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Legal Responsibility Of The Board Of Directors In A Limited Liability Company For Company Losses

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ABSTRACT

Limited Liability Companies are business entities that play a significant role in Indonesia's economic activities, characterized by democratic principles and the separation of shareholder rights and obligations. This article examines the application of the fiduciary duty principle to the responsibilities of directors, particularly regarding the prevention and management of corporate losses, as well as the legal basis for the implementation of derivative suits by shareholders in Indonesia. Fiduciary duty requires directors to act in good faith, prudence, and loyalty, with the business judgment rule mechanism protecting personal liability. Derivative suits serve as a legal instrument for shareholders to hold directors accountable, although procedural regulations in Indonesia are still limited and minimum share ownership requirements are considered to hinder access to justice for minorities. Case studies of court decisions demonstrate important developments related to the protection of minority shareholders. This study recommends improving legal education for directors, improving derivative suit regulations, strengthening internal oversight functions, and implementing Good Corporate Governance principles to maintain corporate integrity and sustainability.

Keywords: Limited Liability Company, fiduciary duty, directors, good corporate governance, company losses.

INTRODUCTION

One of the relatively dominant business entities in economic activities is a business entity in the form of a Limited Liability Company (PT). Many companies are now changing their legal status to a Limited Liability Company. One of the factors driving the change in the status of the company form from another form to a Limited Liability Company is because the Limited Liability Company form is a business entity that separates the rights and obligations of the entrepreneurs concerned as shareholders with the rights and obligations of assets. In this view, the existence of a Limited Liability Company is essentially an economic activity institution that has a function in addition to carrying out business activities as well as a democratic economic institution.

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The idealization of the above concept encourages Limited Liability Companies to be required to carry out their activities supported by a clear framework and quality human resources. The aim and objective is so that the activities of the Limited Liability Company as a business unit and legal entity in Indonesia can be carried out productively, with quality and efficiency, and are oriented towards becoming a democratic institution.

Besides its characteristics, Limited Liability Companies also have advantages, including: as a result of limited liability, if the company has debts, shareholders are only responsible for the amount of capital they have contributed; Limited Liability Companies are a legal entity. So the continuity of the company as a legal entity is guaranteed even if the owner has changed; Limited Liability Companies can easily transfer shares from one shareholder to another; Limited Liability Companies can easily expand their business. This is because Limited Liability Companies easily obtain additional capital; Capital sources are managed more efficiently due to their specialized management.

RESULTS AND DISCUSSION

Application of the "Fiduciary Duty" Principle in the Practice of Directors' Responsibilities in Indonesia, Especially Regarding Losses Inflicted on the Company

Law Number 40 of 2007 concerning Limited Liability Companies. In a Limited Liability Company, the Board of Directors is the main pillar that ensures the continuity of the Company's business. It is called the main pillar because the existence of the Board of Directors is what makes the Limited Liability Company a living person. Without the Board of Directors, the Limited Liability Company is merely a paralyzed person. Conversely, the Board of Directors would never exist if it were never formed. Therefore, the Limited Liability Company exists, because of the Board of Directors. Thus, the existence of the Limited Liability Company and the Board of Directors is a mutualistic symbiosis. The Board of Directors is one of the organs within the Limited Liability Company, which carries out all the Company's activities. The Board of Directors is referred to as the Company's administrators because they are a complementary tool of the Company that carries out all the Company's activities and represents the Company. Thus, the scope of the Board of Directors is to manage the Company. The Board of Directors, who represent the interests of the Limited Liability Company and run the Limited Liability Company, is fully responsible for the management of the Limited Liability Company. In managing the Company, the

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Board of Directors must carry out its management in good faith, not based on bad faith. The good faith referred to may include:

1. Must be trusted
2. Obliged to carry out management for reasonable purposes
3. Obliged to comply with laws and regulations
4. Must be loyal to the Company; and
5. Must avoid conflicts of interest.

