



Media Juris

Volume 6, Nomor 2, June 2023

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Media Juris

Published three times a year in February, June and October by Faculty of Law,
Universitas Airlangga

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Before submitting the manuscript, the author be required to adjust first in journal template style as contained on the last page of this journal

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Article history: Submitted 2 July 2022; Accepted 6 January 2023; Available online 20 June 2023.

How to cite: Raden Besse Kartoningrat and Edi Krisharyanto, 'Principles of Statutory Duty and Fiduciary Duty in The Responsibility of The Bankruptcy Curator' (2023) 6 Media Iuris.

Principles of Statutory Duty and Fiduciary Duty in The Responsibility of The Bankruptcy Curator

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Keywords:

Halal Tourist;
Additional
Service; Local
Economy.

Abstract

The curator is a subject of Bankruptcy Law who has complete authority and responsibility for managing and resolving the bankruptcy estate. Curators are required to have integrity and are prohibited from having conflicts of interest with their duties and authorities. The issue raised in this study is the application of the principles of statutory duty and fiduciary duty in the responsibility of the bankruptcy curator. This study aims to identify, understand, and analyze bankruptcy law regarding the curator's responsibility based on the principles of statutory duty and fiduciary duty. This study employed a normative method by examining the consideration materials to conclude. The results of the analysis in this study indicate that in carrying out the duties of managing and settling, the curator must comply with the principles of statutory duty and fiduciary duty as regulated in Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations and the code of ethics of the curator profession. The curator's actions that can harm the parties, whether creditors or bankrupt debtors, can be personally accounted for outside the bankruptcy estate by imposing civil, criminal, or administrative sanctions.

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Published in Media Iuris. Published by Universitas Airlangga, Magister Ilmu Hukum.



Introduction

Many businesses in numerous sectors have ceased operations as a result of the Covid-19 epidemic, particularly in fields associated with exports, imports, and tourism, resulting in financial hardship. This can cause the company to be unable to pay the loan, resulting in the company going bankruptcy. The definition of bankruptcy in Article 1 is point 1 jo. Article 2, paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as *UUK-PKPU*) is a commercial court stipulation against debtors who have two or more creditors and are unable to pay one of the debts when it is due and can be billed, whose management and settlement of assets are carried out by the curator.

Based on Article 24, paragraph (1) of the *UUK-PKPU*, the bankrupt debtor has lost the right to control and manage the assets that are included in the bankruptcy estate

as of the date the bankruptcy decision is pronounced. Bankruptcy management and settlement are carried out by the curator under the supervision of the supervisory judge with the main objective of using the proceeds from the sale of such assets to pay all the debts of the bankrupt debtor on a *pro rata parte* and in accordance with the creditor structure.¹ Article 15 paragraph (3) of the *UUU-PKPU* explains that the curator handles bankruptcy cases and more than 3 (three) Postponement of Debt Payment Obligations cases and is assigned and responsible for managing and settling bankruptcy estates independently. Meanwhile, the curator, who manages and settles bankruptcy estates, does not have a conflict of interest with the debtor or creditor.

According to Jerry Hoff in Imran Nating, bankruptcy aims to pay creditors' rights based on their rank. Therefore, the curator must act in the best interests of both creditors and debtors.² Article 72 of the *UUU-PKPU* regulates the curator's responsibility for errors or omissions in carrying out the task of managing and settling bankruptcy estates. Article 92 of the *UUU-PKPU* states that the curator must carry out all efforts to secure the bankruptcy estate and maintain all letters, documents, money, jewelry, securities, and other securities by providing a receipt that has been in effect since his appointment.

Bankruptcy curators have two obligations, the first is the obligations that have been regulated in Law Number 40 of 2007 on Limited Liability Companies (hereinafter referred to as the Company Law). In other words, the curator carries out the principle of statutory duties, where in carrying out his obligations, the curator must comply with the provisions of the law. Furthermore, in carrying out its obligations, the curator must carry out the principles of fiduciary duties. In Latin, fiduciary refers to trust, and the term fiduciary is interpreted as someone who holds something in trust for the benefit of others.³ The curator is expected to be able to perform the duties of managing and settling bankruptcy estates honestly.

Bankruptcy is a branch of civil law whose provisions are regulated by the *UUU-PKPU*. However, *UUU-PKPU* does not directly regulate criminal provisions. As stated

¹ Gunawan Widjaja, *Resiko Hukum Dan Bisnis Perusahaan Pailit* (Forum Sahabat 2011) 16.

² Imran Nating, *Peranan Dan Tanggug Jawab Kurator Dalam Pengurusan Dan Pembersan Harta Pailit* (PT Raja Grafindo Persada 2019) 71.

³ Ridwan Khairandy, 'Perseroan Terbatas Sebagai Badan Hukum' (2007) 26 *Jurnal Hukum Bisnis* 204.

above, the criminal threat in *UUU-PKPU* is aimed at the curator's independence in carrying out the duties of managing and settling bankruptcy estates.⁴ To avoid criminal acts against the curator who manages and settles bankruptcy estates, it is necessary to apply the principles of statutory duty and fiduciary duty as the responsibility of the bankruptcy curator. From the description of the background above, the authors need to review and conduct research with the title "Principles of Statutory Duty and Fiduciary Duty in the Responsibilities of the Bankruptcy Curator".

Research Methods

This research is normative legal research, which means that this study was carried out by examining library materials, specifically secondary legal materials, also known as library legal research. Research is a methodologically performed scientific activity that involves analysis and construction. In normative legal research, different methodologies serve to acquire information from the various elements of the subject that are being sought to find answers.⁵

Principles of Statutory Duty and Fiduciary Duty

Black's Law Dictionary defines *Statutory* as involving legislation. This principle emphasizes acting in good faith and being careful in carrying out duties and obligations.⁶ The principle of statutory duty or obligation has the meaning of being obliged to obey laws and regulations. In this principle, compliance is the key for someone who has been given the authority to perform their duties. *A second initial point concerns the status of an obligation. The ERA states that the parties "must" deal with each other in good faith thus imposing a clear statutory obligation that cannot be contracted out.*⁷ Therefore, a statutory obligation can be defined as the relationship between parties that must be carried out in good faith.

