

## Legal Certainty of Actio Pauliana Decision in Bankruptcy Cases

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**Abstract:** In bankruptcy practice, it is not uncommon for debtors to try to reduce bankruptcy assets by performing legal actions against their bankruptcy assets, resulting in losses for creditors. To protect the rights of Creditors, actio pauliana is an instrument provided by law. For example, in the case of Decision Number 1 / Pdt. Sus - Actio Pauliana / 2018 / PN. Niaga.Mdn Jo Supreme Court Decision Number 89K / Pdt. Sus - Bankruptcy / 2019 / PN. Mdn where the Panel of Judges rejected the Cassation request with the consideration that the evidence submitted could not prove that the bankrupt debtor knew or should have known that the sale and purchase would harm the creditor. However, as a result of the sale and purchase made by the debtor with a third party, the bankruptcy estate was reduced, to the detriment of the creditors. Therefore, the purpose of the research was held to find out and analyze actio pauliana can provide legal protection carried out by the curator against creditors, the limitations between good faith debtors and bad faith debtors in transferring part of the bankruptcy property and the application of actio pauliana law by the Panel of Judges. This research uses normative juridical research with a legislative approach, case approach and legal doctrines. The results of the research found that actio pauliana is a form of legal certainty over the rights of creditors in bankruptcy. In the actio pauliana lawsuit, it is necessary to have criteria for good faith debtors and bad faith debtors. If it can be proven that the legal action was carried out in bad faith and is detrimental to the creditors, then the actio pauliana lawsuit is rejected and the decision to reject from the Panel of Judges makes no cancellation of legal actions carried out by the bankrupt debtor.

**Keyword:** Actio Pauliana, bankruptcy, creditors.

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### 1. Introduction

Bankruptcy is a legal state of a civil legal subject (legal entity). A debtor can only be declared bankrupt by the court if the debtor is insolvent. Bankruptcy results in the bankrupt debtor losing all rights to perform legal actions against his property, namely to control, manage, and transfer his property. After the bankruptcy verdict is rendered, the Curator and Supervisory Judge are appointed by the Commercial Court (Sutan Remy Sjahdeini, 2016).

Indonesian Bankruptcy Law was created with the aim of providing fair legal protection to all parties, including creditors, debtors and the public. In repaying debts, sometimes there are creditors who are selfish and demand that their rights take precedence without seeing the interests of other creditors or the debtor itself. In

addition, to avoid fraud committed by one of the creditors with the debtor, it is necessary to ensure that the debtor's rights are prioritized (Jono, 2008).

Often, in an effort to avoid the obligation to pay their debts, debtors in bad faith perform legal actions aimed at hiding their assets which are part of the bankruptcy estate by selling, leasing and/or granting these assets to other creditors or third parties before the bankruptcy declaration is handed down. The debtor and / or third parties know that if they carry out these legal actions, it can cause harm to other creditors. Therefore, to protect the rights of creditors, Article 41 paragraph (1) of the UUK PKPU and Article 1341 of the Civil Code make it possible to cancel legal actions carried out by third parties, known as *actio pauliana* (Suci & Poesoko, 2020).

According Sunarmi (2008) *Actio Pauliana* is "the cancellation of all legal actions of a bankrupt debtor that are detrimental to creditors, which are carried out one year before the bankruptcy verdict is legally enforceable." The provisions of *actio pauliana* in the civil law system are regulated in Article 1341 of the Civil Code, while *Actio pauliana* in Bankruptcy Law is regulated in Article 41 through Article 50 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The function of *actio pauliana* is to protect the rights of creditors from bankrupt debtors who have bad faith and want to escape from their obligations to pay off all their debts to creditors (Suci & Poesoko, 2020).

The application of *actio pauliana* can only be done and implemented based on a court judge's decision. This means that any cancellation of the agreement, regardless of the reason, from any party who submits it remains the authority of the court. Through a decision canceling an agreement or action that is detrimental to the interests of creditors (especially the debtor's property), all persons and property are returned to their original state. As is the case in decision number 1 / Pdt.Sus - *Actio Pauliana* / 2018 / PN. Niaga Mdn Jo. decision number 89 K / Pdt.Sus - Bankruptcy / 2019 / PN. Mdn, a decision regarding the assets of an entrepreneur who was declared bankrupt. The curator of the bankruptcy estate filed a lawsuit, namely an *actio pauliana* lawsuit against the bankruptcy debtor who had harmed the creditors, and demanded that the second party return the sale and purchase of land and buildings belonging to the bankruptcy debtor, which was deliberately transferred for personal use because it was considered a bankruptcy estate.

