

IMPLEMENTATION OF CURATOR'S AUTHORITY IN FILING *ACTIO PAULIANA* SUIT (Study of Case Verdict Number 01/Pdt.Sus/ActioPauliana/2016/PN.Niaga.Jkt.Pst)

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Abstract: To protecting the interest of creditors which are prejudiced due to legal actions conducted by debtors, Law Number 37 Year 2004 provides a legal action through *actio pauliana*. The research based on Verdict Number 01/Pdt.Sus/ ActioPauliana/2016/PN.Niaga.Jkt. The authority of Tommy Simorangkir as a curator in filing an *actio pauliana* suit towards the debtor's bankrupt assets in the form of a plot of land which is owned by the bankrupt and 2 (two) other persons, and whether the legal consideration of the panel of judges in deciding the case has been correct or incorrect. The type of research which the author uses in this research is a normatif research and uses the statue and case approach. The data which is used in this research are secondary data by using legal materials. The result finds that the authority to file an *actio pauliana* suit in a bankruptcy case is possessed by curators and Tommy Simorangkir has the authority to file *actio pauliana* although the asset is not only owned by the debtor alone, however, *actio pauliana* filed in the said case shall be rejected since it is not proven that the debtor is aware that their conduct is prejudicial to the creditor.

Keywords: Business Law, Bankruptcy, Curator, *Actio Pauliana*.

Abstrak: Untuk melindungi kepentingan kreditor yang dirugikan akibat perbuatan hukum yang dilakukan oleh debitor, Undang-undang Nomor 37 Tahun 2004 memberikan upaya hukum melalui *actio pauliana*. Penelitian berdasarkan Putusan Nomor 01/Pdt.Sus/ ActioPauliana/2016/PN.Niaga.Jkt.Pst yang bertujuan untuk menganalisis lebih lanjut terkait dengan kewenangan kurator dalam mengajukan gugatan *actio pauliana* berdasarkan Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang, kewenangan Tommy Simorangkir selaku kurator dalam mengajukan gugatan *actio pauliana* terhadap harta debitor pailit yang juga dimiliki oleh 2 (dua) orang lainnya serta sudah tepat atau tidaknya pertimbangan hukum majelis hakim dalam memutuskan kasus *a quo*. Jenis penelitian yang Penulis gunakan dalam Penelitian ini adalah penelitian normatif dengan menggunakan pendekatan perundang-undangan dan pendekatan kasus. Data yang digunakan dalam penelitian ini ialah data sekunder dengan menggunakan bahan hukum. Hasil penelitian menunjukkan bahwa kewenangan mengajukan gugatan *actio*

pauliana dalam kepailitan dimiliki oleh kurator dan Tommy Simorangkir memiliki kewenangan untuk mengajukan *actio pauliana* dalam kasus *a quo* meskipun harta tersebut tidak hanya dimiliki oleh debitor sendiri, namun meskipun begitu *actio pauliana* dalam kasus *a quo* sudah seharusnya ditolak karena tidak terbukti bahwa debitor mengetahui bahwa perbuatan yang dilakukannya merugikan kreditor.

Kata Kunci: Kepailitan, Kurator, *Actio Pauliana*.

Introduction

The bankruptcy mechanism is one of the legal means to resolve problems between debtors and creditors related to debts. According to R. Subekti, a debt agreement is the same as a loan-borrowing agreement as contained in Article 1754 of the Civil Code which states that lending and borrowing is an agreement in which the creditor gives to another party (the debtor) an amount of goods or money that can be used up, on the condition that the debtor will return the same amount of goods/money with the same type and condition as the one borrowed before.¹ In the debt agreement, the rights and obligations that exist are the right of the creditor to collect his receivables within a certain period of time, while the debtor has the obligation to pay off the debt when it is due.²

The UUK-PKPU regulates a mechanism for creditors to get their receivables repaid, namely through the bankruptcy mechanism. Based on Article 1 point 1 of the UUK-PKPU, "bankruptcy is a general confiscation of all assets of the Bankrupt Debtor which settled by a Curator under the supervision of the Supervisory Judge as regulated in this Law."³ The regulation of the bankruptcy mechanism in the UUK-PKPU does not necessarily make the creditors get their receivables repaid without obstacles. Frequently, creditors' efforts to ob-

tain repayment of their receivables through the bankruptcy mechanism are still accompanied by obstacles, which is an act of a debtor who has bad intentions by trying to hide or transfer his assets so they are not used to pay his debts to creditors or there are certain creditors who wish to obtain repayment of their receivables without regard to the interests of other creditors⁴. As an effort to protect the interests of creditors, it is possible to cancel the actions carried out by the debtor prior to the bankruptcy decision by filing an *actio pauliana* lawsuit⁵ based on Article 41 of the UUK-PKPU. According to Sutan Remy, *actio pauliana* is a right granted by law to a creditor to submit an application to the court for the cancellation of all actions that are not required to be carried out by the debtor on his assets which are known by the debtor that the act is detrimental to the creditor.⁶

Although legally *actio pauliana* has been regulated in UUK-PKPU, in practice the *actio pauliana* lawsuit submitted to the Commercial Court is not always granted by the judge, as in Decision Number 01/Pdt.Sus/ActioPauliana/2016/PN.Niaga.Jkt.Pst. Tommy Simorangkir who is the curator in the *a quo* case acting as the plaintiff, filed an *actio pauliana* lawsuit

¹ R. Subekti, *Hukum Perjanjian*, 27th edition, (Jakarta: PT Intermedia, 2014), p. 125.

² Ibid.

³ Law No. 37 Year 2004 about Bankruptcy and Suspension of Obligation for Payment of Debts (herein after referred to Law No. 37 Year 2004), article 1 number 1.

⁴ Andriani Nurdin, *Masalah Seputar Actio Pauliana*, Dalam: Emmy Yuhassarie., *Kepailitan dan Transfer Aset Secara Melawan Hukum*, (Jakarta: Pusat Pengkajian Hukum, 2004), p. 263.

⁵ Elytas Ras Ginting, *Hukum Kepailitan : Teori Kepailitan*, (Jakarta: Bumi Aksara, 2018), p.171.