⁴ Sriti Hesti, 'Pertanggungjawaban Pidana Kurator Berdasarkan Prinsip Independensi Menurut Hukum Kepailitan' (2016) 31 *Yuridika* 442.

⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Perdana Media Group 2016) 40-42.

⁶ Chatamarrasjid Ais, "Fiduciary Duty" Sebagai Standar Para Direksi Dalam Melaksanakan Tugasnya' (2017) 31 *Jurnal Hukum dan Pembangunan* 64.

⁷ M Freedland, *The Personal Employment Contract* (Oxford Press 2003) 238.

Inline with statutory duties, legal awareness needs to be discussed as a manifestation of legal compliance. This is because someone will obey a rule if he is aware of the law itself. Legal awareness refers to the ability to behave in accordance with legal provisions, in the form of legislation and societal norms. Sudikno Mertokusumo suggested that legal awareness entails being conscious of what we should or should not do, particularly in relation to others.⁸ This can be interpreted as awareness of one's obligations as an individual or as a representative of the authority that has been given. Legal awareness is related to compliance. The thing that distinguishes it from legal compliance is the fear of being punished. Meanwhile, legal awareness does not impose sanctions. It is a formulation from the legal community regarding the scientific assessment of the values contained in humans about existing laws or laws that are expected to exist.

The principle of statutory duty means that an act is based on and is limited by laws and regulations. This principle can be implemented properly if someone who is entrusted with managing a position in carrying out their authority must be carried out with legal awareness to be careful, in good faith, and consistently. Thus, if a person who is given authority already knows that an action might be contrary to the law or the applicable laws and regulations, then that person should not have committed it.

Fiduciary duty, known in the common law system, is the elaboration of the duty of loyalty and good faith, together with the duty of care and skill.⁹ In Latin, it is known as *a fiduciary*, meaning trust. The term fiduciary is defined as someone who holds something entrusted to the benefit of others. A person has a fiduciary duty when he has fiduciary capacity. A person is said to have fiduciary capacity if the business being transacted or the assets he controls are not for his interests, but the interests of others. Fiduciary Duties occur when one party does something for the benefit of another party to the exclusion of his interests, but for the benefit of the other party.¹⁰

Black's Law Dictionary defines Fiduciary Duty as *the duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person (such as the*

⁸ Soejono Soekanto, *Kesadaran Hukum Dan Kepatuhan Hukum* (1st edn, Rajawali 1982) 182.

⁹ Gunawan Wijaya, *Tanggung Jawab Direksi Atas Kepailitan Perseroan* (PT Raja Grafindo Persada 2002) 24.

¹⁰ Munir Fuady, *Doktrin-Doktrin Modern Dalam Corporate Law* (PT Citra Aditya Bakti 2014) 33.

duty that one partner owes to another).¹¹ Another definition of fiduciary obligation is when someone acts as a trustee or is equated with something that works as a representative based on trust and confidence, which in this function entails diligence, good faith, and *candor*. Administrators, managers, supervisors, representatives or guardians, and protectors are examples of fiduciary relationships.¹² One who can be said to have a fiduciary duty is someone who has been entrusted as a representative to do something on behalf of another person. The representative must act as if in his interest.

Responsibilities of Curators in the Framework of Statutory Duty and Fiduciary Duty Principles

From the date of the bankruptcy decision, the bankrupt debtor loses the right to manage and administer the assets included in the bankruptcy estate. Bankruptcy decisions have an impact on debtors and creditors regarding the rights and obligations of the parties to the distribution of bankruptcy estates. The curator manages and settles bankruptcy estates for the benefit of creditors and debtors. Article 1 point 5 *UU-KPKPU* defines a curator as an inheritance hall or an individual appointed by the court to manage and settle the assets of the bankrupt debtor under the supervisory judge under the law. According to S.Wojowasito in Annalisa Yahanan, a curator is defined as: 1.) the person appointed to supervise the bankrupt goods; 2.) the person who carries out the *curatele*; 3.) the member of the university supervisory commission.

From these three meanings of curator, as emphasized by S. Wojowasito, a more appropriate meaning is used in the sense that a curator is appointed to supervise bankrupt goods.¹³

The authority to carry out the management and settlement of the bankrupt debtor's assets rests with the curator because, since the declaration of bankruptcy, the debtor by law has lost his right to control and manage the assets included in the bankruptcy. It is further determined that if the debtor or creditor does not submit a proposal for

¹¹ Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia* (1st edn, FH UII Press 2013) 545.

¹² Henry Campbell Black, *Black Law Dictionary* (6th edn, West Publishing Co 1990) 62.

¹³ Annalisa Yahanan, *Hukum Kepailitan Dan Penundaan Kewajiban Pembayaran Utang* (UNSRI 2007) 76.

the appointment of another curator to court, the *Balai Harta Peninggalan* (Indonesian Insolvency & Public Trustee's Office) will act as a curator. The curator, who manages and settles the assets of the bankrupt debtor, must be appointed by the court at the request of the debtor or creditor. It is necessary to observe whether the commercial court may appoint another party as a curator instead of candidates for the curator proposed by the debtor and/or creditor. The Bankruptcy Act does not provide any express provisions that prohibit this, except if the court appoints candidates other than the curator proposed by the debtor or creditor. The reason is to avoid Corruption, Collusion, and Nepotism between the judge and curator appointed by the judge. Moreover, the court will not be criticized if it turns out that the curator concerned in carrying out his duties does not act independently or in good faith.¹⁴

The curator is appointed by the judges of the Court at the time of the decision on the declaration of bankruptcy, following the mandate of Article 15, paragraph (1) of the *UUU-PKPU*. If the debtor or creditor does not submit a proposal for the appointment of another curator to court, the *Balai Harta Peninggalan* will act as a curator. The curator has the authority to manage and settle the assets of the bankrupt debtor because the debtor has lost the right to manage his assets since the bankruptcy declaration. Although the debtor or creditor can propose the curator, the curator works independently without any conflicts of interest. According to Article 70, paragraph (2) of the *UUU-PKPU*, parties who can become curators include the following: Individuals domiciled in Indonesia have expertise in managing and settling bankruptcy estates; and registered at the ministry, the scope of duties and responsibilities is in the field of law and legislation.

