UNMAS DENPASAR

INTERNATIONAL PROCEEDING
INTERNATIONAL CONFERENCE FACULTY OF LAW UNIVERSITY OF MAHASARASWATI DENPASAR
*"Law, Investment, Tourism and Local Wisdom"*
Denpasar, 1st December 2021

# *Actio Pauliana* As a Legal Protection Effort Towards Creditors from Bad Faith Debtors in Bankruptcy Cases

**Putu Eka Trisna Dewi**
Lecturer at Graduate School of Law, Universitas Ngurah Rai
Email: trisnadewi.ecak@gmail.com

***Abstract***

*Actio pauliana is closely related to the issue of Receivable and Liability. Article 1131 of the Civil Code stipulates provisions specifying that all debtor's property shall become dependent for all individual engagements. With this article, a debtor is not bound in determining how they will make use of all the objects they have as long as the stipulated provisions do not harm the creditor. The moment when the debtor continues to take actions that are detrimental to the creditor is the moment where Actio Pauliana may come into effect. The type of research used in this study is normative juridical research with a statute approach. The data were analyzed using legal argumentation technique. In the case of bankruptcy, the court appoints a curator, namely the person in charge of managing and resolving bankruptcy cases. If a matter has been decided a bankruptcy, the curator is responsible for filing a lawsuit to the court containing cancellation of all actions that are considered detrimental to the creditor.*

*Keywords: Bankruptcy, Actio Pauliana, Receivable and Liability.*

## I. INTRODUCTION

### I.1 Background of the Problem

Bankruptcy is an extensively used term in the business world. From a business perspective, bankruptcy can be defined as financial distress experienced by an individual or a company for a certain period of time and is continuously, which results in the person or company losing their financial capacity. In the context of Indonesia, bankruptcy is regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter is referred to as *UUK-PKPU*). In the *UUK-PKPU*, it is stipulated that bankruptcy refers to the general confiscation of all assets of a bankrupt debtor whose management and settlement is performed by a curator under the supervision of a supervisory judge, as regulated in the *UUK-PKPU*.

In principle, the notion of bankruptcy is distinct from insolvency. In an insolvent condition, a company or individual experiences elements of financial distress that takes place protractedly, causing losses. Meanwhile, bankruptcy can occur in individuals or companies whose conditions are still healthy and productive. Bankruptcy occurs because of an unpaid debt to one or more of its creditors. Therefore, it can be seen that the main element of being insolvent is the existence of losses while the main element of being bankrupt is the existence of debts that cannot be paid.

In cases of bankruptcy, the management and settlement of the assets of the bankrupt debtor is carried out by the curator. In the process, the condition of the assets of the bankrupt debtor does not always go well, there can be many problems caused by legal actions

committed by the previous debtor, which then causes the curator to find it difficult to sort out the assets of the bankrupt debtor for the benefit of the current creditors. Another obstacle in the process of managing and settling the assets of a bankrupt debtor is that there are debtors who have bad faith in paying their debts or in providing data on their assets to be included in the bankrupt account.

To anticipate debtors' fraudulence on their assets that will be included in the bankrupt estate, then there is a need for making use of legal instruments in bankruptcy which have been stipulated in *UUK-PKPU*, that is to say, the concept of *actio pauliana,* which aims to protect creditors from actions undertaken by the bankrupt debtor harming the bankrupt assets and that will harm the interests of their creditors. *Actio pauliana* is regulated in Article 1341 of the Civil Code (*KUHPerdata*), which stipulates that a creditor may submit a statement that a legal act that is not obligated by the debtor may be detrimental to the creditor as long as concerned debtor can prove that they aware that the misconduct undertook causes losses to creditors.[1] Comprehensively, *actio pauliana* is regulated in Articles 41 to 49 of the *UUK-PKPU*. The background of the emergence of *actio pauliana* is because many debtors have bad faith in carrying out their debt payment obligations. Proof that debtors have bad intentions is through being able to be specified that the actions they have committed include acts that are mandatory or non-mandatory.

[1] I Komang Indra Kurniawan, 2015, Perlindungan Hukum terhadap Pihak Ketiga (Natuurlijke Persoon) dalam Hukum Bankruptcy Terkait Adanya *Actio Pauliana*, *Kertha Semaya*, Vol. 03, No. 1, Fakultas Hukum Universitas Udayana, p. 2.

