GOOD FAITH AS LEGAL BENCHMARK FOR THE ALLOCATION OF LOSSES BY MUTUAL COMPANY

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Abstract
Allocation of losses is a special scheme that can only be applied to mutual companies, legal entities that position policyholders as both insured parties and owners. The problem with the allocation of losses arises because, in its determination, policyholders are required to fulfill mutual obligations in the fiduciary realm as owners. On the other hand, the allocation of losses has implications for reducing the policyholder's right to receive claims as agreed. This paper is a legal research study employing a statutory approach and a conceptual approach. The results of this study indicate that, for the allocation of losses to have legitimacy, it must align with fiduciary principles and be fair based on the terms of insurance agreements. The legal findings suggest that the principle of utmost good faith should be expanded in mutual companies to serve as an instrument of checks and balances by policyholders over management and aspects related to the fulfillment of agreements.

Keywords:
allocation of losses; fiduciary obligation; good faith; mutual company

Abstrak
Pembebanan kerugian merupakan skema khusus yang hanya dapat diterapkan pada usaha bersama sebagai badan hukum yang memposisikan pemegang polis sebagai tertanggung sekaligus pemilik. Permasalahan dalam pembebanan kerugian timbul karena dalam penetapannya, terjadi tuntutan bagi pemegang polis untuk melaksanakan kewajiban mutual dalam ranah kewajiban *fiduciary* sebagai pemilik. Di sisi lain, pembebanan kerugian berimplikasi pada reduksi terhadap hak pemegang polis dalam menerima klaim sebagaimana yang diperjanjikan. Adapun tulisan ini merupakan penelitian hukum dengan *statute approach* dan *conceptual approach*. Hasil dari penelitian ini yaitu, untuk diperoleh pembebanan kerugian yang memiliki legitimasi atasnya harus patut berdasarkan hubungan *fiduciary* dan adil berdasarkan perjanjian asuransi diperlukan iktikad baik atasnya. Adapun temuan hukum dalam penelitian ini yaitu bahwa perlunya perluasan prinsip *utmost good faith* pada usaha bersama sebagai instrumen *check and balances* oleh pemegang polis terhadap pengelolaan dan aspek-aspek yang berkaitan dengan pemenuhan perjanjian.

Kata Kunci:
pembebanan kerugian; itikad baik; kewajiban fidusia; usaha bersama

Introduction

Based on Article 1 number 1 of Act 40 of 2014 concerning Insurance (Act 40/2014) basically defines insurance as an agreement between two parties, namely the insurance company and the policyholder, which is the basis for the receipt of premiums by the insurance company in exchange for compensation to the insured due to the occurrence of uncertain events. From this understanding, it is obtained

that insurance is basically an agreement so that it has the implication of having binding force like the concept of agreement in general. In the clause of the insurance agreement, it is generally agreed that the insurance company will bear certain risks that have been agreed with the insured, in the form of losses, damages, costs incurred, loss of profits, legal liability, and death/life. In general, the risks experienced by the insured have been and/or will have consequences for the insured's assets. Therefore, by having insurance, the consequences of that risk can be mitigated.

The insurance business automatically places the insurance company as a business actor and the insured as a consumer.[1] Based on Act 8 of 1999 concerning Consumer Protection and considering the form of legal entities of insurance companies in general in the form of Limited Liability Companies (*vide* Act 40 of 2007 concerning Limited Liability Companies), the relationship between the insurance company and the insured is as a different legal entity and does not have the right to interfere in legal affairs other than the matters agreed upon in the insurance agreement. However, this concept cannot be applied equally to all forms of insurance business, where there is a condition where the legal relationship between the insurance company and the insured *in casu* policyholder which is more "special" than insurance companies in the form of Limited Liability Companies.[2]

This "special" legal relationship can be found in insurance agreements with insurance companies in the form of mutual companies. In Indonesian society, the concept related to legal relations in mutual companies is often not understood thoroughly. Of course, this is not surprising because the existence of mutual companies in Indonesia was only found in AJB Bumiputera 1912. It is an inequality in quantity when looking at insurance companies in the form of Limited Liability Companies which are very common in their existence, in fact almost all insurance companies operating in Indonesia are in the form of Limited Liability Companies. Even so, the form of mutual company is one of the forms of legal entities whose

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1 Neneng Sri Setiawati, Perlindungan Hukum terhadap Pemegang Polis Asuransi dalam Menyelesaikan Sengketa Klaim Asuransi, Jurnal Spektrum Hukum, Vol. 15, 2018, p. 150.