⁶ Sutan Remy Sjahdeni, *Hukum Kepailitan Memahami Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan*, 4th edition, (Jakarta: Pustaka Utama Grafiti, 2009), p. 250.

against the bankrupt debtor, Rudy Syarif, as the first defendant (Defendant I), who was declared bankrupt on March 3rd, 2016, Ponywati Syarif as the second defendant (Defendant II), Megawati as the third defendant (Defendant III), Fransisca Sudarma as the fourth defendant (Defendant IV), Hardy Gunawan as the fifth defendant (Defendant V), Meigawati Gunawan as the sixth defendant (Defendant VI), Slamet Musiyanto as the seventh defendant (Defendant VII) and the Land Registry Office of North Jakarta as the eighth defendant (Defendant VIII). The filing of the *actio pauliana* lawsuit is motivated by the facts that prior to being declared bankrupt, on January 20th, 2016 the first defendant, namely Rudy Syarif, was declared to be in the PKPU process. Before being declared to be in the PKPU process, on October 21st, 2015 Defendants I, II, III, IV and V had made and signed a power of attorney to execute a deed of sell number 15 before Defendant VI with the object of the agreement is a land and building with a freehold certificate number 9497, hereinafter referred to as SHM 9497, which is motivated by the existence of debt obligations of Defendant I to Defendants IV and V, which based on information from Defendant I, namely Rudy Syarif, it is known that during the PKPU process, the original document of SHM 9497 was held by Defendant V and Defendant VI.

Based on the power of attorney to execute a deed of sell previously made by the defendants, on February 29th, 2016 without the knowledge of Defendant I, Defendants IV and V made a deed of sale number 212/2016 before Defendant VII as Notary/PPAT even though the plaintiff has sent a notification letter to Defendant IV to stop any action regarding transfer of rights of SHM 9497. The transfer of rights based on the deed of sale number 212/2016 made before Defendant VII as Notary/PPAT on February 29th, 2016 then resulted in the issuance of SHM 9497 on behalf of the new owner, namely Defendant IV and Defendant V.

The existence of legal facts as described above, assessed by the plaintiff as the curator, as an action that resulted in the reduction of the debtor's bankruptcy estate and caused losses to creditors, because SHM 9497 is part of the entire assets of the bankrupt debtor which has been subject to general confiscation in the bankruptcy process. Thus, the plaintiff decided to file an *actio pauliana* lawsuit to the Central Jakarta Commercial Court to request the cancellation of the *a quo* legal action. In connection with the *actio pauliana* lawsuit filed by the plaintiff, the panel of judges only considered that the plaintiff did not have the authority to file an *actio pauliana* lawsuit because the SHM 9497 which was the object of the dispute was not the personal property of the bankrupt debtor so that the object of the dispute was not included in the bankruptcy estate.

In fact, when referring to Article 47 paragraph (1) of the UUK-PKPU, there are provisions that clearly state that the curator has the authority to file an *actio pauliana* in bankruptcy. In addition, Article 21 of the UUK-PKPU also stipulates that bankruptcy covers the entire assets of the debtor at the time the bankruptcy decision is pronounced as well as everything obtained during the bankruptcy and the object of dispute in the *a quo* case is also not an asset that is excluded from the bankruptcy estate as regulated in Article 22 of the UUK-PKPU, so that in making a decision regarding the *actio pauliana* lawsuit filed by the plaintiff, the panel of judges also needs to consider other legal facts in the *a quo* case.

Based on the described background, there are 2 (two) issues raised, which are:

1. What are the authorities of the curator in filing an *actio pauliana* lawsuit based on Article 41 in conjunction with Article 42 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment?
2. How are the judges' legal considerations in Decision Number 01/Pdt.Sus/Actio Pauli-

ana/2016/PN.Niaga.Jkt.Pst related to the *actio pauliana* lawsuit filed by Tommy Simorangkir as the curator?

The type of research used in this study is a normative research with a qualitative research type and uses a statutory approach and a case approach. The data used in this study is secondary data using primary legal materials, secondary legal materials and tertiary legal materials.

Bankruptcy

Etymologically, bankruptcy comes from the word bankrupt. The term bankruptcy comes from the Dutch word *failliet* which has a double meaning, as a noun and as an adjective. The term *failliet* itself comes from the French, namely *faillite* which means non-performing loan payment.⁷ Based on Article 1 point 1 of the UUK-PKPU, bankruptcy is a general confiscation of all assets of the Bankrupt Debtor which settled by a Curator under the supervision of the Supervisory Judge as regulated in this Law.⁸ Referring to the provisions above, what is meant by bankruptcy is a condition where the debtor does not pay his debts that are due and can be collected. Debtors who stop paying their debts are not only interpreted as a condition of the debtor being unable to pay, but also because the debtor does not want to pay the debt even though he is able to pay such debts.⁹

The application for bankruptcy must first be submitted to the commercial court, either voluntarily by the debtor himself or not voluntarily, that is, submitted by other relevant par-

ties.¹⁰ Whether or not an application for bankruptcy is accepted depends on whether or not the conditions are fulfilled. In the UUK-PKPU, it is stipulated that bankruptcy must meet 2 (two) conditions, namely having two or more creditors and not paying off one debt that is due and collectible.¹¹ The provisions above can be explicitly found in Article 2 paragraph (1) of the UUK-PKPU which states that a debtor who has two or more creditors and does not pay at least one debt that has matured and can be collected is declared bankrupt by a court decision, either at his own request or at the request of one or more creditors.¹²

Referring to the above article, the juridical requirements for the bankruptcy of a debtor are as follows:

1. Existence of Debt
Based on Article 1 point 6 of the UUK-PKPU, what is meant by debt is: Obligations that are stated or can be stated in the amount of money both in Indonesian currency and foreign currencies, either directly or that will arise in the future or contingent, arising from agreements or laws and which must be fulfilled by the debtor and if not fulfilled, give the right to creditors to obtain fulfilment from the assets of the debtor.¹³
2. The debt has matured and is collectible
According to the explanation of Article 2 paragraph (1) of the UUK-PKPU, what is meant by debt that has matured and is collectible is:
The obligation to pay debts that have matured, either because it has been agreed upon, due to the acceleration of the collection time as agreed, due to the imposition of sanctions or fines by the competent authori-

⁷ Victor Situmorang & Soekarso, *Pengantar Hukum Kepailitan di Indonesia*, (Jakarta: RinekaCipta, 1994), p. 18.

