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COLLATERAL GUARANTOR LIABILITY FOR DEBTS OF DEBTORS IN BANKRUPTCY

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ABSTRACT

The insolvency of the debtor has legal consequences on the rights and obligations of the parties involved, including the collateral guarantor. Collateral guarantors have the responsibility to fulfil debt payment obligations if the main debtor is unable to pay off his obligations. This study aims to analyse the obligations of collateral guarantors in cases of debtor bankruptcy based on bankruptcy law in Indonesia. The research method used is normative juridical with a statutory and case approach. The results showed that collateral guarantors still have an obligation to fulfil debt payments even though the main debtor is declared bankrupt, unless there is an agreement that regulates otherwise. In addition, in practice, there are problems related to the execution of collateral and legal protection for guarantors in the bankruptcy system. Therefore, there is a need for legal certainty and a clearer protection mechanism for collateral guarantors in order to create a balance between the interests of creditors and guarantors. This research will discuss how bankruptcy law in Indonesia regulates the obligations of collateral guarantors in the event that the debtor experiences bankruptcy. This research will also analyse the problems that often arise in practice, and provide recommendations to clarify the legal protection mechanism for collateral guarantors.

INTRODUCTION

Bankruptcy occurs when a debtor cannot meet their financial obligations to creditors, resulting in the distribution of the debtor's assets to creditors as per legal requirements. In the field of banking and finance, it is common to have third parties serving as collateral guarantors to secure the repayment of debts owed by the debtor (Adams & Finche, 2008). However, the debtor's bankruptcy status can have a legal impact on the collateral guarantor, especially in terms of collateral execution and fulfilment of debt payment obligations.

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In a property guarantee, the borrower pledges a property to the lender as security for the money borrowed. This means that if the borrower fails to repay the debt, the lender can seize the pledged property to settle the debt. On the other hand, in a personal guarantee, the borrower does not offer any property as security. Instead, a third party, such as an insurer or guarantor, assures the lender that the borrower is capable of meeting their obligations. If the borrower fails to fulfil their obligations, the third party is willing to step in and fulfil them on behalf of the borrower (Nabilasari Lesmana & Yustiawan, 2023).

Convention is an agreement between two or more persons to create, abolish, or modify an obligation. A contract is an agreement that expects the performance of an obligation (Prawirohamidjojo, 1978). In most cases, when lending or borrowing money, the borrower is usually required to provide some form of security to the lender. This security can take the form of physical belongings, known as property guarantees, or promises to pay back the debt, known as personal guarantees (Bahsan, 2020). A personal guarantee is a formal promise made by someone other than the borrower to ensure that the borrower's responsibilities to the lender are met in the event of a default (Supianto, 2015).

The assurance contract complements the arrangement of credit between the borrower and the lender (Salim, 2019). When the credit agreement is accepted by the entrepreneur (borrower) and the Bank as the lender, it creates a legal bond where contradictory interests arise. On one side, the borrower requires swift and simple access to credit, while on the other side, the lender (bank) seeks assurance and protection against delays in debt repayment by using tangible assets as collateral that can be easily enforced.

In personal guarantees, in the event of bankruptcy, the creditor has the right to demand the fulfilment of his debt in addition to the main debtor also to the insurer or can demand fulfilment from other debtors (Pangastuti, 2015). Such personal guarantees can occur if the creditor has an insurer (*borg*) or there is a third party who binds himself with responsibility for the debtor (Pamungkas, 2012). This happens when there is a guarantee agreement (*borgtocht*) or a passive guarantee agreement (Wibowo et al., 2022). Unless there is an intentional agreement, third parties can also bind themselves individually to creditors for the fulfilment of obligations based on statutory provisions. The process of resolving debt and credit issues through bankruptcy can be complex, especially with the implementation of the 2004 Bankruptcy Law. Many individuals facing challenging debt and credit problems now turn to the bankruptcy system in the Commercial Court for resolution. This is due to the law's provision of equitable legal protection for creditors, debtors, and the general public.

