

Liability of the Board of Directors of the Limited Liability Company To Fiduciary Duty

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Abstract

Background: The Board of Directors is a person who is in the organ of a limited liability company who is responsible for the management and representation of the company, in accordance with the aims and objectives of the company based on the articles of association of the limited liability company. Management and representation by the board of directors must be carried out in accordance with the principle of fiduciary duty. and Law Number 40 of 2007 concerning Limited Liability Companies. However, in practice, the Board of Directors does not carry out its management in good faith and is not fully responsible for causing losses to the company, therefore the purpose of this paper is to explain and analyze the responsibilities of directors who violate fiduciary duty in limited liability company, to explain and analyze the factors causing the directors limited liability company violated fiduciary duty in Banda Aceh. And To explain and analyze dispute resolution in the case that the limited liability company board of directors violates fiduciary duty in Banda Aceh.

Materials and Methods: This research is a normative legal research which includes qualitative research on legal principles. The primary legal materials used in this research include Law Number 40 of 2007 concerning Limited Liability Companies, Law Number 37 of 2004 concerning Bankru Limited company. The analysis of legal materials is carried out in a qualitative descriptive manner.

Result: The results show that the board of directors was proven to have violated fiduciary duty, namely by deliberately not paying the obligations of the company, even though the company was able to pay them, until finally the company was declared bankru Limited company. However, in the decisions of the Supreme Court Number 01PK/N/2004 and 11PK/N/2007, the application for the responsibility of the board of directors which caused the company to go bankru Limited company was rejected without simply being able to prove it. The directors should be more careful in carrying out the management of the company as the bearer of fiduciary duty because violations of the fiduciary duty principle will result in liability to the directors' personal assets. Thus, the simple evidence required can be carried out in the trial process.

Conclusion: The Board of Directors of the company in carrying out the management of the company is based on the mandate given by the company. This mandate is called fiduciary duty, which requires the directors to be careful and have good intentions in carrying out their management. The authority of the board of directors must be exercised in accordance with the aims and objectives of the company contained in the limited liability company ADRT and the laws and regulations

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I. Introduction

A Limited Liability Company (LLC) is a legal entity (rechtspersoon, legal entity) because it was created or realized by a legal process in accordance with the provisions of the legislation. LLC is called an artificial legal entity created by the state through a legal process. Therefore, for the birth process, the LLC must meet the requirements determined by the laws and regulations. If the requirements are not met, the relevant company will not be given a decision to ratify its status as a legal entity by the Government, in this case the Minister of Law and Human Rights.¹

LLC is a legal entity, an independent legal subject, *persona standi iudicio*¹, capable of entering into legal relations or carrying out legal actions with other legal subjects. LLC as a legal subject in the sense of an artificial person, which is the result of a legal creation, cannot carry out its rights and obligations independently,

¹Jono, Bankru Limited company Law, Third Printing, First Edition, Sinar Graphic, Jakarta 2008, p. 54

but must be assisted by the company's organs. The company's organs consist of the General Meeting of Shareholders, the board of directors and the board of commissioners.²

The Board of Directors cannot be separated from the supervision of the Board of Commissioners in carrying out their duties and if there is an error or ignorance of the Board of Directors in carrying out these duties, the Board of Commissioners will provide input and advice. All actions of LLCorgans including the Board of Directors must not deviate from the applicable legal rules, the rules used as a reference for the LLCorgans in carrying out actions, among others, are the Company Law, which is based on the LLC Articles of Association, as well as other laws and regulations against actions that can be taken.

The function of the Board of Directors is explained in Article 1 paragraph 5 of the Company Law 3 "All members of the Board of Directors or all directors, including the president director, are appointed by the GMS." Article 12 paragraph 1 letter a of the Company Law states that the main task of the Board of Directors is to carry out the management of the company for the interests and objectives of the company and to act as the leader in the management. 4Based on the article, it is clear that in terms of managing a company, the Board of Directors acts as the leader in the management of LLC. The management of a LLC is carried out by certain organs in it, in contrast to the principle of managing a firm which can be concluded based on the provisions of Article 17 of the Commercial Code (KUHD) and Article 1639 paragraph (1) BurgerlijkWetboek (BW) carried out by the partners from the firm. Article 1 paragraph (2) of the Company Law states that: "The organ of the Company is the General Meeting of Shareholders, the Board of Directors and the Board of Commissioners". The three organs of LLC are regulated in Article 1 paragraph (4) of the Company Law, Article 1 paragraph (5) of the Company Law and Article 1 paragraph (6) of the Company Law.⁵

The Board of Directors in carrying out the management of the company must comply with and comply with the provisions stipulated in the law and its implementing regulations and the articles of association of the company itself. In the event that the board of directors violates the provisions referred to, the commissioner may propose the dismissal of a member of the board of directors to the GMS and report to law enforcement officials if it is found that deviations have been made by the board of directors.

One of the cases regarding the responsibility of the directors of a limited liability company can be found in several places, including in the District Court, as quoted from the Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decisions of the Supreme Court Number 01PK/N/2004 and Number 011PK/N/2007. This case initially started with the Issuance of Corporate Guarantees of LLC. WIKA and LLC. Wijaya Indah Permai by the defendants.

The Board of Directors performs the duties and obligations or actions based on good faith solely for the sake of the interests and responsibilities of the company's duty of loyalty which is needed to realize the interests and objectives of the company. The Board of Directors is obliged to manage the company in good faith and full of responsibility in managing the company.

Based on good faith, each member of the board of directors can avoid actions that benefit personal interests by harming the interests of the company. The efforts or steps of the parties involved in resolving the problem of the responsibility of the board of directors in a limited liability company as above need to be considered, so that they can have a resolution of the problem in accordance with legal provisions, both in terms of company law.

Based on the descriLimitedcompanyion, it is clear that if a member of the board of directors abuses his position as a fiduciary duty holder or if he is guilty or negligent in carrying out his duties which causes the company to suffer losses, each member of the board of directors is personally responsible.⁶ Article 97 paragraph (3) of the Company Law states that each member of the board of directors is personally responsible for the company's losses.

If the person concerned is guilty or negligent in carrying out his duties in managing the company. Article 97 paragraph (4) of the Company Law also states that if the board of directors consists of two or more

²*Ibid*

³ Explanation of Law No. 40 of 2007 concerning Limited Liability Companies, Article 1 paragraph (5)

⁴ Elucidation of Law Number 40 of 2007 concerning Limited Liability Companies Article 12 paragraph (1)

⁵ Article 1 paragraph (4) of the Company Law: General Meeting of Shareholders is an organ of the company that has authority not granted to the Board of Directors or the Board of Commissioners within the limits specified in this Law and/or the articles of association. Article 1 paragraph (5) of the Company Law: The Board of Directors is a Company organ that is authorized and fully responsible for the management of the Company for the benefit of the Company, in accordance with the aims and objectives of the Company and represents the Company, both inside and outside the court in accordance with the provisions of the articles of association. paragraph (6) of the Company Law: The Board of Commissioners is the Company's Organ in charge of carrying out general and/or special supervision in accordance with the articles of association and providing advice to the Board of Directors

⁶ RidwanKhairandy, *Principles of Indonesian Commercial Law*, 1st printing, FH UII Press, Yogyakarta 2013, p.109, quoted from Bryan A. Garner, *Black's Law Dictionary, Eight Edition*, (St. Paul Minn: West Publishing Co., 2004), p.123

members of the board of directors, the personal responsibility applies jointly and severally to each member of the board of directors. However, in its implementation, the responsibility is only assigned to one member of the Board of Directors, so that this is not in accordance with what is stated in Article 97 paragraph (4) of the Company Law. So the author conducted a scientific study based on the above problems in the form of research with the title "Responsibility of the Board of Directors of a Limited Liability Company towards Fiduciary Duty".

The formulation of the problem in this research is:

- 1) What is the legal framework for regulating limited liability companies in the Company Law?
- 2) How is the liability of the board of directors of a limited liability company based on fiduciary duty?
- 3) How is the implementation of the responsibility of the board of directors of a limited liability company to fiduciary duty in court decisions?

Research purposes

- 1) Based on the background and problem formulation described above, the objectives of this study are to:
- 2) To find out the legal framework for regulating limited liability companies in the Company Law.
- 3) To explain and analyze the form of liability of the directors of a limited liability company to fiduciary duty based on the Company Law.
- 4) To find out and analyze the implementation of the responsibility of the board of directors of a limited liability company to fiduciary duty in court decisions.

II. Materials And Methods

This research was conducted on the Responsibilities of the Board of Directors of a Limited Liability Company towards Fiduciary Duty

Study Design. The specifications in this study are analytical descriptive. It is descriptive, because this research is expected to be able to provide a detailed, systematic, and comprehensive picture of everything related to the Responsibilities of the Board of Directors of a Limited Liability Company towards Fiduciary Duty.

