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The Borgtocht (Suretyship) Paradox in Bankruptcy: Guarantor Liability versus Ownership Rights

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Original Article

Abstract

Debtor bankruptcy presents complex legal issues when third-party assets pledged as collateral under a borgtocht (suretyship) arrangement are included in the bankruptcy estate, even though the third-party owner has not been declared bankrupt. This study examines the legal status of third-party collateral assets and the forms of legal protection available under Indonesian bankruptcy and secured-transactions law. It employs a normative juridical research method using statutory, conceptual, and case-based approaches, with particular emphasis on Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022. The findings demonstrate that liability arising from a borgtocht arrangement does not automatically transfer ownership of third-party assets to the debtor's bankruptcy estate. Legal protection is available through verification of ownership, the filing of ancillary claims (gugatan lain-lain), and the exercise of available legal remedies, as further reinforced by Supreme Court Circular Letter No. 2 of 2024 (SEMA No. 2 of 2024). The study concludes that clearer limitations on the curator's authority and more precise mechanisms for the execution of third-party collateral are necessary to ensure legal certainty and safeguard the property rights of non-debtor third parties.

Keywords: *Bankruptcy, Borgtocht, Curator, Legal Protection*

Abstrak

Kepailitan debitur menimbulkan persoalan hukum ketika aset milik pihak ketiga yang dijadikan jaminan (borgtocht) turut dimasukkan ke dalam boedel pailit, meskipun pihak ketiga tersebut tidak dinyatakan pailit. Penelitian ini bertujuan menganalisis kedudukan hukum objek jaminan milik pihak ketiga dan bentuk perlindungan hukumnya berdasarkan hukum kepailitan dan hukum jaminan di Indonesia. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, konseptual, dan kasus melalui analisis Putusan Mahkamah Agung Nomor 476 K/Pdt.Sus-Pailit/2022. tanggung jawab borgtocht tidak serta-merta mengubah status kepemilikan aset pihak ketiga menjadi boedel pailit debitur. Perlindungan hukum diberikan melalui verifikasi kepemilikan, gugatan lain-lain, dan upaya hukum, yang diperkuat SEMA Nomor 2 Tahun 2024. Penelitian menyimpulkan perlunya pembatasan kewenangan kurator dan mekanisme eksekusi yang tegas untuk menjamin kepastian hukum dan perlindungan hak pihak ketiga.

Kata kunci: *Kepailitan, Borgtocht, Kurator, Perlindungan Hukum*

1. INTRODUCTION

Property law fundamentally regulates legal relationships involving assets of economic value, including the relationship between an individual and an asset that gives rise to a property right (zakelijk recht). Unlike personal rights, which primarily create claims enforceable against specific parties, property rights confer direct legal authority over an asset and are generally enforceable erga omnes, that is, against third parties generally (Valsan 2013). This characteristic places property rights at the center of economic transactions, particularly credit relationships between debtors and financial institutions. The certainty of debt repayment depends not only on the debtor's capacity to perform their contractual obligations but also on the availability of security mechanisms that protect creditors in the event of default. Accordingly, assets of economic value are commonly used to secure credit through either real security (jaminan kebendaan) or personal security (jaminan perorangan).

The legal framework governing security interests becomes more complex when the collateral is owned by a third party rather than by the debtor. A third party may secure the repayment of a debtor's obligations either by assuming personal liability through a suretyship arrangement (borgtocht) or by encumbering their own property with a security interest for the benefit of the creditor.[1] Under a borgtocht arrangement, Article 1820 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata or KUHPerdata) defines the surety as a third party who undertakes an obligation toward the creditor to satisfy the debtor's obligations if the debtor fails to perform them.

Where a third party encumbers their own property as collateral, however, the legal issue extends beyond personal liability to the legal status and ownership of the encumbered asset. The complexity becomes particularly pronounced when the debtor is subsequently declared bankrupt. Article 21 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations provides that the bankruptcy estate comprises the debtor's entire property at the time the bankruptcy declaration is issued, as well as property acquired during the bankruptcy proceedings.

This framework places the bankruptcy trustee (kurator) at the center of the administration, management, and liquidation of the bankruptcy estate. Nevertheless, the application of the bankruptcy-estate concept becomes legally contentious when the trustee identifies an asset that is formally owned by a third party but has been encumbered to secure the obligations of the bankrupt debtor. At this point, competing legal interests emerge among the principle of universality in bankruptcy, the trustee's statutory authority, the enforcement rights of secured creditors, and the third party's property rights. The central question is therefore not simply whether a third party's

[1] Frederick Septian Tuwan and Ariawan Gunadi, "The Effectiveness of Executing a Personal Guarantee as Security in Resolving Non-Performing Loans in Indonesia," *Lambung Mangkurat Law Journal* 10, no. 1 (2025): 48–57, https://doi.org/10.20527/abc.v10i1.209.

asset was used to secure the debtor's obligations, but whether the creation of the security interest has any legal effect on ownership or otherwise expands the scope of the debtor's bankruptcy estate to include property that the debtor does not own. This uncertainty may place third-party owners in a vulnerable legal position while simultaneously exposing the trustee to potential liability if the trustee proceeds to administer or sell property that falls outside the bankruptcy estate.