⁸ Law No. 37 of 2004, Article 1 number 1.

⁹ Rachmadi Usman, *Dimensi Hukum Kepailitan di Indonesia*, (Jakarta: PT. Gramedia Pustaka Utama, 2004), p. 15.

¹⁰ H. Man S. Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, (Bandung: PT. Alumni, 2006), p. 2.

¹¹ Hadi Shubhan, 2008, *Hukum Kepailitan, Prinsip, Norma dan Praktik di Peradilan*, (Jakarta: Kencana-Prenadamedia Group), p. 72.

¹² Law No. 37 Year 2004, Article 2 paragraph (1).

¹³ *Ibid.*, Article 1 number 6.

ty, or due to court decisions, arbitrators, or arbitration tribunals.¹⁴

3. There are two or more creditors

The types of creditors in bankruptcy are:

- a. Concurrent creditors
- b. Separatist creditors
- c. Preferred creditors

4. The debtor does not pay at least one debt

Referring to Article 2 paragraph (1) of the UUK-PKPU, it does not state that the article is limited to debtors who are unable to pay their debts. Based on the provisions above, the condition that the debtor does not pay at least one debt can be interpreted that the debtor is unable to pay or does not want to pay the debt.

In the event that the bankruptcy conditions as regulated in Article 2 paragraph (1) of the UUK-PKPU have been fulfilled and the debtor is declared to be in a state of bankruptcy, it will cause legal consequences to the assets of the bankrupt debtor resulting in all of the debtor's assets as well as everything obtained during the bankruptcy are in general confiscation from the moment the bankruptcy decision is pronounced and the debtor by law loses all his rights to control and manage his assets included in the bankruptcy estate as of the date of the bankruptcy, as regulated in Article 21 *jo*. 24 paragraph (1) of the UUK-PKPU.

Curator

Curators according to Article 1 point 5 of the UUK-PKPU is property and Heritage Agency or an individual appointed by the Court to manage and settle the assets of the bankrupt Debtor under the supervision of the Supervisory Judge in accordance with the provisions of this law.¹⁵

Referring to the provisions above, a curator is Property and Heritage Agency as well as individuals. The requirements to become an

individual curator based on Article 70 paragraph (2) of the UUK-PKPU are:

1. An individual who is domiciled in Indonesia, who has the special skills needed to manage and/or settle the bankruptcy estate;
2. Registered with the ministry whose scope of duties and responsibilities is in the field of law and legislation.¹⁶

The curator is in charge of managing and/or settling bankruptcy estate as stipulated in Article 69 paragraph (1) of the UUK-PKPU. In relation to the duties and authorities it has, the curator is also charged with the responsibility as stipulated in Article 72 of the UUK-PKPU, namely the curator is responsible for errors or omissions in carrying out management and/or settlement tasks that cause losses to the bankruptcy estate.¹⁷

Actio Pauliana

Actio Pauliana, according to Sutan Remy, is the right granted by law to a creditor to submit an application to the court for the cancellation of all actions that are not required to be carried out by the debtor on his assets which are known by the debtor that the act is detrimental to the creditor.¹⁸

Basically, the rights owned by creditors are generally regulated in Article 1341 of the Civil Code which reads:

“Nevertheless, the creditor may apply for the invalidation of all actions that are required by the debtor, by whatever name it is called, which is detrimental to the creditor; provided it is proven that when the action was taken, the debtor and the person with whom or for whom the debtor acted,

¹⁴ Ibid., Explanation of Article 1 number 6.

¹⁵ Ibid., Article 1 number 5.

¹⁶ Ibid., Article 70 paragraph (2).

¹⁷ Ibid., Article 72.

¹⁸ Sutan Remy Sjahdeni, *Hukum Kepailitan Memahami Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan*, p 250.

knew that the action resulted in a loss to creditors.”¹⁹

In line with the provisions in the Civil Code above, Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment regulates the implementing provisions of this *actio pauliana*. According to Article 41 paragraphs (1), (2) and (3) of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment, it is regulated that:²⁰

1. For the interest of bankruptcy estate, the court may request the cancellation of all legal actions of the debtor who have been declared bankrupt which harm the interests of the creditor, which was carried out before the bankruptcy decision was pronounced;
2. The cancellation as referred to in paragraph (1) can only be made if it can be proven that at the time the legal action was taken, the Debtor and the party with whom the legal action was carried out knew or should have known that the legal action would result in a loss to the creditor;
3. Exceptions from the provisions as referred to in paragraph (1) are legal actions of the Debtor which must be carried out based on an agreement and/or by law.

Referring to the above provisions, there are 6 (six) requirements for the fulfilment of *actio pauliana*, namely:²¹

1. The *actio pauliana* is carried out for the benefit of the bankruptcy estate;
2. There is a legal action from the debtor;
3. The debtor has been declared bankrupt;
4. The legal action is detrimental to the interests of the creditor;
5. The legal action was carried out prior to the declaration of bankruptcy;
6. It can be proven that at the time the legal action was carried out, the debtor and the party with whom the legal action was car-

ried out knew or should have known that the legal action would result in a loss to the creditor and the legal action was not an obligatory legal act, that is, it is not required by an agreement or law.

In relation to debtors and third parties, who are deemed to know that the act that is done is detrimental to the creditors, there is a provision in Article 42 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment which reads, If a legal act that harms creditors is carried out within a period of 1 (one) year prior to the pronouncement of the bankruptcy decision, while the act is not obligated to be carried out by the Debtor, unless it can be proven otherwise, the Debtor and the party with whom the act was committed are deemed to have known or ought to have known that the act would result in a loss to the creditor as referred to in Article 41 paragraph (2), in case such acts are:²²

1. An agreement where the debtor's obligations far exceed the obligations of the party with whom the agreement is made;
 2. A payment of, or guarantees for debts that have not yet matured and/or have not yet collectible;
 3. Performed by individual debtors, with or for the benefit of:
 - a. Husband or wife, adopted child, or their third-degree relatives;
 - b. A legal entity where the debtor or his husband or wife, adopted child, or their third-degree relatives are members of the board of directors or managers or if the parties, either individually or jointly, participate directly or indirectly in the ownership of the legal entity more than 50% (fifty percent) of the paid-up capital or in control of the legal entity;
- a. Performed by debtor who is a legal entity, with or for the benefit of:
 - 1) Members of the board of directors or managers of the debtor, husband

¹⁹ Indonesian Civil Code Article 1341

²⁰ Law No. 37 Year 2004, *Op.Cit.*, Article 41.

