

DOI: <https://doi.org/10.24297/jssr.v16i.8787>

## The Legal Status of Appraisal of Materials Guarantee for Bankruptcy Process of Indonesia

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### Abstract

This research studies the legal status of a material guarantee for the bankruptcy process of Indonesia. The purpose of this research is to find out the legal status of whether the material guarantee that has been declared bankrupt by the appraisal because of not fulfillment of repayment of the debtor to the creditor can be transferred on non-bankruptcy status? Moreover, what is the creditor's execution rights to the debtor's material guarantee? This research uses a *normative legal research* method, namely: legal research that is done with the purpose of discovering the principles and philosophical base (*dogma or doctrine*) of positive law, and the research of legal discovery efforts *in concreto* that is suitable to be implemented to solve a particular legal case. The result of this research is that material guarantees that have been determined as Bankruptcy cannot be transferred to their status when they are sold with a non-bankrupt status before a written decision by the judge justified the status. This shows obedience to the principles of legality and legal certainty, that selling the bankrupt assets with the status of (non bankrupt assets) cannot be justified according to the law. If the curator still continues to sell the bankrupt assets, that process is illegal, including the execution of the selling according to the law. When it was being declared of bankrupt the total value of the material guarantee is assessed by the appraisal to be sufficient for paying all debts to the creditor, then it became the guarantee of repayment of the debtor, but if the value of the material guarantee valued by the appraisal is smaller than the debt, then there must be a reassessment in order to make justice for debtors and creditors. Mortgage-holding creditors, fiduciary guarantees, mortgage rights, mortgages, or other collateral rights, can execute their rights as if Bankruptcy did not occur, but there are several receivables that must be matched before executing their separatist rights.

**Keywords** : Legal Status, Appraisal, Estate Guarantee, Bankrupt, Bankruptcy, Execution.

### INTRODUCTION

Bankruptcy is a condition of the debtor who is under pressure of inability to do something or achievement. According to Hadi Shubhan, Bankruptcy is a situation where the debtor is unable to make payments on the debts of his creditors. The situation of being unable to pay is usually caused by *financial distress* from the debtor business that has suffered a decrease (M. Hadi Shubhan 2012).

In Republic of Indonesia Law Number 37 of 2004 about the Bankruptcy and Delaying obligation to Pay Debt Article 2 section (1) states, "Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt by a court decision, both at their own request or at their own request of one or more creditors".

From Article 2 section (1) of the Law, the status of Bankruptcy does not occur on its own, but requires a judicial institution's decision as a form of legality for a debtor's condition to be declared on bankrupt. Accordingly, Bankruptcy is a court decision which results in general confiscation of the entire assets of bankrupt debtors, both existing and future ones. In Indonesian republic of Law Number 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations Article 1 number 1, states, Bankruptcy is a general confiscation of all the assets of a Bankrupt Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervising Judge as regulated in the Law. The management and settlement of the Bankruptcy are carried out by the curator under the supervision of the supervising judge with the main purpose of using

the proceeds of the sale of these assets to pay all debts of the bankrupt debtor proportionally and in accordance with the creditor structure.

Algra stated that bankruptcy is "*faillissementis een gerechtelijk beslag op het gehele vermogen van een schuldenaar ten behoeve van zijn gezamenlijke schuldeise*". (bankruptcy is a general confiscation of all assets of a debtor (the debtor) to pay off debts to the creditor (the debtor) (Algra, N.E 1974).

Henry Campbell stated, "*bankrupt is the state or condition of one who is unable to pay his debts as they are, or become, due*" (Henry Campbell Black). Bankruptcy can be said as an alternative solution that is commercial to get out of the problem of debts that have debtors, where the debtor is unable to pay off his debts to creditors. The condition of the debtor's inability to pay off the debts that have matured is a condition that is created naturally, therefore, the procedure to submit a request to determine bankruptcy status to the court is the right decision. The presence of Bankruptcy as a general confiscation of the assets of bankrupt debtors cannot be separated from the purpose of the law, namely to distribute its estate guarantees equitably to creditors.

Article 55 of Indonesian Republic Law Number 37 Year 2004 Concerning the Bankruptcy and Suspension of Debt Payment Obligations, "every creditor who holds a mortgage, liens or guarantee rights over other objects, can execute his rights as if bankruptcy did not occur".