## I.2 Research Objectives

The purpose of this study is to reveal and analyze the application of *actio pauliana* in the cases of bankruptcy and legal remedies for *actio pauliana* as legal protection towards creditors from debtors with bad faith in bankruptcy cases.

## 1.3 Research Method

This research employs a normative research method. Normative research is one that puts law as a system of norms, whose scope of research is in the form of legal principles, legal systematics, comparative law and legal history.[2] In terms of the type of data, this research is library research. Data were collected from library materials called secondary data. In this study, the statute approach was used and then the data were analyzed using a legal argumentation technique.

# II. DISCUSSION

Bankruptcy is a way out of the debtor's receivable and liability issue to its creditors. The purpose for bankruptcy is to distribute debtor's wealth to creditors by a curator under the supervision of a supervisory judge based on a court decision. The statement of being bankrupt causes the debtor, by law, to lose the right to take control over and manage the assets that are included in the bankrupt estate, which comes into effect starting from the statement of the decision of being bankrupt. Conditions for a debtor to be declared bankrupt can be seen in Article 2 Paragraph (1) of *UUK-PKPU*, which stipulates bankruptcy occurs when a debtor has two or more creditors and does not pay off at least one debt that has matured and can be collected. the said debtor is

[2] Soerjono Soekanto dan Sri Mamudji, 2007, *Penelitian Hukum Normatif*, PT Raja Grafindo Persada, Jakarta, p. 12

declared bankrupt by a court decision, either at their own request or at the request of one or more creditors.

In Article 1131 of the Civil Code, it is determined that all a debtor's assets, by law, shall be collateral for their debts. Article 1132 of the Civil Code further stipulates that the goods become joint guarantees for all creditors and the proceeds of the sale are divided according to the ratio of accounts receivable of each creditor, except for creditors who are prioritized by law. Kartini Muljadi stated that, if it is thoroughly examined the bankruptcy regulations in the *UUK-PKPU* exist as an elaboration of Articles 1131 and 1132 of the Civil Code, and therefore:

a. bankruptcy covers only bankrupt assets and not debtors;
b. the debtor is still the owner of their property and is the party entitled to it, but no longer has the right to control it or use it or transfer their rights or pledge it;
c. Conservator's confiscation generally includes all bankrupt assets.[3]

In its development, many debtors are trying to avoid the enactment of Article 1131 of the Civil Code. Debtors often take various legal actions to transfer or displace their assets before the decision of being bankrupt is handed down by the commercial court. Such bad intentions from debtors greatly harm creditors, because it results in a decrease in assets included in the bankrupt estate so that the repayment of debts to creditors cannot be made optimally. In protecting creditors from debtors' fraudulent actions and bad faith, the law has anticipated them, particularly through Article 1341 of the Civil Code and articles 41-49 of the law, that is, through the one so-called *actio pauliana*.

*Actio pauliana* is a legal effort to cancel transactions made by debtors for the benefit of the debtor concerned which can harm the interests of the creditors. However, in practice, the effort to prove that the debtor has committed various legal actions harming the creditor is not an easy matter.[4] In the civil law system, three are types of *actio pauliana* distinguished, such as:

a. *Actio pauliana* (general) as set forth in Article 1341 of Civil Code;
b. *Actio pauliana* (inheritance) as set forth in Article 1061 of Civil Code; and
c. *Actio pauliana* in bankruptcy as stipulated in Articles 41 to 47 of *UUK-PKPU*.

The difference between the provisions in the Civil Code and those in the *UUK-PKPU* regarding *actio pauliana* is that in the Civil Code *actio pauliana* is proposed by the creditor while in the *UUK-PKPU* it is filed by the curator and the curator can only file an *actio pauliana* lawsuit with the approval of the supervisory judge. There are three requirements in filing an *actio pauliana* in bankruptcy cases, which are as follows:

1. The legal action taken by the debtor is detrimental to the creditor;
2. The act is not obligatory to do; and
3. It is performed within a period of one year in advance of the decision of being bankrupt is pronounced.

