the following elements:[106]

a) The debt has matured

A debt is said to have matured when the time has been in accordance with the agreed period, or there are other things where the debt can be collected even though it has not yet matured. Debts that are not yet due can be collected using an acceleration clause, an acceleration provision, and a default clause. The meaning of the acceleration clause is to give the creditor the right to accelerate the maturity period of the debt if the creditor feels deem himself insecure. Therefore, the acceleration clause instead of the default clause is used if the creditor considers it necessary to do so even though the debt has not yet matured. Because the creditor can accelerate the maturity of the debtor's debt in the event of an event of default, meaning that something has happened or has not been fulfilled by the debtor in the credit agreement, causing the creditor to accelerate the maturity.

[106] M. Hadi Shubhan, *Op. Cit.*, p. 91-92.

b) The debt can be collected

The debt is not arising from a natural engagement (*natuurlijke verbintenis*). An engagement whose fulfilment cannot be prosecuted in court and is commonly referred to as a natural engagement cannot be used as a reason for filing a petition for a declaration of bankruptcy.

c) The debt is not paid off

Debts that have been paid but have not paid off the obligations then the debt can be used as the basis for applying for a declaration of bankruptcy.

5. Authorized Parties to File an Application for Bankruptcy

Several types of parties can apply for a declaration of bankruptcy per their respective provisions in the laws and regulations. The parties are as follows:

a. Debtor himself (Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment obligations)

The Bankruptcy Law gives the debtor the right to file a petition for a declaration of bankruptcy on his behalf. If the debtor is still bound in a legal marriage, the application can only be submitted with the husband or wife's consent. This does not apply if in the

marriage there is no unity of property between husband and wife (Article 4 of the Bankruptcy Law).

b. One or more creditors (Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment obligations)

Based on the explanation of Article 2 paragraph (1) of the Bankruptcy Act, creditors who can apply for a declaration of bankruptcy are preferred, separatist, and concurrent creditors. Specifically, preferred, and separatist creditors can apply for a declaration of bankruptcy without losing their priority rights and collateral rights for the property they have against the debtor's assets.

c. Prosecutor's Office of the Republic of Indonesia (Article 2 paragraph (2) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment obligations)

The Prosecutor's Office may apply for a declaration of bankruptcy on the grounds of public interest if the requirements for filing a petition for a declaration of bankruptcy have been met and no party has filed a bankruptcy petition.

The meaning of "public interest", the explanation of Article 2 paragraph (2) of the Bankruptcy Law explains that it is in the interest

of the nation and state and/or the interests of the wider community, for example:

(1) The debtor runs away;

(2) The debtor embezzles part of the assets;

(3) The debtor has debts to State-Owned Enterprises (BUMN) or other business entities that collect funds from the public;

(4) The debtor has debts originating from the collection of funds from the wider community;

(5) The debtor does not have good intentions or is uncooperative in resolving the outstanding debts and receivables; or

(6) In other cases, according to the prosecutor's office, it is in the public interest.

The procedure for applying for bankruptcy is the same as for a bankruptcy application filed by a debtor or creditor, provided that the prosecutor's office can apply for bankruptcy without using the services of an advocate.

d. Financial Services Authority (OJK)

Article 6 of Law Number 21 of 2011 on the Financial Services Authority describes the regulatory and supervisory duties as follows:

"OJK carries out the task of regulating and supervising:

(1) Financial services activities in the banking sector;

(2) *Financial services activities in the Capital Market sector; and*
(3) *Financial service activities in the insurance sector, pension funds, financing institutions, and other financial service institutions."*

Thus, with the enactment of this Law on the Financial Services Authority, the application for a declaration of bankruptcy in the banking sector which was initially the authority of Bank Indonesia becomes the authority of the Financial Services Authority; petition for declaration of bankruptcy in the Capital Market and Insurance sectors, Pension Funds, Financing Institutions, and Other Financial Services Institutions which were initially under the authority of the Minister of Finance shall become the authority of the Financial Services Authority.

6. Legal Consequences for Declaration of Bankruptcy

The legal consequences of the bankruptcy decision are as follows:

a. Bankruptcy Decisions Can Be Executed First (Immediate Decision)

In principle, the bankruptcy decision is immediate and can be executed first even though further legal action is still being taken against the decision. The curator, accompanied by the Supervisory Judge can directly carry out his function to manage and settle the bankruptcy. Meanwhile, suppose the bankruptcy decision is canceled due to the legal effort. In that case, all actions that have been carried out by the curator before or on the date the curator receives the

notification of the cancellation decision will remain valid and binding on the debtor.[107]

The immediate enactment of the bankruptcy decision does not have negative implications about settling assets to pay creditors' receivables. For example, suppose the bankruptcy decision has been carried out immediately, and there are some creditors whose receivables have already been paid. In that case, the bankruptcy decision turns out to be canceled in a legal remedy, so the debtor is also not disadvantaged because, either in bankruptcy status or not bankrupt, a debt must be paid.

b. General Confiscation (Public Attachment, *Gerechtelijk Beslag*)

The assets of the debtor that enter the bankruptcy estate are a general confiscation along with what was obtained during the bankruptcy. In Article 21 of Law Number 37 of 2004 on Bankruptcy and Postponement of Obligation to Pay Debt, it is determined that bankruptcy covers all debtor assets at the time the bankruptcy declaration is pronounced as everything obtained during the bankruptcy. The essence of general confiscation of debtor's assets is that the purpose of bankruptcy is to prevent the seizure of bankrupt assets by creditors and to stop the traffic of transactions against bankrupt assets carried out by debtors, which allows losses to the

[107] *Ibid.*, p. 162.

creditors. With general confiscation, the bankruptcy estate is suspended from all kinds of transactions and other legal actions until the curator manages the bankruptcy estate.

As a result of the decision to declare bankruptcy, general confiscation occurs by law and does not require special actions to carry out the confiscation. This general confiscation also means that it can lift other special confiscations if the debtor's assets are already being confiscated at the time the debtor is declared bankrupt.[108]

The Bankruptcy Law excludes several things that are not included in bankruptcy assets, namely:[109]

(1) Objects, including animals that the debtor needs in connection with his work, equipment, medical equipment used for health, bedding and equipment used by the debtor and his family, and food for 30 (thirty) days for the debtor and his family, who are there;

(2) Everything that is obtained by the debtor from his work as a salary from a position or service, as wages, pensions, waiting for fees or allowances, to the extent determined by the Supervisory Judge; or

(3) According to law, money is given to debtors to fulfill an obligation to provide living expenses.

[108] *Ibid.*, p.163.
[109] *Ibid.*, p. 164.

The provisions for the exclusion of assets included in the bankruptcy estate must be read as long as the bankruptcy debtor is an individual and not a legal entity. The bankruptcy estate exemption cannot be applied if the bankrupt debtor is a limited liability company. Even the salary of a director of a limited liability company becomes a bankruptcy estate debt that must be paid to the director.[110]

c. Loss of Authority in Wealth

The bankrupt debtor, by law, loses his right to manage (*daden van behooren*) and carry out acts of ownership (*daden van beschikking*) on his assets included in the bankruptcy. The loss of free rights is only limited to his wealth and not his status. Debtors in bankruptcy status do not lose other civil rights as well as other rights as citizens, such as political and private rights. The *ratio legis* stipulation that bankruptcy is only concerned with the debtor's assets is that the purpose of bankruptcy is to distribute the debtor's assets to pay the debtor's debts to his creditors.[111]

Thus, the bankrupt debtor is not at all affected by other matters that are not related to assets. If there are parties linking bankruptcy with other things outside the bankrupt debtor's assets, it is inappropriate.

[110] *Ibid.*
[111] *Ibid.*, p. 165.

d. Engagement after Bankruptcy Decision

Article 25 of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that "all Debtor engagements issued after the bankruptcy declaration decision can no longer be paid from bankrupt assets, unless the engagement benefits the bankruptcy estate." If the bankrupt debtor violates this provision, his actions do not bind his assets unless the engagement brings benefits to the bankrupt assets. The problem with this provision is if the debtor makes an antedate engagement (dated backward) and even the debtor intentionally creates a fictitious creditor for the benefit of the bankrupt debtor. Therefore, the curator in carrying out his role, must be careful.

The *ratio legis* of this provision is that the debtor's assets are intended to be distributed to existing creditors. The requirements for the application for bankruptcy include the presence of at least two already-owned creditors. So, if the applicant for bankruptcy argues that he is the debtor's creditor while the other creditors will still exist in the future, then the relevance of the bankruptcy becomes non-existent.[112]

[112] *Ibid.*, p. 166.

According to Marjan E. Pane, in conducting an inventory and verification of accounts payable, the curator must classify the debts of the bankrupt debtor into:[113]

(1) Bankruptcy debt, namely debt that existed at the time the bankruptcy was decided, including debt guaranteed by special collateral/guarantee;

(2) Debts that cannot be verified, namely debts that arise after the bankruptcy decision and therefore cannot be classified as bankrupt debts, still have claim rights but are backward in position from bankruptcy debts; and

(3) Assets payable/bankruptcy boedel, debts arising after the bankruptcy decision. This debt was created to facilitate managing and settling bankrupt assets. This debt will be repaid from the bankrupt assets/boedel without needing to be verified and has priority over the bankrupt debt.

e. Payment of Accounts Receivable Bankrupt debtor

The bankrupt debtor may not pay a payment of receivables to creditors after the bankruptcy decision. If this is done, it does not release the debt. Likewise, claims and lawsuits regarding rights and

[113] Marjan E. Pane, "Inventarisasi dan Verifikasi dalam Rangka Pemberesan Harta Pailit dalam Pelaksanaannya", in Emmy Yuhassarie (ed.), *Undang-undang Kepailitan dan Perkembangannya*, Pusat Pengkajian Hukum, Jakarta, 2005, p. 280.

obligations in terms of assets may not be submitted by or to the bankrupt debtor but must be by or to the curator.[114]

However, if the claim is filed or forwarded by or against the bankrupt debtor, then if the claim results in a sentence against the bankrupt debtor, the sentence has no legal effect on the bankrupt assets. In addition, during the bankruptcy, the claim to obtain fulfillment of the engagement from the bankruptcy estate directed against the bankrupt debtor can only be submitted by registering it for verification.[115] Meanwhile, a lawsuit in court filed against the debtor insofar as it aims to obtain the fulfillment of obligations from the bankruptcy estate, and the case is ongoing, is null and void by law with the pronouncement of the bankruptcy declaration decision against the debtor.[116]

If the bankrupt debtor still conducts transactions using debit or credit for his assets, there will be legal confusion in the field of assets related to the debtor's bankruptcy. First, regarding the responsibility for the transaction, namely, who is the party responsible for the third party for the fulfillment of the transaction? It would be illogical if the bankrupt debtor were still conducting transactions. In contrast, the transaction still has legal consequences, directly or indirectly, while the bankrupt debtor's assets are generally

[114] Article 26 paragraph (1) and paragraph (2) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

[115] Lee Eng Beng, "Insolvency Law", SAL Annual Review, 2003, p. 8.