Article 55 provides the flexibility (*freedom*) for creditors to execute their rights as if Bankruptcy did not occur to the debtor. This shows, if the debtor is unable to pay debts that are past due, then the creditor can execute the collateral guaranteed by the debtor with the applicable terms and conditions.

The problem is, when the estate or goods that are guaranteed by the debtor to the creditor are initially higher than the value of the debtor's debt to the creditor, and after the debtor is declared bankrupt by the court, the reality is that after the appraisal is assessed, the value of the object or guarantee is lower than the debtor's debt value to the creditor. This problem often occurs in Indonesia, where the value of goods or estate guaranteed by the debtor to the creditor after an appraisal is assessed, the value is lower than the value of the debtor's debt to the creditor after being declared bankrupt by the court.

The condition of the decline in the value of the guarantee is a condition that is sometimes not predicted by the creditor, so that the creditor loses. But on the other hand, the condition of Bankruptcy is not an indulgence or will made by the debtor, but because of the decline or decline in the debtor's business, therefore the debtor is declared bankrupt unable to repay debts which are due to the creditor. This becomes the author's study of how the legal status of the collateral in the event of Bankruptcy of the bankruptcy process after being appraised by the appraisal? Can the guarantee that has been declared bankrupt by the appraisal not meet the debtor's debt repayment to the creditor can be transferred to non-bankruptcy status? And what about the execution rights?

## **MATERIALS AND METHODS**

This research uses a normative legal research method (*normative legal research*), namely: a legal research which is done by the purpose of discovering the principles and philosophies (*dogmas or doctrines*) of positive law, and research in the form of legal discovery efforts *in concreto* that is suitable to be implemented to complete a certain legal matters. This type of research is commonly referred to as dogmatic study or commonly known as *doctrinal research* (Soetandyo Wignjosoebroto 1974). This *Doctrinal Research* is also called *normative legal research*.

Related with this, Hadin Muhjad and Nunuk Nuswardani provided an explanation, legal research is often called as normative research, because it studies about legal issues from the perspective of legal science deeply to the legal norms established (Hadin Muhjad & Nunuk Nuswardani 2012).

The approach used is *the statute approach, conceptual approach, historical approach, and case approach*. Types and sources of data, are primary data, secondary and tertiary data. While the data collection method is done by identifying and tracing relevant with the legislation and cases, then analyzed using theoretical instruments the results are presented in the form of descriptive analytic or prescriptive analytic.

## **RESULT AND DISCUSSION**

### **1. The definition and Short History of Bankruptcy Law for the Bankruptcy Process of Indonesia**



Bankruptcy law has existed since Roman times. The word bankrupt in English is called *bankrupt*, comes from Italian law, namely *Banca Rupta*. Meanwhile in Europe of middle century, there was the practice of Bankruptcy by destroying the benches of bankers or traders who fled secretly with the creditors' property. It was similar to what happened in Venice (Italy), *banco* (bench) of lenders (bankers) when it was unable to pay debts or business failed then bankrupt has been completely broken or destroyed (Munir Fuady 2002).

The rules surrounding Bankruptcy are listed in *Wetboek Van Koophandel and Reglement op de Rechtsvoordering* (RV). Bankruptcy is regulated specifically in KUHD, Chapter III with the title *Van de Voorzieningen in Geval van Onvormogen van Koopliden*. Then it was replaced with a *validation Verordening* that was valid based on Staatblaads Number 276 of 1905 and Staatsblaad Number 348 of 1906. Then created the Government Regulation in Lieu of Law Number 1 of 1998 concerning Amendment to the Bankruptcy Law which was later replaced by the Government Regulation as the Law by Indonesia republic law Number 4 of 1998 concerning the Establishment of Government Regulations in lieu of Law Number 1 of 1998 concerning the Amendment to the Law on Bankruptcy into Law regulation (Anonym 2019). Then resulted Indonesia republic of Law Number 37 Year 2004 rearding Bankruptcy and Deferral of Debt Payment Obligations.

Law Number 37 of 2004 about Bankruptcy normatively states that "bankruptcy is a general confiscation of all the assets of a bankrupt debtor whose management and settlement is carried out by the Curator under the supervision of the Supervising Judge as regulated in this Law".