Decision Number 16/Pdt.Sus - PKPU / 2017 / PN. Niaga Mdn, Bun Hui (Bankrupt Debtor) was an entrepreneur who opened a children's snack business, "Es Tip Top", where Bun Hui (Bankrupt Debtor) had debts to Narsen Lawisan (Creditor) in the amount of Rp. 140,000,000, - and Malia Widjaja (Creditor) in the amount of Rp. 400,000,000, -. However, Bun Hui (Bankrupt Debtor) defaulted, there was no payment deadline agreement with Narsen Lawisan, only verbally because they were friends, Narsen Lawisan (creditor) was the director of UD. Bumi Jaya, which owns the "Tip Top Ice" business and to Malia Widjaja with a debt acknowledgment letter agreement secured by a land and building. Therefore, in Decision Number 16/Pdt.Sus - PKPU / 2017 / PN. Niaga Mdn, declared Bun Hui (bankrupt debtor) bankrupt, on January 31, 2018. From decision Number 16/Pdt.Sus - PKPU/2017/PN. Niaga Mdn, a curator was

appointed to manage the bankruptcy estate, namely Irfan Surya Harahap (Plaintiff) where the curator filed an *actio pauliana* application. Where Irfan Surya Harahap (Plaintiff) has the right as a curator to prosecute BunHui (Defendant I) who multiplied the land and building assets to Arifin Thjin (Defendant II) through sale and purchase deed No. 144/2017, signed by Hustati, SH (Defendant III), as a Medan City PPAT. Where the sale and purchase of the land and building was as collateral for the debt given by Bun Hui (Defendant I) to Malia Widjaja (creditor). The sale and purchase was carried out by Bun Hui (Defendant I) 1 (one) year before the bankruptcy decision on March 14, 2017, decision number 16/Pdt.Sus - PKPU / 2017 / PN. Niaga Mdn. Therefore, the judge rejected the *actio pauliana* lawsuit filed by the curator, Irfan Surya Harahap (Plaintiff), the judge said Bun Hui (Defendant I) and Arifin Tjhin (Defendant II) were not in good faith with verdict number 1 / Pdt. Sus - Actio Pauliana / 2018 / PN. Niaga Mdn, on October 4, 2014.

Because at the first level the *actio pauliana* lawsuit filed by Irfan Surya Harahap was rejected by the Panel of Judges. Then Irfan Surya Harahap on October 11, 2011, resubmitted the *actio pauliana* application to the cassation level. In the cassation memorandum there are objections raised by Irfan Surya Harahap (Cassation Petitioner) which basically state that in giving its decision the Court of First Instance has misapplied or violated the applicable law. That in deciding the case, the Court of First Instance had violated or ignored the provisions of Article 41(2) jo. Article 42 paragraphs (a and c) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Although the requirements as referred to in Article 41 paragraph (2) jo. Article 42 letters (b and c) have been fulfilled, but this was never heeded by the *judex facti* in handing down their decision. That Bun Hui (Defendant I) and Arifin Tjhin (Defendant II) had transferred and sold the bankruptcy estate to the detriment of creditors. The decision given by the Panel of Judges argued that the evidence submitted by the Plaintiff could not prove that the bankruptcy debtor or Defendant I, and Defendant II knew or should have known that the sale would harm creditors. However, in reality, the result of the sale and purchase made by the debtor and Defendant I caused a reduction in the bankruptcy estate, thereby reducing the repayment of the debtor's debt to the creditors, and of course in this case the sale and purchase agreement was detrimental to the creditors.

## **2. Research Method**

The type of research used in this research is normative juridical legal research. Approaches to legislation, case approaches, and legal doctrines. Data analysis is carried out with an analytical descriptive approach, the analysis used is a qualitative approach to the secondary legal material obtained. The analyzed data will be concluded by providing legal arguments in this research, providing an assessment of what and how it should be according to legal norms, doctrines and legal rules, to answer problems related to *actio pauliana* legal remedies as a form of legal certainty for creditors.