[116] M. Hadi Shubhan, *Op. Cit.*, p. 167.

confiscated. Second, to avoid legal transactions based on bad faith by the bankrupt debtor or third parties who wish to co-opt the legal status of the bankrupt debtor.[117]

f. Previous Court Decisions

The decision on the declaration of bankruptcy results in any court decision on any part of the debtor's assets initiated before bankruptcy must be terminated immediately. Since then, no decision has been enforceable, including or by holding and detaining the debtor. All confiscations carried out before the bankruptcy decision will be annulled, and if necessary, the Supervisory Judge must order the termination.[118]

The logical ratio of this provision is that bankruptcy is intended, among other things, to annul every court decision relating to the debtor's assets immediately when the Commercial Court pronounces the declaration of bankruptcy decision. Even if it has already occurred, it can be terminated with this bankruptcy decision.

g. Employment Relationship with Bankrupt Company Employees

Article 39 Paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations, explains that a worker who works for a debtor can terminate his

[117] *Ibid.*

[118] Article 31 paragraph (1), paragraph (2), and paragraph (3) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

employment relationship. Conversely, the curator can dismiss him by considering the time according to the approval or provisions of the applicable laws and regulations, understanding that the employment relationship can be terminated with at least 45 (forty-five) days prior notice.

These provisions are not in accordance with the provisions of labor law. In labor law, theoretically, termination of employment is divided into four types, namely:[119]

(1) Termination of employment for the sake of law

Termination of employment by law occurs due to the expiration of a certain time work agreement, the death of the worker, or the worker entering retirement.

(2) Termination of employment by employers

Termination of employment by the company occurs because the worker made a serious mistake, the worker (after) being detained by the authorities for six consecutive months due to committing a crime outside the company, the worker has received three warning letters, the company is closed (liquidated) This is not because the company has suffered a loss, or the company is no longer willing to accept workers (continue the working relationship) due to a change in status, merger, and consolidation of companies.

[119] M. Hadi Shubhan, *Op. Cit.*, p. 169-171.

(3) Termination of employment by workers

This termination of employment occurs because the worker automatically resigns or the worker asks to be dismissed because the company has made a serious mistake, such as abusing workers.

(4) Termination of employment by the judge

Termination of employment due to a court decision is the case if you employ a minor by not fulfilling the provisions of the applicable regulations.

Each type of termination of employment has different juridical consequences. The Commercial Court is a special court with absolute competence on bankruptcy and other related matters. This means that in addition to deciding the petition for bankruptcy declaration, the Commercial Court is also competent to resolve other matters that arise because of the bankruptcy statement, such as the *actio pauliana* lawsuit, renvoi lawsuit, and other lawsuits. The *ratio legis* of this provision is that bankruptcy must be a necessary and prompt procedure. It is said to be integral because bankruptcy issues related to other issues have common threads that can be drawn in common, and by unifying one procedure, overlapping and conflicting verdicts can be avoided. It is said that the bankruptcy procedure is a quick procedure to avoid a protracted bankruptcy decision, even though bankruptcy is a quick way to resolve the

problem of debtors' debts that cannot be paid to avoid a seizure of the debtor's assets by the creditors and the embezzlement of the debtor's assets by the debtor himself.[120]

Thus, it is logical that if there is a dispute regarding termination of employment related to bankruptcy, the resolution is through the Supervisory Judge and to what extent is necessary through the Commercial Court. Meanwhile, workers in a bankrupt company are creditors of bankrupt assets. They are classified as preferred creditors, so the issue of fulfilling labor rights is the distribution of bankrupt assets to creditors, including workers.

h. Separatist Creditors and Suspension of Rights (Stay)

Article 55 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, explains that every creditor who holds collateral rights over property, such as holders of mortgage rights, liens, or other rights, can exercise the right of execution as if - as if there was no bankruptcy.

The *ratio legis* of this provision is that establishing a legal guarantee institution is to give preference to the guarantee holder in paying debtors' debts. However, the implementation of the preferential rights of the separatist creditors has different arrangements with the exercise of the preference rights of the

[120] *Ibid.*, p. 172.

creditors holding the guarantee when they are not in bankruptcy. The special provisions are regarding the stay period, and execution of guarantees by the curator after the creditors holding the guarantees are given two months to sell themselves.[121]

The provisions for the right of stay (stay) are regulated in Article 56 paragraph (1) of the Bankruptcy Law, which stipulates that the separatist creditor has the right to be suspended for 90 days to execute the collateral in his possession. This provision means that in practice, the holder of the security right will sell the collateral object at a quick selling price (a price below the market price) with the aim of only meeting the interests of the creditor holding the guarantee. This will result in losses to the *boedel* of bankruptcy. Meanwhile, suppose it is suspended for 90 days. In that case, it will provide an opportunity for the curator (acting under the supervision of the Supervisory Judge) to get a reasonable price, even the best price. In the context of bankruptcy, if there is a residual value of the liquidation of the collateral object, then the remainder will be included in the *boedel* of bankruptcy. Such an arrangement will provide legal protection to the bankrupt debtor and other creditors, while the creditor holding the collateral object will not be harmed at all.[122]

[121] *Ibid.*, p. 172-173.
[122] *Ibid.*

i. *Actio Pauliana* in Bankruptcy

Based on the Bankruptcy Act, *actio pauliana* is regulated in Articles 41-47 of Law Number 37 of 2004 on Bankruptcy and Suspension of Obligation to Pay Debts. In contrast to *actio pauliana* in the Civil Code, which creditors submit, *actio pauliana* in bankruptcy is filed by the curator, and the curator can only file an *actio pauliana* lawsuit with the approval of the supervisory judge.

The *actio pauliana* lawsuit in bankruptcy requires that the debtor and the party with whom the act was committed are deemed to have known or ought to have known that the act would result in a loss to the creditor. *Actio pauliana* lawsuits in bankruptcy must meet the following criteria:[123]

(1) The legal action that *Actio Pauliana* is suing in the bankruptcy is an act that is detrimental to the creditor, which was carried out within 1 (one) year before the bankruptcy decision.

"…However, an *actio pauliana* can be filed even though the debtor's actions are more than 1 year before being declared bankrupt provided that the curator must prove that the debtor knows that his actions will harm his creditors."

(2) The legal action that *Actio Pauliana* is suing in the bankruptcy is an act that is detrimental to the creditor and is not obliged to be carried out by the bankrupt debtor.

[123] *Ibid.*, p. 176.

(3) The legal action sued by *Actio Pauliana* in the bankruptcy is an act that harms the creditor, which is an agreement where the debtor's obligations far exceed the obligations of the party with whom the agreement was made.

(4) The legal action that is being sued by actio pauliana in the bankruptcy is an act that is detrimental to the creditor, which is the payment of, or the provision of guarantees for debts that have not yet matured and/or have not been or cannot be collected; or

(5) The legal action that Actio Pauliana sued in the bankruptcy was an act that was detrimental to the creditor committed against an affiliated party. Affiliated parties are determined as stipulated in Article 42 of the Bankruptcy Act.

Article 3 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations states that the decision on the application for a declaration of bankruptcy and other matters related and/or regulated in this law shall be decided by the Court whose jurisdiction covers the area where the debtor's legal domicile is. As for what is meant by other matters, it is explained in the Elucidation of Article 3 paragraph (1) of Bankruptcy Law, namely:

> *"Other matters are, among others, actio pauliana, third party resistance to confiscation, or cases where debtors, creditors, curators or management are one of the parties in cases related to bankruptcy assets including the curator's*

lawsuit against the board of directors which causes the company to be declared bankrupt because of negligence or error''.

The procedural law that applies in adjudicating cases that include "other matters" is the same as the Civil Procedure Code that applies to cases of a petition for a declaration of bankruptcy including regarding the limitation of the settlement period, legal remedies, and the immediate enactment of the decision."

j. Forced Body (*Gijzeling*)

Gijzeling is a legal effort to ensure that the bankrupt debtor or the directors and commissioners in the case of bankruptcy is a limited liability company, which really assists the curator's duties in managing and settling the bankruptcy estate. This agency is primarily intended if the bankrupt debtor is not cooperative in resolving the bankruptcy. The regulation regarding this *gijzeling* in Indonesian bankruptcy law is in Articles 93 to 96 of Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations. Meanwhile, the technical provisions for the forced agency refer to the Supreme Court Regulation Number 1 of 2000 on the Agency for Forced Institutions. Article 2 of the Supreme Court Regulation Number 1 of 2000 states that the enforcement of the agency against debtors with bad intentions is carried out based on the

provisions as referred to in Article 209 to Article 224 HIR (or Article 242 to Article 258 RBg).[124]

Judging from the normative provisions regarding *gijzeling* in the Bankruptcy Law, Supreme Court Regulation Number 1 of 2000, and in HIR, there is juridical disharmony. Some of these disharmonies include:[125]

(1) The minimum amount of debt from debtors with bad intentions that can be subject to *gijzeling*

In Bankruptcy Law and the HIR, there is no minimum amount of debt owed by a bankrupt debtor with bad intentions that the body can impose. Meanwhile, Article 4 of the Regulation of the Supreme Court Number 1 of 2000 states that a force body can only be imposed on debtors with bad intentions who have debts of at least Rp. 1,000,000,000 (one billion rupiah).

(2) Period of *gijzeling*

In the Bankruptcy Law, it is determined that the period of detention for *gijzeling* is valid for a maximum of 30 (thirty) days from the date the detention is carried out and can be extended each time for a maximum period of 30 (thirty) days. Meanwhile, in the Supreme Court Regulation Number 1 of 2000, it is determined that *gijzeling* is stipulated for 6 (six)

[124] *Ibid.*, p. 179.
[125] *Ibid.*, p. 180-181.

months and can be extended every 6 (six) months with a maximum total of 3 (three) years.

(3) The age of the debtor that can be subject to *gijzeling*

The Bankruptcy Law and the HIR do not specify a maximum age limit for debtors subject to *gijzeling*. Meanwhile, in the Supreme Court Regulation Number 1 of 2000, it is determined that *gijzeling* cannot be imposed on debtors with bad intentions who are 75 years old.

(4) The scope of debtors with bad intentions

In Bankruptcy Law, the scope of what is meant by bad intentions is debtors who intentionally without any valid reason fail to fulfill their legal obligations as stipulated in Article 98, Article 110, or Article 121 paragraphs (1) and (2). Bankruptcy Law, namely obligation (a). safeguard against all bankrupt assets (Article 98), (b). summons to provide information (Article 110), or (c). avoiding matching debt meetings (Article 121). While the scope of what is meant by debtors with bad intentions in the Supreme Court Regulation Number 1 of 2000 is debtors, guarantors, or debt guarantors who are able but unwilling to fulfill their obligations to pay their debts.

(5) The purpose of *gijzeling*

In Bankruptcy Law, the purpose of implementing *gijzeling* is solely to pressure bankrupt debtors to cooperate in the bankruptcy process. At the same time, the purpose of *gijzeling* in HIR is to pressure the debtor by forcing the debtor to pay his debt even though the debtor has no assets in the hope that his relatives will also pay the debt. Meanwhile, the purpose of *gijzeling* in the Regulation of the Supreme Court Number 1 of 2000 is aimed more at debtors or debt guarantors who are able but do not want to pay their debts.