The issue is particularly significant in light of Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022. In that case, the disputed assets consisted of three condotel units that had been encumbered with *Hak Tanggungan* (mortgage security rights over land and buildings) to secure the obligations of PT Asiapac Pancamakmur Abadi, which had been declared bankrupt, although the assets were associated with a third party. At the first-instance level, the Commercial Court of the Central Jakarta District Court, through Decision No. 24/Pdt.Sus-Gugatan Lain-Lain/2021/PN Niaga.Jkt.Pst., held that third-party assets used as security for the debtor's obligations did not form part of the bankruptcy estate and ordered the trustee to remove those assets from the bankruptcy inventory. On cassation, however, the Supreme Court reversed that decision and held that the trustee's inclusion of the disputed assets in the bankruptcy estate inventory was lawful.

The divergence between these decisions exposes a fundamental tension between asset ownership and liability for another person's debt. The use of a third party's property as collateral does not, in itself, transform the property owner into the debtor or transfer ownership of the property to the debtor. Nevertheless, the creation of a security interest confers specific legal rights upon the creditor with respect to the encumbered asset. The resulting legal problem therefore extends beyond the question of whether the collateral may be enforced. It also concerns who is legally entitled to possess, administer, control, and dispose of the asset, and how the proceeds of any sale should be treated within bankruptcy proceedings.

Against this background, the *borgtocht framework* raises a significant doctrinal paradox: a third party may remain legally distinct from the debtor while simultaneously placing their property at risk of enforcement for the debtor's obligations. The distinction between personal liability and proprietary rights therefore becomes critical in determining the scope of the bankruptcy estate and the limits of the bankruptcy trustee's authority. The Supreme Court's approach in Decision No. 476 K/Pdt.Sus-Pailit/2022 provides an important case through which to examine this tension and to assess whether the existing Indonesian bankruptcy and security-law framework adequately protects third-party ownership rights while preserving the legitimate enforcement rights of creditors.

Previous scholarship demonstrates that bankruptcy, security interests, separatist creditors, and third-party rights have received substantial academic attention, although existing studies generally examine these issues from distinct doctrinal perspectives. Sularto, for example, examines the tension between bankruptcy proceedings and the enforcement rights of separatist creditors. The study demonstrates that the suspension or restriction of security enforcement may generate inconsistencies between bankruptcy law and secured-transactions law.[2] This finding is significant because it illustrates that the liquidation of the bankruptcy estate cannot be considered independently of the droit de suite and enforcement rights inherent in in rem security interests. Nevertheless, the study does not specifically address the legal status of assets owned by third parties but used to secure the obligations of a bankrupt debtor.

Setyabudi, Janisriwati, and Windra Syahrial examine the protection of third parties in the context of actio pauliana. Their findings indicate that a third party affected by the annulment of a legal transaction may, under certain circumstances, recover the transferred asset or claim its substitute value and may even acquire the status of a concurrent creditor.[3] Ramadhita and Velentina, in contrast, specifically investigate the protection of third parties whose assets have been used as security for the obligations of a bankrupt debtor. Their study places third-party property rights at the center of the analysis and proposes remedies including claims for substitute value and actio pauliana.[4] Putri and Rustam further emphasize the importance of asset verification by the bankruptcy trustee and identify legal remedies available to third parties—including verzet (objection proceedings)—when their assets are incorporated into the bankruptcy estate.[5]

From the perspective of personal guarantees, Damanik et al., Septiaji et al., and Sya'Bina and Pangaribuan demonstrate that borgtocht (suretyship) raises several important legal issues, including the scope of the surety's liability, the waiver of statutory privileges, subrogation, and the legal standing of the surety when the principal debtor enters bankruptcy.[6] Suhandoro, Ismail, and Iryani further identify inconsistencies in judicial decisions concerning the legal status of personal guarantors during the suspension of debt payment obligations (Penundaan Kewajiban Pembayaran Utang or

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[2] Sularto Sularto, "Perlindungan Hukum Kreditur Separatis Dalam Kepailitan," *Mimbar Hukum* 24, no. 2 (2012): 241–53, https://doi.org/10.22146/jmh.16128.

[3] Albertus Hansen Setyabudi et al., "Perlindungan Hukum Terhadap Pihak Ketiga Dalam Actio Pauliana," *Argumentum: Jurnal Magister Hukum* 9, no. 1 (2023): 119–27, https://doi.org/10.24123/argu.v9i1.5771.

[4] Mouva Putri Ramadhita and Rouli Anita Velentina, "Perlindungan Hukum Pihak Ketiga Terhadap Objek Yang Dijadikan Harta Pailit," *Unes Law Review* 7, no. 2 (2024): 832–38, https://doi.org/10.31933/unesrev.v7i2.2366.

[5] Safirah Maharani Putri and Muhammad Rizal Rustam, "Tinjauan Hukum Terhadap Jaminan Harta Pihak Ketiga Dalam Kepailitan Yang Dijadikan Harta Pailit Oleh Kurator," *Jembatan Hukum: Kajian Ilmu Hukum, Sosial Dan Administrasi Negara* 2, no. 1 (2025): 13–25, https://doi.org/10.62383/jembatan.v2i1.1220.