2 Rifqi Irawan Harahap, Perlindungan Hukum Terhadap Pemegang Polis Asuransi Jiwa Bersama (AJB) Bumiputera 1912 Yang Mengalami Likuiditas, Universitas Indonesia, 2022.

legitimacy is recognized other than Limited Liability Companies and Cooperatives based on Article 6 number (1) of Act 40/2014.

Mutual companies as legal entities engaged in insurance are not only limited to positioning policyholders as insured *in casu* consumers, but also as owners.[3] Article 1 number 1 of Government Regulation 87 of 2019 concerning Insurance Companies in the Form of Joint Venture (PP 87/2019) defines a mutual company as a legal entity that organizes an insurance business and is owned by members. The intention of the members here can be reviewed in the provisions of Article 1 number 3 jo. Article 3 letter (d) of PP 87/2019, that members are policyholders in mutual companies. Element of ownership by members *in casu* policyholder makes the legal relationship between the insurance company and the policyholder not limited to the agreement based on the agreement only, but also to the concept of fiduciary relationship involving the policyholder in the implementation of the mutual company with the mutual company organ. [4]

By placing the policyholder as the insured as well as the owner, the concept of dualism of legal status in the mutual company is obtained.[5] Policyholder participation *in casu* members in the implementation of a mutual company can be reviewed from the provisions of Article 10 numbers (1) and (2) of Indonesian Financial Services Authority/*Otoritas Jasa Keuangan* (OJK) Regulation No. 7/POJK.05/2023 on Governance and Organizational Arrangement of Mutual Insurance Companies (POJK 7/2023) which norm the rights and obligations of members, as follows:

(1) Members are entitled:
   a. elected as RUA participants in accordance with the requirements and mechanisms as stipulated in the provisions of laws and regulations; and
   b. get all benefits from business activities in accordance with the provisions of laws and regulations.

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3 Douglas P Long, Governance of Mutual Insurance Companies: A Call for Reform, Drake Law Review, Vol. 29, 1979, p. 693.

4 Id.

5 Danu Kristian Ira Widodo, Pembebanan Kerugian pada Perusahaan Asuransi Berbentuk Usaha Bersama, Fakultas Hukum Universitas Airlangga, 2024.

(2) Mandatory members:

a. comply with the Articles of Association and decisions that have been agreed upon in the RUA; and
b. allocating all losses from business activities in accordance with the provisions of laws and regulations.

From these provisions, it is obtained that the special characteristics of ownership by policyholders of mutual companies are clear and concrete. One of the obligations that needs to be considered includes the allocation of losses. The allocation of losses policy is generally applied by insurance companies in the form of mutual companies when the company's condition does not have good financial health so that losses are charged to policyholders. The allocation is in the form of a reduction in the value of benefits, a reduction in the value of policies that are investment, and additional premiums set by mutual companies to policyholders. Therefore, the allocation of losses strongly emphasizes the participation of policyholders for the sustainability of mutual companies.

The practice of allocation of losses in Indonesia itself can be reviewed in the *Penurunan Nilai Manfaat* (PNM)/diminished value policy by AJB Bumiputera 1912 which was established in 2023.[6] In fact, it was found that PNM's policy was rejected by many policyholders. Various lawsuits have been filed in the form of class actions to demand the full fulfillment of the claims of the 1912 Bumiputera AJB.[7] As for when a loss is charged, the risk that is the object of insurance has the potential to not be fully or even not mitigated at all. This is very contrary to the purpose of insurance itself, especially in life insurance which aims to restore the economic condition of the family or the party appointed as the beneficiary after the death of the insured.