Against this conflict of norms, the solution is to use the principles of *lex superiori derogate legi inferiori*, and *lex specialis derogate legi generalis*. The party entitled to apply for a forced body is at the suggestion of the supervisory judge, the request of the curator, or the request of one or more creditors and after hearing the supervisory judge. The application for this *gijzeling* is submitted to the Commercial Court. In contrast, the executor of *gijzeling* is a prosecutor appointed by the supervisory judge. The implementation of *gijzeling* is carried out either in the State Detention Center or in the debtor's own house under the supervision of the prosecutor appointed by the supervisory judge.[126]

[126] *Ibid.*, p. 182.

k. Criminal Provisions

Criminal arrangements in the Criminal Code relating to bankruptcy with the following acts:[127]

(1) The debtor does not want to attend or provide/not provide misleading information in the bankruptcy settlement process (Article 226 of the Criminal Code);

(2) The bankruptcy debtor's actions that harm the creditor (Article 396 of the Criminal Code);

(3) Debtor's act of transferring assets to the detriment of creditors and causing bankruptcy (Article 397 of the Criminal Code);

(4) The actions of the directors or commissioners of the company that cause losses to the company either before or after the declaration of bankruptcy (Article 398 of the Criminal Code);

(5) Deception by bankrupt debtors to creditors (Article 400 of the Criminal Code);

(6) The fraudulent agreement between a bankrupt debtor and a creditor in the framework of offering a bankruptcy settlement (Article 401 of the Criminal Code);

(7) The actions of the bankrupt debtor reduce the rights of creditors (Article 402 of the Criminal Code);

[127] *Ibid.*, p. 183-184.

(8) The actions of the directors of a limited liability company are contrary to the articles of association (Article 403 of the Criminal Code).

Suppose the bankrupt debtor is a limited liability company. In that case, the directors and commissioners can be charged with the provisions of Article 398 and Article 399 of the Criminal Code, if they do the following:[128]

(1) Participate in or approve acts that violate the articles of association of the limited liability company, and such acts cause heavy losses so that the company goes bankrupt.
(2) Participate in or approve loans on onerous terms to delay the bankruptcy of a limited liability company.
(3) Negligent in keeping the books as required by the Limited Liability Company Law and the articles of association of the limited liability company.

Although Article 396, Article 397, and Article 403 of the Criminal Code stipulate that the cause of bankruptcy can be punished, it must meet the criteria, namely in the case of Article 396 of the Criminal Code (simple bankruptcy):[129]

(1) Expenditures beyond the limits of daily life/too extravagant; or

[128] Fred B.G. Tumbuan, "Tanggung Jawab Direksi Sehubungan dengan Kepailitan Perseroan Terbatas", Legal Papers, 1998, p. 7-8.

[129] Denny Kalilimang, "Aspek-aspek Pidana dalam Kepailitan", in book: Rudhy A. Lontoh (ed.), *Penyelesaian Utang Piutang melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2001, p. 324.

(2) Borrowing money/capital with high interest even though it is known that it does not help the bankruptcy; or

(3) Cannot show in full without changes (doodles or writings) as specified in Article 6 of the Commercial Code.

Meanwhile, in the event that bankruptcy occurs due to fraud in Article 397 of the Criminal Code, namely:[130]

(1) There are three kinds of action: (a) fabricating actions that never existed; (b) not recording any revenue; (c) setting aside or withdrawing an item from the *boedel*;

(2) The act of removing an item from the *boedel* for free or at an openly lower price;

(3) Actions in any form benefit one of the creditors;

(4) Actions in the form of deviations from the provisions of Article 6 of the Commercial Code.

Meanwhile, Article 403 of the Criminal Code stipulates that the management or commissioner of a limited liability company has cooperated or given his approval to take actions that are contrary to the articles of association, which causes the company to be unable to fulfill its obligations or must be dissolved.[131]

[130] *Ibid.*, p. 325-326.
[131] M. Hadi Shubhan, *Op. Cit.*, p. 185.

B. Overview about Insurance

1. Definition about Insurance

The term insurance in Indonesia is known as coverage. This term follows the Dutch terms, namely *assurantie* (insurance) and *verzekiring* (coverage). While in English, the terms insurance and assurance have the same meaning. The term insurance is used for loss insurance, while assurance is used for life insurance.[132]

Book One Chapter IX Article 246 of the Commercial Code defines insurance that "Insurance or coverage is an agreement, where an insurer binds himself to an insured, by receiving a premium to compensate him for a loss, damage, or forfeit the expected profits, which he may suffer due to unspecified events."[133]

The limitations of the insurance agreement according to Article 246 of the KUHD are as follows:[134]

a. There is a transfer of risk that is offset by the premium paid, so this premium is a substitute for the losses incurred.
b. Interest in the insurance agreement is an absolute requirement when an uncertain event occurs.
c. Even if a lawsuit is filed either from the insurer or the insured, it is resolved through the courts.

[132] Radiks Purba, *Mengenai Asuransi Angkutan Darat dan Udara*, Djambatan, Jakarta, 1997, p. 40.
[133] Article 246 of the Commercial Code.
[134] Zahry Vandawati Chumalda, *Prinsip Itikad Baik dan Perlindungan Tertanggung pada Perjanjian Asuransi Jiwa*, Dissertation, Unair, Surabaya, 2013.

d. A legal consequence of the agreement is the emergence of a reciprocal relationship in the insurance agreement, namely the emergence of the rights and obligations of each party.

Subekti said that insurance is an agreement in which the party who guarantees promises to the party is guaranteed to receive a certain amount of premium money as a replacement for the losses suffered by the insured due to the consequences of an event that is not yet clear. Insurance involves two parties: the party who guarantees the loss and the party who suffers the loss.[135]

HMN. Purwosutjipto explained that insurance or coverage is a reciprocal agreement between the insurer and the claimant to bind themselves to compensate or pay a certain amount of money at the time of closing the agreement to the insured in the event of an event. In contrast, the insurance claimant binds himself to pay the premium.[136]

Meanwhile, Article 1 point 1 of Law Number 40 of 2014 on Insurance states that:[137]

"Insurance is an agreement between two parties, namely the insurance company and the policyholder, which is the basis for receiving premiums by the insurance company in return for:

a. provide compensation to the insured or policyholder due to loss, damage, costs incurred, loss of profit, or legal liability to third

[135] Subekti, *Pokok-pokok Hukum Perdata*, 21 Mold, Intermassa, Jakarta, 2003, p. 217.
[136] HMN. Purwosutjipto, *Pengertian Pokok Hukum Dagang*, Djambatan, Jakarta, 1986, p. 10.
[137] Article 1 point 1 of Law Number 40 of 2014 on Insurance.

parties that may be suffered by the insured or policyholder due to the occurrence of an uncertain event; or

b. provide payments based on the insured's death or payments based on the insured's life with benefits whose amount has been determined and/or based on the results of fund management."

According to Munir Fuady, the juridical elements of insurance are:[138]

a. The existence of the Insured Party, namely the party whose interests are insured to another party, usually an insurance company, by paying a premium and obtaining a contra premium from the Insurer.
b. The existence of the Insurer Party, namely the party who bears the insured party based on the insurance agreement, because the Insurer has bound himself to the Insurer by receiving a premium and is obliged to provide a contra premium following the agreed insurance agreement.
c. The existence of an insurance contract or agreement between the Insurer and the Insured, in which the form is written and is called a premium.
d. There is an obligation of the Insurer to provide compensation to the Insured.
e. Certain events may occur.
f. There is a premium paid by the Insurer to the Insured (facultative).

[138] Munir Fuady, *Pengantar Hukum Bisnis*, Citra Aditya Bhakti, Bandung, 2002, p. 26-42.

In Article 1 point 29 of Law Number 40 of 2014 on Insurance, it is explained that:

> *"Premium is an amount of money determined by the insurance company or reinsurance company and approved by the policyholder to be paid based on the insurance agreement or reinsurance agreement, or an amount of money determined based on the provisions of the legislation that underlies the mandatory insurance program to obtain benefits."*

The amount of premium to be paid by the insured is also considered the costs associated with the insurance. The amounts that can calculate in the premium amount are:[139]

a. Percentage of the insured amount.
b. The number of costs incurred by the insurer, for example, the cost of the policy and stamp duty.
c. Curtation for intermediaries if coverage is provided through intermediaries.
d. Profit for the insurer in the amount of the reserve.

Based on some of the definitions above, insurance is a reciprocal agreement between the Insurer who binds himself to the Insured to pay compensation or an amount of money in the event of an uncertain event stipulated in the insurance agreement in exchange for premium payments by the Insurer.[140]

[139] Abdul Kadir Muhammad, *Pokok-pokok Hukum Pertanggungan*, Alumni, Bandung, 1978, p. 75.

[140] Wetria Fauzi, *Hukum Asuransi Indonesia*, First Printing, Andalas University Press, Padang, 2019, p. 19.

2. Types of Insurance

According to Sri Redjeki Hartanto, the division of insurance types based on their growth and development in Indonesia are:[141]

a. Commercial insurance is insurance that is held by the government or the purely private sector. The implementation of this type of insurance is entirely dependent on the parties, meaning that there is no interference from third parties except for the company's activities. Commercial insurance can be divided into loss insurance and insurance for a sum of money in a practice called life insurance, such as old-age insurance, scholarship insurance, dual-use insurance, and others.

b. Social insurance is organized by the government, and all provisions in this insurance must be based on the requirements of the laws that have been set. The implementation of social insurance is intended for the welfare and interests of the wider community. All provisions relating to social rights are determined and regulated in laws and government regulations.

According to Law Number 40 of 2014 on Insurance, the types of insurance are divided into the following:[142]

a. Loss Insurance

Loss insurance replaces risks for losses, damages, costs incurred, loss of profits, or legal liability to third parties that the

[141] Man Suparman Sastrawidjaja, *Aspek-aspek Hukum Asuransi dan Surat-surat Berharga*, First Edition, 3rd Mold, Alumni, Bandung, 2012, p. 15.

[142] Law Number 40 of 2014 on Insurance.

policyholder may suffer from uncertain events (Article 1-point 1a of the Insurance Act).

b. Sum Insurance (covers life insurance and social insurance)

Sum insurance provides payment services based on the policyholder's death or payments based on the policyholder's life with benefits whose amount has been determined and/or based on the results of fund management (Article 1-point 1b of the Insurance Act).

c. A reinsurance business is a service business against risks faced by insurance companies, guarantee companies, or other companies (Article 1 point 7 of the Insurance Act).

The difference between loss insurance and sum insurance can be broken down as follows:[143]

a. The parties

In loss insurance, there are only two parties, namely the Insurer and the Insured. While in sum insurance (life insurance), the Insured can be divided into two forms, namely:

(a) Cover (Taker) Insurance, the person who closes or takes insurance is obliged to pay premiums and is entitled to receive the policy.