### 3. Result and Discussion

Actio pauliana is a right / legal remedy owned by creditors to cancel transactions carried out by debtors in the interests of these debtors which can harm the interests of their creditors. For example, the debtor sells his property so that the object can no longer be confiscated or used as debt collateral to the creditor for the return of receivables. To cancel legal actions carried out by the debtor in the Civil Code, the creditor can be submitted directly to the district court where the debtor is domiciled within 4 (four) months from the time the legal action is carried out by the debtor. The provisions of actio pauliana in Article 1341 of the Civil Code apply generally to all agreements, this is evident because the provisions are located in the Third Book of the Civil Code concerning Binding in the Third Section concerning the effects of an agreement (Munir, 2010).

The presence of the actio pauliana provision is intended to protect the interests of creditors who are harmed as a result of legal actions taken by the debtor.<sup>98</sup> The actio pauliana provision in Article 1341 of the Civil Code is also associated with the provisions in Article 1131 of the Civil Code which regulates the principle of *paritas creditorium*. This is because Article 1131 of the Civil Code stipulates that all of the Debtor's assets by law become collateral for the Debtor's debts. Thus, the Debtor is actually not free of his assets when he has debts to other parties, in this case to Creditors. When declared bankrupt, the Debtor automatically loses his right to manage his assets, this is because all assets of the Bankrupt Debtor are in the power of the Curator who is tasked with managing all bankruptcy assets in order to pay off the Debtor's debts to Creditors until all Debtor debts are successfully repaid. Debtors are prohibited from taking legal actions such as buying and selling, leasing, or granting their assets to other parties or one of the Creditors. According to Article 1341 of the Civil Code, the parties that can file an actio pauliana lawsuit are Creditors.

The actio pauliana provision makes the debtor's actions over the control of his wealth limited when the debtor is entering into an agreement with the creditor, while the debtor's actions can harm the creditor in terms of repaying the debtor's debt. However, the debtor is still allowed to take legal actions against his property as long as these actions do not harm the creditors (Sastrawidjaja, 2006).

The Civil Code regulates that actio pauliana lawsuits are filed directly by aggrieved creditors to the local district court. The focus of the lawsuit is the cancellation of all actions of the debtor that harm the creditor with one important element that becomes the benchmark in the regulation of actio pauliana in Article 1341 of the Civil Code, namely the element of good faith. Proof of the presence or absence of the element of good faith is the basis for determining whether the act is an unrequired or required act. In Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, actio pauliana is regulated in Article 41 to Article 49 of the Bankruptcy and PKPU Law concerning the cancellation of the debtor's legal actions carried out before the bankruptcy declaration is pronounced and Article 50 of the Bankruptcy and PKPU Law concerning the cancellation of the debtor's legal actions after the bankruptcy declaration is pronounced. The difference between actio

pauliana regulated in the Civil Code and the UUKeppankitan and PKPU, in Article 1341 of the Civil Code actio pauliana is submitted by the Creditor while in Article 30 of the UUKeppankitan and PKPU actio pauliana is submitted by the Curator with the approval of the Supervisory Judge.

Article 46 of the Bankruptcy and PKPU Law provides that the cancellation and refund of money received by a particular creditor cannot be requested if the creditor is the holder of a payment order or payment letter by appointment that requires priority payment of debts to that creditor. However, if it can be proven that at the time of issuance of the payment order or payment instrument, the parties were aware that a petition for bankruptcy against the Debtor had been registered, and the issuance of the payment order was the result of a conspiracy between the Debtor and the holder of the payment order, the Bankruptcy Estate shall be obliged to refund the amount of the debt paid by the Debtor.

Actio Pauliana can be done if it meets several conditions, namely the debtor performs a legal act; the legal act performed is not required; the debtor harms the creditor with the legal act; the debtor knows that the legal act is detrimental to the creditor; and the party with whom the debtor performs the legal act knows that the act is detrimental to the creditor.

The actio pauliana remedy is a legal action following the bankruptcy process of a debtor who has been granted a bankruptcy verdict by the court which causes the debtor to lose his right to control and manage his assets which have been subject to general confiscation by the commercial court to serve as collateral in settling all bills and obligations. The management and arrangement is carried out by the curator as the party given the task of managing the bankruptcy property as stipulated in Article 69 of the Bankruptcy and PKPU Law in conjunction with Article 47 paragraph (1) of the Bankruptcy and PKPU Law, one of which tasks is to carry out actio pauliana legal efforts to maximize the value of bankruptcy property. Debtors who have committed legal acts that can be subject to actio pauliana, the legal act (*rechsthaneling*) can be canceled by the court by filing a lawsuit to the commercial court and the legal act can have legal consequences that restore the position to its original state before the act was committed. Article 41 of Law No. 37 of 2004 explicitly states that such actions can be invalidated, in this case of course by the curator. If the debtor sells an object that is subject to actio pauliana, the sale is voided by the Commercial Court.

