



## Legal Position of Creditors Holding Fiduciary Security Rights in Debtor Bankruptcy Processes

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### **Abstract**

This paper examines the legal position of creditors holding fiduciary security rights during debtor bankruptcy proceedings. Under Indonesian law, particularly the Fiduciary Law, creditors holding fiduciary rights are classified as separatist creditors, meaning they have the ability to sell the secured assets independently of the bankruptcy estate, as if bankruptcy had not occurred. This privileged status allows fiduciary creditors to prioritize their claims over other creditors. However, the paper also discusses the limitations of this right, particularly in situations where the sale of assets must benefit the bankruptcy estate or when there are legal challenges to the execution of the fiduciary rights.

**Keywords:** *Fiduciary; Creditors; Debtor; Bankruptcy*

### **Introduction**

Fiduciary guarantee is a form of material guarantee regulated in Law No. 42 of 1999 concerning Fiduciary Guarantee (UUJF). Credit is given based on the principle of trust, in which fiduciary guarantee plays an important role. According to Article 1 paragraph 1 and 2 of UUJF, fiduciary means the transfer of ownership of an object based on trust, but the object remains under the control of its owner. Fiduciary guarantees include movable objects, both tangible and intangible, as well as immovable objects, especially buildings that cannot be subject to mortgage rights as regulated in Law No. 4 of 1996. This object remains in the hands of the Fiduciary Provider as collateral for the payment of certain debts, giving the Fiduciary Recipient higher priority than other creditors.<sup>1</sup>

According to the provisions of Article 1 number 6 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Law), debt is an obligation that is stated or can be stated in an amount of money, either in Indonesian currency or foreign currency, either directly or which will arise in the future

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<sup>1</sup> Ndoen, M. R. (2024). KEDUDUKAN KREDITUR SELAKU PENERIMA JAMINAN FIDUSIA DALAM HAL DEBITUR PAILIT. *Paulus Law Journal*, 5(2), 207-221.

or contingently, which arises due to an agreement or law and which must be fulfilled by the debtor and if not fulfilled, gives the creditor the right to obtain fulfillment from the debtor's assets. Based on this understanding, we can draw a conclusion that debt is an obligation that must be fulfilled by the debtor. However, in practice it does not always go well if the debtor as the party obliged to pay the debt experiences a state of cessation of payment, namely a state where the debtor does not have the ability or willingness to pay his debt. Likewise, the concept of debt in Dutch bankruptcy law is also applied in Indonesia with the principle of concordance in bankruptcy regulations, that debt is a form of obligation to fulfill performance in a contract.<sup>2</sup>

In bankruptcy cases, creditors are often faced with various obstacles, particularly related to the repayment of debts by debtors who have been declared bankrupt. The process of managing and settling the bankrupt estate, which should be conducted properly, is frequently tainted by the bad faith of the curator or supervising judge. This can result in a lack of transparency in asset management, harming creditors, prolonging the repayment process, or even reducing the amount creditors are entitled to receive. Such bad faith adds to the complexity of bankruptcy issues, making it more difficult for creditors to claim their rights.<sup>3</sup>

Moreover, the application of the *pari passu* prorata parte principle in bankruptcy law also leads to dissatisfaction among creditors. This principle, which stipulates that all creditors are treated equally without distinguishing between those with secured claims and those without, is considered unfair. Creditors who have extended loans with secured assets should be given priority in repayment, but in practice, they are often treated on par with unsecured creditors. This creates inequality and diminishes the sense of fairness for creditors with stronger claims over the bankrupt debtor's assets.<sup>4</sup>

If a debtor has multiple creditors and their assets are insufficient to repay all debts, the creditors will compete to secure payment first, either legally or illegally. This situation can be detrimental, especially when the debtor's assets are inadequate, with separatist creditors being particularly disadvantaged. The proposed solution is to apply the structured creditors principle, which classifies creditors based on their type. In bankruptcy, creditors are divided into three categories: separatist creditors, concurrent creditors, and preferential creditors. Article 2, paragraph (1) of the Bankruptcy Law states that a debtor with two or more creditors who fails to pay at least one due and payable debt may be declared bankrupt by court decision, either at their own request or at the request of a creditor. Creditors here include all types, and for separatist and preferential creditors, they retain their rights to collateral and priority in repayment.<sup>5</sup>

The resolution through bankruptcy is expected to be the best solution for both debtors and creditors. However, in practice, this expectation is not fully realized by separatist creditors due to restrictions that limit their ability to obtain repayment or directly execute their collateral. These limitations are considered insufficient in protecting the position of separatist creditors. The

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<sup>2</sup> Dewanto, R. F. (2008). *Kedudukan Kreditur Selaku Penerima Jaminan Fidusia Dalam Hal Debitur Pailit* (Doctoral dissertation, Program Pasca Sarjana Universitas Diponegoro).