(b) A connoisseur is a person appointed by the Insurance Cover to receive the achievement of the Insurer, which is in the form of a

[143] Wetria Fauzi, *Op. Cit.*, p. 28-29.

sum of money whose amount has been determined at the time the insurance is closed.

b. Regarding the insured

Coverage on loss insurance is goods that may be attacked by the danger that harms the Insured; these goods are insured objects. In comparison, the sum (life) insurance coverage is the life (life) of a person called the insured body.

c. Regarding the performance of the Insurer

The Insurer's achievement in loss insurance is to compensate for the loss suffered by the Insured. Meanwhile, the achievement of sum (life) insurance is paying a certain amount of money determined when the coverage is closed to the Connoisseur.

d. About interests

The interests of loss insurance are subjective rights or obligations that are worth money, can be threatened with harm, and are not prohibited by law (269 of Commercial Code). Meanwhile, the importance of sum (life) insurance is immaterial and usually takes the form of a family relationship.

e. About the event

Event loss insurance is in the form of an uncertain event that causes the insured a loss. In contrast, evenement insurance (life) is the loss of a person's life or the passage of a certain grace period without the death of the insured body.

f. About Indemnity

Indemnity only applies to lose insurance. Meanwhile, in sum (life) insurance, indemnity does not apply because immaterial losses are not absolute.

The development of the insurance business forms a distinction between types of insurance conventional insurance (as explained above, regulated in the Commercial Code and Insurance Law) and sharia insurance. Article 1 point 2 of Law Number 40 of 2014 on Insurance, is explained:[144]

“Sharia insurance is a collection of agreements consisting of agreements between sharia insurance companies and policyholders and deals between policyholders, in the context of managing contributions based on sharia principles to help and protect each other by:

a. provide compensation to participants or policyholders due to losses, damages, costs incurred, lost profits, or legal liability to third parties that participants or policyholders may suffer due to the occurrence of an uncertain event; or
b. provide payments based on the participant's death or fees based on the participant's life with benefits whose amount has been determined and/or based on the results of fund management."

[144] Article 1 point 2 of Law Number 40 of 2014 on Insurance.

3. Functions of Insurance

Insurance has various benefits, which are classified into the following functions:[145]

a. The Main Function

1) Risk Transfer

Insurance functions as a means of transferring the possibility of risk or loss (chance of damage) from the Insured as the "original risk bearer" to one or several Insurers (a risk transfer mechanism). Thus, uncertainty in the possibility of loss due to an uncertain event will turn into definite insurance protection by changing the loss into compensation or claim compensation with premium payment terms.

2) Fundraiser

Insurance as a collection of funds from the public (policyholders) to be paid to policyholders who experience a disaster, the funds collected are in the form of premiums paid by the Insured to the Insurer.

3) Balanced Premium

Arrangements for premium payments from each Insured are carried out to balance premium payments with the risk transferred to the Insurer (equitable premium).

[145] Mulhadi, *Dasar-dasar Hukum Asuransi*, Rajawali Press, Jakarta, 2017, p. 38-39.

b. Additional Functions

1) Invisible export functions as a covert sale of commodities or intangible products abroad.
2) The stimulator of economic growth serves to stimulate business growth, prevent losses, and control losses.
3) A means of saving investment funds and invisible earnings.

4. Principle of Insurance Agreement

An agreement is said to be valid if it fulfills the provisions of Article 1320 of the Civil Code. In addition to fulfilling the requirements in Article 1320 of the Civil Code, insurance agreements must also comply with the requirements in Book I, Chapter IX of the Commercial Code.[146] The principles of the insurance agreement are as follows:

a. Indemnity Principle

The principle of indemnity is the main principle in the insurance agreement because the principle of indemnity forms the basis of the working mechanism and provides direction for the insurance agreement. The insurance agreement mainly aims to provide compensation to the Insured by the Insurer. The definition of loss must not cause the Insured's financial position to be more

[146] Sri Rejeki Hartono, *Hukum Asuransi dan Perusahaan Asuransi*, First Printing, Sinar Grafika, Jakarta, 1992, p. 98.

profitable than before suffering a loss.[147] The principle of indemnity elaborates on the principle of the existence of interests. So, there must be a continuity relationship between the principle of indemnity and the principle of interest.[148]

b. Principle of Insurable Interest

The principle of insurable interest means that the insured party is involved in such a way as to result if is not certain to occur, and the person concerned suffers a loss. Based on the provisions of Article 250 and Article 268 of the Commercial Code, every interest can be insured, either material interests or rights interests, as long as the interests can be valued in money, can be threatened with danger, and are not excluded by law.[149]

If the requirements of Article 250 and Article 268 of the Commercial Code are not fulfilled, the Insurer will be free from his obligation to pay compensation to the Insured party.

c. Good Faith Principle

The principle of good faith towards insurance agreements is regulated in Article 251 of the Commercial Code, which:[150]

> *"All false or untrue notices, or all concealment of circumstances known to the Insured, even if made in good*

[147] Wetria Fauzi, *Op. Cit.*, p. 46.
[148] Sri Rejeki Hartono, *Op. Cit.*, p. 99.
[149] Wetria Fauzi, *Op. Cit.*, p. 47.
[150] Sri Rejeki Hartono, *Op. Cit.*, p. 103.

faith, of such a nature, so that the agreement will not be entered into, or shall not be entered into under the same conditions, if the Insurer is aware of the circumstances verily from all these things, make the coverage null and void."

Based on Article 251 of the Commercial Code, only the Insured party is unilaterally obliged to provide correct information. At the same time, the Insurer gets protection against violations of the principle of good faith from the Insured.

d. Principle of Subrogation for Insurers

The principle of subrogation in the insurance agreement is subrogation based on the law. Therefore, the principle of subrogation can only be enforced if it fulfills two conditions: if the Insured has rights to the Insurer, the Insured also has rights to third parties, and these rights arise due to the occurrence of a loss. Article 284 of the Commercial Code stipulates that:[151]

"The Insurer who has paid for the loss of the insured item shall obtain all the rights that the Insured may have against a third party in respect of the loss; and the Insured is responsible for any actions that may harm the rights of the Insurer against that third party."

In general, the principle of subrogation is also expressly regulated as a policy requirement with the following formulation:[152]

1) Under Article 284 of the KUHD, after compensation for the property insured in this policy, the Insurer replaces the Insured in all rights obtained against third parties in connection with the

[151] Article 284 of the Commercial Code.
[152] *Ibid.*, p. 108.

loss. This subrogation principle applies automatically without needing a special power of attorney from the Insured.

2) The Insured remains responsible for harming the rights of the Insurer against third parties.

Thus, in an insurance agreement, the principle of subrogation for the Insurer is carried out either by law or by agreement.

e. Contribution Principle

If there is insurance protection for the same object by more than one insurance company, and each of them issues an insurance policy with the same insurance value equal to the actual value of the thing that is the object of coverage, the insurance company is only obliged to pay compensation on a prorated basis per the responsibilities according to a balanced *ratio*.[153]

The principle of contribution in the insurance agreement means that if the insurance company has paid in full the compensation that is due to the Insured, then the insurance company has the right to sue other insurance companies involved in the same object to pay a proportionate share of the loss according to a balanced ratio.

[153] Mulhadi, *Op. Cit.*, p. 88.

5. Policyholder

According to Article 255 of the Commercial Code, a policy is an insurance agreement that must be made in writing in the form of a deed. Furthermore, Article 19 paragraph (1) of Government Regulation Number 73 of 1992 on the Implementation of Insurance Business stipulates that a policy or form of an insurance agreement with any name and attachments which form a single unit may not contain words or sentences that can lead to different interpretations on the risks covered by the insurance, the obligations of the insurer and the obligations of the insured, or making it difficult for the insured to manage his rights.[154]

Based on these provisions, the policy is proof of a written agreement in the form of a deed between the Insured and the Insurer, in which the contents of the policy must be stated clearly and do not cause multiple interpretations regarding the rights and obligations of each Insured and the Insurer.

Meanwhile, if something happens after the insurance agreement, but the policy has not been made, or even though it has been made or has not been signed or has been signed but has not been submitted to the Insured, then an event occurs that causes a loss to the Insured, then for that matter article 257 of the Commercial Code explained that, although the policy has not been made, insurance has occurred since an agreement

[154] Article 19 paragraph (1) of Government Regulation Number 73 of 1992 on the Implementation of Insurance Business.

was reached between the Insured and the Insurer.[155] Furthermore, Article 258 paragraph (1) and paragraph (2) on the Commercial Code states that:

Paragraph 1:

> *To prove the agreement's closing, it is necessary to confirm in writing. However, other means of proof are also allowed if there is already a beginning of evidence in writing.*

Paragraph 2:

> *However, it is permissible for special provisions and conditions if a dispute arises in the period between the closing of the agreement and the delivery of the policy; it is proved by all means of evidence, but with the understanding that all matters which are covered by various kinds of coverage by the provisions of the law According to the law, threats of cancellation are required to be stated firmly in the policy, must be proven in writing."*

Article 256 of the Commercial Code stipulates that:

> *"Every policy, except for life insurance, must state:*
> *(a) the day the coverage is closed;*
> *(b) the name of the person who covers the insurance at his own expense or the expense of a third person;*
> *(c) a fairly clear description of the goods insured;*
> *(d) the amount of money for how much coverage is held;*
> *(e) dangers are borne by the Insurer;*
> *(f) the moment at which the peril begins to apply to the Insurer's dependents and the time when it expires;*
> *(g) the insurance premium; and*
> *(h) in general, all conditions that may be important for the Insurer to know, and all terms agreed between the parties to the policy must be signed by the person of each Insurer."*

The insurance agreement is deemed to have existed since the deal was reached/from when the insurance agreement was closed, even before the policy was signed. This is following the provisions of Article 257 paragraph (1) of the Commercial Code, which stipulates that the insurance agreement is issued immediately after the deal is closed; the

[155] Wetria Fauzi, *Op. Cit.*, p. 43-44.

mutual rights and obligations of the insurer and the insured come into effect from then on, even before the policy is signed.

6. Insurance Company

Article 1 point 1 of Law Number 40 of 2014 on Insurance explains:

> *"Insurance business is all business related to insurance or risk management services, risk reinsurance, marketing and distribution of insurance products or sharia insurance products, insurance consulting and intermediary, sharia insurance, reinsurance, or sharia reinsurance, or insurance loss assessment or sharia insurance loss assessment."*

After the enactment of Law Number 40 of 2014, the regulation and supervision of insurance companies were carried out by the Financial Services Authority. The supervisory system carried out by the Financial Services Authority is an integrated supervision system, meaning that all financial service activities carried out by various financial institutions are subject to the method of regulation and supervision of the Financial Services Authority.[156] Meanwhile, the regulatory and supervisory functions carried out by the Financial Services Authority are to stipulate laws and regulations in the insurance sector, grant and revoke insurance business licenses, approve or refuse to provide registration statements for actuarial consultants, public accountants, appraisers, and require insurance companies to submit reports regularly.[157] This is reinforced by

[156] Zulkarnain Sitompul, "Konsepsi dan Transformasi Otoritas Jasa Keuangan", Indonesian Legislative Journal, Vol. 9 No. 3, 2012, p. 345.