The research conducted is normative legal research which includes research on legal principles. Therefore, this research uses qualitative research methods. This method aims to understand the legal phenomena that will be studied by emphasizing the understanding of the problem, especially the Responsibilities of the Board of Directors of a Limited Liability Company towards Fiduciary Duty.

Data Collection Process . The technique used to obtain data in this research is literature study. Which aims to obtain secondary data, namely library materials related to the problems contained in this research, namely in the form of: (1) Secondary data collection techniques in the form of primary legal materials, carried out by taking inventory and studying the principles and legal norms that become object of the problem or which can be used as an analytical tool in the research problem. (2) Secondary data collection techniques in the form of secondary legal materials, carried out by tracing the legal science literature or legal research results that are relevant to the research problem. (3) The technique of collecting secondary data in the form of tertiary legal materials is carried out by tracing legal dictionaries, language dictionaries, and other written documents that can clarify a problem or term found in primary legal materials and secondary legal materials.

Data analysis. In this normative legal research, data processing is only aimed at qualitative descriptive data analysis, where the material or legal materials will then be studied and analyzed for their content, so that the level of synchronization, the feasibility of norms, and the submission of new normative ideas regarding responsibility can be determined. the directors of the Limited Liability Company are responsible for fiduciary duty.

III. Results

FORM OF LIABILITY OF THE BOARD OF DIRECTORS OF THE LLC FIDUCIARY DUTY BASED ON LLC

A. Liability in a Limited Liability Company

Any violation or deviation from the duties and obligations of the board of directors will result in the responsibility of the board of directors to personal assets for the losses suffered by each interested party. Violations and deviations can be classified into:

- 1) Not carrying out their duties professionally in accordance with their expertise, including:
 - a) Intentionally or not violating the assigned task (breach of duty).
 - b) Deliberately or not, neglecting the duties that should be carried out (omission of duty).
 - c) Intentionally or not, giving a misleading statement (misleading statement).
 - d) Deliberately or not abuse of authority or power as directors.
 - e) Intentionally or not, do not fulfill the promise that has been given (breach of warranty or authority commitment).

The provisions for piercing the corporate veil may apply to:⁷

- 1) Shareholders of the company, if:
 - a) The requirements of the company as a legal entity have not been or are not met. For example, the company's articles of association have not been approved by the Ministry of Law and Justice.
 - b) Shareholders, either directly or indirectly, in bad faith use the company solely for their personal interests.
 - c) Shareholders are involved in unlawful acts committed by the company.
 - d) Shareholders, either directly or indirectly, unlawfully use the company's assets which results in the company's assets being insufficient to pay off the company's debts.
- 2) Board of Directors of the company, if:
 - a) The requirements for the company as a legal entity have not been or have not been met (among others the articles of association have not been ratified or have not been announced in the state news, or have not been registered with the local district court).
 - b) The Board of Directors violates the provisions of applicable laws and the company's articles of association.
 - c) The Board of Directors violated the ultra vires principle.
 - d) The Board of Directors violated the fiduciary duty principle.

In the Company Law, the regulation regarding piercing the corporate veil can be found in the formulation of the provisions of Article 3 paragraph (2), the Company Law which expressly states that the limited liability of shareholders in a limited liability company does not apply in terms of:

- 1) The requirements of the Company as a legal entity have not been or are not met;
- 2) The shareholders concerned, either directly or indirectly, in bad faith take advantage of the Company for personal gain;
- 3) The shareholder concerned is involved in unlawful acts committed by the Company; or
- 4) The shareholders concerned either directly or indirectly illegally use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

In the United States, the principle of piercing the corporate veil applies when:⁸

- a) Company objectives and legal formalities are ignored.
- b) Shareholders of the company treat the company's assets as their own property.
- c) Company officers fail to maintain the necessary records or documents.
- d) The company does not have enough capital, but the company is still running.
- e) Companies are used for fraudulent purposes, for example to avoid taxes.

The fiduciary duty provisions in the Company Law which if violated will result in piercing the corporate veil. This is contained in Article 85 paragraph 1 and paragraph 2 which essentially states that each member of the board of directors of the company is responsible for his personal wealth, if the person concerned is guilty or negligent in carrying out his duties in good faith and is fully responsible for the interests and business of the company.

Likewise, Article 90 paragraph (2) of the Company Law which states, in the event of bankruLimited company due to negligence or error of the board of directors and the company's assets are not sufficient to cover the losses due to the bankruLimited company, the members of the board of directors are jointly and severally responsible for the loss.

In principle, the fiduciary duty provisions required of the company's directors *mutatis mutandis* also apply to the board of commissioners and to executives who receive and represent certain authorities in their positions.

Therefore, in order to minimize the risk of an increasing position, the directors and executives should be able to anticipate it as early as possible, by closing job insurance so that they can work safely and calmly without being haunted by unnecessary worries.⁹To find out how the fiduciary duty and business judgment apply to the company's directors in the Limited Liability Company Law, it is necessary to pay attention to the provisions governing the management duties, obligations and in particular the responsibilities of the limited liability

⁷MagazineHumanCapitalNo.21,*loc.cit.*

⁸*Ibid*

⁹GunawanWidjaja,*op.cit.* ,p.76

company directors in the Limited Liability Company Law. Related to the activities of managing the company as regulated in the Company Law with fiduciary duty and the business judgment rule in Law no. 40 of 2007 can be found general rules or provisions in Article 97 of the Company Law. These general provisions are then spread in various other articles in the Company Law.¹⁰

The provisions of Article 97 of the Company Law begin with the formulation of paragraph (1) which states that "The Board of Directors is responsible for the management of the Company as referred to in Article 92 paragraph (1)". If you pay attention to this provision, it is an affirmation of the rules stipulated in Article 92 paragraph (1) of the Company Law, where it is stated that the board of directors in carrying out their management duties must:¹¹

- a) Pay attention to the interests of the Company;
- b) In accordance with the aims and objectives of the LLC (intra vires act);
- c) Observing the provisions regarding the prohibitions and limitations provided in the Company Law and the articles of association.

From this provision, it is known that the actions of the board of directors are actions that have civil responsibility. As management of the Company, the directors are agents of the company, and therefore cannot act as they please. What is done by the board of directors that is outside the limits of the authority given to him must be accounted for by him. In this case there are three types of responsibilities that must be borne by the board of directors, namely:¹²

- a) Accountability to the Company;
- b) Accountability to shareholders; and the last one is
- c) Liability to creditors.

Furthermore, to be able to measure to what extent the responsibility of the board of directors is in carrying out management in achieving the goals of the LLC that have been set in the articles of association, the board of directors must make and implement an annual work plan. The achievement of the work is an evaluation material in the performance appraisal of the board of directors as outlined in the annual report submitted to and for approval by the GMS.¹³ This company management activity can never be separated from the duties of the board of directors representatives as regulated in Article 98 of the Company Law. As management of the company, the board of directors will represent the company in every action or legal action of the company with third parties.

In this case, it is clear that the board of directors is an agent for the company.¹⁴ As previously explained, good faith is an important element for the board of directors to obtain business judgment rule protection, as stated by Salamon in the Gries Sports Enterprises Football Co., Inc. case. 496 NE 2nd 959 (Ohio 1986). The business judgment rule involves two things, namely process and substance. As a process, the business judgment rule involves the formality of decision making within the Company. As a substance, in making a business decision, the directors of a company act on the basis of the information they have in good faith and with the belief that the actions taken are solely for the benefit of the company.¹⁵

The provisions of Article 97 paragraph (5) of the Company Law clearly describe the meaning of good faith and the principle of due care in the business judgment rule for each member of the board of directors. Any evidence that expressly and clearly states that the board of directors has violated fiduciary duty or has committed gross negligence, fraud, matters in which there is an element or causes a conflict of interest, or acts that violates the law (illegality), then the principle of business judgment rule no longer protects the board of directors as a whole. With the provisions of Article 97 paragraph (4) of the Company Law, this responsibility becomes the

¹⁰RosaAugustine, as quoted in Ridwan Khairandy, *op.cit.*, h.323

¹¹Elucidation of Article 97 of Law No. 40 of 2007

¹²Parsian Simanungkalit, GMS Relation to the Responsibilities of the Board of Directors in a Limited Liability Company, Jakarta : Fair Life, 2006, p 60

¹³*Ibid*

¹⁴Simanungkalit Parsian, *Position Independent Company Limited With Review According to Constitution Number 1 Year 1995*, Bandung: Image Aditya devotion, 2002, p 87

¹⁵Widjaya, IGrai, *Law Company, Usage Name LIMITED COMPANY, System Method Establish LIMITED COMPANY, System Method Registration company*, TDUP & SIUP, Jakarta, LIMITED COMPANY. megapoints, 2000, h 69

responsibility of all members of the board of directors. So for a member of the board of directors who wants to be released from joint and several responsibilities, he must be able to prove otherwise, that:¹⁶

- a) The loss is not due to his fault or negligence;
- b) Have carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company;
- c) Does not have a conflict of interest either directly or in direct intention of management actions that result in losses; and have taken action to prevent the occurrence or continuation of the loss

Thus, it is clear that both the board of directors and the board of commissioners have a fiduciary duty, which if implemented properly protects the two boards from any actions, actions or decisions taken by them based on the principle of business judgment rule.¹⁷

If the arrangement regarding fiduciary duty and the principle of business judgment rule of the board of commissioners can be found in Article 114 of the Company Law.¹⁸In relation to the fiduciary duty, Article 114 paragraph (2) of the Company Law emphasizes the accountability of the Board of Commissioners for the supervision carried out on the management of the company. The responsibility of the board of commissioners is borne by each member of the board of commissioners. So in this case it is the same as the board of directors, each member of the board of commissioners has the same fiduciary duty; although different from the members of the board of directors, who can take legal actions individually, the board of commissioners only acts in one unit as an assembly, based on the decision of the board of commissioners.