²¹ Munir Fuady, *Hukum Pailit dalam Teori dan Praktik*, (Bandung: PT Citra Aditya Bakti, 2010), p.86.

²² Law No. 37 Year 2004, Article 41 paragraph (2).

- or wife, adopted child, or third-degree relatives of the members of the board of directors or the managers;
- 2) Individuals, either individually or jointly with their husband or wife, adopted child, or third-degree relatives, who participate directly or indirectly in the ownership of the debtor more than 50% (fifty percent) of the paid-up capital or in control of the legal entity;
 - 3) Individuals whose husband or wife, adopted child, or third-degree relatives, participate directly or indirectly in the ownership of the debtor more than 50% (fifty percent) of the paid-up capital or in control of the legal entity;
- b. Performed by a debtor who is a legal entity, with or for the benefit of another legal entity if:
- 1) Individual member of the board of directors or the managers in both business entities are the same person;
 - 2) Husband or wife, adopted child, or third-degree relatives from individual member of the board of directors or the managers of the debtor who are also members of the board of directors or the managers of the other legal entity, or vice versa;
 - 3) Individual member of the board of directors or the managers, or members of the supervisory board of the debtor, or their husband or wife, adopted child, or third-degree relatives, either individually or jointly, participate directly or indirectly in the ownership of the other legal entity more than 50% (fifty percent) of the paid-up capital or in control of the legal entity, or vice versa;
 - 4) Debtor is a member of the board of directors or the manager of the other legal entity, or vice versa;
- 5) The same legal entity, or the same individual, whether jointly or not with their husband or wife, and or their adopted child and their third-degree relatives, participate directly or indirectly in the two legal entities at least 50% (fifty percent) of the paid-up capital;
- c. Performed by a debtor who is a legal entity with or against another legal entity in a group of which the debtor is a member;
 - d. The provisions in number 3, number 4, number 5, and number 6 apply *mutatis mutandis* in the event that it is carried out by the debtor with or for the benefit of:
 - 1) Managers of a legal entity, husband or wife, adopted child, or three-degree relatives of such managers;
 - 2) Individuals, either individually or jointly with their husband or wife, adopted child, or third-degree relatives who participate directly or indirectly in the control of the legal entity.

In the event that the judges grants the *actio pauliana* lawsuit filed by the curator, then there are legal consequences arising from it as stipulated in Article 49 UUK-PKPU, which reads:²³

- 1) Any person who has received an object which is part of the Debtor's assets subject to the cancelled legal action, must return the object to the Curator and report it to the Supervisory Judge;
- 2) In the event that the person as referred to in paragraph (1) is unable to return the object that has been received in its original condition, the person is obligated to pay compensation to the bankruptcy estate;
- 3) The rights of third parties to the objects as referred to in paragraph (1) which

²³ Ibid., Article 49.

- are obtained in good faith and not for free, must be protected;
- 4) Goods received by the Debtor or its replacement must be returned by the Curator, to the extent that the bankruptcy estate is benefited, and as for the deficiency, the person subject to the cancellation can appear as a concurrent creditor.

The Authority of the Curator in Filing an *Actio Pauliana* Lawsuit is Based on Article 41 in Conjunction with Article 42 of Law No. 37 of 2004 Concerning Bankruptcy and Suspension of Debt Payment

In connection with the loss of the bankrupt debtor's right to manage his assets which are included in the bankruptcy estate, the court appoints a curator who will manage and settle the assets of the bankrupt debtor as contained in Article 69 paragraph (1) of the UUK-PKPU. The curator's authorities can be executed from the date of the bankruptcy decision, even though the decision has not been inkraht, as stipulated in Article 16 paragraph (1) of the UUK-PKPU which reads:

The curator is authorized to manage and/or settle the bankruptcy estate from the date the bankruptcy decision is pronounced even though an appeal or judicial review is filed against the decision.²⁴ Referring to his duties, the curator has a very important role in maximizing and increasing the bankruptcy estate in order to fulfil the debt repayment obligations of the bankrupt debtor.²⁵ Therefore, in carrying out an action, the curator must pay attention to the following matters, among others:²⁶

1. Whether he is authorized to do so;
2. Whether it is a good time to take certain actions;

²⁴ Ibid., Article 16 paragraph (1).

²⁵ Adrian Sutedi, *Hukum Kepailitan*, (Jakarta: Ghalia Indonesia, 2009), p. 63.

²⁶ Munir Fuady, *Hukum Pailit dalam Teori dan Praktik*, p. 42.

3. Whether the action require prior approval/permission/participation from certain parties, such as supervisory judges, commercial courts, etc.;
4. Whether the action require certain procedures, such as shall be decided in a meeting with a certain quorum, shall be in a court session that is attended/led by a supervisory judge;
5. It shall consider the appropriateness from a legal, customary and social point of view in carrying out certain actions.

Furthermore, with regard to *actio pauliana* in the UUK-PKPU, the authority to apply for *actio pauliana* is no longer given to the creditor, but such authority is given to the curator as contained in Article 47 paragraph (1) of the UUK-PKPU:

"The claim for rights based on the provisions as referred to in Article 41, Article 42, Article 43, Article 44, Article 45, and Article 46 is submitted by the Curator to the Court."²⁷

If we refer to the article above which regulates that the claims for rights based on Article 41 to Article 46 are submitted by the curator to the court, in which the provisions mentioned above are basically provisions which regulates *actio pauliana* in bankruptcy, then it may be interpreted that the authority to file an *actio pauliana* in bankruptcy is given to the curator, so that in the event a creditor wants to cancel the legal action of the bankrupt debtor that harms him, the creditor must first ask the curator to submit a request for the cancellation through an *actio pauliana* lawsuit.

In connection with the authority of the curator in filing an *actio pauliana* lawsuit, before filing the lawsuit, the curator must first obtain permission from the supervisory judge as the party overseeing the management and settlement of the bankruptcy estate.

²⁷ Law No. 37 Year 2004, Article 47 paragraph (1).