Based on the above understanding, the existence of a common seizure element, namely confiscation of all the assets of the bankrupt debtor. This general definition of confiscation is to distinguish it from special confiscation, such as *revindicatoir beslag*, *conservatoir beslag* danan *ecsecutor beslag* all of which are all beslag or special confiscation because certain objects. Although the Bankruptcy is said to be general confiscation as regulated in Article 21 of the Bankruptcy Law of 2004, but there are some objects which are out of confiscated, means that they are not confiscated (Ari Purwadi 2019).

## **2. Legal Status of Goods or estate guarantee of Bankrupt thing in the Bankruptcy Process After Appraisal**

The U.S. has two different personal bankruptcy procedures Chapter 13. Chapter 13 bankruptcy is intended for debtors who earn regular incomes. Under it, debtors do not increase assets in Bankruptcy, but they must propose a plan to repay a portion of their debts from future income, usually from three to five years. The plan goes in to effect as long as the bankruptcy judge accepts it, i.e.; creditors do not have the right to block repayment plans. (Scott Fay, Erik Hurst, Michelle J. White 2002).

In any debts between debtors and creditors, estate guarantee is very necessary, this is intended if the debtor is unable to do payments, then the guarantee is useful, so that the guarantee will be tied by an appointment in accordance with the provisions of the applicable laws and regulations.

The debt guarantee can be the goods (estate) so that it is a material guarantee or in the form of a debt insurance pledge, so it is an individual guarantee. Material guarantees provide material rights to the guarantee holders (M. Bahsan 2007). A guarantee appointment is an *assesoir* agreement, where the existence of this guarantee is an appointment that is associated with the principal appointment, in this case the credit appointment.

In a bankruptcy institution actually regulates how if a debtor cannot pay his debts, as well as how the debtor's responsibility, in his authority with assets that are still or will have it (Sriti Hesti Astiti 2014).

In the case of Bankruptcy, it is important to note that the law must effort to overcome the reluctance of debtors to fulfill their obligations, by determining the level of creditors and priority payments on their debts, by taking measures to prevent debtors from getting rid of their assets and by making arrangements about settlement of assets or rehabilitation of the debtor. Therefore, there must also be a guarantee so that the debtor is treated carelessly. ((Sriti Hesti Astiti 2014).

Retnowulan explained that a credit guarantee is a guarantee either it is object or person given by the debtor to the creditor, which is needed to facilitate the lending and is intended to ensure that creditors are not harmed, if the debtor breaks promises or is unable to repay the loan on time. (Retnowulan Sutantio 1987)

The function of the guarantee is give the right and power to the (creditors) of the bank to get repayment from the auction results of the object guaranteed, if the debtor does not pay back the debt on time specified in the agreement. (Retnowulan Sutantio 1987)

Why is guarantee important in debts, because it has its own uses. According to Thomas the purpose of guarantees is to: (Thomas Suyatno 1995)

1. Gives the right and power to the bank to get repayment from the selling of the guarantees items, if the customer makes a promise of default, that is not repaying the debt at the time determined on the appointment..
2. Certifying that customers participate in transactions to finance their business, so that the possibility to leave their business or project at harm of themselves or the company can be prevented at least from being able to do that.
3. Support the debtor (the people who get debt) to fulfill the credit appointment. Especially regarding repayment in accordance with the agreed terms so that he does not lose the wealth that has been pledged to the bank

In addition, guarantees as the legal protection for creditors, in Article 1131 the Civil Code has generally provided guarantees for creditors, states that: "All estate debt, both movable and immovable, both existing and the new one will be later, will be responsible for all individuals ".

If being paid attention to the editorial of Article 1131 of the Civil Code, it can be mapped, namely:

1. Guarantee equal distribution of debtor assets to creditors.
2. As guarantee for debtor's assets to creditors.
3. Creating a good attitude between debtors and creditors.
4. Creating conditions for the creditor's unfavorability of the debtor.
5. Creating legal protection for creditors.

For the next Article 1131 of the Civil Code is affiliated with 1132 Civil Code, stating, "the material is a guarantee for all those who impose it on him; the sales income of the estate is divided according to balance, that is, according to the size of the respective receivables, except if among the debtors there are valid reasons to come first ". Therefore, Article 1132 of the Civil Code shows that every creditor has the same position as other creditors, unless otherwise stipulated by the Law, because he has a valid reason to take precedence over other creditors.