The supervision carried out by the Board of Commissioners must be carried out for the benefit of the Company and in accordance with the aims and objectives of the Company, in accordance with the management duties of the Board of Directors whose management duties are supervised by the Board of Commissioners. One thing that should not be forgotten is that in addition to carrying out supervisory duties, the board of commissioners by Article 108 paragraph (1) of the Company Law is given the task of providing advice to the board of directors. This advice will show how far the good faith and prudence of the board of commissioners in carrying out supervision. So actually the function of giving this advice is also in the context of carrying out supervisory activities on the implementation of the duties of the company's directors.¹⁹

Violation of fiduciary duty causes each member of the Board of Commissioners to be not protected by the business judgment rule, and therefore is personally responsible for the Company's losses. In this case, the elements of errors and omissions play an important role. A member of the board of commissioners who is not prudent can be said to have been negligent in carrying out their duties.²⁰

One of the fundamental characteristics of a limited liability company as a corporation is the legal entity nature and limited liability of the limited liability company.²¹Legal actions on behalf of a company that have not obtained legal entity status may only be carried out by all members of the board of directors together with all founders and all members of the company's board of commissioners and they are all jointly and severally responsible for such actions.²²What is meant by "legal action on behalf of the company" is a legal act, either mentioning the company as a party in a legal action or mentioning the company as an interested party in a legal action.

In the event that the legal action is carried out by the founder on behalf of the company that has not obtained the status of a legal entity, the legal action is the responsibility of the founder concerned, and is not binding on the company. This provision is intended to emphasize that members of the board of directors cannot take legal action, without the consent of all founders, other members of the board of directors and members of the board of

¹⁶*Ibid* h 79

¹⁷OrintonAncient,asquotedinAugustinoSandypermana,et al.,*Accountability of Directors of Limited Liability Companies who conduct* , Legal Journal, Civil DepartmentEconomy,faculty of LawUniversityjember,2013,h.5

¹⁸ExplanationChaLimitedcompanyer92paragraph(3)ConstitutionNo.40Year2007about the companyLimited.

¹⁹*Ibid*

²⁰ZarmanHadi,*CharacteristicsNot quite enoughAnswerPersonalHolderShare,CommissionerAndDirectorsInMalang Limited Liability Company* ;UBpress,2011,h.91

²¹H. ZaeniAshhadieandBudiSutrisno,*LawCompanyandBankruLimited companycy*,Erlangga,Jakarta,2012,h.118

²²*ibid*

commissioners. The legal actions referred to are because the law becomes the responsibility of the company after the company becomes a legal entity.

Legal actions taken by the founder on behalf of the company that have not obtained the status of a legal entity are only binding and become the responsibility of the company after the legal action is approved by all shareholders in the GMS which is attended by all shareholders of the company. What is meant by "attended" is attended alone or represented based on a power of attorney. The GMS which is attended by all shareholders of the company is the first GMS which must be held no later than sixty days after the company has obtained the status of a legal entity (Article 14 of the Company Law).

The basic principle is that before the company gets the status of a legal entity, all actions, whether shareholders, directors, or members of the board of commissioners, are personally responsible. This happens if the action or legal action is carried out without the approval of all shareholders in the GMS which must be attended by all shareholders after the company becomes a legal entity.

B. Legal Basis of Liability of the Board of Directors of a Limited Liability Company to Fiduciary Duty

The Board of Directors is an organ of a limited liability company that is responsible for the management and representation of the company, in accordance with the aims and objectives of the company based on the Articles of Association of the limited liability company. Management and representation by the board of directors must be carried out in accordance with the principle of fiduciary duty. This paper emphasizes the issue of the carelessness of the directors so that they violate fiduciary duty, which results in the application of piercing the corporate vision to the board of directors. The main legal bases used in this study include the Civil Code (KUHP) and the Company Law.

The organs of a Limited Liability Company according to Article 1 point 2 of the Company Law consist of: 'General Meeting of Shareholders, Directors and Commissioners'. In a Limited Liability Company, the board of directors is the main organ that ensures the continuity of the company's business because the company cannot do anything without the role of members of the board of directors. According to Article 1 point 5 of the Company Law "The Board of Directors is a company organ that is authorized and fully responsible for the management of the company for the benefit of the company, in accordance with the aims and objectives of the company and represents the company both inside and outside the court in accordance with the provisions of the articles of association"

The Board of Directors in carrying out its management must be based on good faith and full responsibility because the Board of Directors holds the fiduciary duty of the company. If the directors are negligent in their duties, the directors may be subject to piercing the corporate vision, namely personal liability to the personal assets of the directors for losses received by the company, shareholders, or third parties.

This is used to protect the interests of shareholders or third parties who are harmed by arbitrary or inappropriate actions of the board of directors carried out on behalf of the company. The Board of Directors on the one hand, is treated as the recipient of the power of attorney from the Company to run the Company in accordance with its interests to achieve the Company's objectives as outlined in the Company's Articles of Association, and on the other hand is treated as an employee of the Company, in a superior-subordinate relationship in a labor agreement which means The Board of Directors is not allowed to do anything that is not or is not their duty.²³

task of a Board of Directors is to carry out the best management of the Company for the interests and objectives of the Company and to represent the Company inside and outside the court, so that the purposes and objectives of the Company will be achieved. The management duties of the Board of Directors are not limited to routine activities, but are also authorized and obliged to take the initiative to make plans and estimates regarding the development of the Company for the future in order to realize the goals and objectives of the Company.²⁴

The Board of Directors is one of the vital organs of the Company, which is fully responsible for the management of the Company for the interests and objectives of the Company and represents the Company both inside and outside the court (Article 98 paragraph (1) of the Company Law). In this case, there are two powers of the Board of Directors, namely management and representation. Authority in Management is a matter of

²³Ahmad Yani and Gunawan Widjaja, *Company limited, op.cit.*, Thing.97

²⁴Abdulkadir Muhammad, *Law Company Indonesian*, (Bandung: Image Aditya devotion, 2002), Thing.58.

internal relations between the management and people whose assets are in the management of the management, while representatives talk about external relations, namely the relationship between the management and assets managed by the management, with third parties with whom a legal act is carried out by the management in capacity as administrator of other people's assets.²⁵

In the event that the members of the Board of Directors consist of more than 1 (one) member of the Board of Directors, each member of the Board of Directors is authorized to represent the Company unless otherwise stipulated in the Company Law and/or Articles of Association. This is because the Company Law Limited company's a collegial representation system, meaning that each member of the Board of Directors is authorized to represent the Company. Therefore, the authority of the Board of Directors to represent the Company is unlimited and unconditional, unless otherwise stipulated in the Company Law, the articles of association, or the decision of the GMS. GMS decisions may not conflict with the provisions of the Company Law and/or the Company's articles of association

According to the principles contained in criminal law, to be able to convict the perpetrator, it must meet the requirements, namely the existence of an act followed by an error, then a criminal act occurs. Criminal liability is deemed to exist, unless there are reasons for the abolition of the crime. In other words, criminal liability can be carried out as long as the maker does not have a 'defence', when committing a criminal act. In the field of criminal proceedings, this means that a defendant is considered responsible for the crime he has committed, if he cannot prove that he has a 'defence' when committing the crime.

Such a concept Limited company forms a balance between the right to indict and sue from the Public Prosecutor, and the right to deny and present a defense of the accused. The Public Prosecutor has the right to indict and prosecute someone for committing a crime. For this reason, the Public Prosecutor is obliged to prove what was indicted and prosecuted, namely to prove the things contained in the formulation of the crime. Meanwhile, the defendant can file a defense on the basis of the reasons for the abolition of the crime. To avoid being penalized, the defendant must be able to prove that he has a reason for eliminating the crime when committing a crime.