Managing a Company is not an easy matter. Therefore, in order for the Company to be managed according to the purpose for which the Company was established, becoming a Director requires requirements and expertise. The delegation of authority from the Company to the Directors to manage the Company is commonly referred to as Fiduciary Duty. After the enactment of the old Limited Liability Company Law, many legal theories regarding Companies that previously did not exist or were no longer applicable were adopted and implemented in Indonesia. The provisions on Fiduciary Duty in the old Limited Liability Company Law can be found in Article 79 paragraph (1), Article 82, and Article 85. However, the regulations were still relatively simple. After the enactment of the new Limited Liability Company Law in 2007, the existing legal theories regarding Companies were further refined, including how to regulate Fiduciary Duty for Directors in Indonesia.
According to Prasodjo, the improvement of the Fiduciary Duty regulations aims to ensure that the Board of Directors and the Board of Commissioners are not negligent in running their business. In this regard, Blanchard also stated that the seriousness of the Board of Directors in carrying out their obligations to the Company is more useful in preventing personal liability. Fiduciary Duty means that a person who holds a position as a trustee or a person who has received trust and is obliged to carry out that trust in good faith. It is an obligation for a person to act in the interests of others and is the most important obligation before the law. At a glance, Company law suggests that the Board of Directors must manage the Company with due care, just as drivers must drive their cars with full caution. Regarding the issue of implementing the duty of care in the implementation of the Company's management, it is necessary to state a generally applicable principle, known as "business judgment risk." This means that if the Board of Directors is truly honest and has good faith in carrying out their responsibilities for managing the Company, and can prove it, the Board

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of Directors cannot be held accountable for those mistakes. This is related to the Corporate Opportunity principle in Limited Liability Company Law which is regulated in Article 97 paragraph (2) and Article 99 paragraph (1).

Corporate Opportunity is a doctrine that teaches that a Director, Commissioner or other employee of the Company or the main shareholder, is not permitted to take the opportunity to seek personal gain when the action he/she takes is actually an action that should be carried out by the Company in running its business. Thus, when the action is an opportunity for the Company in running its business, the Directors may not take the opportunity for their personal interests. Corporate Opportunity transactions teach that due to the Fiduciary Duty of the Directors, the Directors must prioritize the interests of the Company over their personal interests.

Thus, if the company has the opportunity to conduct the same transaction with a third party while the Board of Directors also wants to conduct the same transaction with a third party, then the Board of Directors of the company must prioritize the interests of the Company first by allowing the company to conduct the transaction, and the Board of Directors must give in to it. With the interests of the Company (so that they must be prioritized) by the Board of Directors, it is meant that every right, property, interest, and expectation owned by the Company or which according to the principle of justice should belong to the Company. With the regulation of the principles of Fiduciary Duty and Corporate Opportunity, a Commissioner and Board of Directors must be able to demonstrate management and implementation of business activities with good faith and prudence in running the Company. As ordinary human beings, the Board of Directors and the Board of Commissioners are not closed to the possibility of making mistakes that can harm the company and cause the Board of Directors and the Board of Commissioners to be asked to be accountable for matters related to problems related to the company they manage. fiducia" which means trust, and the word "duty" which means obligation. In the context of corporate law, fiduciary duty refers to the legal and moral obligations of the party holding the trust (trustee) in this case the Board of Directors of a Limited Liability Company to act in the best interests of the party giving the trust, namely the Company and shareholders.

As the party entrusted with managing the company, the board of directors is obligated to act as a trustee, not abusing their position or authority for personal gain. Therefore, the board of directors is not only a technical manager, but also a guardian of the company's integrity

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and sustainability, both legally and ethically. The application of fiduciary duty in Indonesian corporate law is recognized through two main pillars:

1. Duty of Care

   The Board of Directors is required to make business decisions with reasonable, analytical consideration and based on adequate information. This ensures that decisions remain within a framework of responsible professionalism.

2. Duty of Loyalty

   Directors are prohibited from taking personal advantage, misusing company secrets, and engaging in any form of conflict of interest. The interests of the Company must always take precedence over personal or group interests.

These obligations are also emphasized in Article 97 paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies, which states that Management must be carried out in good faith and with full responsibility. In practice, the responsibilities of directors based on fiduciary duty apply to all actions related to company management, both internally and externally. This means that directors are responsible for operational decisions, business strategies, transactions, and company legal compliance. If a director makes a business decision that is detrimental to the company but can prove that the decision:

a. made in good faith,
b. done with caution, and
c. If there is no conflict of interest, the directors cannot be held personally liable. This is known as the application of the Business Judgment Rule principle.