[6] Fritz Hotman Syahmahita Damanik et al., "Community Participation in the Public Decision Process: Realizing Better Governance in Public Administration," *Global International Journal of Innovative Research* 1, no. 2 (2024): 88–96, https://doi.org/10.59613/global.v1i2.12; Satriya Ardhi Dwi Septiaji et al., "Kedudukan Dan Tanggung Jawab Penjamin Dalam Borgtocht: Tinjauan Atas Perlindungan Hukum Bagi Pihak Ketiga," *Jurnal Ilmiah Advokasi* 13, no. 2 (2025): 528–51, https://doi.org/10.36987/jiad.v13i2.7363; Yasmin Ghaisani Sya'Bina and Togi Marolop Pangaribuan, "Pertanggungjawaban Jaminan Perorangan (Personal Guarantee) Dalam Kepailitan: Studi Kasus Putusan Nomor 6/Pdt.Sus-Pailit/2020/Pn.Niaga.Jkt.Pst.," *Lex Patrimonium* 3, no. 1 (2024): 3.

PKPU) proceedings. These studies, however, primarily examine the personal liability and legal protection of guarantors rather than the proprietary consequences arising when assets owned by third parties are used as collateral for a debtor's obligations and subsequently treated as part of the bankruptcy estate.[7] Kharisma also examines the position of separatist creditors and the enforcement of in rem security interests but does not fully develop the conflict between the bankruptcy trustee's authority and the third party's ownership rights over the collateral.[8]

Taken together, the existing literature has not yet comprehensively integrated third-party ownership rights, the legal nature of collateral, the scope of the bankruptcy estate, the authority of the bankruptcy trustee, and the enforcement rights of separatist creditors within a single analytical framework. The principal research gap therefore concerns the absence of sufficiently clear legal parameters for determining whether, and under what circumstances, an asset owned by a non-debtor third party may lawfully be included in and sold as part of the bankruptcy estate. This gap is particularly significant where the asset is encumbered to secure the bankrupt debtor's obligations but remains legally owned by a third party.

The originality of this study lies in its integrated analysis of the normative conflict and judicial reasoning reflected in Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022. Rather than treating third-party collateral solely as an issue of creditor enforcement or guarantor liability, this study examines the interaction between ownership, security interests, bankruptcy-estate boundaries, and the trustee's authority. It consequently seeks to clarify the legal limits of the bankruptcy trustee's authority and to develop a coherent framework for protecting third-party ownership rights without undermining the legitimate enforcement rights of secured creditors.

Against this background, this study has three principal objectives. First, it analyzes the legal status of assets owned by third parties that are used to secure the obligations of a bankrupt debtor and determines the extent to which such assets may be treated as part of the bankruptcy estate under Indonesian property law, security law, and Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Second, it examines the limits of the bankruptcy trustee's authority over such assets, particularly where the trustee seeks to inventory, administer, or sell property that is not legally owned by the bankrupt debtor. Third, it analyzes the forms of legal protection available to third parties whose assets are included in the bankruptcy estate, including objection mechanisms and other available legal remedies, and develops a legal

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[7] Udi Suhandoro et al., "Perlindungan Hukum Terhadap Batasan Tanggungjawab Penanggung (Borgtocht) Dalam Perkara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (PKPU) Terhadap Kewajiban Utang Debitor," *Iqtishaduna: Jurnal Ilmiah Mahasiswa Hukum Ekonomi Syari'ah* 7, no. 3 (2026): 3240–59, https://doi.org/10.24252/iqtishaduna.v7i3.67729.

[8] Ayudinda Pilar Kharisma, "Kedudukan Hukum Kreditor Separatis Atas Jaminan Kebendaan Milik Guarantor Yang Telah Pailit Dalam Kepailitan Debitor Pailit," *Perspektif* 28, no. 2 (2023): 73–82, https://doi.org/10.30742/perspektif.v28i2.850.

framework capable of providing greater certainty for bankruptcy trustees, separatist creditors, bankrupt debtors, and third-party property owners.

2. RESEARCH METHODOLOGY

This study adopts a normative legal research design with a doctrinal approach to examine the legal norms, principles, doctrines, and judicial decisions governing the status of assets owned by third parties but used as collateral in bankruptcy proceedings. The analysis employs four complementary approaches: the statutory, conceptual, case, and comparative approaches.

The statutory approach examines the relevant provisions of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata or KUHPerdata), particularly those governing borgtocht (suretyship), as well as Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Penundaan Kewajiban Pembayaran Utang or PKPU) and the statutory framework governing in rem security interests. The conceptual approach is used to clarify and distinguish the legal concepts of ownership, in rem security, borgtocht, the bankruptcy estate (boedel pailit), separatist creditors, and the authority of the bankruptcy trustee (kurator). The case approach focuses principally on Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022 and Commercial Court Decision No. 24/Pdt.Sus-Gugatan Lain-Lain/2021/PN Niaga.Jkt.Pst., with particular attention to the relevant legal facts, judicial reasoning, and ratio decidendi. The comparative approach is employed selectively to provide additional doctrinal perspectives and to contextualize the Indonesian legal framework.