In holding someone accountable in criminal law, it must be possible for the maker to explain why he did so. If the legal system does not open up such an opportunity, then it can be said that there is no due process to account for the perpetrators of criminal acts. In turn, this will deal with the principles of justice. Hart said, "If a legal system did not provide facilities allowing individuals to give legal effect to their choices in such areas of conduct, it would fail to make one of the law's most distinctive and valuable contributions to social life"²⁶ (If the legal system does not provide facilities that enable individuals to exert legal effect on their choices in such areas of behavior, it will fail to make one of the most distinctive and valuable legal contributions to social life).

Thus, the law is seen as failing to provide valuable input to social life, if it does not open an opportunity for the offense maker to explain why he cannot avoid the occurrence of a crime. Accountability for a person in criminal law does not mean that it is legal to impose a sentence on that person, but it can also be fully believed that it is in the right place to ask for accountability for the crime he has committed. Criminal liability is not only 'rightfully sentences' but also 'rightfully accused'.²⁷ First of all, criminal liability is the condition of the maker with the actions and sanctions that should be imposed with the actions and sanctions that should be imposed.²⁸

Crime is the formulation of a prohibition to do something, a prohibition not to do something, or a prohibition to cause certain consequences. The way in which a crime is formulated also affects the responsibility of the maker. In this regard Clarkson says, "criminal liability is imposed upon blameworthy actor whose conduct has caused a forbidden harm. Criminal liability is imposed upon a blameworthy actor whose conduct constitutes the forbidden harm." Thus, the nature of the reproach against the maker is also influenced by the formulation of the act that is designated as a crime.²⁹ Criminal liability is born with the continuation of objective reproaches (vewitbaarheid) against actions that have been declared as criminal acts based on the applicable criminal law.

²⁵Gunawan Widjaja, *Series Aspect Law In Business: Ownership, management, Representative, and Giving Power In Corner Look KUH Civil*, (Jakarta: date, 2004) h. 149.

²⁶HLA Hart, *Punishment and Responsibility*, *Essay in Philoshopy of Law*, (Oxford: Clarendon press, 1968), h. 34, quoted from Chairul Huda, *Ibid.*, h. 63

²⁷*Ibid*

²⁸Chairul Huda, *From No Crime Without Error To Nothing Accountability Criminal Without error*, (Jakarta, Prenada Media, 2006), h. 62

²⁹Munir Fuady, *Business Law*, (Bandung: Citra Aditya Bakti, Fourth Book, 1997), h. 163-164

And subjectively to the perpetrators of criminal acts who meet the requirements to be subject to criminal penalties for their actions.³⁰

The basis for the existence of a crime is the principle of legality, while the basis for a criminal offense is the principle of error. This means that the perpetrator of a criminal offense will only be punished if he has a mistake in committing the crime. When someone is said to have made a mistake is a matter of criminal liability. A person has an error when at the time of committing a crime, from a social perspective, he can be reproached because of his actions.

In this sense, criminal acts do not include criminal liability. Criminal acts only refer to the prohibition of actions as stipulated in a statutory regulation. Whether the perpetrator of a criminal act who has committed a prohibited act is then also sentenced to a crime, it really depends on the issue of whether in committing the act the criminal act maker can be held accountable.

Talking about criminal liability, it cannot be separated from criminal acts. Although in a criminal act there is no definition of criminal responsibility. New criminal acts are meaningful when there is criminal responsibility. The term crime is taken from the term strafbaarfeit contained in Dutch Criminal Law. Even so, according to Adam Chazawi, there is no official explanation of what strafbaarfeit means in the Dutch Criminal Code (Wetboek van Strafrecht –WvS), which later became most of the material into the Indonesian Criminal Code (KUHP), with UU no. 1 year 1981.³¹

Legal experts do not seem to have the same view on the meaning of strafbaarfeit. There are at least 7 (seven) terms to interpret the word, including criminal acts, punishable acts, offenses and others. However, in the legislation the term that is more often used is a criminal act. In simple terms, a crime can be interpreted as all actions/deeds that can be punished/penalized that are strictly regulated by law. All the actions referred to are not only in the active sense but also in the passive sense. Not doing anything where it is prohibited by law, including in this sense.³²(1)

Regarding regulation by law, it is very important to mention because criminal law applies the principle of legality as stated in Article 1 paragraph (1) of the Criminal Code, which states that no act can be punished, but on the strength of the provisions in the legislation that existed before the act occurred. In general, in the Criminal Code, criminal acts or criminal acts are classified into two groups, namely Crimes and Violations. Acts that are considered crimes are regulated in Article 104 – Article 488 of the Criminal Code. Meanwhile, acts that are classified as violations are regulated in Articles 489 – 569 of the Criminal Code.

The theory of normative error causing error is not absolute to be seen as a 'condition of the human psyche'. This opens up errors other than matters marked by intention or negligence (the maker's psychology). Thus, it is possible for errors to exist not only in human legal subjects, but also in corporations. It is almost impossible to pinpoint the fault of the corporation if the fault is viewed solely as a psychological problem.

Relying on the theory of normative error, corporate criminal liability is carried out on the basis of error. It's just that the content of the error is different from the subject of human law. The basis for determining whether a legal entity can be blamed is not properly fulfilling the social functions of a legal entity. 'From the perspective of society', corporations have not carried out their functions properly. An indicator of error for corporations is how corporations carry out their social functions. This social function includes but is not limited to preventing the occurrence of criminal acts. In other words, while it is possible for corporations to 'be able to do other things' apart from committing a criminal act, this expectation should be reflected as far as possible from its policies and the way it operates. The corporation fulfills its social function so that it can be 'reproached' when a criminal act occurs because of it.

In both human and corporate legal subjects, the value of whether or not to be sentenced to a crime lies in the presence of an error. This means that the meaning of the principle of 'no crime without guilt' is 'no criminal responsibility without guilt'. If this is the case, then wrongdoing, both against humans and against corporations,

³⁰*Ibid*

³¹*Ibid*

³²*Ibid*

must be connected with the objectives of criminal law. Both the objectives of criminal law are preventive and repressive.

Errors in corporations are not marked either intentionally or negligently. First of all, this is because it is rather difficult to determine whether the corporation was intentional. Even if it can be done, it relies on a theory that is not always in line with the theory of normative error. Of course, it would be inappropriate to determine whether there was intentional involvement in the corporation, but this was done based on a very subjective view of error. Regarding corporate intentionality, Muladi argues as follows: "The will of a legal entity occurs when the intention is in fact involved in corporate politics, or is in the actual activities of a particular company.

In other cases the settlement must be carried out with the construction of liability, the intentional act of an individual (*natuurlijkpersoon*) acting on behalf of the corporation so that it is considered that it can also lead to the will of a legal entity. The opinion above shows that the determination of the existence of a legal entity is based on a fictional theory. The weakness of this theory is that the error only serves a repressive function, and cannot be placed in its function to prevent the occurrence of criminal acts. Meanwhile, if it is carried out based on organ theory, objections can also be raised. In this case, the willful act of an organ of a legal entity can be legally accounted for.

In certain cases the will of a subordinate, even from a third person, can result in the will of a legal entity.³³ Considering that a corporate crime can only occur in the form of participation, the corporate error is a continuation of the material maker's error. However, it should be borne in mind that criminal liability for the crime of participation can only occur if it is done intentionally. This causes if participation occurs due to negligence, it is outside the scope of criminal responsibility. Van Strien, who said that unconscious mistakes in carrying out prohibited actions occur as well as due to poor leadership/management of legal entities, so with 'aware mistakes' we can treat legal entities as perpetrators of criminal acts.³⁴ This view is difficult to accept Limited company, considering that corporations can be the sole perpetrators of criminal acts.

Regarding the structure of accountability, according to legal theory, there are several types of responsibility systems, including:

- 1) Absolute liability (strict liability);
- 2) Liability based on fault;
- 3) Liability based on negligence.

For clarity, the meaning of the system of responsibility at the point above can be explained as follows.³⁵ Absolute liability is a translation of the term strict liability, which is a term generally used by modern courts, which means responsibility imposed on the perpetrator which is not an act. which intends to undermine the interests of someone who is protected by law, without a legal justification for the destruction, or a violation of a person's obligations in the event that he behaves properly towards others (reasonable care), namely in the form of negligence (negligence) which can be prosecuted in court Against absolute responsibility is often also referred to as responsibility without fault. However, the term responsibility without error can give the wrong impression because there is also a lot of responsibility for actions, both intentional and negligence that undermine the interests of others. Interests are protected by law, which is a responsibility without moral guilt.

