

## Conference Paper

# Juridical Analysis of the Legal Standing of Insurance Companies Creditors in Bankruptcy and Suspension of Debt Payment Obligations Application

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**Abstract.**

This article aims to discuss and analyze the legal position of insurance company debtors in bankruptcy and PKPU proceedings. It also seeks to explore further the rationale and objectives of conferring the authority to file bankruptcy or PKPU proceedings for insurance companies on OJK. The research applies normative juridical research method. The article concludes that since the issuance of Law Number 21 of 2011 concerning the Financial Services Authority was issued, the authority over insurance companies, including the legal standing for bankruptcy application, was transferred to OJK. Such stipulation is reaffirmed in Law Number 40 of 2014 concerning insurance. The authority of OJK on bankruptcy applications for insurance companies is justified to protect the public interest. Even though the applicable legal provisions do not explicitly state that the specific requirement for bankruptcy applications against insurance companies also apply to PKPU proceedings, it should also apply *mutatis* to PKPU proceedings. Both proceedings against insurance companies might have an impact on the economy. In both bankruptcy and PKPU proceedings, equal treatment should not be given to creditors because the interests of the state are greater than those of the creditors. Therefore, the authority of the OJK to file for bankruptcy of insurance companies must be interpreted as the authority to file for PKPU for insurance companies.

**Keywords:** bankruptcy, suspension of debt payment obligations, insurance

## 1. INTRODUCTION

Bankruptcy reflects a condition in which a debtor is unable to make payments on his debts. The common cause of a debtor's inability to pay his debt is financial distress due to economic and business setbacks. Bankruptcy will result in the general confiscation

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of the bankrupt debtor's existing and future assets. The debt settlement will be under a curator's authority under a supervisory judge's supervision. The ultimate goal of a bankruptcy proceeding is the settlement of debts proportionally (*prorate parte*) to all creditors by using liquidated assets. [1]

In addition to bankruptcy proceeding, Law Number 37 of 2004 in Indonesia also regulates suspension of debt payment obligations (*penundaan kewajiban pembayaran utang*—"PKPU"). PKPU allows debtors that cannot pay mature and payable debts to pay them in the future, avoiding bankruptcy declaration.

A bankruptcy and PKPU proceeding is also applicable to insurance companies suffering financial distress. Law Number 37 of 2004 regulates special requirements for insurance companies. Article 2 paragraph (5) of Law Number 37 of 2004 limits that the legal standing to file for bankruptcy or PKPU against an insurance company lies with the Minister of Finance. This special requirement also applies to reinsurance companies, pension funds, or State-Owned Enterprises operating in the field of public interest.

Since Law Number 21 of 2011 concerning the Financial Services Authority was issued, the authority to regulate and supervise insurance companies is under the authority of the Financial Services Authority (Otoritas Jasa Keuangan—"OJK"). Such stipulation is reaffirmed in Article 50 of Law Number 40 of 2014 concerning Insurance. The elucidation of this article elaborates that in line with the scope of the duties of OJK, which serves to establish an integrated regulatory and supervisory system for financial services sector activities. It includes the authority to file bankruptcy for companies in the related sector which were originally carried out by the Minister of Finance based on Law Number 37 of 2004. Article 50 and the elucidation, however only mention the application for bankruptcy without mentioning PKPU. This may raise interpretation on the legal standing of creditors to file PKPU proceeding against insurance companies.

This article aims to discuss and analyze more about the legal position of insurance company debtors in bankruptcy and PKPU proceedings. It also seeks to explore further the rationale and objectives of conferring the authority to file bankruptcy or PKPU proceedings for insurance companies on OJK.

## 2. METHODOLOGY

This article is normative juridical research. Normative juridical research is doctrinal legal research in which law is conceptualized as written laws ("law in book") or laws decided by judges in court. This method is carried out by approaching the laws relating to PKPU.

This research is analytical descriptive, a method used to describe or provide answers to the issue under study through the collected data and conclusion.