The legal materials comprise primary, secondary, and tertiary legal sources, collected through systematic legal literature research. Primary sources include legislation, judicial decisions, and other authoritative legal instruments; secondary sources consist of scholarly books, journal articles, and legal commentaries; and tertiary sources include legal dictionaries and reference materials used to clarify relevant terminology and concepts.

The collected legal materials are analyzed using a qualitative-prescriptive method involving five stages; identification, interpretation, systematization, evaluation, and legal construction. The analysis is organized around four principal normative parameters: ownership, security interests, bankruptcy, and the authority of the bankruptcy trustee. Through this process, the study evaluates the consistency of the applicable legal norms and judicial reasoning and identifies potential conflicts between the rights of third-party property owners and the enforcement interests of creditors within bankruptcy proceedings.

The validity and consistency of the doctrinal analysis are strengthened through normative triangulation, whereby relevant statutory provisions, legal doctrines, and judicial decisions are examined and cross-referenced against one another. This analytical process is intended to produce a coherent legal construction defining the limits of the bankruptcy trustee's authority over third-party-owned collateral and establishing an appropriate framework for protecting the property rights of non-debtor owners while preserving the legitimate enforcement rights of secured creditors.

3. RESEARCH RESULT AND DISCUSSION

3.1. Legal Status of Third-Party-Owned Collateral in Bankruptcy

Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022, which overturned the decision of the Commercial Court of the Central Jakarta District Court in Case No. 24/Pdt.Sus-Gugatan Lain-Lain/2021/PN Niaga.Jkt.Pst., illustrates a significant normative tension between the concept of the bankruptcy estate as comprising the debtor's assets and the existence of security interests over property owned by a third party. The tension arises because the creation of a *Hak Tanggungan* (security right over land and buildings) over third-party property does not, in principle, alter the property's ownership or transform the third-party owner into the debtor.

Bankruptcy operates as a general attachment of the assets belonging to a debtor who has been declared bankrupt, with the administration and liquidation of those assets entrusted to a bankruptcy trustee (kurator) under the supervision of a supervisory judge. Accordingly, the primary legal consequences of a bankruptcy declaration extend to the debtor's assets rather than to every asset that has an economic or security-related connection to the debtor's obligations. This distinction has direct implications for collateral owned by third parties. Where land remains legally registered in a third party's name and there is no evidence of a valid transfer of ownership or other proprietary rights to the debtor, its ownership status does not change merely because the land has been encumbered as security for the debtor's debt. A fundamental distinction must therefore be maintained between property owned by the debtor and property owned by a third party that is encumbered by a security interest for the benefit of the debtor's creditor.

In the case under consideration, the three disputed parcels of land were registered in the name of Anthony Sumitro Rahardjo under Freehold Title Certificates (Sertifikat Hak Milik) Nos. 10319, 10320, and 9723. Based on the factual findings of the Commercial Court, the properties belonged to Anthony Sumitro Rahardjo and had been provided as collateral for the obligations of PT Asiapac Pancamakmur Abadi to PT Bank Negara Indonesia. Two distinct legal relationships must therefore be differentiated. The first is the ownership relationship between Anthony Sumitro Rahardjo and the three parcels of land. The second is the security relationship among the property owner, the debtor, and the bank as creditor. The existence of the latter does not, by itself, extinguish, transfer, or otherwise alter the former.

The legal position adopted by the Supreme Court was different. In Decision No. 476 K/Pdt.Sus-Pailit/2022, the Court held that because the three properties had been encumbered with *Hak Tanggungan* to secure the obligations of PT Asiapac Pancamakmur Abadi, they constituted assets of the bankruptcy estate. On that basis, the Court considered the bankruptcy trustee's inclusion of the properties in the provisional inventory of the bankruptcy estate to be lawful. This reasoning indicates that the Supreme Court placed substantial emphasis on the function of the properties as security for the bankrupt debtor's obligations. Nevertheless, a critical doctrinal distinction must be maintained between the property's status as collateral and its status as an asset of the bankruptcy estate. A *Hak Tanggungan* creates a proprietary security interest in favor of a creditor over specified property to secure the performance of an obligation. It does not, however, inherently transfer ownership of the encumbered property to either the debtor or the creditor.

The distinction is particularly important when the case is analyzed alongside the concept of *borgtocht* (suretyship).[9] Article 1820 of the Indonesian Civil Code defines *borgtocht* as an agreement under which a third party undertakes toward the creditor to satisfy the debtor's obligations if the debtor fails to perform them. *Borgtocht* therefore constitutes a form of personal security that is accessory to the principal obligation. In the present case, however, the disputed properties were not merely the subject of a personal guarantee. Rather, the three parcels of land owned by Anthony Sumitro Rahardjo were directly encumbered with *Hak Tanggungan* to secure the debt of PT Asiapac Pancamakmur Abadi.

Accordingly, Anthony's legal position cannot be adequately characterized solely through the doctrine of personal guarantee.[10] His position is more accurately understood through the concept of a third-party security provider—a person who, without becoming the principal debtor, encumbers their own property to secure another person's obligations.[11] This distinction is legally significant because the consequences of assuming personal liability as a surety differ fundamentally from those arising when a third party provides property as in rem security. A surety may become personally liable within the scope established by the suretyship agreement and applicable law, whereas a third-party security provider generally exposes the specifically encumbered property to enforcement without thereby transferring ownership of that property to the debtor.