Authority is a definition that comes from government administrative law, explained as all rules relating to the acquisition and use of government authority by subjects of public law within the scope of public law. Bagir Manan suggests that, in legal terms, authority is not the same as power (*macht*). Power describes only the right to do or not to do. In law, authority simultaneously refers to the rights and obligations (*rechten*

¹⁴ Sutan Remi Sjahdeini, *Hukum Kepailitan* (Pustaka Utama Grafiti 2002) 210-211.

enpflichten).¹⁵ It can be concluded that authority is the power to make decisions, order, and delegate responsibility to others.

Article 69 paragraph (1) *UUUK-PKPU* has regulated the duties and authorities of the curator to manage and settle bankruptcy estates. This task has been carried out since the date of the bankruptcy decision, although later, there will be other legal remedies, namely cassation or reconsideration. Paragraph (2), b, (3), and (4) of Article 69 allow the curator to make loans to third parties in an effort to increase bankruptcy estates with pledges, fiduciary guarantees, mortgages, or other material collateral. The encumbrance of the bankruptcy estate may only be made to the part of the bankruptcy estate that has not been pledged as debt collateral. When conducting the settlement of bankruptcy estates, the curator must pay attention to the best value within the settlement period. The curator can assess the value of the bankruptcy estate either independently or by appointing a competent third party with the permission of the supervisory judge. Furthermore, the curator can determine the value of the bankruptcy estate from the assessment results, which will later be used for settlement purposes.

The curator can consist of several people in the form of a Board of Curators. If the curator consists of more than one person, according to Article 70A, paragraph (1) and paragraph (2) of the Bankruptcy Law, to take legal and binding actions, the curators need to approve more than the number of curator members. Apart from the permanent curator, it is also possible to establish an interim service curator. The appointment of a temporary curator is carried out by the Commercial Court, as long as the decision on the petition for a declaration of bankruptcy has not been determined. The duties of a temporary curator are not the same as those of a permanent curator, as a temporary curator is a mere “supervisor.” In Article 7 paragraph (1) of the Bankruptcy Law, it is stated that the task of the temporary curator is to supervise debtors in the context of bankruptcy requiring the approval of the curator, especially in:¹⁶

¹⁵ Syendi Surya Atmaja, *Pelaksanaan Memorandum Of Understanding Antara Badan Pengawas Keuangan Dan Pembangunan Dan Kejaksaan Tinggi Terhadap Pengawasan Keuangan Dan Kejaksaan Tinggi Terhadap Pengawasan Keuangan Pemerintah Provinsi Lampung* (Digital Repository Unila 2015).

¹⁶ Serlika Aprita, *Wewenang Dan Tanggung Jawab Hukum Kurator Dalam Proses Hukum Pengurusan Dan Pembersihan Harta Pailit* (CV Pena Indis 2017) 60.

- a. Debtor's business management;
- b. Payments to creditors;
- c. Transfer of debtor's assets;
- d. Collateral of debtor's wealth.

To carry out his duties and authority, a curator needs to sort out his authority according to the law:¹⁷ The authority that can be exercised after obtaining approval from another party, in this case, the supervisory judge; or the authority that can be exercised without the need for approval from *imiansi* or other parties.

The curator's actions without the necessary power or permission from the supervisory judge or the heeding of the provisions of Articles 83 and 84 of the *UUK-PKPU* regarding creditor meetings cannot affect the validity of the actions taken by the curator against third parties. However, some acts of the curator are still valid even without the permission of the supervisory judge, with due regard to the following matters:

- a. whether he is authorized to do so;
- b. whether the time is right (especially economically and business) to do the deed;
- c. Whether the actions require the existence of certain parties, such as supervisory judges, commercial courts, creditor committees, and debtors;
- d. It must be seen how appropriate it is from a legal, customary, and social point of view in carrying out a particular act.¹⁸

Article 98 of the *UUK-PKPU* states that from the start of his appointment, the curator must carry out all efforts to secure the bankruptcy estate and keep all letters, documents, money, jewelry, securities, and other securities by providing a receipt. All money, jewelry, securities, and other securities must be kept by the curator unless another method of depositing is determined by the supervisory judge. The explanation in Article 108 *UUK-PKPU* does not reduce the possibility that the securities are kept by the custodian, but the responsibility remains on behalf of the bankrupt debtor; for example, deposits on behalf of the bankrupt debtor's curator.¹⁹

By adhering to the above provisions, Article 100 of the *UUK-PKPU* obliges the curator to immediately begin recording the bankruptcy estate. Recording can

¹⁷ Marjan E Pane, 'Permasalahan Seputar Kurator', *Lokakarya Kurator/Pengurus dan Hakim Pengawas; Tinjauan Secara Kritis* (2002).

¹⁸ Munir Fuady, *Hukum Pailit Dalam Teori Dan Praktek* (Citra Aditya Bakti 2017) 44.

