

Legal Consequences of Bankruptcy for Creditors Holding Mortgage Rights and Execution Parate

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ABSTRACT

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The right of the separatist creditor as the holder of the mortgage right is clearly regulated by Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (henceforth referred to as UUHT) Article 20 paragraph (1). In particular, the effect of bankruptcy on mortgage rights appears with the existence of Article 56 paragraph (1) UUK which states that the execution right of a separatist creditor holding mortgage rights against mortgage rights that are in the control of creditors is suspended for a maximum period of 90 days (stay period). The rights of the mortgage holder that have been protected by Article 20 paragraph (1) and Article 21 UUHT are no longer protected if the debtor is declared bankrupt because Article 56 paragraph (1) UUK (stay period) applies which suspends the execution of the mortgage holder for 90 days.

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1. Introduction

Article 1 of the 2004 UUK states that bankruptcy is a general confiscation of a bankrupt debtor's assets that is managed and settled by the Curator under the supervision of the Supervisory Judge in accordance with this Law. The essence of bankruptcy is the general confiscation (beslaag) of the bankrupt debtor's wealth, according to this definition (Hanif, 2020). Then, what are the requirements for declaring the debtor bankrupt? There are a few prerequisites that must be met before a bankruptcy declaration can be requested. Article 2 paragraph 1 of the 2004 UUK provides an explanation of the requirements for filing for bankruptcy:

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

The following are the requirements for declaring a debtor bankrupt:

1. The debtor owes at least two creditors;

2. At least one owing and collectible debt remains unpaid by the debtor.

Creditors, debtors, Bank Indonesia, The Attorney in the Public Interest, the Capital Market Supervisory Agency, and the Minister of Finance all have the right to apply to the Commercial Court for a declaration of bankruptcy. During an examination session, the court will go over the steps involved in processing the application for a bankruptcy statement. 60 days after the date the application for a bankruptcy declaration was registered, the decision must be read aloud.

Mortgage rights are one of material security rights, and creditors who hold mortgage rights are separatist creditors. The mortgage he owns is preferred by this separatist creditor. This mortgage preference is characterized by the fact that the mortgage agreement stipulates that the creditor has the authority to sell the mortgage object in the event of the debtor's default. The "Droit de preference" guarantee law principle is expressed in the preference that the holder of this mortgage right has (Natalia, 2018).

The right of the separatist creditor as the holder of the mortgage right is governed by Article 20 paragraph 1 of Law Number 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land (hereafter referred to as UUHT)s:

"If the debtor defaults, then based on the:

- a. the right of the first Mortgage Right holder to sell the Mortgage object as referred to in Article 6, or
- b. the executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), namely the mortgage object sold through a public auction according to the procedure specified in the laws and regulations for the settlement of receivables of the Mortgage holder with prior rights over other creditors."

As required by Article 20 paragraph (1) UUHT above, the rights implementation of creditors holding mortgage rights is not as simple as anticipated. The court still needs to approve the right to sell under its authority (bedding van eigen machtige verkoop). In a similar vein, it is not uncommon to encounter resistance (verzet) when putting into action the execution of mortgage rights based on the executive power of mortgage certificates (Nindyo Pramono & Sularto, 2017).

Paragraph (1) UUK states that the right of execution for a separatist creditor holding a mortgage right on a mortgage right in the possession of a creditor is suspended for a maximum period of 90 days (stay period) (Sjahdeini, 2010). During this suspension the object of mortgage is under the supervision of the curator, the role of the curator to oversee this object of mortgage is a feature of bankruptcy law.

If the debtor is declared bankrupt, the mortgage holder's rights that were protected by Article 20 paragraph 1 and Article 21 of the UUHT are no longer protected because Article 56 paragraph 1 of the UUK (stay period) applies, which suspends the mortgage holder's execution for 90 days. According to the science of law, there is a conflict of legal norms (norm conflict) between the UUK's provisions regarding mortgage rights, particularly those outlined in Article 56 paragraph 1 and Article 21 UUHT. This is because the articles of the two laws conflict with legal norms.

The problem in this paper is What are the Legal Consequences of Bankruptcy for Creditors Holding Mortgage Rights?.