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[9] Faris Muhammad Irfan et al., "The Principle of Justice in the Legal Position of Suretyship in Indonesian Insolvency Law," *International Journal of Business, Law, and Education* 6, no. 2 (2025): 1045–53, https://doi.org/10.56442/ijble.v6i2.1121.

[10] Indri Syahfitri et al., "The Execution of Personal Guarantees (Borgtocht) on Working Capital Loans in Bankruptcy Cases: A Study of Indonesian Supreme Court Decision No. 141/Pdt.Sus-PKPU/2020/PN.Niaga.Jkt.Pst," *International Journal of Law and Society* 1, no. 4 (2024): 181–91, https://doi.org/10.62951/ijls.v1i4.186.

[11] Suharnoko Suharnoko, "Legal Issue on Pledge Share Aggrement," *Indonesia Law Review* 1, no. 1 (2011): 3, https://doi.org/10.15742/ilrev.v1n1.94.

This distinction also defines the limits of the bankruptcy trustee's authority. Article 16(1) of Law No. 37 of 2004 authorizes the bankruptcy trustee to administer and liquidate the bankruptcy estate. That authority, however, cannot be construed as an unrestricted power to administer or dispose of every asset that is economically connected to the debtor's obligations. The trustee's authority remains confined to property that legally falls within the bankruptcy estate. Article 21 of Law No. 37 of 2004 establishes the debtor's property as the central constituent of that estate. Accordingly, when an asset is formally and substantively owned by a third party, the trustee must identify a legally sufficient basis for concluding that the asset nevertheless falls within the estate subject to administration and liquidation.

The mere existence of a security interest does not, standing alone, establish a transfer of ownership to the debtor. Rather, it establishes a legal relationship concerning the creditor's security interest and the conditions under which the encumbered property may be enforced. Consequently, the inclusion of third-party-owned collateral in a bankruptcy inventory requires a careful distinction between ownership, security interests, and the scope of the bankruptcy estate. Failure to maintain these distinctions risks conflating the creditor's enforcement rights with the debtor's proprietary rights and, ultimately, extending the bankruptcy trustee's authority beyond the assets that the law places within the bankruptcy estate.

This study further identifies a critical issue in the reasoning of Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022. The Supreme Court effectively treated the existence of a security interest—in this case, a *Hak Tanggungan*—securing the bankrupt debtor's obligations as sufficient to establish that the encumbered assets formed part of the bankruptcy estate. This legal construction, however, warrants a more restrictive interpretation. Although the status of an asset as collateral gives a secured creditor the right to obtain satisfaction from that specific asset in accordance with the applicable security-interest regime, it does not, by itself, transform the asset into a general source of payment for all creditors through the bankruptcy estate. Where the asset is legally owned by a third party, the creditor's rights should ordinarily be exercised through the enforcement mechanisms governing the security interest rather than through a recharacterization of the asset as property of the debtor.

This finding is consistent with Ramadhita and Velentina, who identify third-party protection as a critical legal issue where assets owned by a third party are used as collateral for the obligations of a debtor who is subsequently declared bankrupt.[12] Putri and Rustam likewise emphasize the importance of verifying ownership before the bankruptcy trustee includes an asset in the bankruptcy estate. These studies support the proposition that the existence of a security arrangement does not eliminate the need to

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12 Ramadhita and Velentina, "Perlindungan Hukum Pihak Ketiga Terhadap Objek Yang Dijadikan Harta Pailit."

establish the ownership status of the collateral.[13] The present analysis, however, extends beyond the question of third-party protection and the procedural mechanisms available to challenge the trustee's actions. It specifically examines the ratio decidendi of Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022 by analyzing the interaction between bankruptcy law and the law governing security interests.

The findings also extend beyond the concerns identified by Sularto, whose analysis primarily addresses the tension between bankruptcy proceedings and the enforcement rights of separatist creditors. The present study demonstrates that the conflict has an additional dimension; the property rights of third parties whose assets have been encumbered to secure the debtor's obligations.[14] The legal tension therefore does not arise solely between the bankruptcy trustee and separatist creditors but also involves the relationship between secured enforcement and third-party ownership. Similarly, studies by Damanik et al., Septiaji et al., and Sya'Bina and Pangaribuan primarily examine the legal status and protection of personal guarantors. Where security is provided through specific assets owned by a third party,[15] however, the analysis cannot rest exclusively on the doctrine of *borgtocht* (suretyship). It must also incorporate the legal regimes governing ownership and in rem security interests.

The analysis therefore establishes that third-party-owned collateral does not automatically become part of the bankruptcy estate merely because it secures the obligations of a bankrupt debtor. Its legal status must be determined by examining at least four factors: (1) ownership of the asset; (2) the type and legal nature of the security interest; (3) the legal relationship among the third-party owner, debtor, and creditor; and (4) the statutory basis for the bankruptcy trustee's authority over the asset. A third party who has not been declared bankrupt retains ownership of their property, subject to the security interest validly established over it. At the same time, the secured creditor retains the right to obtain satisfaction from the collateral in accordance with the applicable enforcement regime. The trustee's authority should therefore be confined to those actions legally necessary to administer the bankruptcy proceedings while recognizing and facilitating the creditor's valid security rights, without automatically treating the third party's property as an asset of the bankrupt debtor.