### 3. RESULTS AND DISCUSSION

#### 3.1. Definition and Elements of Suspension of Debt Payment Obligations

Bankruptcy in Dutch, French, Latin and English is both a noun and an adjective. In French, the term *faillite* means a strike or a delay in making payments. People who strike or stop paying their debts are referred to as *Le Faile*. Whereas in Latin the term *failire* is used and in English the term to fail is used. In English-speaking countries, the terms “bankrupt” and “bankruptcy” are used to define bankruptcy and insolvency. [2] In general, bankruptcy refers to a condition in which a debtor facing financial difficulties in settling his debts is declared bankrupt by the court. Following the court decision, the debtor assets will be distributed to creditors based on law and regulations. Historically, bankruptcy proceeding was to protect creditors by providing a legal path to settling debts. [3]

PKPU (*surseance van betaling*) is a period granted by law through the Commercial Court decision, during which time creditors and debtors are provided the chance to settle their debts by providing a payment plan for all debtors, including if necessary to restructure the debt. [4] PKPU essentially seeks to find a solution to reach an amicable consensus between debtors and their creditors and prevent insolvent debtors from going bankrupt. However, if it fails, then the debtor will be declared bankrupt by the Commercial Court. [5] In line with that premise, According to Tumbuan, the filing for PKPU aims to avert bankruptcy declaration which will lead to the liquidation of the debtor’s assets. Specifically for companies, PKPU also aims to improve debtor’s economic viability and profitability. Therefore, it is likely that the debtor can pay off all debts. [6]

Debtors who are aware of their financial difficulties can choose several steps in debt settlement, which include: [7]

1. Holding alternative dispute resolution with its creditors;
2. Holding reconciliation in court if the debtor is sued in a civil case;
3. Submitting a PKPU application;
4. Submitting negotiations in PKPU;

5. Submitting bankruptcy declaration to the court; and
6. Proposing negotiations on peace in bankruptcy.

Article 222 paragraphs (1), (2) and (3) of Law Number 37 of 2004 explains PKPU application further. The article indicates that application of PKPU against a debtor can also be initiated by creditor. A creditor who suspects debtor's inability to meet repayment obligation which are due and payable, may request that the debtor be granted PKPU to enable him to submit settlement plan. It may include an offer to repay the debt entirely or partially to the creditors.

It can be concluded that PKPU is a legal remedy proposed by debtors or creditors to resolve legal issues related to legal disputes involving debts from debtors who have more than 1 (one) creditor that is due and payable. When a debtor cannot or estimates that he will not be able to continue paying his, through PKPU the debtor can submit a settlement plan. This description highlights several key elements of PKPU as follows:

1. There is more than 1 (one) debtor's debt, one of which is due and payable.
2. Applied by creditors or debtors to the Commercial Court.
3. Debtors are in default or can predict a potential default.
4. With the intention of proposing a settlement plan.
5. Examination is carried out with simple proof.

Debt is a substantial element of PKPU. The definition of debt must be defined specifically. This is due to the fact that a standard definition for the word "debt" in PKPU or bankruptcy is fundamental to form the basis of legal proceedings.

The definition of debt based on Article 1 (6) of Law Number 37 of 2004 emphasizes the legal construction of debt as an obligation stated or expressed in an amount of money in Indonesian or foreign currency, incurring either directly or indirectly, or which will arise in the future or contingencies, arising from agreements or laws. The debtor must fulfil the obligation to repay and will entitle the creditor to obtain fulfillment of the debtor's assets in the situation of default. Based on the developing doctrines and jurisprudence, there are 3 (three) definitions of debt, namely: [8]

1. Debt in the narrow sense, receivables arising from lending and borrowing agreements.

This is a narrow opinion because the agreement that underlies the receivables is only a loan agreement, meaning money lending and not all types of agreements. Thus, the

achievements of other parties such as the buyer's obligation to hand over money are not included as receivables for the seller. Similarly, achievements in service agreements and other agreements are also not included as debt.