2. Materials and Methods

The descriptive analytical method was used to write this applied paper. This means that data that clearly describes problems directly in the field were used, and then the analysis was done and a conclusion was made to solve a problem. methods of observation and

literature review for data collection in order to solve problems and prepare this paper. In line with the research objectives to be achieved, the realm of this research is included in the realm of qualitative research, thus a qualitative approach method will be used. According to Petrus Soerjowinoto et al., the qualitative method is a method that emphasizes the process of understanding the researcher on the formulation of the problem to construct a complex and holistic legal phenomenon (Soerjowinoto, 2006). Normative juridical approach carried out against certain laws and regulations or written law, relating to cases of illegal immigrants who are in Indonesia (Soemitro, 1990). This study describes the condition of the object under study, i.e., focusing on the Legal Consequences of Bankruptcy for Mortgage Creditors in practice.

3. Results and Discussions

3.1. Consequences of Bankruptcy on the Authority of Bankrupt Debtors in the Field of Property Law

Bankruptcy begins with applying a bankruptcy statement and will result in a bankruptcy decision. The bankrupt debtor faces a number of legal repercussions as a result of the bankruptcy decision, one of which is the authority to act on the bankrupt debtor in the area of property law. Because of this, the debtor had very limited authority. Bankrupt debtors can only perform actions that can provide an advantage or actions that can increase the number of assets which are then used as bankrupt debtors. However, if the bankrupt's conduct is likely to result in loss or reduce the bankruptcy estate, the trustee may request that the bankrupt's court proceedings be reversed. According to Article 41 of the 2004 UUK, the cancellation is relative, which means that it can only be used to benefit bankruptcy assets. Actio Paulina refers to the course of action taken by the curator to request the cancellation. The cancellation is done to safeguard the interests of creditors and prevent their harm, in addition to preventing the assets of the bankruptcy from being reduced.

As regulated in Article 41 paragraph (2) of the 2004 UUK, it is stated that "The cancellation can only be made if it can be proven that at the time the legal action was carried out, the Debtor and the party with whom the legal action was carried out knew or should have known that the legal action would result in losses for creditors". UUK 2004 also regulates one-party legal actions carried out by bankrupt debtors, namely grants. The grant is regulated in Article 43 of the 2004 UUK which reads "Grants made by the Debtor can be requested for the cancellation to the Court if the Curator can prove that at the time the grant was made the Debtor knew or should have known that this action would result in a loss for the Creditor".

From the regulations above, it can be concluded that the curator does not need to prove whether the recipient of the grant knows that the act of the grant harms the creditor or not. The curator only needs to demonstrate that the debtor is presumed to be aware that the grant is detrimental to the creditor and that the grant was made within one year of the decision to declare bankruptcy. In addition, the 2004 UUK also regulates the cancellation of debt payments by a bankrupt debtor due to suspicions of being in favor of one of the creditors. This is regulated in Article 45 of the 2004 UUK, the contents of which are "Payment of a debt that can already be billed can only be canceled if it is proven that the recipient of the payment knows that the Debtor's application for a declaration of bankruptcy has been

registered, or if the payment is the result of a conspiracy between the Debtor and the Creditor to benefit the Creditor exceeds that of other Creditors”.

With the above analysis, bankruptcy can result in the authority to act in bankruptcy debtors becoming more limited, especially in the area of assets. The authority to manage and dispose of his assets is transferred to the curator and the bankrupt debtor can only take legal actions in the field of assets if his actions provide an advantage that can increase the bankruptcy assets. The curator can ask for the bankrupt debtor's legal actions to be canceled if they have a negative impact on creditors or reduce the bankruptcy debtor's assets. Additionally, the bankrupt debtor is required to discuss the legal actions he has taken with the curator prior to taking legal action, particularly in asset-related matters, in order to avoid damaging the bankruptcy assets.

3.2 Legal Consequences of Bankruptcy for Creditors Holding Mortgage Rights.

If the debtor is declared bankrupt by the court, Article 56, Article 59, and Article 60 of the UUK will apply. According to Article 60 UUK, Creditors with mortgage rights, collateral rights, or mortgage rights on other objects exercise their rights to execute the objects that become collateral and the curator about the proceeds from the sales of the objects that become collateral. They also hand over the remaining sales that have been deducted from the amount owed to the curator, including interest and fees. The holder of the mortgage right, mortgage right, or collateral right on other objects must surrender a portion of the sale proceeds in an amount equal to the privileged invoice in accordance with the preferential demands of the curator or creditor (Tanaya & Sudiarawan, 2017).