<sup>3</sup> Pai, V. R. (2014). *Kedudukan Penerima Jaminan Fidusia Terhadap Debitor Yang Dinyatakan Pailit*. *Lex Privatum*, 2(2).

<sup>4</sup> Salsa Bila, K. N. (2024). *PERLINDUNGAN HUKUM BAGI DEBITUR TERHADAP KREDITUR YANG DINYATAKAN PAILIT DALAM PERJANJIAN JAMINAN FIDUSIA (Studi Kasus PT. Arjuna Finance)* (Doctoral dissertation, Universitas Pembangunan Nasional "Veteran" Jawa Timur).

<sup>5</sup> Andreina, E. T. (2022). *Kajian Terhadap Kedudukan Kreditur Selaku Penerima Jaminan Fidusia Akibat Debitur Pailit*. *Lex Privatum*, 9(12).

provisions concerning separatist creditors are regulated in Articles 55, 56, and 59 of the Bankruptcy Law.

The rights and obligations of the debtor and creditor are interconnected. As long as both parties fulfill their obligations as agreed, no issues will arise. However, if the debtor fails to repay the debt on time, according to Article 1131 of the Civil Code, all the debtor's assets, both movable and immovable, will be used as collateral. Article 1132 of the Civil Code further states that these assets will serve as joint collateral for all creditors, and the proceeds from their sale will be distributed according to the proportion of each creditor's claim, unless there are legitimate reasons for priority.<sup>6</sup>

The filing of a bankruptcy petition by the creditor is one method for debt settlement. If the debtor is declared bankrupt by the Commercial Court, all of their assets will become bankruptcy assets, in accordance with Article 21 of Law No. 37 of 2004 on Bankruptcy. Bankruptcy means the seizure of all the debtor's assets to be distributed to creditors. The goal of bankruptcy is to stop and replace separate executions with joint seizures, so the debtor's assets can be distributed according to the rights of each creditor.

The granting of a bankruptcy petition by the Commercial Court not only affects the party declared bankrupt but also impacts other parties, including creditors. For creditors, the debtor's bankruptcy declaration raises issues related to debt repayment. The repayment of debts depends largely on the creditor's position in relation to the bankrupt debtor.

The research method used by the author in this study is normative juridical, through a literature review and secondary data. The study examines the regulatory aspects of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, specifically Articles 41-50, as well as the Civil Code concerning *Actio Pauliana*. Additionally, literature related to *Actio Pauliana* in bankruptcy law is analyzed using a descriptive-analytical approach, which describes the main issues and relates them to applicable laws, theories, and practices in positive law.

## ***Discussion***

In the context of bankruptcy law, the legal position of creditors holding fiduciary guarantees often becomes a complex issue. Fiduciary guarantees are a legal instrument used to protect the interests of creditors, where the debtor retains control over the property that serves as collateral, but the creditor has the right to take over that property if the debtor fails to fulfill their obligations.<sup>7</sup>

However, in practice, when a debtor is declared bankrupt, the rights of creditors holding fiduciary guarantees may be threatened. Based on the principle of *pari passu* in bankruptcy law, all creditors are treated equally without distinguishing between those who hold collateral and those who do not. This can lead to dissatisfaction among creditors holding fiduciary rights, as they should have priority in the repayment of debts from the debtor's assets.

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<sup>6</sup> REZKI, A. (2022). *PERLINDUNGAN HUKUM TERHADAP KREDITUR DALAM PERJANJIAN KREDIT DENGAN JAMINAN FIDUSIA BERDASARKAN UNDANG-UNDANG NOMOR 42 TAHUN 1999 TENTANG JAMINAN FIDUSIA* (Doctoral dissertation, Universitas Pasir pengaraian).