[157] *Ibid.*

the provisions in Article 6 of Law Number 21 of 2011 on the Financial Services Authority, which stipulates as follows:

> "*OJK carries out the task of regulating and supervising:*
> *(a) Financial services activities in the banking sector;*
> *(b) Financial services activities in the Capital Market sector; and*
> *(c) Financial service activities in the insurance sector, pension funds, financing institutions, and other financial service institutions."*

Specifically, regarding the insurance business, Article 8 paragraph (1) of Law Number 40 of 2014 on Insurance stipulates that every party conducting an insurance business must first obtain a business license from the Financial Services Authority. Suppose the permit application has been submitted and received. In that case, the Financial Services Authority must approve or reject the insurance business license no later than 30 (thirty) working days after the complete application is accepted, as stipulated in Article 9 paragraph (1) of the Insurance Law. Meanwhile, to carry out its duties related to granting licenses or revoking insurance business licenses, Article 9 letter h explains that the Financial Services Authority has the authority to grant permits and/or revoke business licenses, issue permits and/or revoke approvals to conduct business activities, and grant permits and/or revoke the approval permit or stipulation on the dissolution of the insurance business.

Based on the provisions described above, everything related to the insurance business, whether in the application for a license to conduct an insurance business, revocation of an insurance business license, or an

application for filing for bankruptcy of an insurance company is the authority of the Financial Services Authority. On the Financial Services Authority, a government official, all administrative actions carried out by the Financial Services Authority also apply the provisions contained in Law Number 30 of 2014 on Government Administration in which some of the contents of the article have been amended in Law Number 11 of 2020 on Job Creation.

C. Bankruptcy and Insurance in the Perspective of Islamic Law

1. Bankruptcy in the Perspective of Islamic Law

Article 1 point 29 of the Compilation of Sharia Economic Law (KHES) explains that debt (*dain*) is an obligation that is stated or can be expressed in an amount of money, either in Indonesian currency or other currencies directly or contingently. The definition of debt in this KHES is as per the definition of debt in bankruptcy law. The Qur'an Surah Al-Baqarah verse 282 explains as follows:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا تَدَايَنتُم بِدَيْنٍ إِلَىٰٓ أَجَلٍ مُّسَمًّى فَٱكْتُبُوهُ ۚ وَلْيَكْتُب بَّيْنَكُمْ كَاتِبٌۢ بِٱلْعَدْلِ ۚ وَلَا يَأْبَ كَاتِبٌ أَن يَكْتُبَ كَمَا عَلَّمَهُ ٱللَّهُ ۚ فَلْيَكْتُبْ وَلْيُمْلِلِ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ وَلْيَتَّقِ ٱللَّهَ رَبَّهُۥ وَلَا يَبْخَسْ مِنْهُ شَيْـًٔا ۚ فَإِن كَانَ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَن يُمِلَّ هُوَ فَلْيُمْلِلْ وَلِيُّهُۥ بِٱلْعَدْلِ ۚ وَٱسْتَشْهِدُواْ شَهِيدَيْنِ مِن رِّجَالِكُمْ ۖ فَإِن لَّمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَٱمْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ ٱلشُّهَدَآءِ أَن تَضِلَّ إِحْدَىٰهُمَا فَتُذَكِّرَ إِحْدَىٰهُمَا ٱلْأُخْرَىٰ ۚ وَلَا يَأْبَ ٱلشُّهَدَآءُ إِذَا مَا دُعُواْ ۚ وَلَا تَسْـَٔمُوٓاْ أَن تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰٓ أَجَلِهِۦ ۚ ذَٰلِكُمْ أَقْسَطُ عِندَ ٱللَّهِ وَأَقْوَمُ لِلشَّهَٰدَةِ وَأَدْنَىٰٓ أَلَّا تَرْتَابُوٓاْ ۖ إِلَّآ أَن تَكُونَ تِجَٰرَةً

حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا ۗ وَأَشْهِدُوٓا إِذَا تَبَايَعْتُمْ ۚ وَلَا يُضَآرَّ كَاتِبٌ وَلَا شَهِيدٌ ۚ وَإِن تَفْعَلُوا۟ فَإِنَّهُۥ فُسُوقٌۢ بِكُمْ ۗ وَٱتَّقُوا۟ ٱللَّهَ ۖ وَيُعَلِّمُكُمُ ٱللَّهُ ۗ وَٱللَّهُ بِكُلِّ شَىْءٍ عَلِيمٌ

It means:

"O you who believe, if you do not do *mu'amalah* in cash for a specified time, then you should write it down. And let a writer among you write it correctly. And let the writer not be reluctant to write it down as Allah taught him, let him write, and let the debtor obey (what is to be written), and let him fear Allah his God, and let him not reduce anything from his debt. If a debtor is a person who is weak in mind or weak (his condition) or unable to enforce it, his guardian should be honest about it. And bear witness with two witnesses from the men (among you). If there are not two men, then (permissible) a man and two women from the witnesses you are pleased with so that if one forgets, the other reminds him. Do not let the witnesses be reluctant (to testify) when they are summoned and do not get tired of writing down the debt, whether small or large, until the deadline for paying it. Thus, it is more just in the sight of Allah, strengthens your testimony, and is closer to not (causing) your doubts. (Write your *mu'amalah*), Unless it is a cash trade that you carry out among yourselves, then there is no sin for you (if) you do not write it down. And bear witness when you buy and sell; let not the writer and the witness make it difficult for each other. If you do (that is), it is an act of disobedience to you. And fear Allah; God teaches you, and Allah is Knower of all things."

Based on the explanation of the Qur'an Surah Al-Baqarah verse 282, it orders Muslims to determine the time limit for debts, write down debts, and present two male witnesses or one male witness and two female witnesses.[158]

The concept of Islamic law related to the ability of debtors who are unable to pay their debts is referred to as *taflis*, which by Ibn Rusyd, is said to be a situation where the debtor has a larger amount of debt when compared to the assets he has, or the debtor has no assets at all.[159] The definition of bankruptcy in Islamic law is *iflas* (*taflis*), which means: not having property. Meanwhile, a *muflis* is a person who is declared bankrupt by the judge, and the judge prevents the *muflis* from taking legal action on his assets so that his creditors do not suffer losses.[160]

The legal basis of *taflis* is based on the words of the Prophet Muhammad. Prophet Muhammad SAW set Mu'az bin Jabal as a person who was in debt and unable to pay his debts. Then the Prophet Muhammad paid off the debt of Mu'az bin Jabal with the rest of the property from Mu'az bin Jabal. However, the debtor did not fully accept the loan he gave, and the Prophet Muhammad said, "nothing can be given

[158] Liza Dzulhijjah, Fahmi Fatwa Rosyadi Satria Hamdani, Asep Hakim Zakiran, "Pandemi Covid-19 sebagai Upaya Pencegahan Kepailitan dalam Perspektif Hukum Positif dan Hukum Islam", Journal of Civilization and Islamic Law, Vol. 4, No. 2, 2021.

[159] Ibnu Rusyd, *Bidayatul Mujtahid,* (Andalusia: Darul Fikri, Vol. 2, p. 213), as quoted in Dian Asriani Lubis, "Kepailitan Menurut Ibnu Rusyd dan Perbandingannya dengan Hukum Kepailitan Indonesia," Undergraduate Thesis, Universitas Islam Negeri Sultan Syarif Kasim, Pekanbaru, 2011, p. 33.

[160] Ridwan, "Studi Komperatif terhadap Kepailitan Perusahaan Asuransi Syariah Menurut Hukum Islam dan Undang-undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang", Legal Scientific Journal, Vol. 2, No. 4, 2022, p. 3.

to you other than that." (Hadith History of Darul Qutni and al-Hakim).[161]

The other hadiths that explain bankruptcy (*taflis*) are as follows:

عَنْ أَبِي بَكْرِ بْنِ عَبْدِ اَلرَّحْمَنِ ,عَنْ أَبِي هُرَيْرَةَ رضي الله عنه قَالَ :سَمِعْتُ رَسُولَ اَللَّهِ صلى الله عليه وسلم يَقُولُ:(مَنْ أَدْرَكَ مَالَهُ بِعَيْنِهِ عِنْدَ رَجُلٍ قَدْ أَفْلَسَ ,فَهُوَ أَحَقُّ بِهِ مِنْ غَيْرِه) مُتَّفَقٌ عَلَيْهِ

It means:

"Whoever finds his goods actually in the hands of a person who is bankrupt, then he is more entitled to the goods than anyone else." Muttafaq Alaihi.

Based on the hadith, if a person (the debtor) has much debt and cannot pay his debts, then the control over his property is transferred to someone else on the judge's orders to pay off the debt from the debtor. If the debtor's assets are insufficient to pay off his debts, then the distribution of all the debtor's assets is carried out on a *prorate* basis.

Regarding the status of the bankrupt debtor, Imam Abu Hanifah argues that the bankrupt debtor is not declared as a person under guardianship (*mahjur 'alaih*), so the bankrupt debtor is still considered capable of taking legal actions other than relating to his assets. Imam Abu Hanifah's opinion is not in line with Imam Abu Yusuf and Imam Muhammad bin al-Hasan ash-Syaibani, who argue that a person who has been declared bankrupt by a judge is considered incapable of taking legal action against his property.[162]

[161] *Ibid.*, p. 4.
[162] *Ibid.*, p. 5-6.

2. Insurance in the Perspective of Islamic Law

In Arabic, insurance is known as *at-ta'min*, the insurer is called *mu'ammin*, and the insured is called *mu'amman lahu* or *musta'min*.[163] *At-ta'min* means someone pays or submits installments so that he (the one who pays) or his heirs gets an amount of money as agreed or compensation for his lost property.[164] The book *'Aqdu at-Ta'min wa Mauqifu asy-Syariah al-Islamiyah Minhu, az-Zarqa* states that the insurance system understood by Islamic law scholars is *ta'awun* and *tadhamun* system. The goal is to cover the loss of events or calamities.[165]

The term other than *at-ta'min*, often used in insurance, is *at-takaful*. *At-takaful* comes from the word *takafala-yatakafalu*, which means to bear or guarantee each other. In the case of *muamalah*, *takaful* means taking each other's risks between people so that one of the two bears the risk of the other.[166]

The verses of the Qur'an and the hadiths of the Prophet Muhammad SAW explain a lot about the concept of insurance. The verses are classified as follows:[167]

a. God's command to prepare for the future

Qur'an Surah *Al-Hashr* verse 18

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[163] Muhammad Syakir Sula, *Asuransi Syariah (Life and General) Konsep dan Sistem Operasional*, Gema Insani, Jakarta, 2004, p. 28.

[164] Kuat Ismanto, *Asuransi Syari'ah*, First Mold, Pustaka Pelajar, Yogyakarta, 2009, p. 52.

[165] Muhammad Syakir Sula, *Loc. Cit*.

[166] *Ibid.*, p. 32.

[167] Mokhamad Khoirul Huda, *Prinsip Itikad Baik dalam Perjanjian Asuransi Jiwa*, FH UII Press, Yogyakarta, 2016, p. 152-154.

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ ٱتَّقُواْ ٱللَّهَ وَلۡتَنظُرۡ نَفۡسٞ مَّا قَدَّمَتۡ لِغَدٖۖ وَٱتَّقُواْ ٱللَّهَۚ إِنَّ ٱللَّهَ خَبِيرُۢ بِمَا تَعۡمَلُونَ

It means:

"O you who believe, fear Allah and let everyone pay attention to what he has done for tomorrow (hereafter); And fear Allah, verily Allah is Knowing of what you do."

b. God's commandment is to help each other

Qur'an Surah *Al-Maidah* verse 2

وَتَعَاوَنُواْ عَلَى ٱلۡبِرِّ وَٱلتَّقۡوَىٰۖ وَلَا تَعَاوَنُواْ عَلَى ٱلۡإِثۡمِ وَٱلۡعُدۡوَٰنِۚ وَٱتَّقُواْ ٱللَّهَۖ إِنَّ ٱللَّهَ شَدِيدُ ٱلۡعِقَابِ...