With regard to criminal liability, the main principle that applies is that there must be an error (*schuld*) on the perpetrator. According to Vos, the notion of *schuld* has 3 (three) special signs, namely:

- 1) The responsible ability of the person doing the deed (*toerekeningsvatbaarheid van de dader*).
- 2) Certain inner relationships of the person who commits the act can be intentional or negligent.
- 3) There is no basis for the reason that eliminates responsibility for the maker for his actions.

Thus, regarding this corporate responsibility, there are 2 (two) models of corporate criminal liability, namely:³⁶

- 1) Corporate management as the maker and management are responsible.
- 2) Corporations as responsible makers and administrators. corporation as a maker and also as a responsible

³³ZulkarnainSitompul*ProtectionFundCustomerBank:SomethingIdeaAboutEstablishmentInstitutionGuarantorSavingsInIndonesian*, Jakarta:UniversityIndonesia,2002, h 135

³⁴*Ibid*

³⁵*Ibid*

³⁶Walter, Woon,*CompanyLaw*, Singapore:longman,1998 h 315

C. Causes of Limited Company Directors Violating Fiduciary Duty

Violation of fiduciary duty, as well as other legal violations, entitles the injured party to and on his behalf to file a lawsuit against the party who issued the loss. In the event of a violation of fiduciary duty by the Board of Directors, there are at least three interests that must be considered;

- a) Company interests
- b) the interests of the Company's shareholders, especially minority shareholders, and
- c) the interests of third parties that are legally related to the Company, in particular the interests of the Company's creditors

A fiduciary relationship arises when one party does something for the benefit of the other party to the exclusion of his own personal interests. The Fiduciary Duties of the Board of Directors contain the following principles:

- 1) The Board of Directors in carrying out their duties may not do so for personal interests or the interests of third parties without the approval and or knowledge of the company;
- 2) The Board of Directors may not take advantage of their position as management to gain profits, either for themselves or for third parties, except limited company with the approval of the company; The Board of Directors may not use or misuse the company's assets for their own interests and or third parties³⁷

In this case the director is deemed necessary to carry out his duties and responsibilities in accordance with what has been regulated in the Company Law as an absolute obligation. Fiduciary duty in the doctrine of limited liability company management Article 97 paragraph (2) of the Company Law states that each member of the Board of Directors must in good faith and full responsibility carry out their duties for the interests and business of the company. In carrying out his fiduciary duties, a board of directors must do so with (1) good faith, (2) fulfilling the proper elements of purpose, (3) full freedom of responsibility, and (4) not having conflict of interest (conflict of duty and interest).³⁸

In principle, the board of directors is burdened with the principle of fiduciary duties to the company, not to the shareholders. Therefore, only the company can force the board of directors to carry out the principle of fiduciary duties. However, in carrying out his function as directors, in general he must also pay attention to the interests of shareholders. Even though he has the principle of fiduciary duties as a director, he is still free to give voice and opinion according to his beliefs and interests in every meeting he attends. The Board of Directors also has the freedom to make decisions according to their business considerations and business instincts as long as the decision does not harm the company.³⁹

Article 97 paragraph (2) of the Company Law states that "the management of the company must be carried out by every member of the board of directors in good faith and full of responsibility in carrying out their duties for the interests and business of the company". One of the principles contained in Article 97 paragraph (2) of the Company Law is the principle of fiduciary duty, what is meant by fiduciary duty is that the duties carried out by the board of directors are carried out with full responsibility for the benefit of other people or parties. In this context, specifically acting for and on behalf of the company in carrying out its management duties. There are several important things in the fiduciary duty principle, one of which is:⁴⁰The principle not to take personal advantage on opportunities that actually belong to or are intended for the company (no secret profile rule). - doctrine of *corpotare opportunity*).

Similar to the civil law system in the common law system, the duties carried out by members of the Board of Directors of the Company can be described as follows:

- a) Fiduciary Duties of Good Faith and Loyalty.⁴¹

The fiduciary duties are analogous to the duties owed by trustess. In addition, according to Bernard S Black, it is interpreted as "the decision maker within the company should act in the interest of the company, and not in their

³⁷RidwanKhairandy.*TreesLawTradeIndonesian* ,printnumber 1,FHUIIpress,Yogyakarta.2013.h.110

³⁸MunirFuadi,*CompanyLimitedParadigmNew* , (CitraAdityadevotion,Bandung, 2003). p.82.

³⁹MunirFuadi,*LawCompanyinParadigmLawbusiness* ,(ImageAdityadevotion ,Bandung,2002),p.61.

⁴⁰GunawanWidjaya ,*op.cit* , p.,23

⁴¹ShintaIkayaniKusumawardani.*ArrangementAuthority,andResponsibilityDirectors in a Limited Liability Company (Comparative Study of Indonesia and Australia)*. Legal JournalUniversityUdayana.2012 .p .9.quotedfromNationalLibraryofAustraliaCatalogingwantPublication Data, 1987, *Duties And Responsibilities of Company Secretaries and Directors inAustralia* ,CCHAustraliaLimited,Australia.p.50.

own interest.⁴²(Decision makers within the company must act in the interests of the company, and not in their own interests).

In this case, the Board of Directors acts in carrying out the management of the Company not to abuse the trust given to him solely for personal interests but the duties and authorities given are carried out for the benefit of the Company in accordance with the purposes and objectives of the Company in running the Company. Members of the Board of Directors are based on fiduciary duties of good faith, and loyalty can be categorized as follows:⁴³

Director must act bona fide, in what they believe to be in the best interest of the company (Directors must act in good faith, in what they believe is in the best interest of the company).

b) Directors must be exercising their power for purpose for which they are conferred and not for an extraneous purpose.

c) Director must not fetter their discretion to exercise their powers. (Directors must not be influenced by their direction by other parties in exercising their authority).

d) Director must not place themselves in position of conflict of interest without the consent of the company. (Directors may not place themselves in a position of conflict of interest without the company's approval).

Each member of the Board of Directors in carrying out management based on his own way of thinking, as well as in making a decision must be with the right intentions and goals based on good faith by considering practically solely for the benefit of the Company.

e) Duties of Skills and Care.

These duties of skill and care are based on the duty to exercise care and diligence. Seeing this obligation, the Board of Directors in carrying out the management must be careful. And a Board of Directors is required to make the right and fast decisions for the benefit of the Company. To protect every decision made by the Board of Directors based on the authority and good faith with prudence, there is a business of judgment principle.

So when the error or omission comes, the risk must be accounted for. Everyone who lives will definitely experience and will face the risk of his own life, this is due to his ignorance of the events that he will experience for sure. In a Limited Liability Company, the existence of the Board of Directors is like the life of the company. It is impossible for a company without a Board of Directors. On the other hand, there cannot be a Board of Directors without a Company. Therefore, the presence of the Board of Directors for a Limited Liability Company is important.

The Board of Directors is entrusted by all shareholders through the mechanism of the General Meeting of Shareholders to become the Company's organ that will work for the benefit of the Company, as well as the interests of all shareholders who appoint and entrust it as the only organ that manages and manages the Company. In carrying out the management and representation of the Company, the Board of Directors must act carefully, properly or as well as possible in accordance with the authority given in the articles of association. If in the management and representation of the company, the Board of Directors commits an act or action that violates the limits of authority or a provision that has been stipulated in the articles of association, then he can be held accountable.

Therefore, a member of the Board of Directors must be careful in carrying out his duties (duty of care). In addition, a member of the Board of Directors in carrying out his duties may not take advantage of himself for the company (duty of loyalty). Violation of these two principles in a fiduciary duty relationship can cause the Board of Directors to be held personally responsible for their actions, both to shareholders and other parties.

The Board of Directors is not allowed to do things on behalf of the company or use the company for purposes not for the benefit of the company or contrary to the company's objectives. The Board of Directors may not prioritize personal interests or parties outside the company. The Board of Directors also cannot take any action which, even if it is in the interest of the company, is not in accordance with the aims and objectives of the company as stipulated in the articles of association. For example, a company which is determined in its articles of association aims to carry out labor directing services, but the directors carry out import activities. Even though the activities carried out by the board of directors are very beneficial to the company, the directors are considered to have violated the provisions of the laws and regulations.⁴⁴A member of the board of directors can obtain personal benefits from his position and duties in various ways, obtained through legal means, or in ways

⁴²*Ibid*. quoted from Bernar S Black, 2001, *The Principles Fiduciary Duties Of Board Ofdirectors*, AsianRoundtableoncorporate governance, Singapore, April, p. 2.

⁴³*Ibid*. quoted from *National Library of Australia Cataloging in Publication data*, *op.cit*, p. 55.