The provisions above also apply to the holder of collateral rights over the harvest. After submitting a request for matching the debt, the holder of mortgage rights, mortgage rights, or collateral rights on other assets may submit a bill as a concurrent creditor to settle the shortfall from the bankrupt asset if the sale proceeds are insufficient to pay off the disputed receivables. The enactment of these articles will affect the rights of creditors holding mortgage rights as mandated by Article 20 paragraph (1) and Article 21 UUHT. The resulted in the position of creditors holding mortgage rights against mortgage objects under their control becoming weak and no longer protected by the UUHT because separatist creditors as mortgage holders were no longer entitled to assets that had been burdened with mortgage rights before the debtor was declared bankrupt, which played a role in the process bankruptcy is the curator.

UUK has restricted the rights of the mortgage creditor in the form of parate execution and execution based on the mortgage certificate's executive power. UUK just focuses on installment (reimbursement) of receivables from lenders holding contract freedoms. As a result, there is a conflict between the UUHT's legal norms and the UUK's, which is referred to as a "norm conflict" in legal science. The creditor who holds the first mortgage has the authority to sell the mortgage object at a public auction under Article 6 UUHT. The creditor settles his Parate execution, or receivables, with the auction's proceeds. The Parate execution is based on the terms agreed upon in a Deed of Granting Mortgage Rights, according to the elaboration of Article 6 UUHT.

According to Sutan Remy Syahdeini, the agreement regarding the right to sell on his

power is stated as a promise; however, the UUHT also determines that this right is a right granted by law, which means that the holder of the first mortgage right has the authority to sell the mortgaged property in the event that the debtor defaults on the payment. by way of a public auction, and use the money from the sale to settle the debts.

In essence, what a judge does in dealing with a case is that the judge must resolve it and for that the judge must know, seek, and find the law to apply to the case. According to the classical view, all laws are completely and systematically contained in statutes and the task of the judge is to adjudicate according to the provisions of the law. It is the duty of the judge to examine and decide on a case submitted to him and the judge may not refuse because the law is unclear or does not exist, this is in line with the judge's function as the mouthpiece of the law (Fuady, 2013).

Determining the applicable legal provisions to resolve bankruptcy cases, Commercial Court judges are guided by the legal principles that can be used by judges to be able to determine the law that must be applied, namely the legal principle known as the principle of *lex posterior derogat legi priori*, namely if there is a conflict between laws -the old law with the new, and the new law does not revoke the old law that applies is new. Because the Bankruptcy Law No. 37 of 2004 is newer than the Mortgage Law No. 4 of 1996 and no provision in the UUK states that the UUHT does not apply, the Bankruptcy Law No. 37 of 2004 must be chosen.

Referring to the facts on the ground, According to the findings of the research, the judges of the Commercial Court used the *Lex posteriori derogate legi priori* to determine which legal provisions should be applied when deciding whether or not to file for bankruptcy. These adjudicators put together their choice with respect to the arrangements of Regulation Number 37 of 2004. Consequently, both the creditor and the bankrupt debtor are covered by the bankruptcy provisions. Following a ninety-day suspension, preferred creditors with mortgage rights can only exercise their execution rights on mortgaged assets for a period of two months. following the bankruptcy ruling.

The judge's decision must contain justice for both the bankrupt debtor and the creditor holding the mortgage. The Commercial Court judge's decision relies on the principle of *lex posteriori derogate legi priori*, which states that only bankrupt debtors should be treated fairly. This is related to the reasoning behind the issuance of UUK, which is stated in the general elucidation of UUK that several factors necessitate regulation regarding bankruptcy and delaying obligations related to debt payment: a. to try not to argue about the debtor's resources if a few leasers simultaneously collect their receivables from the debtor; b. to prevent mortgage-secured creditors from selling the debtor's property without taking the debtor's or other creditors' interests into consideration; c. to avoid fraud on the part of the debtor or one of the creditors (Nur, 2015).

From these three rationales, the purpose of UUK is more to protect the interests of the debtor, while the interests of creditors holding Mortgage Rights as preferred creditors and having the right of execution where these rights have been guaranteed by UUHT are neglected. So, it is clear that the judge's decision in the bankruptcy case does not provide a balanced sense of justice between the bankrupt debtor and the mortgage holder creditor.