¹⁹ Sentosa Sembiring, *Hukum Kepailitan Dan Peraturan Perundang-Undangan Yang Terkait Dengan Kepailitan* (CV Nuansa Aulia 2006) 175.

be performed manually, while the assessment is carried out by the curator, with the approval of the supervisory judge. Put simply, the curator's duties and authorities are divided into three categories:²⁰

1. Administrative duties and powers. The curator is responsible for organizing the bankruptcy process, such as announcements, inviting creditors to a meeting, securing the assets of the bankrupt debtor, conducting an inventory of bankruptcy estates, and making regular reports to the Supervisory Judge.
2. Managing bankruptcy estates. As long as bankruptcy has not yet reached an insolvency state and the debtor has a business that is still running, the curator can run the bankrupt debtor's business as an organ of the company in accordance with the approval of the creditor meeting. For this action, the curator is obliged to act on the basis of the interests of bankruptcy estates. Although the curator has power over the debtor's wealth, it is not a corporate organ that belongs to the debtor's company. Therefore, the curator is not subject to Company Law; however, the curator is obliged to prepare, keep, and publish the annual financial report.
3. Selling bankruptcy estates. As the main task of the curator is to make settlements, the curator can sell bankruptcy estates belonging to the debtor, which later pay the proceeds of the sale will be paid to the concurrent creditors.

According to William E. Holder, *bankruptcy law is to protect and maximize value for the benefit of all interested parties*.²¹ Thus, the task of the curator is not only to collect bankruptcy estates to be distributed to creditors but also expected to be able to increase the value of bankruptcy estates. The curator's broad authority in controlling bankrupt debtor assets must be limited to prevent any conflicts of interest and arbitrary actions by the curator. In practice, the stipulation of the name of the appointed curator is submitted by the creditor who submits a petition for bankruptcy to the debtor. However, even though it is proposed by the creditor, the curator must remain independent because he/

²⁰ Aprita (n 16) 74-75.

²¹ William E Holder, *Indonesian Bankruptcy Reform: The IMF Approach, & Lam Indonesia; Bankruptcy, Law Reform and the Commercial Court, Comparative Perspectives on Znsolvensi Law and Policy* (Timothy Lindsey ed, Desert Pea Press 2000) 45.

she will be responsible for what he/she does.²²

The curator must have the integrity to be objective and thorough in carrying out his/her duties. Integrity is a benchmark for a profession's professionalism towards its performance. Integrity is guided by truth and justice and the obligation to comply with professional and ethical standards according to the content and spirit. Therefore, the curator must comply with the principles of statutory and fiduciary duties. The principle of statutory duty or statutory obligation is also in line with Indonesia as a legal country where the curator must obey the regulations, in this case the *UU-KPKPU* to carry out all activities of managing and settling bankruptcy estates. Although the fiduciary duty principle is identical to the responsibility of the board of directors to a limited liability company, this principle can be applied to the curator as the bankrupt debtor's representative, who manages and settles his bankruptcy estates.

*A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence "... A fiduciary is expected to be extremely loyal to the person to whom he owes the duty ("the principal"): he must not put his interests before the duty, and must not profit from his position as a fiduciary, unless the principal consents".*²³ Hence, based on the above definition, the curator as a fiduciary or trustee has been entrusted with carrying out management and settlement tasks, and is obliged to carry them out with integrity and responsibility.

Implementation of the Principles of Statutory Duty and Fiduciary Duty in Curator Responsibilities

After receiving minutes of the appointment, the curator has the duty to take over the control and management of the bankrupt debtor's assets. Furthermore, the curator is obligated to secure the bankruptcy estate such that it does not decrease in value. For certain assets, the curator must take the following steps:²⁴

- a. Bank accounts. The curator is required to provide immediate notification to the bank

²² M Hadi Subhan, *Hukum Kepailitan: Prinsip, Norma Dan Praktik Di Peradilan* (Kencana 2009) 108.

²³ Aidhya Diory, 'Fiduciary Duty Direksi Sebagai Pengurus Perseroan Terbatas' <<https://www.pph-bi.com/fiduciary-duty-direksi-sebagai-pengurus-perseroan-terbatas/>>.

²⁴ Professional Standards for Curators and Administrators 341.

- where the debtor's account is located (including current accounts, savings accounts, deposits, and other financial instruments). Notification means that the debtor is declared bankrupt and does not have the authority to conduct financial transactions.
- b. Securities and precious metals. The curator has the authority to control and store in a safe place, with proof of receipt to the debtor.
 - c. *Aan opname* securities. In the case of *aan opname* securities, it is necessary to convey to the parties related to the securities the bankruptcy of the debtor and its legal consequences.
 - d. Immovable property. The curator maintains certificates, letters, and proof of ownership related to the debtor. If necessary, the curator can also submit a declaration of bankruptcy to the agency or party in charge of the immovable property.
 - e. Other movable objects. The curator as soon as possible selects assets that belong to the bankrupt debtor for further security.
 - f. Bankruptcy debtor correspondence. PT. Pos and Giro Persero are notified by the court clerk regarding the statement of the debtor's bankruptcy, the correspondence of which will then be addressed to the curator. The curator has full authority over all correspondences addressed to the bankrupt debtor related to the bankruptcy budget.

Bankruptcy law has a philosophy of overcoming the problem of debtor assets that are not sufficient to pay all their debts to creditors. Moreover, bankruptcy is an exit from financial distress or a way out of financial problems that can no longer be resolved. Bankruptcy is intended as a way of separate executions by creditors by carrying out joint executions. Accordingly, the debtor's wealth can be divided equally among all creditors according to their respective rights because bankruptcy guarantees that several creditors obtain special rights over the bankrupt debtor's assets.²⁵ The process of managing and settling bankruptcy estates requires assistance from related parties, such as debtors, creditors, and supervisory judges as the giver of approval regarding all actions of the curator on bankruptcy estates. Creditors and parties related to the distribution of bankruptcy estates require good cooperation with the curator. The creditor committee may record a description of assets, debts, and receivables belonging to the bankrupt debtor carried out by the curator. To determine the percentage of bankruptcy estates approved by the supervisory judge, the curator is required to carefully prioritize payments to certain creditors, except for creditors whose special nature of receivables is regulated by law. The curator must

²⁵ Aprita (n 16) 106.

professionally deal with each creditor to prevent any conflicts of interest that can harm the debtor or other creditors. It is also necessary to establish good cooperation between the curator and debtor. Debtors are prohibited from making it difficult for the curator to manage a bankrupt account. Article 128 paragraph (1) of the *UUU-KPKPU* may allow the curator to immediately make settlements and sell all bankruptcy estates without the permission of the debtor, if: The proposal for the management of the debtor company is not submitted within the timeframe, or the proposal is rejected; and, Termination of the management of the debtor company.