From the examples of bankruptcies provided, it can be inferred that when the primary debtor is declared bankrupt, the guarantor is required to assume responsibility towards the creditor if the primary debtor fails to meet their obligations as outlined in the guarantee agreement. In cases where the guarantor fails to act in good faith in meeting their obligations, the creditor has the option to petition the court to declare the personal guarantor bankrupt.

Guarantees or insurances are covered in Articles 1831 to 1850 of the Civil Code. According to the Civil Code, a guarantor or insurer is considered a debtor as well. Insuring is confirmed in Article 1820 of the Civil Code as an agreement where a third party commits to fulfilling the debtor's obligations if the debtor fails to do so. Based on the information provided, the main issue can be identified as the Responsibility of Collateral Guarantors for Debtor Debts in Bankruptcy situations.

RESEARCH METHOD

The author employs normative legal research, specifically library legal research, focusing primarily on library materials. In this approach, the author explores legal principles derived from specific legal domains, beginning with the identification of rules established in various laws and regulations.

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Normative research involves examining laws, principles, and doctrines in order to address legal questions effectively (Marzuki, 2016). This aligns with the prescriptive nature of legal studies. Normative legal research aims to generate fresh ideas, theories or concepts as recommendations for addressing current issues. Additionally, it is clarified that the method employed to address research questions is the Statutory Approach. The Statutory Approach involves an in-depth examination of all laws and regulations pertaining to the legal matters at hand, as well as the Case Approach, which involves a detailed analysis of relevant court cases. These cases are drawn from judicial rulings that have lasting legal impact in relation to the research problems. Normative legal research aims to study the application of norms in legal practice, especially regarding cases that have been decided as contained in the jurisprudence of the case that is the focus of the research.

RESEARCH RESULTS AND ANALYSIS

I. What is the liability of the collateral guarantor to the creditor after the bankruptcy judgement against the debtor?

The legal responsibility of a personal guarantor has shifted to the borrower, indicating that the borrower has been negligent in repaying the full amount of the loan received from the Bankruptcy Petitioners. As per Article 1832 of the Civil Code, the relationship between the borrower and the guarantor is considered equivalent to that of a debtor. Consequently, the guarantor is obligated to settle the borrower's debts to the creditors if the borrower fails to pay off the due or collectible debts. This principle also extends to personal guarantees initiated by the creditors in case of bankruptcy.

Thus, collateral aims to obtain credit facilities from creditors. Meanwhile, security law is a regulation regarding the binding of collateral for the fulfilment of a receivable with the aim of creating confidence for creditors to provide loan facilities to debtors (Ashibly, 2017).

In a debt-debt relationship, a third party can make payment of the main debtor's debt to the creditor as long as the third party is a creditor.

(1) a co-debtor;
(2) a party that has agreed to assume the debts of the principal debtor; or
(3) a party that has no interest, but acts for and on behalf of the principal debtor or for and on its own behalf even though it does not aim to fulfil the rights of the principal debtor (Yulia, 2018).

According to Article 1820 of the Civil Code, a Guarantor or Debt Insurer is a third party who agrees to fulfill the obligations of the Debtor in case the Debtor is unable to do so, for the benefit of the Creditor.

The primary concept of bankruptcy pertaining to the resolving of debts between debtors and creditors revolves around the principles of equal standing of creditors, equal proportionate distribution, and organized distribution. The concept of equal standing of creditors highlights that all creditors are entitled to the same rights over the debtor's assets, including both current and future possessions in relation to debt settlement. This means that all creditors are on an equal footing in terms of access to the debtor's assets. The principle of equal proportionate distribution specifies that assets serve as collective security for creditors and the proceeds from these assets should be divided among them in a fair and proportionate manner, unless certain creditors are given priority based on legal provisions for payment.