A more coherent conceptual framework can be developed by distinguishing three analytically distinct layers of legal relationships: ownership, security interests, and the bankruptcy estate. Ownership determines who holds the legal title and associated

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13 Putri and Rustam, "Tinjauan Hukum Terhadap Jaminan Harta Pihak Ketiga Dalam Kepailitan Yang Dijadikan Harta Pailit Oleh Kurator."

14 Sularto, "Perlindungan Hukum Kreditur Separatis Dalam Kepailitan."

15 Damanik et al., "Community Participation in the Public Decision Process"; Septiaji et al., "Kedudukan Dan Tanggung Jawab Penjamin Dalam Borgtocht"; Sya'Bina and Pangaribuan, "Pertanggungjawaban Jaminan Perorangan (Personal Guarantee) Dalam Kepailitan: Studi Kasus Putusan Nomor 6/Pdt.Sus-Pailit/2020/Pn.Niaga.Jkt.Pst."

proprietary rights in an asset.[16] A security interest determines the creditor's legally protected rights in relation to specified collateral and the circumstances under which that collateral may be enforced.[17] The bankruptcy estate, by contrast, defines the pool of assets subject to administration and liquidation by the bankruptcy trustee.[18] Although these three legal constructs may operate simultaneously in relation to the same asset, they serve different legal functions and cannot be treated as interchangeable.

Accordingly, the inclusion of a third-party-owned asset in a bankruptcy inventory should not, without more, be construed as a transfer of ownership to the bankrupt debtor. Any administration, execution, or sale of such an asset by the trustee must be supported by a specific and legally sufficient basis and must respect the competing rights of both the third-party owner and the secured creditor. The central issue in the present case is therefore not simply whether the third party bears liability for the debtor's obligations, but where the legal boundary lies between the third party's liability and the ownership status of the collateral. Even when a third party has voluntarily subjected specific property to enforcement for the debtor's obligations, that undertaking does not automatically subject the third party's other assets—or necessarily the collateral itself as an ownership matter—to the bankruptcy estate.

A legally coherent framework must consequently reconcile three potentially competing interests: the creditor's right to enforce valid security, the bankruptcy trustee's statutory authority, and the third party's ownership rights. Such a framework should ensure that security interests remain effective as instruments of credit protection while preventing the expansion of bankruptcy administration beyond the assets legally belonging to the debtor. This approach better accords with the principles of legal certainty, proportionality, and protection of property rights, while preserving the functional effectiveness of secured transactions within the Indonesian bankruptcy system.

3.2. Forms of Legal Protection for Third Parties Whose Collateral Is Included in the Bankruptcy Estate

A normative tension exists between the principle of general attachment under bankruptcy law and the principle of separation of ownership under secured-transactions law. Article 1(1) of Law No. 37 of 2004 defines bankruptcy as a general attachment over

[16] Carey K. Morewedge, "Psychological Ownership: Implicit and Explicit," *Current Opinion in Psychology* 39 (2021): 125–32, https://doi.org/10.1016/j.copsyc.2020.10.003.

[17] Biner Sihotang, "Protection of the Rights of Secured Creditors Who Reject the Composition in the Suspension of Debt Payment Obligations: An Analysis of Articles 281 and 286 of the Law on Bankruptcy and Suspension of Debt Payment Obligations from the Perspective of Legal Politics and Legal Certainty," *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4189–208, https://doi.org/10.38035/jlph.v6i5.3614.

[18] Nyulistiowati Suryanti et al., "The Status of Property Granted in The Provisions of Bankruptcy Law in Indonesia," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 1 (2025): 38–54, https://doi.org/10.29303/ius.v13i1.1593.

the entire estate of a debtor who has been declared bankrupt, with the administration and liquidation of that estate entrusted to a bankruptcy trustee (kurator). Accordingly, the trustee's authority is, in principle, limited to assets that legally form part of the debtor's estate. The three parcels of land registered in the name of Anthony Sumitro Rahardjo were legally owned by a third party and did not constitute assets of PT Asiapac Pancamakmur Abadi. The fact that the land was encumbered by a *Hak Tanggungan* (security right over land) to secure the debtor's obligations did not, in itself, transfer ownership of the land to the bankrupt debtor.

A fundamental distinction must therefore be drawn between the ownership status of collateral and its function as security. A *Hak Tanggungan* grants the secured creditor a preferential right to obtain satisfaction from the encumbered property in the event of default. The creation of such a security interest, however, does not transfer ownership of the collateral to either the debtor or the bankruptcy trustee. A security interest over a third party's property should instead be understood as establishing a legal relationship among the property owner, the debtor, and the creditor, rather than as automatically providing a legal basis for incorporating the property into the bankrupt debtor's estate.