It means:

"…And help you in (doing) righteousness and piety, and do not help in sin and transgression. And fear Allah, verily Allah is severe in punishment."

c. Allah's command to put your trust and be optimistic in trying

Quran Surah *Al-Taghabun* verse 11

مَآ أَصَابَ مِن مُّصِيبَةٍ إِلَّا بِإِذۡنِ ٱللَّهِۗ وَمَن يُؤۡمِنۢ بِٱللَّهِ يَهۡدِ قَلۡبَهُۥۚ وَٱللَّهُ بِكُلِّ شَيۡءٍ عَلِيمٞ

It means:

"No misfortune befalls a person except with Allah's permission; And whoever believes in Allah, He will guide his heart. And Allah is Knower of all things."

d. Hadith about Aqilah

Narrated by Abu Hurairah *r.a.*, he said: "Two women from the tribe of *Huzail* quarreled, then one of the women threw stones at

the other woman causing the woman and the fetus she was carrying to die. So, the heirs of the dead woman reported it to the Prophet Muhammad. Prophet Muhammad SAW decided on compensation from a man or a woman and compensated the woman's death with blood money (*diyat*) paid by her Aqilah.

The principle of Islamic agreement is free from elements of *gharar*, *maisyir*, and *riba* that can be implemented into insurance companies' business activities. The provisions regarding contracts in insurance include:[168]

1) Contract in insurance
    a) Contracts between participants and insurance companies consist of *tijarah* contracts and/or *tabarru'* contracts.
    b) The *tijarah* contract in question is *mudharabah*, while the *tabarru'* contract is a grant.
    c) In the contract, at least there must be rights and obligations of the participant and the insurance company; method and time of premium payment; the type of *tijarah* contract and/or *tabarru'* contract, as well as the agreed terms according to the type of insurance contract.
2) The position of the parties in the *tijarah* and *tabarru'* contracts

[168] Novi Puspitasari, *Manajemen Asuransi Syariah*, UII Press, Yogyakarta, 2015, p. 90.

a) In a *tijarah* contract (*mudharabah*), the insurance company acts as the *mudharib* (manager) and the participant acts as the *shahibul mall* (policyholder).

b) In a *tabarru'* (grant) contract, participants provide grants that will be used to help other participants affected by disasters, while the insurance company acts as the manager of the grant funds.

CHAPTER III

FINDINGS AND RESULTS

A. The Legitimate Parties to Apply for Bankruptcy of An Insurance Company If There is No Response or Approval from The Financial Services Authority

Generally, an insurance company can be declared bankrupt on the same terms as a company other than an insurance company. As for the conditions for a company to be declared bankrupt, a debtor who has two or more creditors and does not pay at least one matured debt and is collectible is declared bankrupt by a court decision, either at his request or at the request of one or more creditors.[169]

In addition to these general requirements, there are also special requirements that the applicant must meet in terms of applying for a declaration of bankruptcy to an insurance company. The legitimate parties to apply for bankruptcy of an insurance companies have different provisions. Chapter IV Article 52 paragraphs (1) and (2), and Article 56 paragraph (1) of Financial Services Authority Regulation Number 28/POJK.05/2015 on Dissolution, Liquidation, and Bankruptcy of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and The Sharia Reinsurance Company explains the requirements and procedures for applying for a statement of company bankruptcy as follows:

[169] Article 2 paragraph (1) Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

"Article 52

(1) Based on their assessment that the company meets the requirements to be declared bankrupt per the law on bankruptcy, creditors may apply to the Financial Services Authority so that the Financial Services Authority applies to a declaration of bankruptcy of the company concerned to the commercial court.

(2) The company cannot apply for a declaration of bankruptcy for itself.

Article 56

(1) To protect the interests of consumers, the Financial Services Authority may apply for corporate bankruptcy to the commercial court without any request from creditors."

The creditors as referred to Article 52 paragraph (1) of the Financial Services Authority Regulation No. 28/POJK.05/2015 on Dissolution, Liquidation, and Bankruptcy of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies is any party that has receivables or claims to the company, including Policyholders, Insured, Participants, or other parties who are entitled to benefits insurance/sharia insurance and company employees.[170] Thus, based on the provisions of the Financial Services Authority Regulation No. 28/POJK.05/2015 on Dissolution, Liquidation, and Bankruptcy of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Reinsurance Companies, it can be concluded that insurance companies cannot apply for bankruptcy statements on themselves. The parties who can apply for a declaration of bankruptcy against an insurance company are creditors of the insurance company whose application is addressed to the Chairman of the

[170] Article 1 point 17 of the Financial Services Authority Regulation No. 28/POJK.05/2015 on Dissolution, Liquidation, and Bankruptcy of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies.

Board of Commissioners of the Financial Services Authority with a copy to the Chief Executive of the Insurance Supervisory Board, Pension Funds, Financing Institutions, and Other Financial Services Institutions, which then the Authority Financial Services applies to a declaration of bankruptcy to the Commercial Court.

The same provision is also stated in Article 51 paragraph (1) Law Number 40 of 2014 on Insurance which states as follows:

> *"Creditors apply to the Financial Services Authority, and then the Financial Services Authority applies a declaration of bankruptcy to the commercial court."*

Besides creditors having the right to apply for a declaration of bankruptcy to an insurance company, the Financial Services Authority also has the authority to apply for a declaration of bankruptcy to an insurance company without a request from a creditor, as stated in Article 56 paragraph (1) of the Regulation of the Financial Services Authority No. 28/POJK.05/2015.

The legitimate parties to apply for bankruptcy of an insurance company based on Article 52 paragraphs (1) and (2), and Article 56 paragraph (1) of the Financial Services Authority Regulations No. 28/POJK/05/2015, namely creditors through the financial services authority and financial services authority without any application from creditors.

The same thing is also explained in Article 8B Part Four concerning the Financial Services Authority Law Number 4 of 2023 on the Development and Strengthening of the Financial Sector states that:

> *"The Financial Services Authority is the only party authorized to submit requests for bankruptcy declarations and/or requests for postponement of debt payment obligations against debtors who are Banks, Securities Companies, Stock Exchanges, Alternative Market Operators, Clearing Guarantee Institutions, Depository and Settlement Institutions, Financial Services Providers Capital Protection Funds, Securities Funding Agencies, Securities Pricing Agencies, Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, or Sharia Reinsurance Companies, Pension Funds, Guarantee Institutions, Financing Institutions, Microfinance Institutions, Electronic System Operators that Facilitate Community Fund Collection Through Securities Offerings, Providers of Information Technology-Based Joint Funding Services, or Other FSI registered and supervised by the Financial Services Authority as long as their dissolution and/or bankruptcy is not regulated differently from other laws."*

Thus, the legitimate party to apply for bankruptcy of an insurance company is only the authority of the Financial Services Authority. Meanwhile, creditors only have the limited right to submit a request for a declaration of bankruptcy of an insurance company to the Financial Services Authority. Although creditors cannot directly apply for a declaration of bankruptcy against an insurance company, the following regulatory provisions provide legal protection for creditors who apply for a declaration against an insurance company to the Financial Services Authority.

Concerning the application for a declaration of bankruptcy from creditors, if the Financial Services Authority does not issue a decision or action regarding the application for a declaration of bankruptcy to an insurance company within (14) fourteen days[171], then Article 3 paragraph (1),

[171] Article 98 paragraph (2) of Law Number 51 of 2009 on the Second Amendment to Law Number 5 of 1986 on the State Administrative Court.

(2), and (3) Law Number 51 of 2009 on the Second Amendment to Law Number 5 of 1986 on the State Administrative Court stipulates that:

"Article 3

(1) *If the State Administrative Agency does not issue a decision, while it is an obligation, then it is equated with a State Administrative Decree.*
(2) *Suppose a State Administrative Agency does not issue the requested decision while the period as determined by the data of the legislation in question has elapsed. In that case, the State Administrative Agency is deemed to have refused to issue the said decision.*
(3) *Suppose the relevant legislation does not specify the period, as referred to in paragraph (2), after the lapse of four months from the receipt of the application. In that case, the State Administrative Agency concerned shall be deemed to have issued a rejection decision."*

Based on the provisions of Article 3 of Law Number 51 of 2009 on the Second Amendment to Law Number 5 of 1986 on the State Administrative Court, that the silence is equated with a written decision containing Rejection or Fictitious-Negative KTUN.[172]

While the different arrangements are contained in the provisions of Part Two regarding Government Administration Article 175 point 6 of Law Number 11 of 2020 on Job Creation which states that:

"The provision of Article 53 is amended so that it reads as follows:

Article 53

(1) *The time limit for the obligation to determine and/or carry out Decisions and/or Actions is given following the provisions of the laws and regulations.*
(2) *Suppose the provisions of laws and regulations do not determine the time limit for the obligations as referred to in paragraph (1).*

[172] H. Yodi Martono Wahyunadi, "Kompetensi Pengadilan TUN dalam Sistem Peradilan di Indonesia", Supreme Court Magazine, No. 2 September 2013 Edition, p. 65.

In that case, the Government Agency is obliged to determine and/or make Decisions and/or Actions within 5 (five) working days after the Government Agency receives the complete application.

(3) Suppose the application is processed through the electronic system and all requirements in the electronic system have been met. In that case, the electronic system shall determine the Decision and/or Action as a Decision or Action of the competent Government Agency.

(4) If within the time limit as referred to in paragraph (2), the Government Agency does not Decide and/or Act, the application is considered legally granted.

(5) Further provisions regarding the form of the stipulation of Decisions and/or Actions deemed legally granted, as referred to in paragraph (3) are regulated in a Presidential Regulation."

Based on the Second Part on Government Administration Article 175 point 6 of Law Number 11 of 2020 on Job Creation, the examination of a fictitious State Administrative Decision (KTUN) can only be seen in the clause after the application is received in full by the Government Agency where the word "application" in the article, it is interpreted as granted (Fiction-Positive KTUN) if the Government Agency remains silent. Therefore, to get a ruling on the acceptance of an application to obtain a decision and/or action by a Government Agency, the creditor can be submitted to the State Administrative Court (Article 175 point 1 of the Job Creation Law) after the application submitted is not responded to beyond the period given by the law.

Regarding the legal conflict between Article 3 of Law Number 5 of 1986 on State Administrative Courts and Article 175 of Law Number 11 of 2020 on Job Creation, based on the legal hierarchy, the two provisions of the law have the same level. Therefore, the solution for the legal

conflict uses the *lex posterior derogate legi priori*, which means that the new regulation overrides the old regulation. According to Peter Mahmud Marzuki, the principle of this legislation can work when there are two laws and regulations that regulate the same problem and what are faced are two laws and regulations in the same hierarchy.[173] Based on this, the regulations used in the form of the Financial Services Authority's silence on applications are guided by the provisions of Article 175 of Law Number 11 of 2020 on Job Creation.