1. Debt in a broad sense.

According to a broad understanding, the debt is defined as any bill to hand over money based on any agreement, not just a money-borrowing agreement. Thus, a limited liability company that does not pay dividends to shareholders, is included in the category of receivables for the shareholders concerned. Likewise, a buyer who does not give up his purchase money is a debt for the seller. Another example is a passenger who does not pay the cost of the transportation agreement to the taxi driver, for the taxi driver it is a receivable. Workers who are not paid by the business actor have receivables from the employer concerned.

2. Debt in a very broad sense.

In a very broad sense, receivables are any invoices based on agreements or laws that do not constitute invoices for a mere sum of money. In short, according to a very broad understanding of receivables in the form of demands for an achievement based on both agreements and laws. According to Article 1234 of the Indonesian Civil Code, these achievements can be in the form of:

- (a) To give something.
- (b) To do something
- (c) To do nothing

In PKPU the debt must also be more than 1 debt or in other words the debt is obtained from various creditors, both separatist and preferred creditors. This is in accordance with Article 222 paragraph 1 of Law Number 37 of 2004 as explained above. The elucidation of the law also states that "creditor" includes every creditor, both concurrent creditor and priority creditor. Priority creditors include both separatist and preferred creditors. Matured and collectible debts are debts that have been agreed upon or with collection time that the parties have amicably accelerated. In addition, imposing sanctions or fines by the authority, court decisions, or arbitration proceedings decision may also give rise to matured and collectible debts. [9]

### 3.2. PKPU Procedures for Insurance Companies

In contrast to the stipulation in the previous bankruptcy law which only allowed PKPU to be submitted by the debtor, Article 222 paragraphs (2) and (3) of Law Number 37 of 2004 provides that debtors and creditors can submit applications for PKPU. This is a very significant difference and in accordance with the aspirations of the business world. Thus, it can be concluded that those who can apply for PKPU are debtors and creditors.

As stated above, Article 222 of Law Number 37 of 2004 imposes certain exceptions in bankruptcy application for certain debtors. Therefore, if the debtor is a bank, the legal standing for the PKPU application lies with Bank Indonesia. For securities companies, stock exchange, clearing and lending institutions, and depository and settlement institutions, the capital market supervisory agency (now OJK) holds the legal standing for PKPU application.

In principle, there are two patterns of PKPU. First, from the perspective of creditors, PKPU as a response to the debtor in the bankruptcy application submitted by the creditor. This will push the debtor to propose a reconciliation or settlement plan which includes an offer to pay the debt entirely or partially to his creditors. But in practice it is not uncommon for PKPU to be used by creditors to bankrupt debtors, because it is considered more practical, and no legal remedy can be filed. According to Article 224 of Law Number 37 of 2004. If the applicant is a creditor, the Court must summon the debtor through the bailiff with registered letter no later than 7 (seven) days before the trial. The debtor must then submit list containing the nature, amount of receivables and debts of the debtor along with sufficient evidence and, if there is a alternative dispute resolution plan.

Second, from the debtor's perspective, PKPU as an initiative of the debtor himself who has assumed insolvency. Article 224 of Law Number 37 of 2004 stipulates that in the event that the applicant is a debtor, the request for PKPU must be accompanied by a list containing the nature, the amount of receivables, and debts of the debtor along with sufficient evidence. Applicant may also include debt settlement or reconciliation plan. This same requirement does not apply to creditor initiating PKPU because creditors can only provide an application letter.