Article 56 section (3) of Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Obligations for Debt Payments, stipulates that "During the period of suspension, the Curator may use bankrupt assets either they are immovable or movable estate or sell bankrupt assets in the form of movable objects which is under the control of the Curator in the context of the business continuity of the Debtor. "Explanation of Article 56 section (3) of Law Number 37 of 2004 regarding bankruptcy and Suspension of Debt Payment Obligations, states:" Bankrupt assets that can be used for sale by curators are limited to supplies or movable property, even though the bankrupt estate is burdened with the guarantee rights to the estate. "Whereas the reasonable protection is protection that needs to be given to those concerned to protect the interests of creditors or third parties whose rights are suspended, with the transfer of said assets concerned, between another:

1. Compensation for impairment of bankruptcy assets.
2. Net selling results.
3. Substitution estate rights.
4. Fair rewards and other cash payments (*guaranteed debt*).

Bankruptcy as an effort to solve the debt payment obligations involves several parties. The parties involved in the Bankruptcy may arise because of the Law, or because of the involvement of those who feel interested in the bankruptcy process. According to Sutan, Bankruptcy contains elements, namely (Sutan Remy Sjahdeini 2009):

1. There is a general confiscation of all the wealth of the debtor
2. For the important of all creditors
3. The debtor is in a state of stopping paying

4. The debtors do not lose their civil rights
5. As of the bankrupt statement the Debtor loses the right to take care of his wealth
6. Realizing the legal principles stated in Articles 1131 and 1132 of the Civil Code.

Article 2 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations provides bankruptcy conditions and decisions, namely:

1. The debtors who have two or more creditors and do not pay off at least one debt which is due and collectible, are declared bankrupt by a court decision, both on their own request and at the request of one or more of their creditors.
2. A request can also be submitted by the prosecutor's office in the public interest.
3. If the Debtor is a bank, the request for Bankruptcy can only be submitted by Bank of Indonesia.
4. In this event that a debtor is a Securities Company, Stock Exchange, Clearing Guarantee Institution, Depository and Settlement Institution, the application for a bankruptcy statement can only be submitted by the Capital Market Supervisory Agency.
5. In the case of a Debtor is an Insurance Company, Reinsurance Company, Pension Fund, or a State-Owned Enterprise engaged in the field of public interest, an application for a bankruptcy statement can only be submitted by the Minister of Finance.
6. Unpaid debt must be due and collectible

Therefore, before the bankruptcy statement decided by the court, a debtor cannot be declared bankrupt, so when there is a court ruling that the debtor is in Bankruptcy, the provisions of Articles 1131 and 1132 of the Civil Code apply.

The law regulates several ones who involved in the bankruptcy process, namely bankrupt applicant creditors, applicant debtors or bankrupt defendants, curators, supervisory judges and judges (courts) who decide cases related to the bankruptcy process. The other ones may be involved in the bankruptcy process including attending creditors' meetings, appraisal (guarantee appraisers) and Notaries if necessary.

The requirements for Bankruptcy in Article 2 section (1) of Law Number 37 of 2004 concerning Bankruptcy and Delaying Obligation of Debt Payment, state that: "*A debtor who has two or more creditors and does not pay at least one debt that is due and can be billed, declared bankrupt by a court decision, either from its own request or at the request of one or more of its creditors*".

With respect to court decisions regarding bankruptcy statements, the following consequences may be made: (Sutan Remy Sjahdeini 2000)

1. Bankrupt debtors lose the right to manage their assets which are included in bankrupt estate. All debtor agreements arising after the decision of a bankruptcy are decided cannot be paid from the bankrupt estate unless they benefit the assets of the bankrupt. Bankruptcy decisions by the court do not result in the debtor losing his ability to carry out legal actions (*volkomen handelingebevoegd*) in general, but only losing his power or authority to administer and transfer his assets. The debtor is not under control. Thus the debtor can still perform other legal actions concerning himself such as marriage, receiving a grant, or acting as a ruler.
2. As a result of Bankruptcy for Creditors, which has the role to settle various bills submitted by creditors to their debtors, each of which has different characters, values and interests, the process of Bankruptcy can manage these differences through the mechanism of collecting receivables collection so that each creditor does not individually settle his bills. With the verdict of the bankrupt statement, all bankruptcy estates are managed and controlled by the curator for the benefit of all creditors of supervising the implementation by the Supervising Judge. All claims regarding bankruptcy property rights and obligations must be filed by or against the curator. All lawsuits filed in court against the debtor as they aim to obtain the repayment of an agreement from bankruptcy estates and the case is ongoing, fall by law with stated the decision of bankruptcy statement to the debtor.
3. Bankruptcy has consequences for all creditors, including creditors for holders of guarantee, pawn, mortgages and fiduciary. As a creditor guaranteed by guarantee rights, the creditor of the guarantee holder certainly hopes that the guarantee he received can be used to pay off the debtor's obligations.