Article 175 point 6 of Law Number 11 of 2020 on Job Creation stipulates that if the statutory provisions do not specify a time limit for the Government Agency to issue a decision or action, then the Government Agency is obliged to issue a decision or action on the application no later than 5 (days) working days from receipt of a complete application.

In relation to these provisions, Article 51 paragraph (2) of Law Number 40 of 2014 on Insurance determines as follows:

> *"The Financial Services Authority approves or rejects the application submitted by the creditor as referred to in paragraph (1) no later than 30 (thirty) days after the complete application is received."*

The same provision is also stipulated in Article 54 paragraph (1) of the Financial Services Authority Regulation Number 28/POJK.05/2015:

> *"The Financial Services Authority approves or rejects the application to file a petition for a statement of company bankruptcy no later than 30 (thirty) days after the complete application is received."*

[173] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2010, p. 101, as quoted in Court Ruling No. 27/PEN.DIS/2015/PTUN-Dps.

Based on those provisions, the time limit for the Government Agency (in this case, the Financial Services Authority) to issue a decision or action on the application for a declaration of bankruptcy from creditors is 30 (thirty) days after the application is received in full.

Meanwhile, the Circular Letter of the Directorate General of the Military Courts and State Administrative Courts Number 2 of 2021 on the handling of case registration to obtain a decision on the acceptance of applications to obtain decisions and/or actions of the Government Agency after the enactment of Law Number 11 of 2020 on Job Creation mentions that:

> *"The procedure for handling case registration to obtain a decision on the acceptance of an application in order to obtain a decision and/or action by a Government Agency is guided by the Supreme Court Regulation Number 08 of 2017 on Procedures for Obtaining a Decision on Acceptance of an Application to Obtain a Decision and/or Action of a Government Agency."*

Thus, if a creditor applies to a declaration of bankruptcy of an insurance company to the Financial Services Authority, and on the request of the creditor, the Financial Services Authority remains silent, the creditor must apply to the State Administrative Court to obtain a Decision on receipt of an application that serves to compel the Financial Services Authority to submit a petition for a declaration of bankruptcy against an insurance company to the Commercial Court.

B. The Policyholder's Position to Other Preferred Creditors in an Insurance Company Declared Bankrupt

A curator distributes the bankrupt assets based on the *paritas creditorium*, the *pari passu prorate parte*, and the structured creditor principle. The difference in the position of creditors in bankruptcy, apart from being regulated in the Elucidation of Article 2 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations, is also regulated in Book II of the Civil Code on Privileged Claims.

Article 1131 of the Civil Code regulates, in general, all debtor objects that are collateral for their debts by law. Furthermore, Article 1132 of the Civil Code states that income from the sale of debtor's assets will be divided equally among creditors unless there is a reason for the payment to be prioritized. Subekti explained that the exception to Article 1132 of the Civil Code is "…unless some of them have been given the right by law to take payment before the other collectors." Article 1133 of the Civil Code states that creditors' prior rights can arise from special rights, liens, and mortgages. The subsequent provision, Article 1134 of the Civil Code, stipulates that a particular right is a right granted by law to a creditor so that the level is higher than that of other creditors solely based on the nature of the claims. Liens and mortgages are superior to privileges, except in cases where the law provides

otherwise. Article 1135 of the Civil Code states that privileges are divided according to the level depending on the nature of the privilege.[174]

Meanwhile, Article 1137 of the Civil Code is a more specific provision than Article 1131 of the Civil Code which is a more general provision regarding privileged claims. Based on Article 1137 of the Civil Code, the state has the right to take precedence even though there is no special guarantee for borrowing by the debtor. The state has rights that precede other creditors because they relate to the community or the public.[175]

Furthermore, the Civil Code divides preferred creditors into two types, namely special preferred creditors, as stated in Article 1139 of the Civil Code, and general preferred creditors, as stated in Article 1149 of the Civil Code, which is as follows:

"Article 1139

Claims that are privileged against certain objects are:

(1) court fees are solely due to punishment for auctioning a movable or immovable object. This fee is paid from the income from the sale of the object before all other privileged receivables, even before liens and mortgages;
(2) rents from immovable objects, repair costs that are obligatory for the lessee, along with all matters relating to the obligation to fulfill the lease agreement;
(3) unpaid purchase price of movable objects;
(4) the costs that have been incurred to save an item;
(5) the cost of doing a job on an item accrued to a handyperson;
(6) the thing that an innkeeper has submitted as such to a guest;
(7) transportation fees and additional costs;

[174] Erni Herawati, "Kreditor Preferen dalam KUH Perdata", 2018, Business Law, Bina Nusantara University, 2018, accessed on November 14, 2022, https://business-law.binus.ac.id/2018/12/19/kreditur-preferen-dalam-kuh-perdata/.

[175] Si Pokrol, "Tafsir Pasal 1137 BW", Hukumonline, 2009, accessed on November 14, 2022, https://www.hukumonline.com/klinik/a/tafsir-pasal-1137-bw-cl6969.

(8) *the things that must be paid to stone masons, carpenters, and other builders for the construction, addition, and repair of immovable property, provided that the debt is not older than three years and the ownership rights to the parcel in question remain with the debtor;*
(9) *reimbursements and payments must be borne by employees who hold public positions because of all negligence, errors, violations, and crimes committed in their positions.*

Article 1149

Claims for all movable and immovable property, in general, are those

mentioned below and are billed in the following order:

(1) *court fees arising solely from the sale of goods as the implementation of a decision on a claim regarding ownership or control and the salvage of property; it takes precedence over liens and mortgages;*
(2) *burial costs, without reducing the judge's authority to reduce them if the costs are excessive;*
(3) *any recent medical expenses;*
(4) *the wages of the workers from the past year and what remains to be paid for the current year, as well as the amount of the increase in wages according to Article 160 q; the number of labor expenditures issued/made to the employer; the amount still to be paid by the employer to the workers based on Article 1602 v fourth paragraph of this Civil Code or Article 7 paragraph (3) "Labor Regulations in Plantation Companies"; the amount accrued by the employer at the end of the employment relationship under Article 1603 s bis to the worker; the amount still owed by the employer to the family of a worker due to the worker's death based on Article 13 paragraph (4) "Labor Regulations in Plantation Companies"; what under the "Accident Regulations 1939" or the "Crew Accident Regulations 1940" still have to be paid to the workers or crew members or their heirs along with the debt bill under the "Regulation on the Repatriation of Workers received or deployed Abroad";*
(5) *receivables due to the delivery of food ingredients, which were made to the debtor and his family during the last six months;*
(6) *accounts receivable from boarding school entrepreneurs for the last year;*
(7) *claims of minors or under the guardianship of their guardians or guardians in connection with their care, to the extent that it cannot be collected from mortgages or other guarantees that must be made according to Chapter 15 of the First Book of the*

Indonesian Code of Law This civil law, as well as allowances for maintenance and education accrued by parents for their legal children who are still minors."

Based on the provisions of Article 1139 of the Civil Code and Article 1149 of the Civil Code, the position of state rights in the form of auction fees occupies the highest position and must be paid first, then other bills.

1. Position of Tax Payable

Tax is a mandatory contribution to the state that is owed by an individual or entity that is coercive under the law without receiving direct compensation and is used for the state for the greatest prosperity of the people.[176] Furthermore, Article 1 point 3 Law Number 7 of 2021 on Harmonization of Tax Regulations explains that taxpayers are individuals or entities, including tax payments, tax deductions, and tax collectors, who have tax rights and obligations under the provisions of tax laws and regulations.

Article 21 paragraph (1) Law Number 7 of 2021 on Harmonization of Tax Regulations stipulates that tax debt is a right that must be paid for first, then other rights, except as stated in Article 21 paragraph (3) which stipulates as follows:

"Predecessor rights to tax debts exceed all other pre-emptive rights, except for:

a. court fees that are only caused by a sentence to auction a movable and/or immovable property;
b. costs that have been incurred to save the goods in question; and/or

[176] Article 1 point 3 Law Number 7 of 2021 on Harmonization of Tax Regulations.

c. *court costs only caused by the auction and settlement of an inheritance."*

The provisions in this article align with what has been stated in Article 1139 and Article 1149 of the Civil Code, which principally states that the auction fee must be paid before other claims. Furthermore, Article 21 paragraph (3a) of Law Number 28 of 2007 on the Third Amendment to Law Number 6 of 1983 on General Provisions and Tax Procedures jo. Article 19 paragraph (6) of Law Number 19 of 2000 on Amendments to Law Number 19 of 1997 on Collection of Taxes by Forced Letter, regulates how the curator works in settlement of bankrupt assets, "that if a taxpayer is declared bankrupt, dissolve, or is liquidated, the curator, liquidator, or person or entity assigned the task of extortion is prohibited from distributing the taxpayer's assets in bankruptcy, dissolution or liquidation to shareholders or other creditors before using the assets to pay the taxpayer's tax debt."

Meanwhile, Article 21 paragraph (4) Law Number 7 of 2021 concerning Harmonization of Tax Regulations states that:

> *"Predecessor rights are lost after exceeding 5 (five) years from the date of issuance of the tax invoice, tax underpayment assessment letter, additional tax underpayment assessment letter, rectification decision, objection decision, appeal decision, or judicial review decision which causes the amount the tax to be paid increases."*

According to the US Bankruptcy Code, section 507(a)(8)(A)(iii), taxes that are still assessable (including by reason of extending a relevant

statute of limitations) but are not yet assessed are considered eighth-priority claims. An “assessable” tax includes taxes for a period in which the statute had been extended by operation of law.[177] In bankruptcy cases other than those of individuals filing under chapter 7 or 11, such as a corporate bankruptcy, the IRS must find that the trustee has a material interest that will be affected by information on the return. Material interest is generally defined as a financial or monetary interest. Material interest isn't limited to the trustee's responsibility to file a return on behalf of the bankruptcy estate. In a chapter 7 case, eighth priority taxes may be paid out of the assets of the bankruptcy estate to the extent assets remain after paying the claims of secured creditors and other creditors with higher priority claims. Meanwhile, taxes incurred by the bankruptcy estate are given second priority treatment, as administrative expenses.[178] Based on these provisions, the potential loss resulting from a tax debt position that is not in the first place is that the loss will be covered by the federal government. The cover for potential losses due to this tax debt is only against creditor claims that are more important, especially claims against wages owed by workers/labors.

Thus, based on the above provisions, tax debt is the state's right, which has a position as a preferred creditor whose fulfillment of rights must take precedence over other creditors, including separatist and

[177] Linda Z. Swartz, Bankruptcy Tax Issues, Cadwallader, 2005, p. 29.

[178] Internal Revenue Service (IRS), “Publication 908 (02/2022), Bankruptcy Tax Guide”, 2022, https://www.irs.gov/publications/p908#en_US_202202_publink1000273542, accessed on January 12, 2023.

preferred creditors. The precedence right applies if it has not exceeded the time limit of 5 (five) years from the date of issuance of the tax invoice, tax underpayment assessment letter, additional tax underpayment assessment letter, correction decision letter, objection decision letter, appeal decision, or judicial review decision.