In the realm of personal guarantee liability, there exist two distinct yet interconnected contracts: the guaranteed principal agreement and the personal guarantee agreement which serves as a guarantee for the principal agreement. The debtor holds the responsibility of fulfilling an engagement against all of his possessions, with the possibility of his assets being sold through enforcement for repayment. Alongside the primary agreement, a personal guarantee agreement includes an additional contract involving a personal guarantor who assumes the obligation. In the context

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of bankruptcy, the personal guarantee refers to the debtor who is required to take on the debts of the debtor. Personal guarantee assets will only come into play to settle debts with creditors if the debtor's assets have been confiscated and sold off, but the proceeds are insufficient to cover the debts.

In the event that the debtor is declared bankrupt, the collateral guarantor (i.e. the material guarantor such as the owner of the goods pledged as collateral) has responsibilities attached to the creditor. Here are some important points related to the responsibilities of collateral guarantors after a bankruptcy judgement against the debtor:

1. Execution Rights of Separate Creditors
   - If the collateral provided is in the form of material security such as mortgages, pledges, or fiduciaries, the creditor holding the security is referred to as a separatist creditor in bankruptcy.
   - Based on Article 55 of the Bankruptcy and PKPU Law (Law No. 37 of 2004), the separatist creditor has the right to execute the collateral without participating in the bankruptcy process.
   - However, the execution must be carried out within 2 months after the bankruptcy verdict, unless extended by the supervisory judge.
2. If the Collateral is Not Enough to Cover the Debt
   - If the proceeds from the execution of the collateral are not sufficient to settle all of the debtor's debts, the creditor has the right to claim the remaining debt in the bankruptcy as a concurrent creditor (Article 1131 of the Civil Code).
3. Personal Guarantor Responsibilities
   - If there is a personal guarantor (*borgtocht* or avalis in debentures), the guarantor remains liable to the creditor even if the debtor is insolvent.
   - According to Article 1831 of the Civil Code, the guarantor is obliged to pay off the debtor's debt if the principal debtor fails to pay, unless there is another agreement that exempts the guarantor.
4. If the Guarantor is also bankrupt
   - If the guarantor is also declared bankrupt, the creditor must file a claim in the guarantor's bankruptcy proceedings.
   - The creditor's position in the bankruptcy of the guarantor depends on the type of guarantee agreement.

The collateral guarantor remains liable after the debtor is insolvent. Creditors can execute the collateral directly or file a bill in bankruptcy if the collateral is insufficient. If there is a personal guarantor, they remain obliged to pay off the debtor's debt unless there is an agreement that exempts them.

Assurance is a supplementary contract, indicating that the guarantor's responsibility is intricately connected to that of the primary borrower. Consequently, if the primary borrower is incapable of settling their debts because of insolvency, the guarantor's responsibility does not automatically cease. As per Article 1831 of the Civil Code (KUHPerdata), the guarantor is required to settle the outstanding debt if the borrower defaults, irrespective of the insolvency ruling.

A bankruptcy verdict against a debtor does not necessarily remove the creditor's right to collect from the guarantor. Within the framework of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UUK-PKPU), even though the debtor has been declared bankrupt, creditors still have the right to sue directly the parties that guarantee the debt, including collateral guarantors. This is based on the principle that collateral security is a separate agreement that still has legal force to guarantee debt repayment.

In practice, pledged collateral is often used to reduce the debtor's debt burden. However, if the proceeds from the execution of the collateral are insufficient to pay off the entire debt, the remaining debt remains the burden of the guarantor. The creditor, in this case, can demand the settlement of the remaining debt to the guarantor through ordinary

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legal procedures, without waiting for the entire bankruptcy estate administration process to be completed. This is a reflection of the principle of the guarantor's responsibility, which is additional and complementary to the debtor's obligations.

Several court decisions have confirmed that a bankruptcy judgement against a debtor does not terminate the relationship of the guarantee agreement. The Supreme Court has emphasised that creditors have the right to immediately collect from the guarantor if the debtor fails to pay, without having to wait for the bankruptcy estate complex process. Thus, the collateral guarantor must still be responsible for its obligations to creditors, even though the main debtor has gone bankrupt.