For example, when Covid-19 occurred and at the same time the world economy was in crisis, there was one family who lost their backbone. However, at that time it coincided with the determination of the allocation of losses which reduced the value of benefits by up to 50%. As a result, the payment of claims is not carried out in full and results in an unstable economy, leading to suffering and a decrease in the quality of life of the family. This is certainly a big problem and dilemma that must be solved

[6] AJB Bumiputera 1912, "Siaran Berita Penjelasan Bumiputera Tentang Pembayaran Polis Tertunda", 2023.
[7] Id.

by the mutual company organ as the party that has the authority to determine the allocation of losses, whether then the interests of the personal life of the policyholder or the sustainability of the mutual company legal entity as a communal are the top priority. Because after all, other efforts can also be taken.[8]

In addition, the potential conflict of interest of the mutual company organ is also a problem. This is considering that the allocation of losses is set unilaterally by the mutual company without a clear participation mechanism to the policyholder as the party charged with the loss. In the 1912 Bumiputera AJB, the determination of PNM was a follow-up to the decision of the *Rapat Umum Anggota* (RUA)/general meeting in continuing the form of a mutual company legal entity.[9] From this, the AJB Bumiputera 1912's RUA is still exclusive, because if it adopts the provisions of the International Cooperative and Mutual Insurance Federation (ICMIF), the decision on the sustainability of the mutual company should be the decision of all policyholders in a communal and non-representative manner.[10]

This is not surprising, considering that basically Indonesia is not legally ready to implement the form of a mutual company legal entity. In its development, many parties have applied to the Constitutional Court for mutual companies to be normed in a separate law and granted as can be reviewed in the Constitutional Court Decision 32/PUU-XII/2013 and 32/PUU-XVIII/2020. However, the facts on the ground are quite disappointing, instead of making the Law as intended, the Indonesian legislature simply underestimates the urgency of forming a Act on Mutual Companies by only integrating it into Act 4 of 2023 concerning the Development and Strengthening of the Financial Sector (Act 4/2023) as part of the amendment to Act 40/2014. Which then complexly, the authority to form the regulation was handed over to the OJK which was then outlined in POJK 7/2023. The implication is that there will be no strict criminal sanctions to minimize violations of the law by stakeholders in the 1912 Bumiputera AJB.

The many legal loopholes that exist in the implementation of the allocation of losses provide a wide opportunity for stakeholders who want to take advantage of

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8 Widodo, supra note 5.
9 AJB Bumiputera 1912, supra note 6.
10 International Cooperative and Mutual Insurance Federation, A Practical Guide to Undestanding Mutual Insurance, (ICMIF ed).

the allocation of losses scheme for their personal interests. Therefore, it is urgent to provide a check and balance system on mutual company strategic decisions that affect insurance agreements. In this case, there needs to be a limit that becomes a benchmark in determining the allocation of losses. It is not easy to set a clear benchmark, because normatively the provisions of the laws and regulations governing mutual companies are still very limited. However, it does not mean that further development is closed, therefore moral law enforcement will be important. Peter Mahmud Marzuki stated that law and morality cannot be separated for the sake of obtaining peace.[11]

"Whoever has good faith, will be protected by the law", this concept is very important because it is the moral standard of legal scholars. Philosophically, the principle of good faith is not only related to the legal dimension, but also to the moral dimension. Therefore, the author views that the principle of good faith can be used as a benchmark for determining the allocation of losses in mutual companies, another reason is by reviewing various legal regimes that must have the principle of good faith in them even though their implementation is different.

The position of the policyholder as the owner is a logical consequence of the closure of the insurance agreement with the mutual company. Therefore, the principle of good faith in insurance law can be used as the basis for analysis, which then its application can be extended to the realm of fiduciary relations for the sake of good performance in insurance agreements. The principle of utmost good faith basically requires information transparency between the two parties, but its application is generally limited to the exchange of information about insurance products and/or the health condition of the insured.