The separatist creditor is very interested so that his rights arising from binding guarantees submitted by the debtor to him, can still be used even though the debtor has declared bankrupt. The problems for separatist creditors will arise, if the value of the guarantee after the execution of the guarantee is not sufficient to pay off all the obligations of the bankrupt debtor to him.

Article 41 of the Republic of Indonesia Law Number 37 Year 2004 Concerning Bankruptcy and delaying obligations for debt Payments states:

1. For the purpose of bankruptcy estates, the Court may be requested to cancel all debtor's legal actions that have been declared bankrupt which harm the interests of the Creditors, which are carried out before the verdict of the bankruptcy statement is stated.
2. The cancellation as referred to in paragraph (1) can only be done if it can be proven that at the time the legal action was carried out, the Debtor and the party with whom the legal action was carried out or knew that the legal action would affected for the Creditors.
3. Excluded from the provisions referred to section (1) are legal actions of the Debtor which must be done based on the agreement and or due to the law.

For example, PT. X was declared bankrupt by the court, when declared bankrupt the total value of assets owned by PT. X 160 Billion will be enough to pay all bills of creditors, because the value of the assets that have been appraised is greater than the market price. Appraisal that has been done by the creditor holding the guarantee (separatist) for the guarantee rights is Rp. 160 billion, and it back out the amount is greater than the market price of Rp. 120 billion. This shows that the value of the guarantee is far greater than debtors' debts to creditors, this means the debtor's position is still in a safe position, when compared to for example the value of assets owned by PT. X Rp. 160 billion, apparently after appraisal by the creditor the value of the asset is smaller than the market price, for example Rp. 175 Billion

After PT. X is declared bankrupt by the court, then assets that have been determined as Bankruptcy can not be sold with a non-bankrupt bankruptcy status before there is a written decision of a judge that justifies the change in status. This shows obidience to the principles of legality and legal certainty, that the sale of bankrupt assets (bankrupt assets) with non-bankrupt status (not bankrupt estate) cannot be justified according to law. If the curator continues to sell the bankrupt estate, therefore it is illegal, including the execution of the sale according to law.

This is in accordance with Article 189 paragraph (1) and (2) of the Law of Indonesia Republic Number 37 of 2004 concerning Bankruptcy and Delaying Obligations of Debt Payment, "The curator must compile a list of distributions for approval from the Supervising Judge. The distribution list contains details of revenues and expenses including the Curator's wages, the name of the creditor, the matching amount of each credit, and the part that must be received by the creditor. This shows that every action in the management and settlement of assets including the planned list of the distribution of bankruptcy sales proceeds must obtain the approval of a supervisory judge. If the curator continues to sell bankrupt assets in a non-bankrupt bankruptcy status (not bankrupt estates), the supervisory judge must report the matter to the case adjudicating judge.

The decision of the supervising judge must be carried out by the curator. The curator is obliged to submit all actions taken to the supervising judge within a certain period. The curator does not have the authority to issue stipulations on bankruptcy assets (bankruptcy estate) that result in third parties.

In accordance with Article 65 of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Delaying Obligations of Debt Payment, the main task of a supervisory judge is to supervise the management and settlement of bankrupt assets.

The results of recent overseas research initiatives in a number of countries have sought to promote entrepreneurship through relaxing the legal consequences of personal Bankruptcy. Whilst there is an intuitive link, relatively little attention has been paid to the question empirically, particularly in the international context. We investigated the relationship between bankruptcy laws and entrepreneurship using data on self-employment over 16 years (1990–2005) and fifteen countries in Europe and North America. We compile new indices reflecting how "forgiving" personal bankruptcy laws are. These measures vary over time and are studied across countries.