One important aspect of the implementation of fiduciary duty is the prohibition on directors from taking what is called a "Corporate Opportunity," namely a business opportunity that should belong to the company, but is instead taken for personal gain. If a director knows there is a strategic land that the company wants to buy for expansion, but he buys the land first and sells it back to the company at a higher price, then he violates the corporate opportunity doctrine. The implementation of fiduciary duty in the field often faces structural and behavioral challenges such as Conflicts of interest between directors and shareholders or other stakeholders, Manipulation of financial reports or decision-making that only benefits certain parties Lack of transparency and accountability, especially in family

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companies or private companies. This conflict can trigger agency conflicts, namely clashes between the interests of the owner (principal) and the manager (agent), which often cause losses to the company. Examples of practices that violate fiduciary duty are: Conducting transactions with affiliated parties without the approval of the GMS; Hiding important information from shareholders; Taking business opportunities for personal gain. In this case, the directors must return the profits to the company. If the directors violate the principle of fiduciary duty, they may be subject to civil liability, such as:

a. compensate for company losses (Article 97 paragraph 3 UUPT),
b. return personal profits obtained from transactions that should be the company's right.
c. Criminal liability, if the action falls under the criminal act of fraud, embezzlement or corruption.

However, Article 97 paragraph (5) of the UUPT provides an exception, namely that directors can be released from responsibility if they can prove that:

a. The loss was not due to his fault or negligence.
b. He has acted in good faith and with due care.
c. There is no conflict of interest.
d. Have attempted to prevent the occurrence or continuation of losses

The application of the fiduciary duty principle in the practice of board responsibilities in Indonesia is a key element in upholding good corporate governance. Despite having a sufficient legal basis, implementation challenges remain significant due to issues of organizational culture, corporate ethics, and weak internal oversight. By optimizing board members' understanding of this principle and strengthening oversight and business ethics, companies will not only avoid legal risks but also build a stronger reputation and business sustainability.

In the context of corporate law, "loss" can be defined as a decrease in the value of a company's assets due to the actions or negligence of company organs, including directors. This loss is not limited to the loss of property but also includes loss of potential profits (loss of profit), damage to reputation, and reduced public and investor confidence in the company.

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Article 97 paragraph (3) of the UUPT stipulates that each member of the Board of Directors is fully personally responsible for the Company's losses if the person concerned is at fault or negligent in carrying out his/her duties. The types of relevant losses include material losses in the form of lost assets or cash, immaterial losses such as a tarnished company image, opportunity loss, and fines or penalties due to violations of the law.

To prevent losses (preventive), companies can implement an internal monitoring system, GCG training, and active involvement of commissioners. For handling (repressive), this can be done through civil lawsuits (Article 97 paragraph (6) of the UUPT), restitution, or criminal reporting based on the Criminal Code or the Corruption Law.

In this case, there has been a court decision regarding the board of directors' problem, where:

1) South Jakarta District Court Decision No. 02/Pdt.G/2010/PN.Jkt.Sel (PT Fukuafu Indah vs. PT Newmont Nusa Tenggara)

   PT Fukuafu (a 20% minority shareholder) sued the board of directors for lack of transparency in the arbitration process and insufficient information. The judge ruled that the minority shareholders had legal standing in the derivative suit, although their personal damages claim was dismissed.

2) Supreme Court Decision of the Republic of Indonesia No. 1794 K/Pdt/2011 (PT TPI vs. Tutut Soeharto)

   The Supreme Court upheld a previous court ruling that found the board of directors (Tutut Soeharto) acted beyond their authority and caused losses to PT Televisi Pendidikan Indonesia (TPI). In this case, the losses were a direct result of the directors' breach of fiduciary duty.

This decision is final and becomes an important reference in the jurisprudence of directors' liability for company losses.

Legal Basis for Shareholders to File a Derivative Suit Against the Board of Directors

A derivative suit or derivative lawsuit is a legal mechanism that allows shareholders to sue directors or commissioners on behalf of the company when the company's management body is negligent, deviates, or commits a violation of the law that is detrimental to the company, but there is no corrective action from the company's internal management. The main purpose of a derivative suit is to maintain management accountability, provide a corrective mechanism (corrective justice) for company losses, protect the rights of minority

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shareholders, who structurally do not have direct control over decisions. The requirement that only shareholders who currently own shares in the company at the time of the actions of the accused board members (Contemporary ownership), (not former shareholders and not shareholders who have only entered after the event the object of the lawsuit occurred), who can file a derivative lawsuit, is only applied in America, Singapore, Canada, Australia and England (all common law countries). In Indonesia, even though this is not regulated, the court still grants the lawsuit of new shareholders who became shareholders after the director's transaction that was the object of the lawsuit occurred. The minimum share ownership requirement is applied in various ways and is generally applied in civil law countries.