When PKPU application is submitted *mutatis mutandis* according to the provisions of Article 6 paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) of Law Number 37 of 2004 which is the procedure for filing a bankruptcy application, matters are regulated in Article 224 paragraph (6) which reads The provisions referred

to in Article 6 paragraph (1) - (5) apply *mutatis mutandis* as the procedure for submitting an application for PKPU as referred to in paragraph (1). These provisions are:

1. An application for bankruptcy declaration is submitted to the chairman of the Court.
2. The Registrar registers the application for bankruptcy declaration on the filing date and provides an authorized written receipt.
3. The Registrar must decline the application if it is done not in accordance with the provisions above.
4. The Registrar submits a request for a declaration of bankruptcy to the Chief Justice maximum 2 (two) days after the registration date.
5. Within a period of no later than 3 (three) days after the date the application for a declaration of bankruptcy was registered, the Court will study the application and set a trial date.

The PKPU application must be submitted to the Chairperson of the Commercial Court within the jurisdiction of the jurisdiction to try Commercial cases as stipulated in Presidential Decree Number 97 of 1999 concerning the Establishment of a Commercial Court at Ujung Pandang District Court, Medan District Court, District Court Surabaya and Semarang District Court. With the issuance of this Presidential Decree, the Commercial Court which previously only existed at the Central Jakarta District Court has changed to 5 Commercial Courts.

PKPU is in two stages, beginning with a temporary PKPU, which a permanent PKPU may follow. When a PKPU application is granted, Law Number 37 of 2004 provides a maximum of 45 days for temporary PKPU. It can be extended to a permanent PKPU up to a maximum of 270 days from the starting date of the temporary PKPU. In PKPU periods, the debtor can negotiate a settlement plan with its creditors. If this process fails in the end of PKPU periods, the court will declare the debtor bankrupt.

Legal standing of OJK for bankruptcy application against insurance companies is also regulated by the issuance of Law Number 21 of 2011 concerning the Financial Services Authority. The law provides that the authority to regulate and supervise insurance companies has become under the authority of OJK. Moreover, Article 50 of Law Number 40 of 2014 concerning Insurance states that applications for bankruptcy declaration against insurance companies, sharia insurance companies, reinsurance companies, or sharia reinsurance companies can only be submitted by OJK. It is in line with the scope of the duties of OJK in establishing an integrated regulatory and supervisory system for all activities in the financial services sector.

### 3.3. Safeguarding the Public Interest in Bankruptcy and PKPU of Insurance Companies

Article 50 paragraph 1 of Law Number 40 of 2014 as well as the elucidation of the article only mentions the application for a bankruptcy statement without mentioning PKPU. Then, can creditors apply PKPU for insurance companies directly without going through the OJK? This requires a deeper understanding of the *ratio legis* why the authority to file bankruptcy for insurance companies rests with OJK.

The authority of the Minister of Finance, then transferred to OJK, is justified to protect the public interest. It should apply to both bankruptcy and PKPU proceeding. Both proceedings against insurance companies might bring an impact on the economy. Therefore, the authority of the OJK to file for bankruptcy of insurance companies, sharia insurance companies, reinsurance companies, and sharia reinsurance companies must also be interpreted as the authority to file PKPU.

Application of PKPU can only be done by the OJK to protect the greater public interest, namely the very large number of policyholders. In addition, the status of PKPU can disrupt insurance companies as one of the large fundraisers for national development. This condition then limits the application of PKPU to insurance companies aimed at protecting the larger interests, especially national economic interests.

Bankruptcy and PKPU are legal events arising from a civil relationship between one person and another. This relationship exists because of debts that are past due and unable to be paid. Therefore, the scope of the legal relationship that forms the basis for bankruptcy and PKPU is the legal relationship between the debtor and the creditor. Likewise, the debt must be simply proven (*terbukti secara sederhana*).

The narrow meaning of the scope of legal relations in bankruptcy and PKPU does not place the bankruptcy process and PKPU in the public law area. In fact, with the development of society, modern bankruptcy law also has a public function, namely to safeguard and protect the interests of the wider community, including the interests of the national economy. The dimension of bankruptcy law does not only protect the civil interests of debtors and creditors but also the interests of the general public who are not involved in civil relations between debtors and creditors. This function of safeguarding the public interest has led to the emergence of the authority of several parties to apply for bankruptcy and PKPU, even though these parties are not debtors or creditors. One of the parties referred to in the legal system in Indonesia is OJK.