Although the provisions of the UUK-PKPU does not explicitly stipulate the need for a supervisory judge's permission in the event the curator files an *actio pauliana* lawsuit, the existence of this provisions can be found in Article 69 paragraph (5) of the UUK-PKPU which stipulates that in order to appear in court, the curator must first obtain the permission of the supervisory judge, except in the case of dispute over the verification of receivables or in the case as referred to in Article 36, Article 38, Article 39 and Article 59 paragraph (3) of the UUK-PKPU.

Based on Article 69 paragraph (5) of the UUK-PKPU, it can be interpreted that in exercising its authority to file an *actio pauliana* lawsuit to the court, the curator must first obtain the permission of the supervisory judge, because the filing of an *actio pauliana* lawsuit does not involve a dispute over the verification of receivables. In addition to requiring the supervisory judge's permission to file an *actio pauliana* lawsuit, the curator must also pay attention to the requirements for submitting *actio pauliana* and the court that is authorized to examine and decide on the *actio pauliana* lawsuit. In the event that the judge grants the *actio pauliana* lawsuit filed by the curator, then there will be legal consequences as regulated in Article 49 of the UUK-PKPU. Referring to the said provisions, the legal consequences arising from the granting of an *actio pauliana* lawsuit filed by the curator is that the party who receives the object which gets cancelled must return the object to the curator as regulated in Article 49 paragraph (1) of the UUK-PKPU.

Meanwhile, if the object cannot be returned in the same condition as before, then in accordance with Article 49 paragraph (2) of the UUK-PKPU, the recipient of the object must replace it by paying compensation. In the event that the third party who receives the object does not have bad intentions, the rights of the third party must be protected as regulated in Article 49 paragraph (3) of the UUK-PKPU. In addition to regulating the return made by

the recipient of the object, Article 49 paragraph (4) of the UUK-PKPU also regulates the return made by the debtor. In the event that the debtor receives an object from the cancelled legal action, the curator must return the object. However, this must be made only if the return provides benefits for the bankruptcy estate. If the return will only bring losses to the bankruptcy estate then it cannot be made.²⁸ In the event that the debtor's legal action with such party has been cancelled but the curator cannot returned the object received by the debtor, then the party can appear as a concurrent creditor and will get the fulfilment of his rights when the bankruptcy estate is settled and distributed.²⁹

Judge's Legal Considerations in Decision Number 01/Pdt.Sus/ActioPauliana/2016/PN. Niaga.Jkt.Pst Related to Actio Pauliana Lawsuit Filed by Tommy Simorangkir as Curator

The main point of the panel of judges' considerations is that the land and building with SHM 9497 which is basically the object of dispute in the *actio pauliana* lawsuit filed by Tommy Simorangkir as curator is not included in the bankruptcy estate because it is owned by 3 (three) people namely Rudy Syarif (Defendant I) and his biological sister, Ponywati Sjarif (Defendant II) and Megawati (Defendant III) and not Rudy Syarif (Defendant I in bankruptcy) himself, so Tommy Simorangkir cannot file an *actio pauliana* lawsuit against the object of the dispute because Article 41 in conjunction with Article 42 of the UUK-PKPU can only be applied to the assets of the bankrupt debtor which are his personal assets and are not assets of the bankrupt debtor which are mixed with other people's assets or joint assets, except joint assets of the bankrupt debtor with a husband or wife who in their marriage

²⁸ Sutan Remy Sjahdeni, *Hukum Kepailitan Memahami Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan*, p. 371.

²⁹ Munir Fuady, *Hukum Pailit dalam Teori dan Praktik*, p. 93.

did not make a prenuptial agreement. As for the lawsuit filed by the Plaintiff, the panel of judges also gave a decision that the Plaintiff's claim was unacceptable (Niet Ontvankelijke). Referring to the considerations of the panel of judges as described above, basically the author does not agree with the considerations of the panel of judges in the *a quo* case which states that:

“Considering, that from the bankruptcy provisions that regulates the consequences of bankruptcy in Article 21 to Article 40 in particular relating to the assets of the bankrupt debtor, it can be concluded that the assets of the bankrupt debtor are personal assets that belong to the bankrupt debtor and are not assets of the bankrupt debtor which are still mixed into joint assets with other people, except for Article 23 which stipulates that the bankrupt debtor as referred to in Articles 21 and 22 includes the wife or husband of the bankrupt debtor who is married with joint assets.”

The author considers that the panel of judges cannot immediately conclude that the debtor's assets included in the bankruptcy estate are only assets owned by the debtor personally, because if it refers to Article 21 of the UUK-PKPU it has been stipulated that bankruptcy covers all the assets of the debtor at the time of the bankruptcy decision is pronounced as well as everything obtained during the bankruptcy.³⁰ As for the provisions above, it can be interpreted that what is meant by bankruptcy estate is all assets owned by the bankrupt debtor that already exist or will exist during the bankruptcy in the sense that the bankruptcy estate includes the debtor's assets obtained after the declaration of bankruptcy until the completion of the settlement by the curator.³¹

This regulation regarding bankruptcy assets is basically an implementation of Article 1131

of the Civil Code which stipulates that all debtor's assets, whether movable or not, both existing and in the future, become dependents for all debtors' debts. If referring back to the *a quo* case, the object of dispute in the form of land and buildings with SHM 9497 cannot be immediately excluded from the bankruptcy estate only because the property is owned by the bankrupt debtor and 2 (two) other people. If we refers to Article 21 and Article 22 of the UUK-PKPU which have stipulated that all assets of a bankrupt debtor, both existing and those that will exist during the bankruptcy period, are included in the bankruptcy estate, except for assets that have been excluded from the bankruptcy estate as regulated in Article 22 of the UUK-PKPU, the object of dispute in the form of land and building with SHM 9497 can be included in the bankruptcy estate, because Defendant I, in this case as the bankrupt debtor is also the owner of the object of the dispute. The SHM 9497 also includes Rudy Syarif as the owner of the rights, so that it is clear that the object of dispute is the assets of the bankrupt debtor that should be included in the bankruptcy estate and are in general confiscation. Moreover, the object of the dispute is also not an assets that are excluded from the bankruptcy estate as regulated in Article 22 UUK-PKPU.