We show that bankruptcy law has a statistically and economically significant effect on self-employment rates when controlling for GDP growth, MSCI stock returns, and a variety of other legal and economic factors (John Armor, Douglas Cumming 2008)

According to Igor Livshits, James MacGee, Michèle Tertilt (2007), Consumer bankruptcy provides partial insurance against bad luck, but, by driving up interest rates, makes life-cycle smoothing more difficult. We argue that to assess this trade-off one needs a quantitative model of consumer bankruptcy with three key features: life-cycle component, idiosyncratic earnings uncertainty, and expense uncertainty (exogenous negative shocks to household balance sheets). We find that transitory and persistent earnings shocks have very different implications for evaluating bankruptcy rules. More persistent shocks make the bankruptcy option more desirable. Larger transitory shocks have the opposite effect.

### 3. Creditors' Rights in Execution of Goods or Estate Guarantees of the Bankruptcy Process

According to Michelle J. White (2007), From 1980 to 2004, the number of personal bankruptcy filings in the United States increased more than five-fold, from 288,000 to 1.5 million per year. By 2004, more Americans were filing for Bankruptcy each year than were graduating from college, getting divorced, or being diagnosed with cancer. In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became law. It made bankruptcy law much less debtor-friendly. Personal bankruptcy filings fell to 600,000 in 2006

Attempts to study the bankruptcy filing decision have been hampered by the lack of household-level data on bankruptcy filings. In an early study, White (1987) regressed the aggregate bankruptcy filing rate by county on the bankruptcy exemption level for the relevant state and other variables. She found that the bankruptcy filing rate was positively and significantly related to the exemption level. (Scott Fay, Erik Hurst, Michelle J. White 2002).

In Indonesia there is a simple guarantee institution, as a guarantee of small loans given to small entrepreneurs, farmers, has been endeavored. All carried out in the form of simple, easy procedures, conditions that are not burdensome with a light guarantee. The form of collateral institutions mostly have international characteristics, known in almost all countries and modern legislation, such as fiduciary security institutions, leasing institutions, mortgages, *credietverband*, *pawn*, *borgtocht* (Sri Soedewi Masjchoen Sofwan 1980).

In Europe, especially in the Netherlands, the majority of purchases and construction of public housing are done by way of credit requests from banks with mortgages guaranteed on houses that they are still buying or will be built as long as the land is already there. (Sri Soedewi Masjchoen Sofwan 1980)

In European, British, American, and Asian countries regarding collateral institutions which generally occur in practice, as well as having been regulated in laws, which are generally grouped into 2 (two) parts, namely: (Sri Soedewi Masjchoen Sofwan 1980)

1. Guarantee institutions by controlling the object, possessory security consists of: (a) Pledge; Pand (b) Lien; retentrecht; droit de retention. (c) Mortgage with possession. (d) Hire purchase; huurkoop. (e) conditional sale. (f) Credit sale; koop op afbetaling.
2. Guarantee institutions without controlling the object, consisting of: (a) Mortgage; hypotheek, hipotheque. (b) Cahttel Mortgage. (c) Fidusiary transfer of ownership; security transfer of title; transfer of ownership; Fiduciair eigendomsoverdracht.

According to Andreas Lehnert and Dean M. Maki, consumer bankruptcy laws, which vary across states and over time, permit debtors to keep assets below a statutory exemption while debts are forgiven. (Andreas Lehnert and Dean M. Maki 2002)

Obligations of the existence of a debt that accompanies agranting mortgage rights is an absolute thing that must be present at the time execution of mortgage is requested. (Gunawan Widjaja & Ahmad Yani 2007). In this case Article 3 section (1) of the Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights and Land-Related Objects, explicitly requires, "debt guaranteed for repayment with Mortgage Rights can be in the form of existing debt or that has been agreed upon with a certain amount or the amount at the time the application for execution of the Underwriting Right is submitted can be determined based on the debt payable agreement or other agreement that creates the related debt receivable relationship. Mortgage can be granted

for a debt that originates from a legal relationship or for one or more debt originating from several legal relationships".

In accordance with Article 18 of the Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights, the mortgage right is deleted due to several reasons, namely:

1. Write off debt guaranteed with mortgage.
2. The release of mortgage rights by the mortgage rights apprentice.
3. Clearing of mortgage rights based on ranking by the chair of the District Court.