Nevertheless, the curator must be able to do good cooperation with the debtor. This is because the debtor is the main source of disentangling the bankrupt account, and can then be cross-matched with data belonging to creditors. It is expected that the management and settlement of bankruptcy estates can be carried out quickly because obstacles will arise if cooperation between parties cannot run well. Although the *UUU-KPKPU* does not specify a time limit regarding the curator's duties, a curator in good faith must record the debtor's assets as soon as possible and as much as possible. Good cooperation among curators, debtors, creditors, and supervisory judges does not mean that the curator can side with one party, which can harm the other party. Therefore, the curator profession requires integrity in carrying out each duty.

The integrity of a curator in maintaining his loyalty as a party that is given the authority to properly manage and settle bankruptcy estates as a responsibility to all parties, both bankrupt debtors and creditors, is the main demand for the curator. In carrying out its duties, the curator is prohibited from acting arbitrarily from law, such as the sale of certain assets through courts, auctions, or privately.²⁶ To carry out these duties and authorities, the curator must have at least the following abilities:

- a. adequate mastery of civil law,
- b. mastery of bankruptcy law,
- c. management control (if the bankrupt debtor is a company whose business activities can still be saved); and
- d. basic mastery of finance.²⁷

²⁶ Munir Fuady (n 10) 44.

²⁷ Pane (n 17).

This capability should ideally be possessed by a curator because, in practice, there are still some curators who are less than optimal in managing and settling bankrupt accounts or often the curators are not supported by adequate human resources to conduct diligence or research on the financial statements of bankrupt debtors, leading to suboptimal protection of debtor bankruptcy estates. In some cases, the curator suggests that the opposite creditors will tend to side with the debtor. This resulted in the protection of debtor bankruptcy estates being suboptimal and not profitable for creditors.²⁸

Conflicts of interest that can affect the performance of curators' duties in management and settlement must be avoided. Therefore, before the appointment, the curator must refuse the appointment if it turns out that at the time of appointment, there was a conflict of interest or if he believed that there may be a conflict of interest. Likewise, after the appointment, the curator must immediately disclose to the Supervisory Judge, creditors and debtors if it turns out that after the appointment a conflict of interest arises. Before accepting an appointment, the proposed curator honestly considers and ensures that the curator has²⁹ the necessary skills, and sufficient resources and capacity to conduct appointments effectively, efficiently, and professionally.

If the curator is unable to fulfill one or more of the above conditions, the curator must reject the proposal. Then, if a debtor or creditor proposes a curator, before accepting the proposal, the curator must examine the possibility of a conflict of interest. If there are conflicts of interest, the curator must reject the proposal. If the curator was not previously proposed but was immediately appointed in the bankruptcy declaration, the curator must immediately check whether there is a conflict of interest before accepting the appointment. If the curator has a conflict of interest, he/she is obliged to resign from his/her appointment. The curator as a legal profession is a noble profession, or *Officium Nobile*. It is called a noble profession, because it is closely related to humanity. According to Bertens, the following requirements are formal criteria for a profession: specialization of work based on expertise and skills, permanence and

²⁸ *ibid.*

²⁹ Nating (n 2) 64.

continuity, prioritizing service over rewards or income, having high responsibility, and being grouped in a professional organization.³⁰

As a profession, the curator is bound by a professional ethic in which ethics and profession relate to providing professional services in their field to the community by prioritizing expertise in professional services as a form of their duty to the community.³¹ A professional code of ethics can be a guide for a profession as well as guarantee quality not to injure the dignity of a profession itself; for a profession, especially a curator, it upholds moral values in carrying out their duties. **Franz Magnis Suseno** suggests five criteria for strong moral values that underlie legal professional personality:

1. Honesty is the basis of a legal profession not to deny its profession. Thus, someone does not become cunning, hypocritical, or self-deceptive.
2. Authentic means to live and show his personality as it is. The personal authenticity of legal professionals, among others, not abusing their authority and not committing acts that can degrade the dignity of the legal profession itself.
3. Responsible for carrying out their duties.
4. Moral independence by not being easily influenced by the surrounding environment.
5. Moral courage, where he remains steadfast in his stance and conscience, bears the risk of conflicts, such as corruption, collusion, and nepotism.³²

In addition to upholding moral values, a curator, as a legal professional, must also be guided by the trust he has received (fiduciary duty) since the curator is required to act in good faith, act sincerely according to his expertise, and prioritize the interests of the parties. Although fiduciary duty is often associated with the responsibilities of company directors, it can also be applied to curators because a fiduciary is technically defined as someone who holds trust in others. A person is associated with the fiduciary principle if the business he is transacting or the assets he controls are not for his interests, but a task that he carries out for other people. This is in line with the task of the curator, who manages and settles the assets of the bankrupt debtor, which will later be distributed as debt payments to entitled curators. Munir Fuady states that fiduciary duty has loyalty and care components:³³

³⁰ Abdulkadir Muhammad, *Etika Profesi Hukum* (Citra Aditya Bakti 1997) 61.

³¹ Suharwadi K Lubis, *Etika Profesi Hukum* (Sinar Grafika 2008) 6.

³² Muhammad (n 30).

³³ Munir Fuady (n 10) 10-11.

1. *Duty of care*, The curator is obliged to carry out his/her duties carefully and consider every decision he/she will make regarding the bankruptcy estate.
2. *Duty of loyalty*, the curator has a responsibility for the interests of the parties, be it debtors or creditors.

From these two elements, it can be concluded that the curator is prohibited from using her authority for personal interests or the benefit of one of the parties in the management and settlement of bankruptcy estates. The benchmark to avoid violating the principle of duty of care is as follows:³⁴

- a. Possessing information about the problem to be resolved and believing the information is correct;
- b. Having no interest in the decision and having good intentions in making the decision;
- c. Possessing a rational basis for believing that the decisions taken are the best.