The legal consequences arising from the cancellation of legal acts due to the actio pauliana lawsuit are regulated in Article 49 of the Bankruptcy and PKPU Law which states that "any person who has received objects that are part of the debtor's property covered by the canceled legal act, must return these objects to the curator and be reported to the supervisory judge; In the event that the person is unable to return the objects received in their original state, he shall be obliged to pay compensation to the bankruptcy estate; The rights of third parties to the objects as referred to in paragraph (1), which were obtained in good faith and not for free, shall be protected; The objects received by the debtor or their reimbursement value shall be returned by the curator,

to the extent that the bankruptcy estate benefits, while for the shortfall, the person against whom the annulment is claimed may appear as a concurrent creditor.”

A form of legal certainty for losses suffered by creditors in the event of bankruptcy is that when the debtor is declared bankrupt, all assets of the company are subject to general confiscation to serve as collateral for the settlement of the company's obligations or debts to its creditors in accordance with their proportional rights. This provision is a further implementation of the provisions of Article 1131 in conjunction with Article 1132 of the Civil Code which is the realization of the principle of *paritas creditorum* and the principle of *paripasu prorata parte*. Based on these two principles, creditors are guaranteed legal protection to get the maximum return of their debts from fraudulent debtor actions, which if this happens, the creditors represented by the curator as the party in charge of protecting and managing the bankruptcy property can take *actio pauliana* legal action to cancel all legal actions taken by the debtor during the year before the bankruptcy declaration is pronounced, which legal actions are detrimental to the creditors.

Decision Number 1 / Pdt. Sus - Actio Pauliana / 2018 / PN. Niaga. Mdn. is the verdict of an *actio pauliana* lawsuit filed by the Curator of Bun Hui (Defendant) who has been appointed in court to become the curator of Bun Hui (Defendant I) and in this lawsuit, the Medan Commercial Court Judge stated that the Plaintiff's claim was granted in its entirety on Monday, October 14, 2018, in terms of canceling the Deed of Sale and Purchase No. 144/2017 dated March 04, 2017 regarding the sale and purchase of a plot of land and its building. In this decision Bun Hui (Defendant I) transferred assets in the form of land and buildings to Arifin Tjhin (Defendant II) as collateral for debt to Malia Widjaja (Creditor I) with an agreement under the hand and sold without the knowledge of the Creditor. Therefore, this sale and purchase deed is null and void and has no legal force and will be used as a bankruptcy estate. In the Supreme Court Decision Number 89K/Pdt. Sus - Actio Pauliana/2019/Pn. Mdn, Arifin Tjhin (Defendant II) and Hustiati Notary PPAT Medan (Defendants) filed for cassation but it was null and void, because the sale and purchase deed was deemed invalid to the detriment of creditors.

The legal action was carried out within a period of 1 (one) year before the bankruptcy declaration was pronounced. Bun Hui (Defendant I) made the transfer of assets to the second party within eight days of the bankruptcy petition against the debtor being filed by one of its creditors or precisely before Bun Hui (Defendant I) was declared bankrupt by the Medan Commercial Court. Therefore, the actions of Bun Hui (Defendant I) were carried out within one year before the bankruptcy verdict was pronounced so that according to Article 42 of the Bankruptcy and PKPU Law, these actions can be requested for cancellation through an *actio pauliana* lawsuit to the Commercial Court.

In Supreme Court Decision Number 89 K / Pdt. Sus - Actio Pauliana / 2019 / PN. Mdn, where Hustiati Notaris PPAT (Cassation Petitioner I) and Arifin Tjhin (Cassation Petitioner II), filed a cassation application for the cancellation of the sale and purchase deed between Bun Hui (Defendant I) and Arifin Tjhin (Defendant II). In the verdict, the



judge rejected the entire case. In this case the author assumes that in giving the decision the judge was right, because the property traded was collateral for debt and credit that was detrimental to creditors, where Bun Hui (Defendant I) knew this. And Bun Hui (Defendant I) tried to sell or transfer the bankruptcy estate. In addition, Bun Hui (Defendant I) sold his assets before 1 year after the bankruptcy pronouncement.