The estate guarantee holder has the following positions:

1. Secured creditor, that is, a creditor who has a very special right, a creditor who holds guarantee, mortgages, mortgage rights and fiduciary guarantees, which can exercise his rights over objects that are used as guarantee as if the Bankruptcy did not occur. This means that these creditors can execute outside of Bankruptcy.
2. Preferred Creditors (Privileges), namely creditors who have the right to overtake because the nature of their accounts receivable is given a special position, because they do not have special guarantees and do not have special rights, so that their position is the same as creditors without other guarantees based on the principle of *parity creditorium*.
3. Unsecured creditor, that is, creditors who have the right to receive repayment together without prior rights, calculated the amount of each receivable against the overall receivables of all debtors' assets. Concurrent creditors are creditors who are not included in separatist creditors and preferred creditors. Concurrent creditors are ordinary creditors who are not guaranteed by pledge, fiduciary guarantee, mortgages, and mortgage and the payment is made in a balanced manner. This creditor generally applies the *pari passu prorata parte* principle, repayment together without prior rights, calculated the amount of each receivable against the overall receivables from the entire debtor's wealth.

In this regard, Article 55 of the Law of Indonesia republic Number 37 of 2004 Concerning Bankruptcy and Delaying Obligations for Debt Payment states, "*every creditor holding a lien, fiduciary guarantee, mortgage, mortgage, or collateral rights on other material, can execute their rights as if Bankruptcy did not occur*".

Article 55 of the Republic of Indonesia Law No. 37/2004 concerning Bankruptcy and Deferral of Obligations for Debt Payments, there are exceptions in the collection of receivables as referred to in Articles 136 and 137 of the Republic of Indonesia Law No. 37/2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. The provisions of Article 136 and Article 137 of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations can be seen that there are several receivables that must be matched before executing their separatist rights, including, (Jono 2008):

1. Receivables with pending terms;
2. Receivables that were not clear at the time of collection;
3. Receivables that give the right to receive payments regularly; and
4. All receivables that can be collected after 1 year after the date of the verdict of the bankruptcy statement is pronounced.

Based on the provisions of Article 55 of the Law of Indonesian Republic Number 37 Year 2004 Concerning Bankruptcy and Delaying Obligations of Debt Payment above, fiduciary creditors are classified as separatist creditors. In doing so, there is no need to worry if the debtor has been declared bankrupt by the court, because he can exercise his own executing rights as if bankruptcy did not occur. However, this does not mean that objects which are burdened with certain collateral are immune from bankrupt assets, only that the creditors holding the material collateral are given the authority to execute them even though the exercise of the executive right is not easy to do.

To execute, a separatist creditor or third party must pay attention in Article 56, determining:



1. Creditors' execution rights as referred to in Article 55 section (1) and the right of a third party to claim his property in control Bankruptcy or Curator Debtor, suspended for a maximum period of 90 (ninety) days from the date the statement of bankruptcy is pronounced.
2. The suspension referred to in paragraph (1) does not apply to creditor bills guaranteed with cash and creditor rights to meeting debt.
3. During the period of suspension as referred to in section (1), curators can use bankrupt assets in the form of immovable objects or movable property or sell bankrupt assets in the form of movable property in the control of the curator in the context of the business continuity of the debtor, in the event that reasonable protection has been given to the interests of creditors or third parties as referred to in section (1).

According to Djuhaendah Hasan, execution of guarantee estate is the exercise of the rights of the creditor of the guarantee right to the guarantee estate for the event of a breach of promise by the debtor by the sale of collateral to repay the receivables. The right to carry out fulfillment of creditor rights is done by selling guarantee objects, and the results are used as payment of creditors' receivables. (Djuhaendah Hasan 1996).

Subekti argued, the provision of estate guarantees always seeks to isolate a part of a person's wealth, the guarantor, and provide it for the fulfillment of obligations (debt payment) of a debtor ". (R. Subekti 1991).

Guarantee is needed in order to secure the creditor from the debtor's bankrupt condition, Subekti stated the criteria for a good (ideal) guarantee as follows:

1. Can easily help the credit acquisition by those who need it.
2. It does not weaken the potential (strength) of the credit seeker to carry out (continue) his business.
3. Which gives certainty to the lender, in the sense that the guarantee is available at any time to be executed, that is if necessary, it can be easily cashed to pay off the debt.