<sup>7</sup> Roache, J. T. (1993). The Fiduciary Obligations of a Debtor in Possession. *U. Ill. L. Rev.*, 133.

On the other hand, legal provisions that restrict creditors' ability to execute guarantees directly add to the complications. Creditors often have to wait for lengthy and complex legal processes, during which their rights may be overlooked. This situation creates uncertainty and can potentially harm the legal position of creditors holding fiduciary guarantees.<sup>8</sup>

The issue is further exacerbated by the bad faith of certain parties in the bankruptcy process, such as curators or supervisory judges, who may hinder the fair management and resolution of the bankrupt estate. Therefore, it is important to understand and analyze the legal position of creditors holding fiduciary guarantees in the debtor's bankruptcy process so that their rights can be more effectively and fairly protected. The significance of this issue encourages further research into how the current legal system can be improved to provide better protection for creditors holding fiduciary guarantees and ensure legal certainty in the bankruptcy process.<sup>9</sup>

Essentially, all creditors have equal standing and are entitled to the proceeds of bankruptcy execution according to the proportion of their claims (*pari passu pro rata parte*). Based on the type of debt repayment from the debtor, creditors can be categorized into the following tiers:<sup>10</sup>

- a. Preferred creditors (privileged or preference), consisting of:
  1. Preferred creditors by law, creditors who are granted a higher priority under Articles 1139 and 1149 of the Civil Code due to the nature of their claims as regulated by law.
  2. Secured creditors (separatist creditors), creditors who have the right to sell the collateral on their own as if bankruptcy has not occurred, meaning they can still exercise their execution rights even if the debtor is declared bankrupt.

Secured creditors, also known as preferred creditors, possess preferential rights and are classified as separatist creditors. The difference between the rights and status of creditors with debts secured by property lies in the fact that their rights are considered preferential due to legal classification as prioritized creditors. In contrast, their status as separatist creditors comes from having rights that are independent of those held by other preferred creditors, with their debts secured by property rights.<sup>11</sup> The term "separatist" indicates this separation, allowing these creditors to sell their collateral independently from the overall bankruptcy assets. Because they hold protected rights, secured creditors can exercise their rights as if bankruptcy had not taken place, thus being viewed as "separatists" (operating independently).

- b. Concurrent creditors (unsecured creditors) are those who are not classified as separatist or preferred creditors. Their debt repayment comes from the remaining proceeds of the sale or auction of the bankrupt estate after the separatist and preferred creditors have received their

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<sup>8</sup> Bowers, J. W. (2000). Security interests, creditors' priorities, and bankruptcy. In *Encyclopedia of Law and Economics*. Edward Elgar Publishing Limited.

<sup>9</sup> Silalahi, J. M. T., & Sari, I. K. (2024). KEDUDUKAN JAMINAN FIDUSIA UNTUK PENYELESAIAN WANPRESTASI PERJANJIAN KREDIT. *Fortiori Law Journal*, 4(01), 35-54.

<sup>10</sup> Widnyana, I. G., & Putra, I. M. W. (2014). Kewenangan Pelaksanaan Eksekusi Oleh Kreditur Terhadap jaminan Fidusia Dalam Hal Debitur Wanprestasi. *Kertha Semaya: Jurnal Ilmu Hukum*, 2(2).

<sup>11</sup> Sihombing, D. R. (2019). Perlindungan Hukum Bagi Debitur Wanprestasi Dalam Eksekusi Jaminan Fidusia Berdasarkan Undang-Undang Nomor 42 Tahun 1999 Tentang Fidusia. *Jurnal Hukum Media Justitia Nusantara*, 6(1).

portions. The remaining proceeds are then distributed according to the size of each concurrent creditor's claims.