When we refers to the *a quo* case, the *actio pauliana* lawsuit filed by Tommy Simorangkir as the curator is only to cancel the legal actions taken by the bankrupt debtor so that the assets owned by the bankrupt debtor, namely Defendant I, are not transferred to other people inappropriately and does not cause losses to creditors. The author considers that the *actio pauliana* certainly will not resulted in legal consequences that cause Defendant II and Defendant III to lose their rights to the land. Moreover, in fact that the SHM 9497 is used as collateral for the debts of Defendant I to Defendant IV and Defendant V, which means that the transfer of rights of the SHM is solely for the benefit of Defendant I. Referring to this fact, of course there will be no loss that will be

³⁰ Law No. 37 Year 2004, Article 21.

³¹ Sutan Remy Sjahdeni, *Hukum Kepailitan Memahami Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan*, p. 284

experienced by Defendant II and Defendant III when the *actio pauliana* is filed against the land. In connection with the inclusion of the disputed object into the bankruptcy estate as described above, Tommy Simorangkir as the curator in the *a quo* case has the authority to manage and settle the SHM 9497 as stipulated in Article 69 paragraph (1) of the UUK-PKPU and the authority to file *actio pauliana* as stipulated in the Article 47 paragraph (1) of the UUK-PKPU.

Furthermore, the author again disagrees with the consideration of the panel of judges which stated that:

“Considering, that from the above considerations, it can be concluded that in accordance with Article 41 jo. Article 42 of the UUK-PKPU, the curator can only apply for *actio pauliana* for assets of the bankrupt debtor which are the bankrupt debtor’s personal assets and are not assets of the bankrupt debtor that are still mixed with other people’s assets or joint assets, except for joint assets of the debtor in bankruptcy from a husband or wife who in their marriage did not make a prenuptial agreement.”

The author does not agree with these considerations, because referring to Article 41 regarding *actio pauliana* in bankruptcy, basically it does not regulate the provisions used in considerations given by the panel of judges which state that *actio pauliana* can only be carried out on the debtor’s personal assets. Furthermore, in relation to the further consideration of the panel of judges which stated that:

“Considering, that because the object of the dispute is a land and building with SHM 9497, which legally proven to be a joint property of Rudy Syarif (Defendant I), and Ponywati Sjarif (Defendant II) and Megawati (Defendant III) and not belonging to Rudy Syarif (Defendant) I (in bankruptcy) alone/ personally, then the those three persons jointly have the right to make a trans-

fer/ sale of the object of the *a quo* dispute, so that all legal actions that have been taken by the three persons as long as it is in accordance with the applicable legal procedures is valid and binding on the related parties, and the provisions of Article 41 in conjunction with Article 42 of the UUK-PKPU which regulates *actio pauliana* cannot be applied.”

The panel of judges in the *a quo* case cannot immediately decided that because SHM 9497 has been transferred by the owner, the act of transferring carried out jointly by the three, as long as it is in accordance with applicable legal procedures were valid and binding on the related parties, then the provisions of Article 41 in conjunction with Article 42 of the UUK-PKPU which regulates *actio pauliana* cannot be applied, because even though in the *a quo* case the act of transferring SHM 9497 was carried out by the entitled parties, namely Rudy Syarif (Defendant I), and Ponywati Sjarif (Defendant II) and Megawati (Defendant III) the act can still be cancelled. The base of this opinion refers to Article 41 paragraph (2) of the UUK-PKPU which regulates that:

“Cancellation as referred to in paragraph (1) can only be carried out if it can be proven that at the time the legal action was carried out, the Debtor and the party with whom the legal action was carried out knew or should have known that the legal action would result in a loss to the creditor.”³²

As for the party with whom the legal action was carried out in the article above, it includes the party for whom the agreement was made,³³ which if referring back to the *a quo* case, the provisions as above also include Ponywati Sjarif (Defendant II) and Megawati (Defendant III). Referring to the analysis that the author gave regarding the consideration of the panel of judges in the *a quo* case, the author consid-

³² Law No. 37 Year 2004, Article 41 paragraph (2).

³³ Ibid., Explanation of Article 41 paragraph (2)

ers that in deciding the *a quo* case, the panel of judges should not immediately state that Tommy Simorangkir is not authorized to propose *actio pauliana* just because SHM 9497 as the object of the dispute is an asset of the debtor and 2 other people, but further consideration must be given regarding whether the conditions for *actio pauliana* as regulated in Article 41 of the UUK-PKPU are met or not in the *a quo* case.

In connection with this opinion, the author will provide further analysis related to the *actio pauliana* lawsuit filed by Tommy Simorangkir by linking the facts contained in the *a quo* case with whether or not the conditions for *actio pauliana* as regulated in the UUK-PKPU are fulfilled. Basically, the conditions for the submission of *actio pauliana* can be formulated as follows:

1. The *actio pauliana* is carried out for the benefit of the bankruptcy estate

Referring to the previous explanation above, the author has provided an analysis that the object of dispute, namely SHM 9497, can be included in the bankruptcy estate because it is part of Rudy Syarief's (Defendant I) assets as the bankrupt debtor. So the *actio pauliana* lawsuit filed by Tommy Simorangkir as the curator was indeed filed for the benefit of the bankruptcy estate, considering that *actio pauliana* is one of the legal remedies that the curator can take in carrying out its role to maximize and increase the bankrupt assets in order to fulfil the debt repayment of the bankrupt debtor.³⁴

2. There is a legal action from the debtor
- Basically what is meant by legal action is every action of the debtor that has legal consequences.³⁵ As for what is meant by legal consequences are consequences

given by law on an act of a legal entity.³⁶ That way, for a debtor's act to be called a legal act, basically it must meet 2 (two) elements, namely:

- a. Do an action;
- b. Has legal consequences.

The legal action taken by the debtor in the *a quo* case is making power of attorney to execute deed of sales No. 15 dated October 21st, 2015 made by Defendants I, II, III, IV and V (exhibits P-2135 and T-3)136, which with such power of attorney, Defendant IV and Defendant V as the authorized person can carry out all the authorities as stipulated in the deed, namely the granting of power to sell, deliver, release, and/or in any way transfer the rights of the land and building.