The term fiduciary which has the same meaning as trust is described by Munir Fuady that there are several limitations regarding this understanding in legal science, namely:³⁵

1. *Trust* refers to the trust given to a person in this case to the trustee for the benefit of another party, called the *Cestui Que Trust*, with respect to an asset that is entered into the trustee's power for the benefit of the *Cestui Que Trust*.
2. *Trust* is the right to property, movable, or immovable, which is controlled by a person for the benefit of another party.
3. *Trust* is a fiduciary relationship about an asset that involves a person who controls the property and has duties in equity to administer the property for the benefit of another party, which stems from the manifestation of the intention to create the trust.
4. *Trust* is any legal action in which the name of an asset is transferred with the intention that the property is regulated by the trustee for the benefit of the other party.
5. *Trust* is an obligation imposed on a person with trust given by another person to manage an object properly through the trust given to him. The property is not only to be controlled by that person, but also to be used for certain purposes for the benefit of third parties.

In bankruptcy law, fiduciary duty is implemented on the responsibility of the curator as trust from the debtor to manage and settle the bankruptcy estate. While carrying

³⁴ Detlev F. Vagts, as cited by Boni F Sianipar, 'Tanggung Jawab Direktur Terhadap Pemegang Saham Minoritas Dalam Pengelolaan Perseroan' (Tesis pada Program Studi Magister Ilmu Hukum Sekolah Pascasarjana USU 2008) 69.

³⁵ Munir Fuady (n 10) 34-35.

out these duties and authorities, the curator must act based on trust, skill, prudence, and diligence (duties of skill, care, and diligence) and on the provisions of the legislation. According to the Professional Standards for Curators and Administrators mentioned in Law Number 37 of 2004, due diligence concerns everything a curator does in exercising his authority in the field and in reporting on actions taken regarding the protection of debtor bankruptcy estates. In addition to the duty of care, where the curator is not allowed to act arbitrarily, in the fiduciary duty there is an element of duty of loyalty in which the curator is prohibited from acting recklessly and not being careful in carrying out his duties. Philip Lipton and Abraham Herzberg divided the duty of loyalty and good faith into duty:³⁶ To act bona fide; To exercise power for their proper purpose; To retain their discriminatory powers; To avoid conflicts of interest.

In relation to bankruptcy laws, the curator's duties can be described as follows:

1. *To act bona fide*, in carrying out his duties, the curator must be based on the bankruptcy law and UU-KPKPU.
2. *To exercise power for their proper purpose*, in carrying out the management and settlement of curators, they exercise their authority fairly.
3. *To retain their discretionary powers*, the curator has the full authority to increase or maintain the value of the bankruptcy estate. However, this authority must follow the permission of a supervisory judge.
4. *To avoid conflicts of interest*, the curator is prohibited from having an interest in personal gain or in one of the parties in the bankruptcy estate that can harm the other party.

Fiduciary duty protects the curator from broad authority to avoid confusion in carrying out his duties. As is the case with the curator's authority to take over and run the debtor's business, if the business is related to the business of a member of the curator's family, this may create a personal conflict of interest for the curator. Therefore, a supervisory judge plays a significant role in providing permission for every action taken by the curator. In practice, there are still many curators who commit fraudulent acts, and some of their actions even lead to criminal acts that result in losses for creditors because there is no legal certainty in obtaining repayment of receivables obtained from the debtor's assets.

³⁶ Philip Lipton and Abraham Herzberg, *Understanding Company Law* (The Law Book Company, Ltd 1992) 297.

In addition to the principle of fiduciary duty, the curator also imposes the principle of statutory duty on applicable laws and regulations. The principle of statutory duty explains the condition under which a person obeys the orders or rules given. In Indonesia, the curator managing and settling bankrupt assets is obligated to *UUK-PKPU* and the curator's code of ethics. The curator must be responsible for all his actions, both as a curator and as a person, for mistakes and omissions during the process of managing and settling the bankruptcy estate. There are several principles of responsibility in connection with the theory of legal responsibility.³⁷

1. The Principle of Liability Based on Fault

This principle of responsibility has been in effect for a long time, both under criminal and civil law. In the civil law system, for example, the principle of unlawful acts (*onrechtmatige daad*) is contained in Article 1365 of the Civil Code.

2. The Presumption of Liability Principle

Until a person or defendant can prove innocence, he is presumed guilty. Consequently, he bore the burden of proof. The reverse proof is the term for this principle (*omkering van bewijslast*).

3. The Principle of Absolute Responsibility (*Strict Liability*)

According to this principle, the defendant must be responsible for the losses suffered by the consumer without having to prove whether he was wrong.

4. The Presumption of Nonliability Principle

According to this principle, the defendant is not always responsible. This principle is the opposite of the principle of presumption of always being responsible; the principle of presumption of not always being responsible has begun to be abandoned.

5. The Principle of Limited Liability (Limitation of Liability)

With this principle, business actors benefit because they include an exoneration clause in their standard agreement.

Through the *UUK-PKPU* has prepared regulations that not only regulate the object of bankruptcy but also the duties and authority of subjects related to bankruptcy, one of which is the curator. Article 67 of the *UUK-PKPU* stipulates that the curator must be responsible for his/her mistakes or omissions in carrying out the management's obligations and/or settlements that cause damage or decrease in bankruptcy assets. When conducting the settlement of bankrupt assets, the curator is prohibited from taking actions that can harm the debtor or creditor, either intentionally or unintentionally. For all his actions, the curator must be held accountable as stipulated in Article 72 of the

³⁷ Jono, *Hukum Kepailitan* (Sinar Grafika 2008) 140-141.