⁴⁴*Ibid*.

that violate the law or ethical norms. Examples of actions that are not based on good faith include the following:⁴⁵

- 1) The Company purchases goods from other parties at a price higher than the fair price, and for the purchase transaction, the directors receive a commission from the seller.
- 2) The Company sells the assets of the Company to other parties at a price much lower than the fair price and the Board of Directors obtains personal benefits from the transaction .
- 3) Giving credit to other parties without a good credit analysis even though the credit application is actually not feasible (feasible), but the board of directors will decide to provide the requested credit and it turns out that the credit then becomes bad which is very detrimental to the company.
- 4) A member of the board of directors obtains personal benefits from his position by taking advantage of the opportunity for transactions that should be carried out with and for the benefit of the company he leads, but are given to other companies for certain benefits for members of the board of directors.

Likewise, the responsibility of the Board of Directors in the event of bankruLimited company is the same as the responsibility of the Board of Directors whose company does not experience bankruLimited company. In principle, the Board of Directors is not personally responsible for the actions they take for and on behalf of the company based on the authority they have. This is because the actions of the Board of Directors are seen as the actions of a Limited Liability Company which is an independent legal subject so that the company is responsible for the actions of the company itself which in this case is presented by the Board of Directors.

However, in some cases the directors may also be held personally responsible for the bankruLimited company of this Limited Liability Company. Article 104 paragraph (2) of the Company Law states that in the event that the bankruLimited company as referred to in paragraph (1) occurs due to the negligence or fault of the Board of Directors and the bankruLimited company assets are not sufficient to pay all the obligations of the company in the bankruLimited company, each member of the board of directors is jointly and severally responsible for all obligations paid off from the bankruLimited company.the bankruLimited company estate. It is not an easy thing to prove that the board of directors has made a mistake/negligence, causing a company to go bankruLimited company which leads to bankruLimited company.

IV. Discussion

IMPLEMENTATION OF THE LIABILITY OF THE BOARD OF DIRECTORS OF THE LIMITED COMPANY TO FIDUCIARY DUTY IN COURT DECISIONS

A. Responsibilities of Directors Who Violate Fiduciary Duty

The Board of Directors is authorized to carry out the management in accordance with policies deemed appropriate, within the limits determined by the Company Law and/or the articles of association. Policies that are deemed appropriate are policies that are deemed to be based, among other things, on expertise, available opportunities and prevalence in the world of similar businesses.⁴⁶

The business world has uncertain conditions, forcing a director to be able to make decisions quickly and accurately based on careful consideration and full of prudence. It is not uncommon for a board of directors in carrying out their duties to be negligent and make mistakes, which actions turn out to later cause losses to the company they lead. Orinton Purba explained that the problems that often involve the board of directors in managing the company are:⁴⁷

- 1) Negligence in carrying out their duties to supervise the company. The negligence of a director in providing oversight of the company's operations will cause the company to suffer losses.
- 2) The bad intentions of the board of directors, either directly or indirectly, such as using the company for personal gain.
- 3) Committing unlawful acts, such as the directors concerned are involved in unlawful acts committed by the company
- 4) Using the company's assets, either directly or indirectly, is against the law using the company's assets which results in the company's assets being insufficient to pay off the company's debts.

⁴⁵ *Ibid.*, p.128-129

⁴⁶ Shinta Kayani Kusumawardani, "Authorities and Responsibilities Arrangements Directors in Company Limited (Studies Comparison Indonesia and Australia)", *Journal Master Law Udayana*, Volume 2, No 1 Year 2013, p 24

⁴⁷ Orinton Purba, as quoted in Agustino Sandy Permana, et al., Responsibility of the Board of Directors of a Limited Liability Company, *Journal of Law, Department of Civil Economics, Faculty of Law, University of Jember*, 2013, p.5

5) The occurrence of corporate bankruptcy, namely the company can become bankrupt when the commissioners do not provide good advice to the board of directors.

The Board of Directors in carrying out their duties must be able to make decisions quickly and accurately, but in every decision making, losses are very likely to occur. GunawanWidjaja is of the opinion that the Board of Directors in carrying out their actions must always refer to the Articles of Association of LLC. If not, it means that an act outside their authority or what is commonly referred to as an ultra vires action has taken place. The business world has uncertain conditions, given that situations tend to change quickly, forcing a director to be able to make decisions quickly and accurately based on careful consideration.⁴⁸

In carrying out business activities can be likened to a big gamble, in business there are only two kinds of results, namely, profit or loss. Every company must always expect profit results in every business transaction, but the risk of loss is definitely present in every business transaction. This is closely related to the board of directors whose duties and obligations are to manage the management of the company, therefore the directors are always required to be able to make decisions quickly, precisely, and carefully considering the very dynamic business conditions.

In connection with such losses, it is not always the responsibility of the board of directors, sometimes the board of directors is released from all forms of responsibility including personal responsibility if he has made the decision carefully and also full of responsibility and in good faith. This is what is called the business judgment rule doctrine. Explicitly, the application of the business judgment rule doctrine can be found in Article 97 paragraph (5) of the Company Law, in essence it is stipulated that the board of directors cannot be personally responsible for the company's losses if they can prove:

- a) The loss is not due to his fault or negligence;
- b) Have carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company;
- c) Does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and
- d) Have taken action to prevent the occurrence or continuation of the loss.

In the Indonesian Criminal Code, there is no known provision that stipulates a legal person or corporation as a subject of criminal law. This can be seen from Article 2 of the Criminal Code which states that the Criminal Code applies to every person in Indonesia who commits an offense. Therefore, the term or terminology that is generally used in the Criminal Code to refer to the subject or perpetrator of the offense is anyone. Another term is citizen, as referred to in Article 5 of the Criminal Code, several other terms are also used which contain the meaning of a person, for example, an official, or an employee in Article 7 of the Criminal Code.⁴⁹

A criminal act is basically an act committed by directors and or employees of a corporation, at every level who carries out their duties and functions and can be considered acting on behalf of a LLC, which can result in criminal liability. Both the LLC and together with their employees can be held criminally responsible.

If the board of directors intentionally violates the rules in fiduciary duty so that and causes the company to suffer losses, third parties or shareholders can claim compensation for the actions of the directors to the director's personal property. This also applies in the event that the company goes bankrupt due to the negligence of the board of directors.

With regard to claims for compensation from third parties or shareholders, the board of directors in this case is subject to unlimited liability. This means that the actions of a company cause legal liability not only to be requested from the company (even though it is a legal entity), but can also be requested from the company's organs (shareholders, directors, commissioners). The Board of Directors as an organ that is fully responsible for the day-to-day management of the company is very at risk of being entangled in this unlimited liability.

Furthermore, the author will discuss the responsibilities of directors who violate fiduciary duty and cause the company to go bankrupt by using the Supreme Court's decision.

- 1) Decision of the Supreme Court of the Republic of Indonesia number 01PK/N/2004

⁴⁸*Ibid*

⁴⁹Barda Nawawi Arief, op.cit.h.37

Violation of fiduciary duty in a case that has received a Supreme Court Decision Number 01PK/N/2004 is that TobengMahatani as director of LLCWIKa did not at all carry out his legal obligations (counter performance) to pay the price of logs (logs) he had received, amounting to USD 179,412.48 plus DR and IHH of Rp. 399.390.670,-. LLCWijaya Indah Permai has done billing many times. However, LLCWIKa always tries to delay payments for various reasons. TobengMahatani as President Director and shareholder of LLCWIKa is legally responsible severally and severally. On March 22, 2003 there was a meeting by and between LLCWijaya Indah Permai and LLCWIKa represented by TobengMahatani, both in his capacity as President Director of LLCWIKa and as himself. During the meeting, an agreement was reached on charging interest on USD debt and 12% (twelve percent) per annum on rupiah debt starting in installments from May/June 2000 to December 2000. However, LLCWIKa and TobengMahatani only made payments to DR and IHH liabilities of Rp. 504,304,581,- while LLCWIKa's debt obligations to LLCWijaya Indah Permai amounting to USD 179,412.48 along with the late payment penalty were never repaid.

The above clearly proves that TobengMahatani as the director has violated his fiduciary duty because he did not act in good faith for the interests and objectives of the company by not making payments to LLCWIKa's debt to LLCWijaya Indah Permai. The Board of Directors is fully responsible for the management of the company in good faith and full of responsibility. The Board of Directors is fully personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties, applies jointly and severally. Violation of the fiduciary duty carries serious consequences for the board of directors as mandated by Article 97 paragraph (1), (2), (3), and (4) of the Company Law because the directors can be held personally responsible.

This Supreme Court decision rejects TobengMahatani's petition for bankruLimited company as director and shareholder of LLCWIKa on the argument that the board of directors is fully responsible for managing the company for the interests and objectives of the company and representing the company both inside and outside the court, therefore TobengMahatani personally cannot be prosecuted. his responsibility for his actions on behalf of LLCWIKa (LLCKaruniaWanaIka Wood Industrial/LLCKAWI) inside or outside the court and taking over the legal considerations in the Surabaya Commercial Court decision on October 9, 2003 was considered by the Supreme Court itself. Legal considerations from the Surabaya Commercial Court in Decision Number 07/PAILIT/2003/PN.NIAGA.SBY rejected the bankruLimited company of TobengMahatani because simple evidence which is a requirement of proof in a bankruLimited company case cannot be fulfilled.