The issue became more complex when the Supreme Court, in Decision No. 476 K/Pdt.Sus-Pailit/2022, held that the bankruptcy trustee's inclusion of the disputed properties in the provisional inventory of the bankruptcy estate was lawful. Among the considerations underlying the decision were Anthony Sumitro Rahardjo's status as a guarantor for the obligations of PT Asiapac Pancamakmur Abadi to PT Bank Negara Indonesia (BNI) and the fact that the three properties had been encumbered with *Hak Tanggungan* to secure the debtor's obligations. The decision thus demonstrates that the Court attributed significant legal consequences to the relationship between the guarantor's liability and the collateral provided for the creditor's benefit.

Nevertheless, a guarantor's liability must be distinguished from the transfer or inclusion of the guarantor's assets in the bankruptcy estate. Article 1820 of the Indonesian Civil Code defines *borgtocht* (suretyship) as an agreement under which a third party undertakes toward the creditor to satisfy the debtor's obligations if the debtor fails to perform them. The legal consequences of a suretyship relationship must therefore be distinguished from the legal consequences of bankruptcy with respect to the debtor's property. Although a guarantor may incur personal liability under the suretyship agreement, that liability does not automatically authorize the bankruptcy trustee to treat the guarantor's property as part of the bankrupt debtor's estate.

This interpretation is reinforced by Supreme Court Circular Letter No. 2 of 2024, particularly Formulation No. 3 of the Civil Chamber. The formulation provides that a guarantor (borgtocht) for a particular creditor is obligated only in relation to the debtor's debt owed to that creditor and is not responsible for the debtor's indebtedness to other creditors. It further provides that property belonging to a guarantor or other third party cannot be included in the bankruptcy estate unless there is a legal basis establishing otherwise. This formulation is significant because it establishes clearer parameters for the scope of a guarantor's liability while simultaneously strengthening the protection of third-party property rights.

From the perspective of legal protection, the interests of third-party property owners may be safeguarded through two principal forms of protection: preventive protection and repressive protection. Preventive protection operates through limitations on the trustee's authority, the verification of asset ownership before inclusion in the bankruptcy estate, and judicial guidelines distinguishing the debtor's property from property belonging to guarantors or other third parties.[19] Supreme Court Circular Letter No. 2 of 2024 represents an important development in this regard because it establishes a normative basis for preventing the automatic expansion of the bankruptcy estate to third-party property solely because that property has been provided as security for the debtor's obligations.

Repressive protection, by contrast, is available through procedural mechanisms that enable third parties to challenge trustee actions that unlawfully include their property in the bankruptcy estate.[20] Commercial Court Decision No. 24/Pdt.Sus-Gugatan Lain-Lain/2021/PN Niaga.Jkt.Pst. illustrates the use of a miscellaneous lawsuit as a mechanism through which a third party may seek judicial protection of its ownership rights. Although the decision was subsequently overturned on cassation, the case demonstrates that Indonesian bankruptcy procedure provides a judicial avenue through which third parties may challenge the trustee's treatment of their property as part of the bankruptcy estate.

Additional legal remedies, including a request for judicial review, may also be available where the statutory requirements for such a remedy are satisfied. These remedies serve a corrective function by providing third-party owners with an opportunity to challenge judicial or administrative determinations that adversely affect their property rights. The availability of both preventive and repressive mechanisms is therefore essential to maintaining a proper balance between the effective administration of bankruptcy proceedings and the protection of property belonging to persons who have not themselves been declared bankrupt.

The protection of third-party property rights should ultimately be understood not as an obstacle to the enforcement of security interests, but as a requirement for maintaining the doctrinal distinction between personal liability, proprietary rights, and bankruptcy administration. A secured creditor should retain the ability to enforce a valid

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19 Nabila Adya Trisnamurti and Amad Sudiro, "Legal Certainty for Curators in the Implementation of Auctions of Collateral Objects of Bankrupt Debtors (Case Study of Decision Number 557 K/Pdt.Sus-Pailit/2024)," *De Lega Lata: Jurnal Ilmu Hukum* 11, no. 1 (2026): 1–8, https://doi.org/10.30596/dll.v11i1.26893.

20 Johannes Joshua Mulia, "Legal Steps by Curators as a Form of Legal Protection for Curators Who Carry Out the Task of Settling Bankruptcy Assets," *International Journal of Science and Society* 2, no. 4 (2020): 584–96, https://doi.org/10.54783/ijsoc.v2i4.241.

Hak Tanggungan against the collateral in accordance with applicable law, while the bankruptcy trustee should not exercise broader authority over the asset than the law permits. This distinction ensures that the existence of a security interest does not, without an independent legal basis, result in the expansion of the bankruptcy estate at the expense of a non-debtor third party's ownership rights.

The findings of this study are consistent with Kusno et al., who characterize the guarantor as a party that maintains a legal relationship with the creditor to secure the performance of the debtor's obligations.[21] Arnanda, Ardhan, and Khoirunnisa likewise demonstrate that a personal guarantee functions as an instrument for mitigating credit risk by providing creditors with additional assurance of debt repayment.[22] However, the function of a personal guarantee as a credit-security mechanism should not be interpreted as providing a legal basis for reclassifying the guarantor's assets as property of a bankrupt debtor. The present study extends the existing literature by incorporating the dimensions of bankruptcy administration and the protection of third-party property rights, which have not been central to previous analyses.