UUU-PKPU. The curator may have acted against this law. Hence, if in carrying out the management or settlement, he is negligent or an error causes harm to the parties, the curator can be sued and must compensate for the loss. One of the elements of an unlawful act committed by a curator is real loss. Losses caused by unlawful acts can occur in the form of material and material losses. From these losses, the curator is responsible for the losses suffered by the third parties. The curator's actions that can harm bankrupt assets and third parties act outside the curator's authority given to him by law, cannot be imposed on bankrupt assets, and are the responsibility of the curator personally. On the other hand, the curator's actions are carried out in accordance with the authority given to him by law and in good faith. However, because things outside the curator's control turn out to be detrimental to the bankruptcy estate, they cannot be personally accounted for by the curator, and losses can be charged to the bankruptcy estate.³⁸

Based on Article 1365 of the Civil Code, the curator's actions can be requested for compensation if they have fulfilled the elements of an unlawful act, including:

- a. The elements against the law (*onrechtmatige daad*), the existence of errors, the losses incurred, and the causal relationship (cause and effect) between the actions and losses incurred.
- b. The act was performed with an error (*schuld*). An error can be intentional where the perpetrator is fully aware of the consequences of his actions or negligence, or where a person does not commit an act, but thus has committed an unlawful act.
- c. These actions result in losses (*schuld*). Losses can be in the form of material losses. Losses are not only limited to property losses but also losses to the human body, soul, and honor.
- d. A causal relationship must exist between the act and the outcome (cause and effect). According to Article 1365 of the Civil Code, where the act is due to his fault, the loss must have been caused by someone's activities. There was no loss for any reason.

In other words, the curator's actions are considered to have an unlawful element (*onrechtmatige daad*) if the curator does not perform his duties in accordance with the provisions of the *UUU-PKPU*. One element of an unlawful act is actual loss. Losses caused by unlawful acts can occur in the form of material and immaterial losses. In carrying out its duties, the curator shall be responsible if his actions in the management and settlement of bankrupt assets cause losses to other parties with an interest in

³⁸ Nating (n 2) 115.

bankruptcy, especially bankrupt creditors and debtors. The lawsuit against the law committed by the curator can be registered with the clerk of the district court where the bankruptcy case was decided.

The curator can also be held criminally responsible for such errors and omissions. This element of error or omission is included within the scope of criminal law. The element of error in criminal law is intentional (*dolus*) or negligent (*culpa*). A person can be held criminally if he has fulfilled the elements of error following the *nulla poena sine culpa* principle. In the heavy-duty and responsibility of the curator, the supervisory judge also plays an absolute role in granting permits related to the curator's actions. For example, every three months, the curator must submit a report to the supervisory judge regarding the condition of bankrupt assets and their duties. This time period may be extended by a supervisory judge. This report is open to the public and can be viewed by everyone free of charge. If the curator does not obtain permission from the supervisory judge, then all actions that can cause harm must be borne personally by the curator. In addition to civil and criminal sanctions, a curator can also be given administrative sanctions through the curator's code of ethics. Curators are prohibited from violating the principles of the professional code of ethics.

- a. Principles of independence and conflict of interest. The curator is prohibited from having a relationship and a relationship of interest between debtors, creditors, or other parties.
- b. Principles of action with respect to bankrupt assets. The curator personally, members, partners, employees, and relatives are prohibited from obtaining goods or interests in bankrupt assets.
- c. Professional responsibility. The act of the curator is obliged to carry out his duties seriously and responsibly in order to maintain public trust in the curator profession.
- d. Integrity principle. The curator must be guided by truth and justice in carrying out his duties by complying with the laws and regulations.
- e. Objective principle. The curator must be fair, impartial, honest, unprejudiced, and free from other interests.

Essentially, the code of ethics for the curator profession fulfills the fiduciary duty element. The application of the principles of fiduciary duty and statutory duty in the responsibilities of a curator cannot run well, even though there is a law that regulates his duties and responsibilities. A curator must behave based on personal awareness to comply with the rules for the management and settlement of bankrupt assets. Legal

awareness is the awareness that exists within an individual about the law itself. The enforcement of the rule of law will be felt in real terms if it is supported by the legal awareness of every citizen. Likewise, with the curator, the management and settlement of bankrupt assets should be carried out properly without any conflict of interest and will not harm the parties if the curator carries out his duties by complying with the *UUK-PKPU*.

Disrepancies in the Implementation of Curator's Duty and Authority based on the Principles of Statutory Duty

The authorities of curators are regulated in Article 69 paragraph (1) of the *UUK-PKPU*, which states that the task of bankruptcy asset management is under the authority of a curator. A curator is not required to ask for approval and notify the debtor in advance of activities to add bankruptcy assets, such as applying for loans to third parties. The authority of a curator, inciting their duties without the consent of the debtor to settle bankrupt assets, refers to Article 184 paragraph (1) *UUK-PKPU*. This article explains that the settlement and sale of bankruptcy assets can be carried out without obtaining approval. Despite being fully authorized to settle bankrupt assets, curators are not allowed to clean up bankrupt assets. A curator is responsible for any actions that cause losses to bankrupt assets as stipulated in Article 72 *UUK-PKPU*.

Curators are prohibited from committing authority abuse One of the cases regarding abuse of authority was found at Number 2081/Pid. B/2011/PN.JKT.PST. In this case, a curator named Denny Azani Baharudin Latief, together with a lawyer named H. Tafrizal H. Gewang, for his actions harmed parties, both debtors and creditors. The defendant was proven guilty because he fulfilled the requirements of Article 372 jo. Article 55, paragraph (1) 1st of the Criminal Code, is sentenced to imprisonment for 3 (three) years. An act can be said to be a crime if it fulfils the elements of a crime. The elements of a crime are divided into 2 (two) aspects, namely:

1. Subjective elements refer to any attributions of perpetrators. The subjective elements of a crime include the following: Willfulness (*dolus*) or negligence (*culpa*); Intention

or voornemen in an attempt or poging, as referred to in Article 53, paragraph (1) of the Criminal Code; The absence of planning or voorbedachte raad commonly occurs in premeditated murder conduct, as stated in Article 340 of the Criminal Code.