A director can be held personally accountable, it must be determined in advance that he has been guilty and negligent in carrying out his duties. So, if the bankruLimited company is due to the fault of the board of directors, there must first be bankruLimited company against the company, then it can be determined that the bankruLimited company occurred due to the fault of the board of directors.

2) Decision of the Supreme Court of the Republic of Indonesia number 011PK/N/2007

The case in the Supreme Court's decision Number 011PK/N/2007 of the board of directors violating their fiduciary duty can be seen in LLCCitaHidayatKomunikaputra represented by H. DediHanurawan unable to fulfill his obligations or overall achievements, namely:

a) The profit of 4% per month as promised by LLCCitaHidayatKomunikaputra to Affandi, ISS, SE based on the provisions of Article 7 of the Deed of Cooperation Agreement Number 3 dated January 6, 2005, turned out to be only paid until February 2005, while the profit from March 2005 until at the end of the agreement LLCCitaHidayatKomunikaputra was never paid.

b) The profit of 6% per month as promised by LLCCitaHidayatKomunikaputra to Affandi, ISS, SE based on the provisions of Article 7 of the Deed of Cooperation Agreement Number 18 dated January 14, 2005, was never paid by LLCCitaHidayatKomunikaputra.

c) Profit of 10% per month as promised by LLCCitaHidayatKomunikaputra to HeruMujianto, S.Sos based on the provisions of Article 7 of the Deed of Cooperation Agreement Number 98 dated Limited companyember 30, 2004, it turned out that until the end of the agreement LLCCitaHidayatKomunikaputra had never paid .

d) Profit of 10% per month as promised by LLCCitaHidayatKomunikaputra to HeruMujianto, S. Sos based on the provisions of Article 7 of the Deed of Cooperation Agreement Number 83 dated November 30, 2004, it turned out that until the end of the agreement LLCCitaHidayatKomunikaputra had never paid .

In the case above, it is also clear that there was no good faith from the board of directors for the interests and objectives of the company. Receivables to Affandi, ISS, SE and HeruMujianto, S. Sos were never settled until the end of the agreement. Therefore, Affandi, ISS, SE and HeruMujianto, S. Sos filed a bankruLimited company petition against the directors and commissioners of LLCCitaHidayatKomunika as the parties

responsible for their receivables. Because LLC Cita Hidayat Komunika has been declared bankrupt limited company but the bankrupt limited company assets owned by LLC Cita Hidayat Komunika are not sufficient to cover the obligations of LLC Cita Hidayat Komunika in bankrupt limited company which has been granted by the panel of judges.

The Supreme Court in its decision gave an explanation that the board of directors cannot be bankrupt limited company because the consequences of negligence have caused the company to go bankrupt limited company and cannot be proven simply so that the case must be examined and decided by the District Court based on a civil application. However, Article 3 paragraph (1) of Law Number 37 of 2004 stipulates the application against the board of directors that causes the assets to go bankrupt limited company, namely: What is meant by "other matters", among others, actio pauliana, third party resistance against confiscation, or cases where the Debtor, Creditor, Curator, or management is one of the parties in a case related to bankrupt limited company assets including the Curator's application against the Board of Directors which causes The company is declared bankrupt limited company due to its negligence or fault.

Based on the article above and its explanation, it can be seen that the case on the decision Number 011PK/N/2007 should be filed in the Commercial Court because negligence and mistakes made by the directors were the cause of the company's bankrupt limited company. The case was filed after a decision stating that the company in question was declared bankrupt limited company by the competent court.

From these two cases, it is clear that for the first case the Supreme Court was correct in determining its decision because the submission of the application against the board of directors which caused the bankrupt limited company became one (at the same time) with the filing of the bankrupt limited company of the company so that the simple evidentiary requirements in the bankrupt limited company case could not be fulfilled.

However, the author does not agree with the considerations in the second case decision, namely the proof of the board of directors causing bankrupt limited company cannot be proven simply because before the submission of the application for accountability of the board of directors due to negligence, there has been bankrupt limited company in the company. For this reason, it should still be able to be proven simply because of the negligence or intentional error of the board of directors which caused the bankrupt limited company of the company to be seen during the settlement of the Company's assets by the curator when the bankrupt limited company statement occurred.

The application for personal responsibility of the board of directors must be proven by the fault or negligence of the board of directors, the error or omission brings losses to the company. An application against the board of directors is filed on behalf of the company, the shareholders representing at least 1/10 (one tenth) of the total shares with voting rights may file an application through a district court against a member of the board of directors who due to his/her mistake or negligence causes a loss to the company.

In the case of decision No. 01PK/N/2004, the petition for a declaration of bankrupt limited company against the board of directors was not granted because the requirements for simple proof in bankrupt limited company cases were not met because the filing of a bankrupt limited company application against the board of directors was carried out at the same time as the petition for bankrupt limited company against the company. Based on Article 104 paragraph (2) of the Company Law, members of the board of directors will only be personally responsible if the company is declared bankrupt limited company. The case in Decision Number 01PK/N/2004 application for personal liability of directors against the company is filed together with the petition for declaration of bankrupt limited company of the company. Thus, simple proof is carried out on two things, namely the requirements for the bankrupt limited company application as referred to in Article 2 paragraph (1) of the UUKPKPU, and proof of the fault or negligence of the board of directors that caused the company to go bankrupt limited company as stipulated in the explanation of Article 3 paragraph (1) of the UUKPKPU.

If in an application there are two proofs as mentioned above, it can be ascertained that the proof cannot be done simply. The bankrupt limited company petition for the company should be filed first, after there is a permanent decision from the court regarding the bankrupt limited company of the company, the petition against the directors which causes the company to go bankrupt limited company can be submitted. This means that the settlement of the bankrupt limited company estate has been completed. The case in the decision Number 011PK/N/2007 an application against the board of directors which causes the company to go bankrupt limited company is filed after the company is declared bankrupt limited company and the bankrupt limited company estate has been settled. The case for the request for accountability of the board of directors for the bankrupt limited

company of the company can be proven simply by looking at the time of the settlement of the bankruLimited company estate by the curator. Is it true that in the settlement there is evidence that the board of directors is the cause of the bankruLimited company of a company. However, in consideration of the Supreme Court's decision, the Supreme Court did not grant the request because the proof could not be carried out in a simple manner so it had to be examined and an application for responsibility was submitted to the District Court through a civil lawsuit.

For the imposition of responsibility is not limited to the board of directors because of negligence or intentionally causing the company to go bankruLimited company, it is still through the Commercial Court because it is still related to the bankruLimited company of the company. The charge is based on a violation of fiduciary duty by the board of directors. If the assets of the company are not sufficient to pay the debts and the costs of bankruLimited company, the assets of the directors that caused the bankruLimited company of the company are used to fulfill the payment of the debt. ExceLimitedcompanyif the board of directors can perform reverse proof (omkering van bewijslast) for members of the board of directors who can prove that the company's bankruLimited company was not due to error (intentional) or negligence in accordance with the provisions in article 104 paragraph 4 of the Company Law. about the reverse proof.

In the business judgment rule conceLimited company, a director cannot easily be considered to have violated the principle of duty of care and skill, as long as he takes an action based on good faith, unless there is fraud, conflict of interest, or acts against the law (illegality). 220 The application of this business judgment rule is contained in Article 97 paragraph (2) and Article 92 paragraph (1) of the Company Law that the board of directors' actions against the company must be carried out by fulfilling the three legal requirements as follows:

- 1) Good faith (good faith)
- 2) Full of responsibility
- 3) For the benefit of the company (proper purpose)

B. Sanctions and Responsibilities and Forms of Settlement for Directors Who Violate Fiduciary Duty

The Board of Directors is a company organ that is responsible for managing the company for the benefit of the company and the company's goals and representing the company both inside and outside the court in accordance with the articles of association. This is what Article 1 point 5 of the Company Law reads. This is confirmed by Article 92 paragraph (1) and paragraph (2) of the Company Law, namely that the management of the company is carried out by the board of directors and the board of directors is fully responsible for the management of the company and not to individual shareholders, for the interests and objectives of the company and representing the company inside and outside the company.the court with a policy deemed appropriate in accordance with the limits determined by the Limited Liability Company Law or the Articles of Association in a Limited Liability Company, the position of the board of directors in two legal relationships is not a problem, as long as the two legal relationships can be applied consistently and in line with a share in the company as determined by the Limited Liability Company Law.