Legal Basis for Derivative Suit in Indonesia Law Number 40 of 2007 concerning Limited Liability Companies (UUPT). Although the UUPT has not explicitly used the term "derivative suit", the principle and concept are contained in Article 97 paragraph (6), which states that shareholders can sue members of the board of directors directly if a loss has occurred to the company, and the Board of Directors is at fault or negligent in carrying out their duties. However, this regulation is not yet comprehensive enough. There is no detailed explanation of the procedure for filing a lawsuit, the categories of actions of directors that can be sued, minimum share ownership or the requirement to make a prior request to management (demand requirement). In Indonesia, shareholders must own a minimum of 10% of the shares in the company to be able to file a derivative lawsuit. This applies to both public and private Limited Liability Companies.

However, there is no requirement for the duration of share ownership or a limitation to only shareholders who owned shares at the time of the alleged incident (contemporaneous ownership) as in common law systems. The 10% share limit is considered to limit access to justice, especially for minority shareholders whose numbers are small but still have the right to legal protection. Therefore, many legal experts have called for the removal of this requirement. Indonesia does not require shareholders to first request the board of directors or commissioners to take legal action before filing a derivative lawsuit with the court. This differs from many other countries, such as China and Japan, which require a written request to the Board of Commissioners, and only if no action is taken within a certain period, a derivative lawsuit can be filed.

Derivative lawsuits serve as both a legal protection tool and an external control mechanism against potential abuse of power by directors. In the context of separation of ownership and control, shareholders do not have direct access to regulate company policy. Therefore, derivative suits are a form of protective and corrective justice to prevent directorial misconduct, correct losses, strengthen investor confidence, and promote sound corporate governance.

Regarding the minimum shareholding period requirement for filing a derivative lawsuit, this only applies in Japan and China (both civil law countries) (Schnyder et al., 2021). In Japan, the shareholder must have held the title for at least six consecutive months, while in China, the shareholder must have held the title for 180 consecutive days. This minimum shareholding period requirement is an additional requirement to the minimum number of shares as outlined above.

In Indonesia, there is no distinction between private and publicly traded companies in terms of share ownership requirements. Both public and private companies require a minimum share ownership of 10% of the company's shares to file a derivative lawsuit. There is no requirement regarding a minimum share ownership period. Interestingly, only four countries—France, Italy, China, and Indonesia (all civil law countries)—impose a minimum share ownership requirement for filing a derivative lawsuit.

A real example of the application of derivative action is in the case of Civil Decision Number 02/Pdt.G/2010/PN.Jkt.Sel, where PT Fukuafu Indah (minority shareholder of 20%) sued the directors of PT Newmont because:

1. Lack of transparency in the international arbitration process
2. Not providing information to shareholders regarding important company decisions.

The panel of judges granted part of the lawsuit and stated that the minority shareholders had legal standing to file a derivative suit, but rejected the claim for personal damages. The main legal basis for derivative suits in Indonesia is Article 97 paragraph (6) of the UUPT, plus the provisions in Article 61 and Article 114. Derivative suits give minority shareholders legal power to hold directors accountable for causing losses to the company. Despite having a legal basis, regulations for implementing derivative suits in Indonesia are still limited and often give rise to formal debates in court.

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CONCLUSION

The principle of fiduciary duty forms the ethical and legal basis for the Board of Directors in managing a company. Under Article 97(2) of Law No. 40/2007 on Limited Liability Companies, directors must act in good faith and with full responsibility, encompassing the duty of care and duty of loyalty. They must make prudent decisions, avoid conflicts of interest, and not misuse authority. The business judgment rule protects directors from liability if actions are taken honestly and without self-interest.

Despite this, challenges persist, such as hidden conflicts of interest, limited transparency, and weak internal oversight. Under Article 97(3), directors are personally liable for company losses resulting from negligence or misconduct, covering both material and immaterial damages. Preventive measures include internal control systems, GCG training, and commissioner oversight; repressive measures include civil suits, restitution, or criminal prosecution.

The derivative suit mechanism allows shareholders—especially minorities—to sue directors or commissioners on behalf of the company for losses caused by abuse of power. This is regulated in Articles 97(6), 114(6), and 61(1) of the PT Law. Though not detailed procedurally, shareholders must hold at least 10% of voting shares to file such suits. This threshold often limits small shareholders' access to justice. The PT Fukuafu Indah vs. PT Newmont Nusa Tenggara case exemplifies judicial recognition of minority shareholders' rights under this mechanism.

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