

PERLINDUNGAN HUKUM TERHADAP KREDITOR SEPARATIS ATAS DEBITOR UTAMA YANG TELAH DINYATAKAN PAILIT BERDASARKAN PERMOHONAN PIHAK KETIGA DALAM HAL PERJANJIAN KREDIT DISERTAI DENGAN PERJANJIAN PENANGGUNGAN (BORGTOCHT)

(Studi Kasus Putusan Peninjauan Kembali MA-RI Nomor 111PK/Pdt.Sus-Pailit/2013 jo. Putusan Kasasi MA-RI Nomor 45K/Pdt.Sus/2013 jo. Putusan Nomor 64/Pailit/2012/PN.Niaga/Jkt.Pst.)

oleh:

Muhammad Deni

Program Pasca Sarjana Magister Ilmu Hukum Universitas Gadjah Mada
Kampus Jakarta

INTISARI

Dinamika kepailitan saat ini sudah sangat beragam, salah satunya adalah adanya debitor yang telah dinyatakan pailit berdasarkan permohonan pihak ketiga, hal mana debitor yang telah dinyatakan pailit tadi ternyata memiliki kreditor separatis berdasarkan perjanjian kredit yang disertai dengan perjanjian penanggungan (*borgtocht*). Apabila debitor utama telah dinyatakan pailit berdasarkan permohonan pihak ketiga dan harta pailit yang ada ternyata tidak cukup untuk memenuhi kewajibannya kepada salah satu kreditor separatis yang dalam perjanjian kredit dengan debitor pailit tersebut ternyata disertai dengan perjanjian penanggungan (*borgtocht*), maka sejauh mana tanggung jawab penjamin dalam perjanjian penanggungan (*borgtocht*) tersebut serta bagaimanakah upaya perlindungan hukum terhadap kreditor separatis sebagaimana dimaksud.

Penelitian ini bersifat deskriptif-eksploratoris dengan metode pendekatan yuridis-normatif melalui studi kepustakaan dengan teknik pengumpulan data melalui studi dokumen, observasi, dan wawancara. Data yang diperoleh selanjutnya dikumpulkan dan dianalisis secara normatif-kualitatif.

Dari hasil penelitian dapat disimpulkan bahwa penjamin dapat beralih kedudukannya menjadi debitor sehingga dapat dimohonkan pailit ketika debitor utama ingkar janji dalam memenuhi kewajibannya serta telah secara tegas melepaskan hak-hak istimewa sebagai penjamin. Untuk penjamin yang tidak melepaskan hak-hak istimewa, maka kedudukannya dapat beralih menjadi debitor ketika debitor utama ingkar janji serta terjadi keadaan yang mengecualikan prinsip penagihan sekunder sebagaimana diatur dalam Ketentuan Pasal 1832 angka 2o s.d. 5o KUH. Perdata. Kendala-kendala yang dihadapi oleh kreditor separatis ketika debitor utama telah dinyatakan pailit berdasarkan permohonan pihak ketiga dalam hal perjanjian kredit disertai dengan perjanjian penanggungan (*borgtocht*) antara lain adalah proses pemberesan yang lama, tidak kooperatifnya debitor pailit, serta lemahnya instrumen hukum yang ada dalam mengatasi permasalahan tidak kooperatifnya debitor pailit. Upaya perlindungan hukum yang dapat dilakukan oleh kreditor separatis tersebut yakni mengajukan permohonan pernyataan pailit terhadap penjamin setelah proses pemberesan terhadap seluruh aset debitor utama selesai dilaksanakan oleh kurator, menawarkan agar penjamin bersedia untuk membayar seluruh kewajiban utang debitor utama untuk kemudian kreditor separatis dapat menyerahkan semua jaminan kebendaan yang diterima dari debitor utama kepada penjamin yang telah membayar seluruh kewajiban utang debitor utama berdasarkan hak subrogasi, dan mengajukan permohonan pailit secara langsung terhadap penjamin setelah debitor utama telah dinyatakan pailit berdasarkan permohonan pihak ketiga tanpa harus menunggu proses pemberesan terhadap seluruh aset debitor utama selesai dilaksanakan oleh kurator.

Kata kunci: Kreditor Separatis, Debitor Utama, Pailit, Perjanjian Kredit, Perjanjian Penanggungan (*Borgtocht*), Penjamin

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**LEGAL PROTECTION AGAINST SECURED CREDITORS ON THE
PRINCIPAL DEBTOR HAS BEEN DECLARED BANKRUPT BY A
THIRD PARTY PETITION IN TERMS OF THE CREDIT AGREEMENT
WITH GUARANTEE AGREEMENT (BORGTOCHT)**

(Case Study on Decision of Reconsideration MA-RI No. 111PK/Pdt.Sus-Bankrupt/2013 jo.
Decision on Appeal MA-RI No. 45K/Pdt.Sus/2013 jo. Decision No. 64/Pailit/2012/PN.Commerce/
Jkt.Pst.)

by:

Muhammad Deni

The Graduate Program Master of Law of Gadjah Mada University
Jakarta Campus

ABSTRACT

The dynamics of bankruptcy nowadays is very diverse, one of which is when the debtor who has been declared bankrupt by a third party petition and that debtor is turned out to have a secured creditors under credit agreement along with guarantee agreement (*borgtocht*). If the principal debtor has been declared bankrupt by a third party petition and the bankrupt assets was not enough to fulfill one of its obligations to secured creditors stated on the credit agreement with that bankrupt debtor accompanied by guarantee agreement (*borgtocht*), the extension of liability guarantor in the guarantee agreement (*borgtocht*) and how the legal safeguards against secured creditors as intended.

This research is descriptive-explanatory with normative juridical approach through literature study with data collection through the study of documents, observation, and interviews. The data were then collected and analyzed in normative-qualitative.

From the results of this study has concluded that the guarantor can be turned into a position as the debtor, thus it can be petitioned for bankruptcy when the principal debtor has broken promises to meet its obligations and has expressly relinquished its privileges as a guarantor. For a guarantor who does not relinquish its privileges, it can be turned into a debtor position when the principal debtor broke promises and a state that excludes secondary billing principles as stipulated in the provisions of Article 1832 figure 2o to 5o on Civil Law Statute Book. Some constraints faced by the secured creditors when the debtor has been declared bankrupt by a third party petition in terms of the credit agreement with the guarantee agreement (*borgtocht*), among others, are the long process of settlement, the uncooperative nature of the bankrupt debtor and the weaknesses of existing legal instruments to overcome the problems of uncooperative bankrupt debtor. The efforts of legal protection can be carried out by the secured creditors by applying for bankrupt declaration against the guarantor after the settlement of all assets of the principal debtor was completed by curator, offering the guarantor to pay all the debt of the principal debtor to secured creditors for then the secured creditors can submit all the material assurances received from the principal debtor to the guarantor who had paid the entire principal debtor obligations by the right of subrogation, and directly filing for bankruptcy against the guarantor after the principal debtor has been declared bankrupt upon the petition of a third party without having to wait for the process of settlement of the entire assets of the principal debtor completed by the curator.

Keywords: Secured Creditors, Principal Debtor, Bankrupt, Credit Agreement, Guarantee Agreement (*Borgtocht*), Guarantor