The central legal issue in the present case is therefore not whether the guarantor may incur liability, but rather the boundary between the guarantor's personal liability and the proprietary status of the guarantor's assets. A guarantor may be liable to a creditor pursuant to a guarantee agreement, including where the guarantor has waived statutory protections, such as the benefit of discussion (beneficium excussionis), or where the circumstances specified in Article 1832 of the Indonesian Civil Code are satisfied. Such liability, however, must be enforced through the appropriate legal mechanisms and does not, by itself, extinguish or transfer the guarantor's ownership rights. Where the guarantor has not been declared bankrupt, treating the guarantor's assets as part of the bankruptcy estate of a different debtor raises a fundamental doctrinal problem concerning the scope of bankruptcy administration.

The potential for legal uncertainty becomes particularly acute at the enforcement stage when third-party assets are included in the bankruptcy estate. This problem is especially apparent where the asset, such as land, remains legally registered in the name of a third party, while its administration and liquidation are conducted within bankruptcy proceedings against another person or entity. Such circumstances demonstrate that bankruptcy law must do more than determine who is liable for the underlying debt. It must also establish clear boundaries among debt liability, security interests, and ownership rights. Without these distinctions, the enforcement of creditor rights may

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[21] Hendra Sanjaya Kusno et al., "Return on Assets and Covid-19: Do Capital Adequacy Ratio, Loan to Deposit Ratio and Operational Efficiency Ratio Matters?," *Jurnal AKSI: Akuntansi Dan Sistem Informasi* 7, no. 2 (2022): 188–96, https://doi.org/10.32486/aksi.v7i2.333.

[22] Rachmat Arnanda et al., "Analisis Terhadap Risiko Hukum Pemberian Kredit Perbankan Dengan Jaminan Personal Guarantee Tanpa Penyertaan Agunan Fixed Asset," *Account* 10, no. 1 (2023): 1836–45, https://doi.org/10.32722/account.v10i1.5574.

inadvertently result in the administration or disposition of property that does not legally belong to the bankrupt debtor.

An effective framework for protecting third-party property rights should therefore operate at three levels. First, preventive protection should be provided through mandatory verification of ownership, clear limitations on the scope of the bankruptcy estate, and application of the judicial guidance established by Supreme Court Circular Letter No. 2 of 2024. Second, repressive protection should be available through miscellaneous lawsuits and other legal remedies through which third parties may challenge trustee actions that unlawfully incorporate their property into the bankruptcy estate. Third, executory protection should ensure that any enforcement against third-party collateral remains strictly confined to the scope of the secured creditor's legally enforceable rights in the specific asset.

Accordingly, the existence of a *borgtocht* (suretyship) arrangement should not be construed as a mechanism for transferring ownership of third-party property into the bankruptcy estate. Suretyship establishes the guarantor's personal obligation to the creditor, whereas a security interest subjects specific property to enforcement under the applicable secured-transactions regime. Neither mechanism, without an independent legal basis, converts property owned by a non-debtor third party into property of the bankrupt debtor. The protection of third-party rights must therefore be structured around a proportional balance among the creditor's legitimate interest in obtaining repayment, the bankruptcy trustee's statutory authority to administer the estate, and the proprietary rights of persons who are not themselves subject to the bankruptcy declaration. Such a framework promotes legal certainty while preserving both the effectiveness of secured credit and the integrity of property rights.

4. CONCLUSION

Collateral legally owned by a third party does not become part of a bankrupt debtor's estate merely because it has been used to secure the debtor's obligations. Although a guarantor may remain personally liable under a suretyship arrangement, such liability does not extinguish the third party's ownership rights or, by itself, authorize the bankruptcy trustee to treat the property as part of the bankruptcy estate. This position is reinforced by Supreme Court Circular Letter No. 2 of 2024, which provides that assets owned by a guarantor or other third party may not be included in the bankruptcy estate absent a legally sufficient basis establishing otherwise.

Legal protection for third parties should encompass both preventive and repressive mechanisms. Preventive protection includes verification of ownership before an asset is incorporated into the bankruptcy estate, whereas repressive protection includes miscellaneous lawsuits and other available legal remedies through which third parties may challenge the unlawful administration or disposition of their property. This study contributes to the doctrinal clarification of the boundaries among guarantor liability, security interests, and ownership rights, particularly in circumstances where third-party property is used to secure a bankrupt debtor's obligations.

The study has two principal limitations. First, its normative juridical methodology does not empirically assess how trustees, creditors, or courts apply the relevant legal principles in practice. Second, its analysis focuses primarily on Supreme Court Decision No. 476 K/Pdt.Sus-Pailit/2022, thereby limiting the extent to which its findings can be generalized across different factual and judicial contexts. From a policy perspective, clearer regulatory and procedural mechanisms are needed to govern the enforcement of third-party-owned collateral within bankruptcy proceedings. Future research should therefore examine how Supreme Court Circular Letter No. 2 of 2024 has been interpreted and applied across a broader range of bankruptcy decisions, with particular attention to judicial consistency, trustee practices, and the protection of non-debtor property rights.

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