In the Indonesian civil law system, the guarantor's responsibility is regulated in Article 1820 of the Civil Code which states that the guarantor is responsible for the obligations of a third party (debtor) if the third party is negligent in fulfilling its obligations.

Bankruptcy is a legal condition in which the debtor is no longer able to fulfil its debt payment obligations to creditors, and the debtor's assets are placed under the supervision of a curator for administration (Article 1 point 1 of Law No. 37 of 2004 on Bankruptcy and PKPU). However, the debtor's bankruptcy does not eliminate the creditor's rights against the guarantor.

This is confirmed in Article 289 of the Bankruptcy Law, which states that 'The declaration of bankruptcy against the debtor does not eliminate the rights of creditors against the guarantor or other parties who are also responsible for the debt.' This means that creditors can still sue the guarantor even though the bankruptcy process is still ongoing.

Supreme Court decisions have also consistently supported this principle, where in several decisions it was affirmed that the guarantor still has independent responsibility, as long as the guarantee agreement is validly made and not cancelled.

However, the guarantor also has the right of regress (the right to request reimbursement) to the debtor if he has paid off the obligation to the creditor (Article 1839 of the Civil Code). Unfortunately, in the context of bankruptcy, this regress right will make the guarantor a concurrent creditor whose position is weak and at risk of not getting repaid.

Overall, the guarantor's liability to creditors remains even though the principal debtor has been declared bankrupt. This is due to:

- Accessoir Nature of Guarantee: The guarantor's obligation is closely linked to the debtor's principal debt, so the debtor's failure to pay the debt (which is even reinforced by the bankruptcy judgement) does not eliminate the guarantor's obligation.
- Creditor's Right to Collect Directly: Creditors have the right to demand payment from the guarantor without having to wait for the entire bankruptcy process to be completed, especially when the executed collateral is insufficient to fulfil the total debt.
- Firm Legal Basis: Both the Civil Code and UUK-PKPU provide a clear legal basis that the debtor's bankruptcy decision does not necessarily terminate the guarantee agreement agreed upon by the parties.

Therefore, the legal answer is that the collateral guarantor remains responsible to the creditor to settle the debt payment obligations of the main debtor, including paying off the remaining debt if the proceeds from the execution of the collateral are insufficient, so that the creditor's position is not disadvantaged despite the debtor's bankruptcy. Collateral guarantors remain liable to creditors after a bankruptcy judgement against the main debtor.

Such liability is not erased by the debtor's bankruptcy status, and creditors have the right to directly demand repayment from the guarantor, regardless of whether the collateral has been executed or the bankruptcy process has been completed.

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The guarantor can be held fully liable for the guaranteed debt, and if he repays the debt, he has the right to demand repayment from the debtor (right of regression). However, the right of regression depends on the outcome of the bankruptcy estate and is very unlikely to be fulfilled in full.

II. Legal position of collateral guarantor in debt agreement if the main debtor is declared bankrupt?

The law requires guarantors to provide assets as a form of responsibility for the debtor's obligations. This applies to existing debts as well as those that will arise in the future, if the debtor fails to fulfil his obligations (default). As explained earlier, personal guarantee agreements are accessory in nature. However, in the fulfilment of obligations, this agreement can function as a subsidy to reduce the debtor's responsibility. That is, if the debtor is unable to fulfil his obligations, then the guarantor is responsible for paying off the debt. These guarantees include general guarantees and special guarantees

When the principal debtor is declared bankrupt, the collateral guarantor remains responsible for fulfilling the payment obligations to the creditor. This is in line with the principle that the guarantor acts as a party who bears the risk if the debtor fails to fulfil its obligations. The guarantor is obliged to provide accountability to the creditor if the principal debtor is unable to fulfil its obligations in accordance with the agreed collateral agreement.

In a debt and credit agreement involving collateral, the position of the collateral guarantor after the debtor is declared bankrupt depends on the type of collateral provided. In general, there are two types of guarantors in the context of debt and credit agreements, namely material guarantors (collateral security) and personal guarantors (*borgtocht*/suretyship).