With the expansion of the principle of utmost good faith, policyholders can demand accountability for the actions and/or business decisions of mutual company organs that are at risk of hindering the implementation of insurance agreement obligations. Even when the mutual company's finances are not healthy, ideally there should be an exchange of information regarding the financial development of the mutual company between policyholders and mutual company organs so that when

[11] Peter Mahmud Marzuki, Pengantar Ilmu Hukum, Kencana Prenada Media Group, Jakarta, 2020.

the allocation of losses is determined, the parties have mitidated risks independently. The dispute that occurred at AJB Bumiputera 1912 was basically caused by the absence of information exchange between the AJB Bumiputera 1912 organ and policyholders.[12] The lack of participation and a sense of kinship, among others, plus the improper handling of losses in AJB Bumiputera 1912 became the background for the dispute. Therefore, it is necessary to involve policyholders in the strategic business decisions of mutual companies, and this can only be achieved if the application of the principle of utmost good faith to mutual companies goes smoothly.

This article is a legal research with a statute approach and a conceptual approach. The application of the principle of good faith in mutual company organ's decision will be analyzed, especially when applying the allocation of losses as a business decision based on fiduciary obligations which has implications for the performance of the implementation of insurance agreements. The urgency of expanding coverage in the application of the principle of utmost good faith will also be discussed in this paper considering the difference in the legal character of mutual companies compared to limited liability company insurance companies. The expansion of the principle will automatically also create a monitoring system on the material aspect and clear benchmarks on the formal aspect in determining the allocation of losses.

Analysis

The Act of a Mutual Companies in Good Faith as a Legality in the Allocation of Losses

Nationally, the existence of mutual companies in Indonesia is a manifestation of the national economy based on the principle of kinship as mandated in Article 33 number (1) of the 1945 Republic Indonesian Constitution. This statement was put forward by the Constitutional Court Panel as a consideration of the Constitutional Court Decision 32/PUU-XI/2013 on the basis of the idea that mutual companies in

[12] CNN Indonesia, "Nasabah Geruduk Kantor Bumiputera Besok, Tolak Penurunan Nilai Manfaat", 2023, <https://www.cnnindonesia.com/ekonomi/20230227141633-78-918358/nasabah-geruduk-kantor-bumiputera-besok-tolak-penurunan-nilai-manfaat>.

carrying out their business prioritize prosperity with their members or the community. This is also included in the Articles of Association of AJB Bumiputera 1912 as its main purpose.

The family principle itself is an acculturation of the solidarity principle which is the initial principle of the formation of mutual company legal entities embraced by mutual companies in European countries.[13] The acculturation of this principle is philosophically carried out by considering the socio-cultural aspects of Indonesian society which are closely related to the tradition of *gotong royong* (working together) and prioritizing common interests over groups/individuals.[14] So that it should not only be based on solidarity alone and should have a differentiating value in its implementation. However, in fact, both the structure and governance of mutual companies in Indonesia do not have significant differences with mutual companies in European countries. Sadly, there are shortcomings because the positive law about mutual companies in Indonesia is still unclear.

Based on common interest, there is a fair division of mutual obligations to each member. To be charged with mutual obligations, interested parties must be directly bound to the company. Therefore, the concept of a mutual company gives a position to the policyholder as the owner so that there is an attachment to the company communally.[15] The ideal type of business for the application of the business concept is the insurance business, because mutual companies are not capital partnerships, so the only source of capital from mutual companies is from premium payments. And this type of insurance business is easy in attracting participation from many people without the dominance of a few people. Therefore, insurance companies that are legal entities as mutual community can always be referred to as 'mutual companies'.[16]

The above explanation is the background for the dualism of the legal position of the policyholder in the mutual company, as the insured and the owner of the mutual company. The two legal positions go hand in hand in the implementation of

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13 Charles S Tapiero, Yehuda Kahane, and Laurent Jacque, Insurance Premiums and Default Risk in Mutual Insurance, Scandinavian Actuarial Journal, Vol. 14, 1986, p. 82.