Based on Article 41 and Article 42 of the Bankruptcy and PKPU Law, it is clear that the legal actions of Defendant I to Defendant II are categorized as actions that are not obligatory, detrimental to creditors, and carried out in bad faith so that these actions can be requested for cancellation to the commercial court by filing an *actio pauliana* lawsuit. If analyzed based on the theory of legal certainty, the *actio pauliana* Decision and the Supreme Court Decision rejecting the Panel of Laws did not result in the cancellation of the legal actions carried out by Bun Hui (bankrupt debtor) and Defendant I, so that the bankruptcy assets still remained in the hands of Defendant I and caused a reduction in bankruptcy assets. The court's resolution of the dispute should have provided legal certainty to the creditor's rights in the bankruptcy case. The perspective of Justice Theory, in this case the Curator's authority to file an *actio pauliana* lawsuit, is expected to provide good benefits for the protection of creditor rights in the debtor's bankruptcy estate. In addition, the clearer inclusion of the qualifications of good faith debtors in Law Number 37 of 2004 concerning Bankruptcy and PKPU, can provide justice to creditors through a fair *actio pauliana* decision for creditors that will be given by the Commercial Court Judge regarding the *actio pauliana* lawsuit by the Curator. The curator, as a party authorized by the Bankruptcy and PKPU Law to clean up and manage the bankruptcy estate, can file an *actio pauliana* lawsuit with the court to cancel legal actions taken by the bankrupt debtor that are detrimental to creditors.

The relevance of the protection theory that the assets of an entrepreneur who is declared bankrupt. The decision of the Panel of Judges in this case, rejecting the *actio pauliana* lawsuit filed by the Curator (Plaintiff) as the curator of Bun Hui (bankrupt debtor) was contrary to the concept of Legal Protection. The decision of the Panel of Judges did not provide protection to other bankruptcy creditors, by rejecting the *actio pauliana* lawsuit filed by the Curator (Plaintiff). The decision to reject the decision of the Panel of Judges made it impossible to cancel the legal actions carried out by Bun Hui (bankrupt debtor) and caused a reduction in bankruptcy assets. The court's dispute resolution should provide protection for creditors' rights in bankruptcy cases.

Based on the description above, the author argues that decision Number 1 / Pdt. Sus - Actio Pauliana / 2018 / PN. Niaga. Mdn. Jo. Supreme Court Decision Number 89 K / Pdt. Sus - Actio Pauliana / 2019 / PN. Mdn determined by the Medan Commercial Court Judge is not appropriate and does not reflect the implementation of legal certainty in *actio pauliana* decisions that are detrimental to creditors (Case Study: Decision Number 1 / Pdt. Sus - Actio Pauliana / 2018 / PN. Niaga. Mdn. Jo. Supreme Court Decision Number 89 K / Pdt. Sus - Actio Pauliana / 2019 / PN. Mdn). Based on all the evidence submitted by the Curator as the Plaintiff, it is clear that the legal actions taken by the Bankrupt Debtor against its Bankruptcy Estate, namely a plot of land and

building on Jalan Setia Jadi, Setia Jadi-Town House Complex Number 22-G, Medan, are detrimental to the Creditors. Therefore, the Curator, as the party tasked with protecting the bankruptcy estate and acting in favor of the bankruptcy estate, has taken the incorrect action of filing an actio pauliana lawsuit against the Debtor, because all the elements required to file an actio pauliana lawsuit have not been demonstrated.

#### 4. Conclusion

Based on the results and discussion above, it is concluded that Actio Pauliana can provide legal protection implemented by the curator against creditors. This right is a protection provided by law to creditors for debtor actions that can harm creditors. If the actio pauliana lawsuit is granted, the party against whom the actio pauliana lawsuit is granted is obliged to: return the goods that he obtained from the debtor's property before he became bankrupt back into the property; if the price/value of the goods is reduced, the party is obliged to return the goods plus compensation; and if the goods do not exist, he is obliged to compensate the value of the goods. Therefore, with the return of the bankruptcy estate agreed upon, it will increase the assets in the bankruptcy estate, so that it can provide debt repayment to other creditors. In this case, the legal action that was carried out within 1 (one) year before the bankruptcy verdict was handed down by the Commercial Court at the Medan District Court, which carried out legal actions in the form of buying and selling with the bankrupt debtor, was one of the bankruptcy creditors who gave receivables to the bankrupt debtor before the bankruptcy verdict in the Commercial Court. In bankruptcy, it prohibits actions taken by a creditor who with his strong bargaining power has pressured the debtor with an out-of-court settlement.

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