The provisions in number II points 1, 2, 3 which basically states that the authorized person is fully authorized to: a). appear before a notary, PPAT, land registry office and other agencies to provide information, show documents, choose legal domicile, make and execute deeds including deed of sale and other deeds, b). determine and accept the total price and terms of the agreement in the context of the sale or transfer of rights of the land and building, c). conduct anything on the land and building without any exceptions. With the authority given to Defendant IV and Defendant V as above, there was a transfer of ownership of SHM 9497 which was originally owned by Rudy Syarif (bankrupt debtor), Ponywati Sjarif and Megawati to the new owners namely Fransisca Sudarma and Hardy Gunawan based on deed of sale dated February 29th, 2016 (exhibit T-4)138. As for the transfer of rights of SHM 9497, Rudy Syarif (bankrupt debtor), Ponywati Sjarif and Megawati no longer have rights of the land and build-

³⁴ Adrian Sutedi, *Hukum Kepailitan*, (Jakarta: Ghalia Indonesia, 2009), p. 63.

³⁵ Munir Fuady, *Hukum Pailit dalam Teori dan Praktik*, p. 87.

³⁶ Achmad Ali, *Menguak Tabir Hukum*, (Jakarta: Kencana, 2017), p. 275

ing with SHM 9497 or in other words the land and building with SHM 9497 are no longer owned by the three because they have transferred the ownership of the land and buildings with SHM 9497. So the ownership of the land and building with SHM 9497 became owned by Fransisca Sudarma and Hardy Gunawan in accordance with the Authentic Deed in the form of SHM No. 9497 (exhibit T-1).

3. The debtor has been declared bankrupt
There is a Commercial Court Decision at the Central Jakarta District Court Number 05/Pdt.Sus-PKPU/2016/PN.Niaga Jkt.Pst (Exhibit P-5)140 dated March 3rd, 2016 which states that Defendant I (Rudy Syarif) is bankrupt with all consequences. It basically makes this third condition, namely that the debtor has been declared bankrupt, has been fulfilled.

4. The legal action is detrimental to the interests of the creditor

Referring to the *a quo* case, there was a transfer of ownership of SHM 9497 which was originally owned by Rudy Syarif (bankrupt debtor), Ponywati Sjarif and Megawati to the new owners namely Fransisca Sudarma and Hardy Gunawan with deed of sale dated February 29th, 2016 (exhibit T-4)141. Based on the power of attorney to execute the deed of sale No. 15 dated October 21st, 2015 made by Defendant I, II, III, IV and V (exhibit P-2142 and T-3) 143 resulting in loss of or reduced bankruptcy estate which should be in general confiscation, managed and settled by the curator, which of course causes losses to creditors.

Furthermore, Munir Fuady qualifies several actions that are included in actions that are detrimental to creditors, including:³⁷

- a. Sales of goods at prices below market prices;

- b. Giving an item in the form of a grant or gift;
- c. Doing something that adds liability or burden on the bankruptcy estate;
- d. Doing something that could cause losses to the creditor's ranking. For example, providing debt repayments or debt guarantees to certain creditors only.

Referring to several actions that are qualified as actions that are detrimental to creditors as above and are related to the *a quo* case, the author considers that the 4th (fourth) *actio pauliana* requirements have been fulfilled because the legal actions carried out by Rudy Syarif as the bankrupt debtor has caused losses to creditors by providing debt payments to certain creditors, namely Fransisca Sudarma (Defendant IV) and Hardy Gunawan (Defendant V). The author considers that the requirements for legal action that harms the interests of the creditor in the *a quo* case have been fulfilled because the legal action of the debtor is an act that harms the interests of the creditor resulting in the loss or reduction of the debtor's bankruptcy estate and the legal action was carried out in order to provide payment for Rudy Syarif's debt to certain creditors, namely Fransisca Sudarma and Hardy Gunawan.

5. The legal action is carried out before the declaration of bankruptcy

The legal action in the *a quo* case is the transfer of ownership of SHM 9497 which was originally owned by Rudy Syarif (bankrupt debtor), Ponywati Sjarif and Megawati to the new owners, namely Fransisca Sudarma and Hardy Gunawan based on the power of attorney to execute deed of sale No. 15 dated October 21st, 2015 made by Defendants I, II, III, IV and V (exhibits P-2148 and T-3). As well as the transfer of title of SHM 9497 to Fransisca Sudarma and Hardy Gunawan which on March 1st, 2013 has

³⁷ Munir Fuady, *Op.Cit.*, p. 88.

been carried out based on the deed of sale dated February 29th, 2016 (exhibit T-4) and issuance of SHM 9497 on behalf of Fransisca Sudarma and Hardy Gunawan on March 1st, 2016. The above series of legal actions were carried out before March 3rd, 2016 which is the date when Rudy Syarif (bankrupt debtor) was declared bankrupt with all the legal consequences based on the Decision of the Commercial Court at the Central Jakarta District Court Number 05/Pdt.Sus-PKPU/ 2016/PN.Niaga Jkt.Pst. (Exhibit P-5). So that the requirements for the legal action to be carried out before the declaration of bankruptcy has been fulfilled.

6. It can be proven that at the time the legal action was carried out, the debtor and the party with whom the legal action was carried out knew or should have known that the legal action would result in a loss to the creditor and the legal action was not a legal act required under the agreement and/or law

To be able to grant the *actio pauliana* lawsuit filed by Tommy Simorangkir in the *a quo* case, the conditions for the debtor and the party with whom the legal action was carried out knew or should have known that the legal action will result in a loss to the creditor must be fulfilled. Referring to the explanation of Article 41 paragraph (2), "What is meant by the party with whom the legal action was carried out, includes the party for whom the agreement was made." As for whether or not these conditions are fulfilled in the *a quo* case, the author will first analyze whether in the *a quo* case the act carried out by Rudy Syarif as a debtor is an act that is mandatory and must be carried out by the debtor in good faith and not in order to cause detrimental loss to creditors.

Referring to the *a quo* case, the legal action carried out by Rudy Syarif, namely

making a power of attorney to execute deed of sale No. 15 which was made on October 21st, 2015 was an act that was indeed mandatory for him to do because the making of a power of attorney was motivated by a debt owned by Rudy Syarif as Defendant I to Defendants IV and V and has matured as evidenced by the existence of a Debt Acknowledgment Letter dated October 20th, 2015 and an addendum dated October 22nd, 2015 which was made and signed by both parties, not based on bad intentions to harm creditor.