14 Widodo, supra note 5.

15 Jean-Philippe Platteau, Mutual Insurance as An Elusife Concept In Traditional Rural Comunities, The Journal of Development Studies, Vol. 33, 1997, p. 764.

16 Id.

mutual companies. Even so, there are exceptions where one of the legal positions can be ignored for the sake of the common good, when the mutual company suffers losses.[17] When a mutual company suffers losses, one of the efforts that can be taken while maintaining the concept of "mutual" is the allocation of losses. The implication is that the mutual company can ignore the full fulfillment of the insurance agreement to the insured, and only provide portions in accordance with the allocation of losses scheme.

The reason for the abandonment of the full fulfillment of the insurance agreement is so that all policyholders receive equal and fair treatment. Policyholders who jointly and without exception bear losses are a tangible manifestation of the family principle and are mutual obligations – in some literature, mutual obligations are mentioned as a type of contingent liability because of the uncertain nature of their application and dependence on an event. The provisions in Article 3 letter (b) of PP 87/2019 also state that in carrying out their business, mutual companies issue insurance products that cause the distribution of profits and losses from mutual company activities for members. Therefore, the allocation of losses is a legal financial restructuring scheme and has legality to be established.

Then, if the allocation of losses is a scheme that can indeed be determined and charged to policyholders as a mutual obligation, it becomes a question about what is the basis for the lawsuit that should be filed by policyholders in the AJB Bumiputera 1912 case when PNM is enforced? In this case, the default lawsuit at that time became irrelevant because when the allocation of losses was determined, the full fulfillment of the insurance agreement could be ignored by the mutual company. In a sense, mutual companies are only obliged to fulfill achievements according to the value set after the allocation of losses.

Reviewing the legal norms in the State of Maine, United States, explicitly regulating the provisions of §3365.4 of Title 24-A: The Maine Insurance Code explicitly states that "A member may not have an offset or counterclaim against any assessment for which the member is liable, on account of any claim for unearned premium or loss payable." Restrictions on legal remedies like this are very important

[17] Aluysius Prianka Driyarkara, Natalia Yeti Puspita, Tanggung Jawab Badan Hukum Usaha Bersama (Studi Kasus: Asuransi Jiwa Bersama Bumiputera 1912), Jurnal Paradigma Hukum Pembangunan, Vol. 8, 2023, p. 67.

to be normed, especially in Indonesia which adheres to the civil law system where the court decides based on laws and regulations so that legal certainty is obtained. Reviewing the case in AJB Bumiputera 1912, most policyholders only demand the payment of the full benefit value without understanding the basic concept of a mutual company legal entity. It is ironic to see the legal problems that arise but there are no positive laws as the basis for legal remedies in AJB Bumiputera 1912, even though the mutual company has been established in Indonesia since 1912 until now. However, of course, its implementation is not carried out arbitrarily, because of the unilateral nature of mutual companys, so its implementation must be based on "propriety".[18] Propriety contains good faith, and vice versa.[19] Therefore, it can be said that the right action is a good good action. Propriety itself is an objective standard of good faith, which according to Wirjono Prodjodikoro focuses more on the legal actions of a party.[20]

In relation to the decision itself, propriety can be a benchmark for legal due diligence on the principle of reasonableness. The principle of reasonableness is the result of propriety itself, in other words that if the action of the mutual company organ is appropriate, it will be reasonable to be carried out.[21] There are two liabilities of the company's organs that can be reviewed and assessed as appropriate which are obtained from the analogy of the provisions of Article 97 number (6) and Article 61 number (1) of Act 40/2007:[22]

1. that the company's organs are personally based on their ability to manage the company. In this case, it will be closely related to the personnel of the company's organs whether they have the competence to carry out the duty of care, duty of skill, and duty of loyalty. Most laws and regulations of the company make this a requirement in the selection of the company's

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18 Agus Yudha Hernoko, Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial, Kencana, Jakarta, 2021.