OJK has the authority to apply for bankruptcy and PKPU against financial services companies, including insurance companies, even though OJK does not have a civil



relationship arising from debts and receivables with insurance companies. Therefore, the basis for legal considerations for delegating such authority to OJK is not solely to protect the interests of insurance company creditors, including policyholders, but further than that objective is to maintain financial system stability. The bankruptcy of an insurance company can impact the financial system's stability, which in turn will adversely affect the national economy. If this condition occurs, then losses will be experienced by creditors, the wider community, and the country's economy. Of course, it is irrational to resolve a legal problem by opening up a broader negative impact on society. Law is, of course, intended as the best way to solve society's problems.

Suppose the authority to apply for bankruptcy of the insurance company is handed over to the creditor. In that case, the creditor will prioritize his interests, namely the repayment of the insurance company's debts. Of course, creditors might not prioritize the public interest in payment collection from insurance companies. For creditors, bankruptcy and PKPU are ways to collect debts (debt collecting pressure). It will differ significantly from the OJK's consideration of submitting a bankruptcy application or PKPU to an insurance company. OJK, as a public institution, does not only represent the interests of insurance company creditors but functions to carry out its purpose of existence, namely to maintain financial system stability. In this position, the primary motivation for OJK in filing for bankruptcy or PKPU is to remain within the scope of public interest, which is its goal.

Modern society needs insurance companies. Economic activity cannot run if no insurance company has the function of accepting risk transfer from various economic activities. Meanwhile, the existence of the vital role of the insurance company is highly dependent on public trust. [10] The loss of public trust will change the existence of insurance companies. For this reason, maintaining public trust is not left to creditors but to the state through the public institution it has formed (OJK).

If the application for bankruptcy or PKPU of the insurance company is fully submitted directly to the creditor, then the civil law relationship (agreement) will be the primary basis. Thus, it is sufficiently simple to prove the debt which is the basis for the application of creditors. The consequence is that creditors are not obligated to consider anything other than to prove the existence of the debt. Facilitating bankruptcy in this way is not following the function of safeguarding the public interest. On the other hand, when applying for bankruptcy or PKPU, an insurance company will consider many economic parameters and their impacts, such as the level of solvency, self-retention, reinsurance, investment, reserve funds, and other requirements stipulated by law. Only the OJK has

the resources to reach out to these considerations before filing a bankruptcy or PKPU application. [11]

The rather more important objective of the insurance company's bankruptcy proceedings stated above causes the bankruptcy process or PKPU of insurance companies to be subject to special or more specific legal principles (*lex specialis*) in bankruptcy law. Equal treatment is not given to creditors because the interests of the state are greater than those of creditors in bankruptcy proceedings or PKPU of insurance companies.

## 4. CONCLUSION

Law Number 37 of 2004 regulates special requirements for insurance companies. It limits that the legal standing to file for bankruptcy against an insurance company lies with the Minister of Finance. This special requirement also applies to reinsurance companies, pension funds, or State-Owned Enterprises operating in the field of public interest. However, since the issuance of Law Number 21 of 2011 concerning the Financial Services Authority was issued, such authority was transferred to OJK. Such stipulation is reaffirmed in Law Number 40 of 2014 concerning Insurance. The authority of OJK on bankruptcy application for insurance companies is justified to protect the public interest. Even though the applicable legal provisions do not explicitly state that the specific requirement for bankruptcy applications against insurance companies also apply to PKPU proceedings, it should also apply *mutatis* to PKPU proceeding.

Both proceedings against insurance companies might bring an impact on the economy. In both bankruptcy and PKPU proceedings, equal treatment should not be given to creditors because the interests of the state are greater than those of the creditors. Therefore, the authority of the OJK to file for bankruptcy of insurance companies, must also be interpreted as the authority to file for PKPU for insurance companies.

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