1. Position of the Collateral Guarantor

The party providing security in the form of an object (for example, the grantor of a mortgage, fiduciary, pledge, or mortgage) does not automatically become insolvent when the debtor becomes insolvent. However, their status in the debtor's bankruptcy can be explained as follows:

a. Separate Creditors

- If a creditor has a lien, fiduciary right, pawn, or mortgage, then it is considered a separatist creditor (Article 55 of Law No. 37 of 2004 on Bankruptcy and PKPU).
- This means that the creditor can execute the collateral directly without following the bankruptcy process.
- However, if within 2 months after the bankruptcy verdict the execution has not been carried out, the right of execution must be subject to the supervision of the curator.

b. Position of the Collateral Guarantor

- If the collateral pledger is a third party (not the debtor), such as an affiliated company or an individual pledging its assets, then it does not automatically participate in the debtor's bankruptcy.
- However, the assets pledged as collateral can still be executed by the securitisation creditor.
- If the proceeds from the sale of the collateral exceed the value of the debt, the remaining funds will be returned to the guarantor.
- If the proceeds are less, the creditor can collect the remaining debt in the bankruptcy process as a concurrent creditor.

2. Position of Personal Guarantor (*Borgtocht* or Suretyship)

If the guarantor not only pledges the object, but acts as a personal guarantor (borg or surety), then the position is different:

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- Under Article 1831 of the Civil Code, the personal guarantor remains liable for the debtor's debt if the debtor fails to pay (including in bankruptcy).
- The creditor can directly collect payment from the personal guarantor.
- If the personal guarantor is also insolvent, the creditor must file its bill in the guarantor's bankruptcy.

A court's decision to declare someone bankrupt does not mean they lose their ability to carry out legal actions, but it does restrict their control over managing and transferring their assets (Adrian, 2009). This means the individual can still engage in activities like getting married, receiving grants, or representing others. Essentially, bankruptcy only affects the assets of the person who is bankrupt, and they are not placed under guardianship. Instead, a curator is responsible for overseeing the management and transfer of their assets. Regarding the assets obtained, the debtor can still perform legal actions to receive these assets, then the assets will be included in the bankruptcy estate.

Guarantees or guarantees are regulated in Articles 1831 to 1850 of the Civil Code. From the provisions in the Civil Code, it can be concluded that the guarantor or insurer is also a debtor. The guarantor or insurer is also a debtor who is obliged to pay off the debtor's debt to the creditor or creditors if they do not pay the debt that is due and or collectible. Because the guarantor or insurer is a debtor, the guarantor or insurer can be declared bankrupt under the Bankruptcy Law.

In case the person who owes money goes bankrupt and the debt is secured by an individual guarantee or the guarantee himself acts as collateral, the rules dictated in Article 1131 and Article 1132 of the Civil Code will be relevant. This means that all possessions of the guarantor, whether they are movable or immovable, both current and future, will serve as guarantee for the agreement with creditors. Consequently, the guarantor's assets will be considered part of the bankruptcy estate, as failing to do so would render the agreement between the creditor and the guarantor pointless.

Article 1132 of the Civil Code ensures that all creditors are on an equal footing, as it states that all assets are used as collateral for the debts owed. This provision guarantees that all creditors have a claim on the same assets owned by the debtor, as outlined in Article 1131 of the Civil Code. This includes both current and future movable and immovable property owned by the debtor, which serves as security for their individual obligations.

However, in the last sentence of Article 1132 of the Civil Code, the equal position among creditors can be overridden due to the right to precedence with valid reasons for precedence. So, it can be concluded that the existence of a security right does not provide a guarantee that the debt will be repaid, but it only provides a better position in its collection, than a creditor who does not hold a security right.