The principle in collateral law states that creditors cannot demand ownership of the pledged asset for debt repayment. This aims to prevent unfairness if the value of the collateral exceeds the debtor's debt. Thus, the collateral must be sold, and creditors are entitled to the sale proceeds for repayment, with any excess returned to the debtor. Article 1131 of the Civil Code provides protection for creditors, while Article 1132 states that the debtor's assets serve as collateral for all creditors. If the debtor defaults, the proceeds from the sale of these assets will be distributed proportionally (*pari passu*) according to each creditor's claims, unless there are valid reasons to prioritize certain creditors.<sup>12</sup>

The Civil Code contains two types of preferential rights that give priority to the holders of these rights in obtaining repayment of the debtor's debts. This is done through the auction of collateral provided to the creditors preferentially. The two preferential rights are: the right of pledge on movable property, whether tangible or intangible, and the right of mortgage on immovable property, excluding land, which can also be in the form of tangible or intangible assets.

If a debtor who grants fiduciary security goes bankrupt, according to the theory of security law, the fiduciary collateral is excluded from the bankruptcy estate. Article 27, paragraph (3) of the Fiduciary Law states that the priority rights of the fiduciary recipient remain intact despite bankruptcy or liquidation. Fiduciary security is a form of collateral, so the creditor holding fiduciary security qualifies as a separatist creditor. In banking practice, if the debtor goes bankrupt, the bank as the fiduciary creditor becomes a separatist creditor. Inventory and movable assets of the debtor that obtain credit from the bank are typically encumbered with fiduciary security. This right legally grants ownership to the creditor, while the debtor retains control over the assets. Therefore, the curator has no authority to sell items encumbered by fiduciary security.<sup>13</sup>

The law regulates aspects related to the second way out for creditors in lending to debtors, as outlined in the Civil Code. Article 1131 of the Civil Code states that all of the debtor's assets, whether movable or immovable, existing or future, serve as collateral for all obligations incurred by the debtor with their creditors. In other words, Article 1131 provides that if the debtor breaches the agreement and fails to repay the debt to creditors, the proceeds from the sale of all the debtor's assets will serve as the source for repaying that debt.

The provision in Article 1131 of the Civil Code provides protection for creditors. Without this provision, it would be difficult to imagine any creditor willing to lend to a debtor. Article 1131 of the Civil Code is a universal principle found in the legal systems of various countries. The proceeds from the sale of the debtor's assets are distributed among creditors if the debtor fails to pay their debts, and the answer to this matter is found in Article 1132 of the Civil Code. According to this article, the debtor's assets serve as collateral for all creditors collectively. This means that if the debtor breaches the agreement and fails to repay their debts, the proceeds from the sale of the debtor's assets will be distributed proportionally (*pari passu*) based on the amount

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<sup>12</sup> Afandi, F. (2024). Penyelesaian Kredit Dengan Jaminan Fidusia Yang Objeknya Dialihkan Oleh Debitur. *Depositi: Jurnal Publikasi Ilmu Hukum*, 2(1), 112-120.

<sup>13</sup> Palapa, J. (2020). Penyelesaian debitur wanprestasi dengan jaminan fidusia. *Sol Justicia*, 3(1), 26-38.

owed to each creditor, unless there are valid reasons that allow certain creditors to be prioritized over others.<sup>14</sup>

According to Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payments, a bankruptcy ruling automatically causes the debtor declared bankrupt to lose all civil rights to control and manage the assets included in the bankruptcy estate. This freezing of rights over the assets is regulated by Article 22 of Law Number 37 of 2004, which takes effect from the moment the bankruptcy declaration is pronounced. This provision also applies to spouses and bankrupt debtors who have a joint property arrangement. As a consequence of Article 22, all obligations between the bankrupt debtor and third parties entered into after the bankruptcy declaration cannot be paid from the bankruptcy estate, unless those obligations benefit the estate. Therefore, lawsuits aimed at fulfilling obligations from the bankruptcy estate during bankruptcy may only be submitted in the form of a report for reconciliation. If the reconciliation is not approved, the party that objects will take over the position of the bankrupt debtor in the ongoing lawsuit. Although the lawsuit only affects the reconciliation, this is sufficient to serve as evidence that can prevent the expiration of rights in the lawsuit.<sup>15</sup>

Since the declaration of bankruptcy is pronounced, the debtor loses the right to manage their assets, as stated in Article 12 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The management of assets will transfer to the curator, who possesses independence and bankruptcy management skills. If no curator is appointed, the Court will designate the BHP (Balai Harta Peninggalan). The debtor is still allowed to engage in legal actions that benefit the bankrupt estate; however, agreements that are detrimental will not bind the estate.

In Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (KPKPU), the role of the curator becomes significantly important in managing and settling bankrupt assets, marking a new characteristic compared to the *Faillissementsverordening*. Following a court decision, the debtor is placed under the curator's supervision, meaning the debtor no longer has the capacity to perform legal actions regarding their assets, including selling, donating, or pledging their wealth, which is now under general seizure. According to Article 1132 of the Civil Code, all of the debtor's assets serve as collateral for all creditors, and if the debtor fails to fulfill their obligations, the proceeds from the sale of those assets will be distributed proportionally according to the amount of each creditor's claim, unless there are valid reasons for prioritizing certain creditors.<sup>16</sup>

The special priority rights are granted to creditors holding security rights over certain assets belonging to the debtor, whether they are movable or immovable. This protection is regulated by Article 1132 of the Civil Code, which states that a creditor may be granted priority

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<sup>14</sup> Hastijoko, R. (2024). ANALISIS YURIDIS PERLINDUNGAN HUKUM BAGI DEBITUR YANG MELAKUKAN WANPRESTASI TERHADAP OBJEK JAMINAN FIDUSIA DITINJAU DARI UNDANG UNDANG NOMOR 42 TAHUN 1999 TENTANG JAMINAN FIDUSIA. *JURNAL AUDI ALTERAM PARTEM*, 2(2), 65-84.

<sup>15</sup> Fakhruddin, M. R., & Firmansyah, A. (2022, January). Penerapan Eksekusi Jaminan Fidusia Terhadap Objek Jaminan Fidusia sebagai Pelunasan Piutang Kreditur Melalui Pengadilan Ditinjau dari Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia. In *Bandung Conference Series: Law Studies* (Vol. 2, No. 1, pp. 892-899).

<sup>16</sup> Dantes, K. F., & Adnyani, N. K. S. (2020). Perlindungan Hukum Bagi Debitur Yang Melakukan Wanprestasi Terhadap Objek Jaminan Fidusia Ditinjau Dari Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia. *Jurnal Komunitas Yustisia*, 3(3), 271-282.

over other creditors. The method for granting such rights is explained in Article 1133 of the Civil Code. According to this article, the right of priority among creditors arises from:

- a. Special Rights
- b. Pledge
- c. Mortgage

According to Article 1134 Paragraph (2) of the Civil Code, Security Rights have a higher position than Preferential Rights, unless otherwise specified by law. Preferential Rights that rank higher than security rights include costs associated with legal proceedings resulting from court orders to auction movable or immovable property, which are paid from the sale proceeds before other creditors. There are two types of creditors: first, Preferential Creditors (Secured Creditors), who are prioritized for repayment from the sale proceeds of the debtor's assets that are encumbered with security rights; second, Concurrent Creditors (Unsecured Creditors), who share proportionally from the sale proceeds of the debtor's assets that are not encumbered with security rights. According to Article 1, Item 2 of the Bankruptcy Law No. 37 of 2004, a creditor is a party who has receivables based on an agreement or law that can be claimed in court.<sup>17</sup>

Meanwhile, Article 185 Paragraph (1) of the Bankruptcy Law (UUK PKPU) mandates that the sale of all bankrupt assets be conducted through a public auction mechanism, in accordance with the procedures established by law. The preparation phase for the auction of bankrupt assets at the KPKNL begins with submitting a request for the auction, determining the location and time of the auction, setting auction conditions, making the auction announcement, requesting a Land Certificate from the local Land Office, and depositing the auction guarantee money.

## **Conclusion**

In debtor bankruptcy processes, creditors holding fiduciary security rights are classified as secured creditors (*separatis creditors*), granting them a preferential position over other creditors. These creditors retain the right to execute the sale of the collateralized assets independent of the bankruptcy estate. Fiduciary security rights protect their claims by ensuring that the assets under fiduciary security are excluded from the general bankruptcy estate, allowing the creditor to prioritize the repayment of their debts. This legal position ensures a higher level of certainty and security for creditors holding such rights during bankruptcy proceedings.

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<sup>17</sup> Hidayat, R., & Soegianto, S. (2019). Penyelesaian Debitur Wan Prestasi Atas Obyek Jaminan Fidusia Yang Telah Didaftarkan. *Jurnal USM Law Review*, 2(2), 288-299.

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