Each company must have clear and firm aims and objectives as well as business activities which are the basis for the board of directors to enter into business contracts and transactions, determine the limits on the authority of the board of directors to conduct business activities. A director cannot be held personally responsible for his actions taken in his position as a director, which he believes to be the best course of action for the company and which he did honestly in good faith, and did not conflict with the applicable law.

Therefore, in carrying out the management of the company, the board of directors must do so in good faith and full of responsibility. This is done based on the highest standard of duty as stated by law. someone who plays the role of a trustee or a role that is equated with something that acts as a representative. In this case, the role is based on trust and confidence, which in this role includes scrupulous, good faith, and candor. This fiduciary includes the relationship between administrators or managers, supervisors, representatives or guardians, and guardians.

The application of the fiduciary duty principle to the company's directors requires that the directors in carrying out their duties meet the following criteria:

- 1) Always have good intentions
- 2) Must be honest (honest) with the company
- 3) Have reasonable skills as normally possessed by people who have the same knowledge and experience as him

- 4) Caring for the company (duty of care)
- 5) High loyalty.
- 6) Making a business-reasonable decision even though it may not be an Limited companyimal decision.⁵⁰

The basic guidelines for the board of directors in carrying out fiduciary duty to the company they lead are:

- 1) Fiduciary duty is a mandatory element in company law.
- 2) In carrying out their duties, a director must not only fulfill the element of good faith, but must also fulfill the element of a proper purpose.
- 3) In principle, the director is burdened with the principle of fiduciary duty to the company, not to the shareholders. Therefore, only the company can force the board of directors to carry out the fiduciary duty.
- 4) However, in carrying out his function as a director, in general he must also pay attention to the interests of stakeholders, such as shareholders and company workers.
- 5) Even though he has the duty as a director, the director is still free to give his voice and opinion according to his beliefs and interests in every meeting he attends.
- 6) The Board of Directors remains free to make decisions according to their business considerations and sense of business. In fact, the court must not interfere in considering the sense of business of the board of directors.
- 7) In cases where there is a conflict of interest, a person is prohibited or at least restricted or supervised in carrying out his duties. Such supervision, for example, applies the principle of disclosure to every transaction that has a conflict of interest.⁵¹

Article 97 paragraph (2) of the Company Law requires each member of the board of directors to have good intentions and full responsibility in carrying out each task.⁵² This article provides the basis for the implementation of fiduciary duty by the board of directors. This fiduciary duty applies to the interests of the company.⁵³ The company as a legal entity has consequences for limited liability to shareholders, commissioners and directors. However, in its development this principle does not apply absolutely, in certain cases it is possible to eliminate the limited liability of shareholders, commissioners and directors of a Limited Liability Company. The unlimited liability is imposed on the shoulders of another person or company, for a legal act carried out by a perpetrator company (legal entity), regardless of the fact that the act was actually carried out by the perpetrator company.⁵⁴

This unlimited liability is essentially aimed at protecting the interests of the holder or third parties who are harmed by arbitrary or inappropriate actions by the board of directors carried out on behalf of the company, whether arising from a transaction with a third party or arising from misleading or other acts. against the law.

Thus, there is no longer any room for the board of directors as management of the company to take actions that can cause harm to the company, shareholders or third parties. If in the implementation and/or operation of the company, the Board of Directors commits a violation of their duties, as in Article 97 paragraphs (2) and (3) of the Company Law, sanctions may be imposed.

- 1) The management as referred to in paragraph (1) must be carried out by each member of the Board of Directors in good faith and full of responsibility.
- 2) Each member of the Board of Directors is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2).

The Board of Directors is jointly and severally responsible in the Article above, where each member of the Board of Directors has responsibility, and the aggrieved party may claim compensation from the member of the Board of Directors for the total amount of the loss suffered.

⁵⁰MunirFuadi,DoctrinesModern...*op.cit.*,h.54.

⁵¹*Ibid* .,p.59.

⁵²ChaLimitedcompanyer97paragraph(2)LLC mentions:"management"as referred to in paragraph (1),must be carried out by every member of the Board of Directors in good faithandfullnot quite enoughanswer."

⁵³This provision can be seen in Article 97 paragraph (1)namely "(1) The Board of Directors is responsibleon the management of the Company as referred to in Article 92 paragraph (1)". Article 1 number 5, namely"The Board of Directors is a Company Organ that is authorized and fully responsible for the management ofthe Company for the benefit of the Company, in accordance with the purposes and objectives of the Company and representing theCompany,goodinnorinoutsidecourtin accordancewithprovisionbudgetbase

⁵⁴MunirFuadi,DoctrinesModern...*op.cit.* ,p.7.

The Board of Directors may be subject to unlimited liability if the Board of Directors does the following:

1) The Board of Directors Does Not Implement Fiduciary Duty To LLC.

Directors who intentionally or negligently perform their fiduciary duty, are not responsible and have no good intentions in carrying out the management of the company, then the directors are personally responsible in accordance with Article 1 point 5 and Article 97 paragraph (3) of the LLC. Requests for piercing the corporate veil can be made by third parties who feel aggrieved and/or shareholders who feel aggrieved. In this case, shareholders act for and on behalf of the company, where shareholders are represented at least 10% of all shares and with valid votes.

2) Incorrect Annual Calculation Document.

One of the duties of the board of directors is to provide the correct calculation of the annual report, if it is proven that the annual report is not correct then the board of directors together with the commissioners are jointly and severally responsible, in accordance with the provisions of Article 69 paragraphs (3) and (4) of the Company Law, providing reverse evidence by the directors and commissioners. .

3) Directors Guilty and Causing the Company to Bankrupt Limited company.

Directors who are guilty of causing the company to go bankrupt Limited company may also be subject to unlimited liability if the error is caused by the following:

a) There is an element of intentional error or negligence on the part of the board of directors with ordinary evidence.

b) To pay debts and bankrupt Limited company costs, it must first be taken from the company's assets. If the company's assets do not meet then it is taken from the assets of the personal directors.

c) Reversed proof (omkering van bewijslast) is applied to members of the board of directors who can prove that the bankrupt Limited company of the company was not due to error (intentional) or negligence.

However, the board of directors can be released from responsibility if the director can prove his innocence in accordance with Article 104 and Article 115 paragraph (1) of the Company Law.

1) Improper Capital

If the company's capital is not sufficient to support an activity, the directors must not carry out such activities.

2) The Company Operates Improperly.

If the company does not operate improperly to the detriment of third parties and/or shareholders, the directors are responsible as executives of the company based on the fiduciary duty doctrine of the directors in a company, unless the directors have carried out their duties properly in accordance with the principles of the business judgment rule. .

The board of directors' business decisions can still be tolerated as long as the negligence or error that causes the loss is still within certain limits and the action is not for personal gain. This is explicitly recognized by Article 92 paragraph (2) of the Company Law and the explanation of the article. The Board of Directors is authorized to carry out the management of the company by implementing policies that are considered appropriate, namely policies based on expertise, available opportunities, and the prevalence in the world of similar businesses.

The Board of Directors must always act in good faith by referring to sufficient and competently processed information based on its capabilities. The sincerity, good faith and prudence of a director can free him from responsibility for his actions that result in losses to the company and legal protection without the need to obtain legal justification from shareholders, commissioners or the court in making every business decision taken or often referred to as the term business judgment rule. This loss can arise due to miscalculation due to force majeure that occurs against the will and calculations of humans or other events that cause losses unless the loss is included in the category of gross negligence.

A director cannot be held personally responsible for his actions carried out in his position as a director, which he believes to be the best course of action for the company and is done honestly in good faith, and does not conflict with applicable law. Even though the action turned out to be wrong and detrimental to the company, it is often referred to as the business judgment rule.

V. Conclusion

This research generally provides the following conclusions:

1) The legal framework governing the violation of fiduciary duty by the board of directors, causing the company to suffer losses, occurs because the board of directors does not have good intentions in carrying out the tasks in the management function of a company that is entrusted to the board of directors and is not in accordance with Law Number 40 of 2007 relating to the management function that be the duty of the board of

directors. Thus, the directors have violated their fiduciary duty. The Board of Directors has violated the law and caused harm to other people, thus requiring the director who caused the loss because of his mistake to pay for the loss.

2) The form of responsibility of the board of directors in carrying out the management of the company is more careful as the bearer of fiduciary duty. Because, the board of directors is an important organ in the company. The Board of Directors performs management at all times for the company, both in its function as management and representation. Management by the board of directors must be carried out in good faith and full of responsibility as stated in the fiduciary duty principle.

3) The application of the responsibility of the board of directors to the principle of fiduciary duty for the board of directors is based on Article 97 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies states that the obligations of the board of directors in managing the company are carried out in good faith and full of responsibility. If in its management the board of directors makes an error or omission that causes a loss to the company, the board of directors is personally responsible for the loss.

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