A home loan is a dependable right that is expected to ensure the reimbursement of the

borrower's obligation which gives the principal right to the bank as the holder of the assurance right to outweigh everything else in taking care of his receivables to different lessors assuming the debt holder defaults. The Bankruptcy Law, on the other hand, stipulates that the creditor's right to execute collateral is only granted for a period of two months from the beginning of the state of insolvency after serving a period of delay of 90 (ninety) days from the date of a bankruptcy declaration once the debtor has been declared bankrupt by a judge. Such a circumstance makes legitimate vulnerability for lessors, the favored situation as a bank is insignificant any longer on the grounds that the power to take installment of receivables ensured by the insurance object is restricted by time, which is just for a very long time.

Furthermore, the use of the legal principle *lex posterior derogate legi priori* as a criterion or guideline for judges in applying the law that applies to bankruptcy cases has resulted in a bankruptcy declaration decision that does not provide benefits to creditors. The two-month period given to the creditor to execute the collateral object is very unrealistic, it is very difficult in such a short time that the creditor can sell the collateral object, so the object that is the collateral must be handed over to the curator to be sold. This means that the creditor's status as preferred creditor changes to become a concurrent creditor who no longer has separatist rights, which is a legal right that creditors have to ensure that bankrupt assets are not included in collateral that is burdened with collateral rights. Creditors also have the authority to carry out executions. without a doubt by regulation as a sign of the lessor's on the whole correct to overshadow other pre-banks. The mortgage right holder may not be hindered by his right to execute the mortgage on the debtor's assets burdened with the mortgage in connection with the enactment of the separatist right. UUK did not uphold the separatist rights of creditors holding mortgage rights.

Concerning the strategy for completing the execution, as expressed in Article 6 UUHT underscores that the execution of execution is through a public closeout so for this situation it is done by Authorities of the State Closeout Office, so the execution technique doesn't need the fiat of the Top of the Local Court, however practically speaking, the Workplace State sell off in completing the offer of sale execution of the article.

This mortgage certificate arises as a result of the legal existence of the *irah-irah* (the head of the decision has executive power and its use is limited only to court decisions and certain documents) "For the sake of Justice based on Belief in the One and Only God" contained in the Right certificate. According to Article 20 of the UUHT, this is the method for executing the object of the second mortgage, which is fiat execution or execution through the court. dependents. The Mortgage Certificate possesses executorial power, similar to a permanent court decision, as a result of this *irah-irah*. Creditors currently prefer to execute through parallel execution rather than underhand sales or auction sales on their own authority, with fiat execution the preferred method. In the event that the debtor defaults, the creditor will therefore apply to the court to execute the mortgage based on the executorial title in the Mortgage Certificate.

If it turns out that the 2 (two) months that have been given to the Creditor holding the Mortgage Right to carry out direct execution (*Parate execution*) of the Mortgage object have been completed, then based on Article 59 paragraph (2) of the Law (UU) concerning

Bankruptcy and Postponement of Debt Payment Obligations (UUKPKPU), the Curator will ask for mortgage documents related to the object that becomes the collateral to be sold through a public auction by Article 185 UUKPKPU, and if the public auction does not sell, then the Curator can sell it by selling underhand with the approval of the Supervisory Judge. Furthermore, the proceeds from the sale of the object of the Mortgage right become the priority to pay off the debtor's debt to the creditor who holds the Mortgage where the payment is reduced by the costs and rights specified in (UUKPKPU) (Husni, 2020).

4. Conclusion

The writer can draw the following inferences from the preceding analysis and discussion: Contract is a security right planned to ensure the reimbursement of the debt holder's obligation which gives the essential freedom to the loan boss as the holder of the assurance right to outweigh everything else in taking care of his receivables to different leasers on the off chance that the borrower defaults. However, the bankruptcy decision of the debtor is subject to the provisions of the Bankruptcy Law, which stipulate that the creditor's right to execute collateral is only granted for a period of two months from the beginning of the state of insolvency after serving a period of delay of 90 (ninety) days from the date of a bankruptcy declaration. The provisions of the Bankruptcy Law govern the legal consequences of the bankruptcy decision. The creditor who holds the first mortgage has the authority to sell the mortgage object at a public auction under Article 6 UUHT. The loan boss purposes the returns of the bartering to reimburse his receivables or Parate execution.

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