The purpose of bankruptcy in the general explanation of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Delaying Obligations of Debt Payment is to settle the accounts receivable debt fairly, quickly, openly and effectively. In addition, bankruptcy also aims to avoid the confiscation and execution of individuals of the debtor's assets that are unable to pay off their debts. Individual executions carried out simultaneously must have the potential to cause conflicts in the form of struggles between creditors. In addition, to prevent the existence of creditors who hold property guarantee rights claim their rights by selling debtor goods without regard to the interests of the debtor or other creditors. To achieve the objective of bankruptcy, of course, bankruptcy debtor assets must be secured and one way to secure it is by confiscation. Another term for confiscation is *beslag* from the terminology *beslag* which is Dutch. (Luthvi Febryka Nola 2018)

As a comparison in Australian Bankruptcy Law, the purpose of bankruptcy is stated: when a person is unable to pay her or his debts and is in a hopeless financial position, the law should enable proceedings to be taken, either by the debtors or by a creditor, so that most kinds of debtor's property can be taken and used to pay the creditors in proportion to the amounts owed to each of the... (Dennis Rose, QC 1994)

According to John Armor, we compile new indices reflecting the 'forgiving' personal bankruptcy laws are, reflecting the time to discharge. These measures vary over time and are studied across countries. We show that bankruptcy law has a statistically and economically significant effect on self employment rates when controlling for GDP growth, MSCI stock returns, and a variety of other legal and economic factors. The results have clear implications for policymakers. (John Armor & Douglas Cumming 2008)

Bankruptcy law institutions basically must pay attention and give balanced legal protection between the interests of the debtor and the creditor, even must also pay serious attention to the interests of other creditors, who do not participate filed for bankruptcy. But it is unfortunate, the guarantee institution the law for creditors as stipulated in Article 10 of Law No. 37 of 2004 many contain weaknesses in the practice of law enforcement that is structural, culture and substance, thus affecting reluctant legal practitioners use it. As a result, in practice bankruptcy law is intended to protect the legal interests of creditors in a commercial court the decision becomes difficult predicted. (Sriti Hesti Astiti 2014).

In principle, any creditor whose debt is not fulfilled may submit a request for a bankruptcy statement to the Commercial Court against a debtor on the conditions stipulated in Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

If confiscation on execution and parate execution is directed at certain assets of the debtor and for the benefit of certain debtors, then for confiscation bankruptcy is directed at the debtor's assets entirely for the benefit of the joint creditors. In bankruptcy, there is no prior executorial title. Although, in principle, every creditor whose loan is not fulfilled can file for bankruptcy, but the conditions must be that there are several creditors who are not fulfilled. (Sri Soedewi Masjchoen Sofwan 1980)

According to (Sudargo Gautama 1998) As long as the decision on the request for bankruptcy has not been determined, each creditor or prosecutor can submit a request to the court to:

1. Placing seized guarantee for some or all of the debtor's wealth.
2. Ask a temporary curator to:
  - a. Overseeing the management of the debtor's business, and
  - b. Overseeing the payments to creditors, the transfer or collateral of the debtor's wealth in the context of bankruptcy requires the approval of a curator.

If the debtor is declared bankrupt by the court, it will have legal consequences which are very detrimental to him. In order for the debtor to shine from the legal consequences of the bankruptcy decision, the debtor can offer peace to concurrent creditors. If the peace offered by the debtor is agreed upon by the concurrent creditors and approved by the commercial court, the bankruptcy and the debtor will end again not a state of bankruptcy. (Anonym 2016)

As such, bankruptcy institutions are one of the basic needs in business activities because the existence of bankruptcy status is one of the reasons why business actors leave the market. If business people are no longer able to play in the market arena, they can get out of the market. In matters like this, then the institution of bankruptcy plays a role. (Sudargo Gautama 1998).

## CONCLUSION

The results of research on the legal status of the estate guarantee in the bankruptcy process in Indonesia, it can be concluded that the estate guarantee that has been determined as a bankrupt cannot be transferred to bankruptcy status when it is sold with a non-estate bankruptcy status before there is a written judge determination that changes the status. This shows obedience to the principles of legality and legal certainty, that the sale of bankrupt assets (bankrupt estate) with non- bankrupt status (not bankrupt estate) cannot be justified according to law. If the curator continues to sell the bankrupt estate bankruptcy, that is illegal, including the execution of the sale according to law. If at the time of being declared bankrupt the total value of the estate guarantee is assessed by the appraisal to be sufficient to pay all the creditors' bills, then the guarantee is a guarantee of debtor debt repayment, but if the value of the material security is valued by the appraisal then there must be a reassessment in order to create justice for debtors and creditors. Creditors' liens, fiduciary guarantees, mortgages, mortgages, or other collateral rights can execute their rights as if bankruptcy did not occur, but there are several accounts that must be matched before executing their separatist rights.

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