In this case, the principle of *paritas creditorium* applies where the payment or repayment of debts is carried out in a balanced manner (Zahlan & Barthos, 2023). Thus, in the bankruptcy of the debtor, the creditors holding personal security rights will only be concurrent creditors, who compete in the fulfilment of their debts, because in personal guarantees there is no specific object as a security object. Security rights give a better position to the creditor who guarantees it. Better here is measured from creditors who do not promise special guarantees, namely concurrent creditors who basically have the same high position, so they have to compete for repayment from the proceeds of the execution of the debtor's property. In addition, property security rights also make it easier for the creditor concerned to take repayment, because the creditor is given the right of *paratexecution* (Usman, 2017).

Property security rights are rights that give the creditor a better position, because:

1. Creditors take precedence and are facilitated in collecting their claims from the proceeds of the sale of certain objects or a group of objects owned by the debtor.
2. There are certain objects belonging to the debtor that are held by the creditor or that are bound by the rights of the creditor, which are valuable to the debtor and can put psychological pressure on the debtor to fulfil his obligations

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properly to the creditor. Here, there is a kind of psychological pressure on the creditor to repay the debt because the object used as collateral is generally an item that is valuable to him. Human nature to try to maintain what is valuable and has become his property, is the basis of the law of guarantee.

According to Article 1820 of the Civil Code (KUHPerdata), a guarantee agreement (*borgtocht*) is an agreement in which a party, for the benefit of the creditor, binds himself to fulfil the obligations of a third party, if the third party does not fulfil his obligations.

The guarantor has the characteristic of being an accessoir to the main agreement (debtor's debt). However, in the event of bankruptcy of the main debtor, the guarantor's position is not necessarily removed. Based on Article 1831 of the Civil Code, the guarantor is still obliged to fulfil the debt if the debtor is unable to repay it, including in the event of bankruptcy.

In addition, Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UUK-PKPU) also provides space for creditors to continue to submit bills to guarantors. In Indonesian bankruptcy law, the bankruptcy of a debtor does not extinguish the rights of creditors against third parties who guarantee the debt.

Furthermore, the Supreme Court in its various decisions also confirmed that creditors have the right to directly collect from the guarantor, without having to wait for the bankruptcy process to be completed, as long as there is a legal basis for a valid guarantee agreement.

The collateral guarantor still has a legal obligation to fulfil the debt repayment of the bankrupt main debtor. The debtor's bankruptcy status does not remove the guarantor's obligation, because the guarantee is a separate agreement that is accessoir, but has legal consequences that remain valid despite the debtor's bankruptcy.

Creditors can immediately demand repayment from the guarantor, either through ordinary civil channels or collateral execution, as long as there is no clause that delays the guarantor's obligation until the bankruptcy estate is completed.

Position when Debtor is Bankrupt:

- When the main debtor is declared bankrupt, the guarantor is still responsible for paying off the debt to the creditor.
- Creditors do not need to wait for the bankruptcy process to be completed to collect from the guarantor.
- The guarantor is not automatically released from liability, unless he can prove that the debt has been paid through the bankruptcy estate.
- If the guarantor pays the debt, then he has the right of subrogation (replacement of the creditor's position) against the debtor's bankruptcy estate.

The legal position of the collateral guarantor in a debt agreement when the main debtor is declared bankrupt is as a guarantor of property that is outside the bankruptcy process, but is bound to the object of the guarantee provided. Creditors have the right to execute the collateral even though the debtor is in the process of bankruptcy, with certain provisions in accordance with the Bankruptcy Law and the Property Guarantee Law.

CONCLUSIONS

The bankruptcy of the debtor does not necessarily remove the obligations of the collateral guarantor for the guaranteed debt. Based on the principles of civil law and the provisions in the Indonesian Bankruptcy Law, the guarantor remains responsible for fulfilling its obligations if the principal debtor fails to repay its debts, including in the event that the debtor is declared bankrupt. Therefore, the guarantor can be held legally liable by creditors, either through collateral execution or civil lawsuit.

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However, the exercise of creditors' rights against the guarantor must still pay attention to legal procedures and principles of justice, so as not to harm the guarantor who is actually a third party. In practice, the position of the guarantor needs to be given adequate legal protection so as not to be the most disadvantaged party in the bankruptcy process of the main debtor.

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