In addition, Rudy Syarif's good faith in the *a quo* case could be seen from Rudy Syarif's willingness to deliver all information to Tommy Simorangkir as curator regarding the power of attorney to execute a deed of sale No. 15 which was made and signed on October 21st, 2015 which motivated by Rudy Syarif's debt to Defendants IV and V, and Rudy Syarif has also notified that SHM 9497 which is the object of the dispute is already held by Defendant IV and Defendant V. Moreover, in the reply submitted by Rudy Syarif, he has stated that the transfer of rights of SHM 9497 was completely beyond his expectations and knowledge, because Rudy Syarif only intended to make SHM 9497 as a temporary debt guarantee. With the existence of this guarantee, the amount of debt and its maturity is still in the calculation process. The statement by Rudy Syarif was confirmed by Defendant I, in which he made a Police Report on the alleged crime of providing/incorporating false information in the authentic deed addressed to Defendant IV and Defendant V (Evidence T-3). Apart from making a police report, Rudy Syarif also took legal action by filing a lawsuit to the State Administrative Court related to the request for cancellation of SHM 9497 on behalf of Defendant IV and Defendant V.

Referring to the facts as above, the author considers that the requirement of the debtor to know or should have known that the legal action will result in a loss to the creditor is not fulfilled in the *a quo* case. After providing an analysis related to the condition that the debtor should know or should have known that the legal action will result in a loss to the creditor, the author will provide an analysis related to whether or not the requirements of the party with whom the legal action was carried out knew or should have known that the legal act would result in a loss. Referring to the *a quo* case, the requirements of the party with whom the legal action was carried out knew or should have known that the legal action would result in a loss to the creditor has been fulfilled by looking at the fact that Tommy Simorangkir has sent notification letters to Defendant IV and Defendant VIII to stop any action on the transfer of rights of SHM 9497 without the approval of the Plaintiff as the administrator through letter No. 04/PKPU-RS/I/2016 dated January 26th regarding application for blocking land and building certificates on behalf of Rudy Syarif (Evidence P-3) and letter No. 36/PKPU-RS/II/2016 (Evidence P-4) dated February 18th, 2016 regarding the request for return of SHM 9497 in order to maintain and secure the assets of Defendant I, so it was not harmed during the PKPU process. However, the notification was completely ignored by Defendant IV as well as Defendant VIII, as evidenced by the transfer of rights of SMH 9497 carried out by Defendants IV and V through the execution of deed of sale dated February 29th, 2016 (exhibit T-4) and the issuance of a new SHM 9497 on behalf of Defendant IV and Defendant V on March 1st, 2016 which the execution of deed of sale and transfer of title of SHM 9497 to Defendant IV and Defend-

ant V (Evidence T-1) had been done within 1 day.

Referring to this fact, the author considers that the requirements of the party with whom the legal action was carried out knew or should have known that the legal action would result in a loss to the creditor in the *a quo* case has clearly been fulfilled by looking at the fact that Defendants IV and V continue to transfer rights of SHM 9497 even though Tommy Simorangkir has given notice to stop any action on the transfer rights of SHM 9497 because Defendant I has been determined to be in the PKPU process based on Decision Number 05/Pdt.Sus-PKPU/2016/PN.Niaga Jkt.Pst (evidence P-1), but Defendant IV and Defendant V still ignored the notification and even the transfer of title of SHM 9497 had been done in just 1 day. As for these facts, according to the author, it clearly shows that there was bad faith owned by Defendant IV and Defendant V to get debt repayments first compared to other Rudy Syarif creditors.

Referring to the analysis as above, the NO decision given by the panel of judges was not correct, because the consideration was based on the basis that Tommy Simorangkir as the curator in the *a quo* case did not have the authority to file an *actio pauliana* lawsuit against the object of the dispute which is a shared asset with other people, because the object of the dispute in the *a quo* case is not included in bankruptcy estate. Whereas referring to the analysis that the author did as above, even though SHM 9497 is owned by the debtor jointly with other people, Tommy Simorangkir still has the authority to file an *actio pauliana* lawsuit against the object of the dispute in the form of SHM 9497 because the object of the dispute is included in the bankruptcy estate. However, considering the fact that the Plaintiff's argument, namely Tommy Simorangkir, was not fulfilled in the *a quo* case, then the *actio pauliana* lawsuit submitted by Tommy Simorangkir as curator was rejected by the panel of judges because the condition that the debtor

knew or should have known that the legal action would result in losses for creditors are not met in the *a quo* case.

Conclusion

Based on the explanation as the author has described in the previous chapter and is related to the main issues that have been specified in this study, the author provides the following conclusions:

1. The curator has the authority to file an *actio pauliana* in bankruptcy as stipulated in Article 47 paragraph (1) of the UUK-PKPU. The authority is in line with the authority given to the curator to manage and settle bankruptcy estate as stipulated in Article 69 paragraph (1) of the UUK-PKPU.
2. In connection with the consideration of the panel of judges in Decision number 01/Pdt.Sus/ActioPauliana/2016/PN.Niaga.Jkt.Pst related to the *actio pauliana* lawsuit filed by Tommy Simorangkir as curator, the author does not agree with the panel of judges because Article 21 of the UUK-PKPU stipulates that bankruptcy covers all the assets of the debtor at the time the bankruptcy decision is pronounced as well as everything obtained during bankruptcy and the object of dispute in the *a quo* case is not an assets that are excluded from bankruptcy as regulated in Article 22 of the UUK-PKPU. Moreover, referring to Article 47 paragraph (1) of the UUK-PKPU, it is clear that the curator has the authority to file *actio pauliana* in bankruptcy. So basically, Tommy Simorangkir as curator has the authority to propose *actio pauliana* in the *a quo* case even though the assets are not only owned by the debtor himself, but even so, the *actio pauliana* proposed by Tommy Simorangkir as curator in the *a quo* case should have been rejected because it had not been proven that the debtor knew that his actions were detrimental to the creditor, because the legal actions carried out by Rudy Syarief as the

bankrupt debtor are indeed an act that he must do in relation to the debts he has against Defendant IV and Defendant V which are due and the transfer of rights of SHM 9497 was an event that was unknown to Rudy Syarief.

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