2. Position of Wages Payable by Workers/Labors

Worker/labor is any person who works by receiving wages or other forms of remuneration.[179] The position of the worker or laborer if the company is declared bankrupt is contained in the provisions of Article 95 paragraph (4) of Law Number 13 of 2003 on Manpower which has been reviewed by the Constitutional Court Number 67/PUU-XI/2013, in which the Constitutional Court gives a decision, one of which reads as follows:

> *"Article 95 paragraph (4) of Law Number 13 of 2003 on Manpower is contrary to the 1945 Constitution. It has no binding legal force as long as it is not interpreted as "paying wages to workers/Labors who are owed takes precedence over all types of creditors, including claims from separatist creditors, claims for state rights, auction offices, and public bodies established by the government, while payments for the rights of other workers/Labors take precedence over all claims including claims for state rights, auction offices, and public bodies established by the government, except claims from separatist creditors."*

Based on the decision of the Constitutional Court, the rights of workers/labors as creditors in bankruptcy are, in principle, a privilege that arises and is granted by law to precede other creditors, especially

[179] Article 1 point 3 of Law Number 13 of 2003 on Manpower.

concurrent creditors. However, the wage rights specifically preceded the rights of separatist creditors.

The ruling of the Constitutional Court Number 67/PUU-XI/2013 is in line with the provisions of the Second Part on Manpower Article 81 point 33 of Law Number 11 of 2020 on Job Creation which states as follows:

"The provisions of Article 95 are amended to read as follows:

Article 95

(1) Suppose the company is declared bankrupt or liquidated based on the provisions of laws and regulations. In that case, wages and other rights that have not been received by the workers/labors are debts whose payment takes precedence.
(2) The wages of workers/labors, as referred to in paragraph (1), are paid before payment to all creditors.
(3) Other rights of workers/labors, as referred to in paragraph (1), shall be paid first for all creditors except creditors holding material security rights."

Protection of workers/labors wage claims in bankruptcy in various countries and international organizations is highly prioritized. One of them is listed in article 11 of the Convention embodies one of the oldest measures of social protection in the ILO, namely the priority given to wage debts in the distribution of the employer's assets in case of an enterprise bankruptcy or insolvency.[180] Based on the many protections for wages owed by workers/labors, this is considered very important because it involves meeting the needs of human life, which depend on

[180] Route des Morillons, e des Morillons, "Protection of workers' wage claims in enterprise insolvency", International Labour Organization, Geneva, Switzerland, 2020, p. 2.

wages, so claims from other creditors cannot precede wages owed by workers/labors.

Thus, based on the description above, payment of wages owed by workers/labors is an obligation that must be paid in advance from all types of creditors, including claims for state rights and public bodies established by the government. Meanwhile, the fulfillment of the rights of other workers/labors is above all types of creditors except claims from separatist creditors.

3. Position Policyholder Rights

Policyholders bind themselves based on agreements with insurance companies, sharia insurance companies, reinsurance companies, or sharia reinsurance companies to obtain protection or management of risks for themselves, the insured, or other participants.[181] The position of the policyholder if an insurance company is declared bankrupt is stated in the provisions of Article 52 paragraphs (1), (2), (3), and (4) of Law Number 40 of 2014 on Insurance, which determines as follows:

"Article 52

(1) If an insurance company, sharia insurance company, reinsurance company, or sharia reinsurance company is bankrupt or liquidated, the rights of the policyholder, the insured, or participants for the distribution of their assets have a higher position than the rights of other parties.

[181] Article 1 point 22 Law Number 40 of 2014 on Insurance.

(2) Suppose an insurance company or reinsurance company is bankrupt or liquidated. Insurance funds must be used first to fulfill obligations to policyholders, the insured, or other parties entitled to insurance benefits.

(3) Suppose there is an excess of insurance funds after fulfilling the obligations referred to in paragraph (2). In that case, the excess insurance funds can be used to fulfill obligations to third parties other than the policyholder, the insured, or other parties entitled to insurance benefits.

(4) Suppose a sharia insurance company or sharia reinsurance company is bankrupt or liquidated. In that case, the participant's tabarru' and investment funds cannot be used to pay obligations other than to the participant."

Based on the provisions of Article 52 paragraphs (1), (2), (3), and (4) of Law Number 40 of 2014 on Insurance, the position of the policyholder in terms of fulfilling his obligations take precedence over other types of creditors. In connection with this provision for which there is no explanation in the phrase "precedence," this provision automatically states that the policyholder's position is a creditor whose fulfillment of his obligations must take precedence over other creditors, including tax bills and wages owed by workers/labors.

Article 1 point 18 of the Insurance Law explains that the Guarantee Fund is the wealth of an Insurance Company, Sharia Insurance Company, reinsurance company, or sharia reinsurance company which is the guarantee to protect the interests of the policyholder, the insured, or participants, in the case of an Insurance Company, a Sharia Insurance Company, reinsurance companies, and sharia reinsurance companies were liquidated.

Although the guarantee fund is part of the insurance company's wealth, since the beginning, these funds have been set aside for the benefit of policyholders. Likewise, when an insurance company is declared bankrupt, even though the guarantee fund is included in the bankrupt board, its use is only to pay the rights of policyholders, not to pay obligations to other creditors.[182] Therefore, if the policyholder's position is not the creditor who gets the fulfillment of his claim for the first time in the distribution of bankruptcy assets, this will have little effect because there is a guarantee fund for the policyholder.

Based on the description regarding the position of the tax debt, the wages owed by the workers/labors, and the fulfillment of the obligations or rights of the policyholder, each provision states that, the provisions regarding taxation state that the tax debt is the right of precedence over all other creditor claims. Meanwhile, the provisions regarding wages owed by workers/labors state that wages owed by workers/labors must be paid before the distribution of bankruptcy assets to other creditors. On the other hand, provisions in the Insurance Law regarding the fulfillment of obligations or rights of policyholder's state that the rights of policyholders for the distribution of their assets have a higher position than the rights of other parties. The legal conflict must be resolved and sought to determine which party occupies the highest position or which party whose rights must be paid first.

[182] Restaria F Hutabarat, "Perlindungan Pemegang Polis dalam Kepailitan Perusahaan Asuransi", https://www.hukumonline.com/berita/a/perlindungan-pemegang-polis-dalam-kepailitan-perusahaan-asuransi-lt63abb2e6ae617?page=1, accessed on January 12, 2023.

Related to legal conflicts and against each of the provisions of the tax law, the law regarding wages owed by workers/labors and the insurance law does not state that it abolishes other provisions. Then in this regard and connection, a review has been carried out by the relevant Constitutional Court of the legal conflict. The resolution is guided by the Constitutional Court Decision. The considerations and opinions of the Constitutional Court Number 67/PUU-XI/2013 are as follows:[183]

1. Whereas in the legal aspect, according to the Court, because workers/labors are socio-economically weaker and lower in position than employers and the rights of workers/labors have been guaranteed by the 1945 Constitution, the law must provide guarantees for protection for the fulfillment of worker/labor rights;
2. In the aspect of the object, the object of the work agreement is labor or skills (services) in exchange for services to fulfill the basic needs of life for themselves and their families of workers/labors. Therefore, the Court believes that human interest in oneself and one's life must be a priority and must be ranked first before separatist creditors;
3. Whereas in the aspect of risk, for entrepreneurs, the risk becomes the scope of their consideration when doing business. Meanwhile, for workers/labors, wages are a means of meeting the necessities of life for their families.

[183] Constitutional Court Decision Number 67/PUU-XI/2013, p. 42-43.

Thus, based on the entire description above, the order of fulfillment of rights from the distribution of bankrupt assets to insurance companies declared bankrupt between tax debts, wages owed by workers/labors, and rights of policyholders are wages owed by workers/labors must get the fulfillment of their rights first before debts taxes and policyholder rights. Furthermore, the tax debt precedes the bill of the fulfillment of the policyholder's rights.

CHAPTER IV

CLOSING

A. Conclusion

1. The legitimate parties to apply for bankruptcy against an insurance company are:

   a. Creditors through the Financial Services Authority

      A creditor can submit bankruptcy applications of insurance companies to the Financial Services Authority. The creditors who can apply for bankruptcy to the Financial Services Authority are any parties with claims or bills from the company, including policyholders, the insured, participants, or other parties entitled to the benefits of insurance/sharia insurance and company employees. Furthermore, the Financial Services Authority applies to the Commercial Court.

   b. The Financial Services Authority

      The Financial Services Authority has the authority to apply for a declaration of bankruptcy against an insurance company without any application from creditors.

   Suppose an application is submitted by a Creditor within 30 (thirty) working days after the application is received in full by the Financial Services Authority. Still, the Financial Services Authority does not make a decision and/or action (silent). In that case, the application is deemed

granted (Fictitious-Positive KTUN) as stipulated in Article 175 point 6 of Law Number 11 of 2020 on Job Creation. The application considered granted must be submitted to the State Administrative Court to obtain a Decision on the acceptance of the application, which compels the Financial Services Authority to file a bankruptcy declaration application against the insurance company to the Commercial Court.

2. The order of fulfillment of rights from the distribution of bankrupt assets to insurance companies declared bankrupt between tax debts, wages owed by workers/labors, and rights of policyholders are wages owed by workers/labors must get the fulfillment of their rights first before debts taxes and policyholder rights. Furthermore, the tax debt precedes the bill of the fulfillment of the policyholder's rights.

B. Recommendation

1. The Financial Services Authority must decide and/or take actions related to requests for bankruptcy statements from creditors considered appropriate for filing bankruptcy statements. This is necessary because debts from insurance companies involve the interests of many parties, ranging from losses to policyholders to causing difficulties for the survival of workers/labors who depend on wages. Even though the Financial Services Authority has remained silent for 30 (thirty) working days since the request was received completely by the Financial Services Authority, the request is considered granted. However, creditors must

apply for acceptance to the State Administrative Court, which will slow down and/or prolong the fulfillment of the rights of creditors. This is contrary to the essence of bankruptcy which reads, "bankruptcy is a legal institution to accelerate the fulfillment of claims from creditors."

2. Amendmend of Act No. 37 Year 2004 is necessary to clearly regulates the order of distribution of bankruptcy assets, to eliminate legal conflicts with the tax, job creation, and insurance laws regarding the position of these preferred creditors. That amendmend should base on the legal objectives will be created, namely "legal certainty, justice and benefit."

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ATTACHMENT

FAKULTAS HUKUM
Gedung Fakultas Hukum
Universitas Islam Indonesia
Jl.Kaliurangkm 14,5 Yogyakarta55584
T. (0274)7070222
E. fh@uii.ac.id
W.law.uii.ac.id

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Yang bertanda tangan di bawah ini:

Nama	: **Joko Santosa, A.Md.**
NIK	: **961002136**
Jabatan	: **Staf Perpustakaan Referensi Fakultas Hukum UII**

Dengan ini menerangkan bahwa :

Nama	: Muhammad Ismail
No Mahasiswa	: 18410527
Fakultas/Prodi	: Hukum
Judul karya ilmiah	: LEGAL ANALYSIS OF AUTHORIZED PARTIES TO FILE BANKRUPTCY AND THE POSITION OF POLICYHOLDERS IN RELATION TO OTHER PREFERRED CREDITORS OF INSURANCE COMPANIES

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Joko Santosa, A.Md.