Meanwhile, according to Fred B.G. Tumbuan, in Article 41 of *UUK-*

---

[3] Rudhy A. Lontoh, 2021, *Penyelesaian Receivable and liability Melalui Pailit atau Penundaan Kewajiban Pembayaran Utan*g, PT. Alumni, Bandung, hal. 300

[4] Susanti Adi Nugroho, 2018, *Hukum Bankruptcy di Indonesia Dalam Teori dan Praktik Serta Penerapan Hukumnya*, Prenadamedia Group, Jakarta, h. 312

*PKPU* there are five requirements that must be met so that *actio pauliana* is valid, including:

1. The debtor has committed a legal action;
2. The legal action is not supposed to be committed by the debtor;
3. The said legal action has harmed the creditor;
4. At the time of committing the legal action, the debtor is knowingly aware or must have known that the legal action will harm the creditor; and
5. At the time of committing the legal action, the party, with whom the legal action was committed, is knowingly aware or must have known that the legal action would result in a loss to the creditor.[5]

As what has been mentioned earlier, one of the requirements for the *actio pauliana* to be enforced is the existence of a "legal act" having been carried out by the debtor. What is meant by legal action in this case refers to every action of the debtor's legal actions that have legal consequences. For example, a debtor sells their property or make them a grant, whether the act is reciprocal (such as buying and purchasing) or unilateral (such as a grant or waiver).[6]

The Bankruptcy Law provides an exception based on Article 41 paragraph (3) of *UUK-PKPU*, in that, a bankrupt debtor can take legal actions as long as they are not for personal interests, but to restore the company's condition. The existence of *Actio Pauliana* is based on Article 3 Paragraph (1) of the Bankruptcy Act (*UUK*) which stipulates that the decision on the application for a declaration of being bankrupt and other matters related to and/or regulated in this law shall be decided by a regional court. The law covers the area where the debtor's legal domicile is. As for what is meant by other matters in the explanation of the article, it includes *actio pauliana* which is a third party's resistance to confiscation, or cases in which the debtor, creditor, curator or management becomes one of the parties in the case related to bankrupt assets, which includes the curator's lawsuit against directors who caused the company to be declared bankrupt due to their negligence or fault.[7] Based on the provisions of Article 41 of the *UUK-PKPU*, conditions that must be proven for cancellation include:[8]

1. There was legal action before the debtor is declared bankrupt. Excusive legal actions here are refusing grants, inheritance, destroying goods.
2. The legal action referred to in 1 is not required to be carried out according to the law or agreement. The legal action includes bilateral legal actions (for example, sales and purchases) and unilateral legal actions (grants).

[5] Sutan Remy Sjahdeini, 2002, *Hukum Kepailitan: Memahami Faillissementsverordening Juncto Undang-Undang Nomor 4 Tahun 1998*, Pustaka Utama Grafiti, Jakarta, p. 66-67

[6] M. Alvi Syahrin, Actio Pauliana: Konsep Hukum dan Problematikanya, *Lex Librum: Jurnal Ilmu Hukum*, Volume 4 Nomor 1 Desember 2017, Sekolah Tinggi Ilmu Hukum Sumpah Pemuda (STIHPADA) Palembang, p. 608

[7] Salvian Salmon dan Chritsine S.T. Kansil, Analisis Actio Pauliana Dalam Bankruptcy Terkait Pemberian Fasilitas Kredit Terhadap Perusahaan Dengan Jaminan Atas Nama Direksi, *Jurnal Hukum Adigama*, Fakultas Hukum - Universitas Tarumanagara, p. 13

[8] Eliana Tansah, 2007, *Actio Pauliana*, Makalah, Disampaikan pada Pendidikan Kurator dan Pengurus oleh AKPI (Asosiasi Kurator dan Pengurus Indonesia).

3. The legal action merugikan kreditur. Here, it implies the following:
    a. If a comparison is made between existing bankruptcy assets and assets prior to the legal action being carried out;
    b. Bankrupt assets bear a greater burden/liability than they did before the legal action; and
    c. Causing a change in the composition/ranking of accounts receivable.
4. At the time of carrying out the legal action, the debtor was knowingly aware or must have known the legal action would be detrimental to the creditor.
5. At the time the legal action was being carried out, the party with whom the legal action was carried out was knowingly aware or must have known the act would result in a loss to the creditor.