2. Objective elements refer to the physical conditions in which a criminal offense is committed out of mind.
 - a. Fulfilling the statutory formula
 - b. Unlawful nature;
 - c. The quality of the perpetrator;
 - d. Causality, relating to the underlying cause of the act and its effect.

Another example of criminal liability stems is the case of Jandri Onasis Siadari (defendant), a curator charged with document forgery. In this case, the prosecutor charged Jandri Onasis Siadari guilty of participating in the making and use of forged documents in violation of Article 263 paragraph (1) in conjunction with Article 55 paragraph (1) to 1 of the Criminal Code and Article 263 paragraph (2) in conjunction with Article 55 paragraph (1) to 1 of the Criminal Code as in the First and Second alternative charges. The defendant was then sentenced for 1 year imprisonment reduced by the detention period. However, the judge ruled that the defendant was not legally and convincingly proven guilty of committing the crime in the First Indictment in violation of Article 263 jo Article 55 paragraph (1) to the 1st Criminal Code, the Second Indictment in violation of Article 263 paragraph (2) jo Article 55 paragraph (1) to the 1st Criminal Code and the Second Indictment in violation of Article 266 paragraph (1) jo Article 55 paragraph (1) to the 1st Criminal Code. The defendant was then acquitted from the first, second, and second indictments, and his rights were restored in his capacity, position, dignity, and respect. For this decision, the prosecutor filed an appeal rejected by the judges, Decision Number 231 K/Pid/2015.

The defendant was not proven guilty that since the writer has agreed with the consideration of the Judex facti regarding False Letter or False Deed in the case a quo in Letter No. 50.01/PKPU-SAIP/JP-JOS/IV/13 dated April 15, 2013 regarding the Report of the voting results on the proposed PKPU extension and the proposed peace plan of PT:50.01/PKPU-SAIP/JP-JOS/IV/13 dated April 15, 2013 regarding the Report of the voting results on the proposed extension of PKPU and the proposed

peace plan that involved PT Surabaya Agung Industri Pulp & Kertas, Tbk addressed to Sriyatmo Joko Sungkowo, S.H., Supervisory Judge of PT Surabaya Agung Industri Pulp & Kertas, Tbk and the matching of receivables, witness Wahyu Hidayat, SH. Who gave the testimony in the trial held on June 9, 2014, and witness Herry Soebagio SH., whose testimony was heard on July 3, 2014. They testified that they were present at the tax verification meeting and the matching of receivables in the temporary PKPU dated April 12, 2013, and the content of Letter No. 50.01/PKPU-SA:50.01/PKPU-SAIP/JP-JOS/IV/13 dated April 15, 2013, is valid based on what the witness heard, saw, and experienced in the meeting on April 12, 2013. In addition, based on the testimony of the Expert, it was found that Letter No. 50.01/PKPU-SAIP/JP-JOS/IV/13 dated April 15, 2013,,:50.01/PKPU-SAIP/JP-JOS/IV/13 dated April 15, 2013,, was not an authentic deed because the letter was not created by an authorized official, This letter was made by the Defendant as the PKPU Administrator of PT Surabaya Agung Industri Pulp & Kertas, Tbk. The facts revealed in the trial clearly show that the Defendant dud bit naje a fake letter; therefore, the Judex Facti freed the defendant through a process that was correct, appropriate, and fulfilling the aspects of justice, usefulness, and legal certainty. The Curator should not be conveniently convicted of his actions in managing bankruptcy assets. The criminal responsibility of a curator, based on his/her mistake, must first be evaluated. Only when the curator has been proven to have made a mistake and has fulfilled the criminal elements can they be held criminally liable.

In addition to criminal sanctions, curators who commit maladministration and abuse of authority in managing bankruptcy may also be subject to administrative or civil sanctions. Administrative sanctions include reprimands, ordinary warnings, stern warnings, temporary suspension from membership for 3 (three) to 6 (six) months, and dismissal from membership, as stipulated in Article 21 point 6 of the AKPI Code of Ethics. A curator can also be held civilly liable based on Article 1365 BW regarding tort, and sued based on Article 78 UUK-PKPU, requiring the curator to bear the losses that occur due to negligence or unprofessionalism.

Conclusions

The principle of statutory duty is the principle of obeying laws and regulations. Furthermore, fiduciary duty is defined as someone who holds something that is entrusted to the benefit of others. In bankruptcy law, the curator plays a central role in carrying out the authority to manage and settle bankrupt debtor assets. The duties and authorities of the curator to manage and settle bankrupt assets has regulated. The application of the principles of statutory duty and fiduciary duty to the curator's responsibility is implemented with the regulation and the code of ethics of the curator. It is intended that the curator can become a curator who has integrity without any conflict of interest, has good intentions, is honest, and always thinks objectively about carrying out his duties to manage and settle bankrupt assets. In carrying out their duties, the curator's actions can cause unlawful acts that cause harm, either intentionally or unintentionally. In this unlawful act, the curator is personally responsible for civil, criminal, or administrative sanctions. Therefore, the application of the principles of statutory duty and fiduciary duty in the curator's responsibility is not only realized in the form of laws and regulations, but also must be owned by each curator as a form of legal awareness.

A curator with legal awareness of the principles of statutory duty and fiduciary duty in the curator's responsibility by complying with the regulation and the curator's code of ethics in carrying out his duties as an administrator and settlement of bankrupt assets will realize a fair bankruptcy process for all parties. Therefore, a curator must be instilled with legal awareness of his authority as a form of trust that must be personally accounted for if an error occurs.

Several forms of liability for curators who committed violations include 3 (three) aspects. The first aspect is Criminal Responsibility, which refers to the criminal liability of a curator who conducted criminal acts. Second, Administrative Responsibilities refer to the possibility that the curator is subject to administrative sanctions by the organization to violate ethics. The third aspect is Civil Liability, in which a curator can be sued for civil conduct related to irresponsibility that causes loss or bankruptcy.

Disclosure Statement

No potential conflict of interest was reported by the author.

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