*Actio pauliana* serves for the right of creditors to cancel agreements made by their debtors with third parties; the creditor is not a party to the agreement. In other words, the party entering into the agreement is the debtor with another party, but the creditor has an interest in the actions of the debtor, whenever the agreement is detrimental to their interests. *Actio pauliana* is applied to actions in the form of providing debt guarantees to certain creditors, which in this case is if the *actio pauliana* has been accepted by the judge. As a consequence, the bank that was given the right of guarantee will lose or cancel their guarantee right. It should be emphasized that compensation in *actio pauliana* is directed at the consideration of the curator. In *actio pauliana*, the element emphasized is the element of cancelling the transaction.[9]

In practice, demands with the *actio pauliana* institution often experience problems, because in some cases *actio pauliana* will clash with the *pacta sun servanda* principle and there is an obligation to prove that there is a bad faith of the debtor who transfers their assets. An important element becoming a benchmark in the regulation of *actio pauliana* is good faith. Proving whether or not there is an element of bad faith becomes the basis for determining the act, including mandatory or non-mandatory actions, actions that are allowed or prohibited. This is important considering that in the settlement of receivable and liability cases, justice and legal certainty for the parties play a crucial role.

## III. CLOSING

*Actio pauliana* is a legal effort to cancel transactions made by the debtor for the benefit of the debtor, which can harm the interests of the creditors. *Actio pauliana* is the right of the creditor to cancel the agreement made by the debtor with a third party. The creditor is not a party to the agreement. In other words, the party who makes the agreement is the debtor with another party, but the creditor has an interest in the actions taken by the debtor, when the agreement is detrimental to their interests. *Actio pauliana* is applied to actions in the form of providing debt guarantees to certain creditors, which in this case is if *actio pauliana* has been accepted by the judge.

[9] Susanti Adi Nugroho, *op.cit*, p. 316

## REFERENCES


**Book**

Badrulzaman, Mariam Darus, *Kompilasi Perikatan* (Bandung: PT. Citra Aditya Bakti, 2001)

Lontoh, Rudhy A., *Penyelesaian Receivable and liability Melalui Pailit atau Penundaan Kewajiban Pembayaran Utan*g (Bandung: PT. Alumni, 2021)

Nugroho, Susanti Adi, *Hukum Kepailitan di Indonesia dalam Teori dan Praktik serta Penerapan Hukumnya* (Jakarta: Prenadamedia Group, 2018)

Sjahdeini, Sutan Remy, *Hukum Kepailitan: Memahami Faillissementsverordening Juncto Undang-Undang Nomor 4 Tahun 1998* (Jakarta: Pustaka Utama Grafiti, 2002)

Soekanto, Soerjono; Mamudji, Sri, *Penelitian Hukum Normatif* (Jakarta: PT Raja Grafindo Persada, 2007)

Syahrin, M. Alvi, Actio Pauliana: Konsep Hukum dan Problematikanya, *Lex Librum: Jurnal Ilmu Hukum*, Volume 4 Nomor 1 Desember (Palembang: Sekolah Tinggi Ilmu Hukum Sumpah Pemuda (STIHPADA), 2017)

**Journal**

Kurniawan, I Komang Indra, 'Perlindungan Hukum terhadap Pihak Ketiga (*Natuurlijke Persoon*) dalam Hukum Kepailitan Terkait Adanya Actio Pauliana', *Kertha Semaya*, 03.1 (2015), < https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/11913

M. Alvi Syahrin, Actio Pauliana: Konsep Hukum dan Problematikanya, *Lex Librum: Jurnal Ilmu Hukum*, 4.1 (2017) < http://dx.doi.org/10.46839/lljih.v4i1.97

Salmon, Salvian; Kansil, Chritsine S.T., 'Analisis Actio Pauliana dalam Kepailitan Terkait Pemberian Fasilitas Kredit terhadap Perusahaan dengan Jaminan atas Nama Direksi', *Jurnal Hukum Adigama*, 01.2 (2018), 1-25 < http://dx.doi.org/10.24912/adigama.v1i2.2912

**Paper**

Tansah, Eliana, '*Actio Pauliana*, Disampaikan pada Pendidikan Kurator dan Pengurus oleh AKPI (Asosiasi Kurator dan Pengurus Indonesia), 2007