19 Bart Jansen et al., A Post-Colonial Comparative Critical Legal Study of The Open Norm of Reasonableness and Fairness (or Good Faith) in Dutch and Indonesian Corporate Law, International and Comparative Corporate Law Journal, Vol. 15, 2021, p. 72.

20 Hernoko, supra note 18.

21 Dewi Santoso Yuniarti, Iman Prihandono, Prinsip Reasonableness dalam Perpanjangan Konsesi Pertambangan Menurut Hukum Investasi Internasional, Fakultas Hukum Universitas Airlangga, 2019 <https://fh.unair.ac.id/en/prinsip-reasonableness-dalam-perpanjangan-konsesi-pertambangan-menurut-hukum-investasi-internasional/> diakses 28 Mei 2024.

22 Widodo, supra note 5.

organs at the beginning, but it is not better to conduct a review when losses occur; and

2. that the company's organs for its actions are appropriate in making or determining business decisions that it considers appropriate. In this case, what is considered is no longer the competence of the company's organs personally, but the correlation of the decision with the company and whether there are external factors that affect the decision. Actually, there are many aspects that can be considered here, but the outline can be reviewed whether the actions of the mutual company organ are in accordance with the hard law and soft law in a larger scope than point (1).

The two items of the propriety assessment must be reviewed sequentially and in stages. Although it is superficial, the OJK has prepared provisions of laws and regulations to standardize valuation in mutual companies. The responsibility of organs for their personal competence can be reviewed in POJK 4/POJK.05/2013, which basically stipulates that the organs of companies regulated in this regulation must have competence as proof of duty of skill, integrity as proof of duty of loyalty, and a good reputation so that the organ candidate applies caution as proof of duty of care.

When the mutual company organ is considered appropriate in terms of personal competence, then the assessment is used to assess the appropriateness of the decision that has been made. The business decision in question will definitely result in losses to stakeholders, but even if it results in losses, it is meaningless because the decision can be blamed on the company's organs. As the business character is dynamic and there are not many risk factors faced. Therefore, in order to protect the organs of mutual companies, business judgement rules are normed, which are regulated in Article 51 number (3) of POJK 7/2023. Where cumulatively, the organ mutual company cannot be held liable if it can prove that:

a. the loss is not due to his fault or negligence;
b. has performed its duties in good faith and prudence for the benefit of the Mutual Company, Members, and in accordance with the aims and objectives of the Mutual Company;

c. does not have a Conflict of Interest either directly or indirectly over the implementation of duties that result in losses; and
d. has taken measures to prevent the occurrence or continuation of such losses.

If the organ of the mutual company can prove these things in court, then it should be free from legal liability due to the business decisions it makes. However, the concept of business judgement rule only proves the innocence of the mutual company organ but does not mean that the business decisions it makes are appropriate.[23] To achieve a level of "propriety", further review is needed. Therefore, it is stated that to be properly assessed must be "... in accordance with hard law and soft law in a larger scope..."[24]

In a larger scope and including mutual company governance, the decision can be reviewed based on the principles in the Good Corporate Governance (GCG) for mutual company.[25] The principles in GCG are the basis for the implementation of a company's governance, so that if the actions of the company's organs can meet the requirements of these principles, they can be considered appropriate. GCG principles in mutual companies are normed in the provisions of Article 2 number (2) POJK 7/2023, including the prudential, transparency, accountability, accountability, professionalism, and fairness. If compared with GCG in insurance companies in general in Article 11 paragraph (2) of Act 40/2014 which has been amended by Act 4/2023, there is no difference in the principles of governance on it. However, of course, the application of GCG principles to mutual companies will be different from insurance companies in the form of Limited Liability Companies considering that there are differences in the structure and character of legal entities.

Although the application is different, the definition of GCG principles still moves on the same basis. The description is as follows:

1. Prudential

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23 David Kelly et al., Business Law, Cavendish Publishing Limited, London, 2002.
24 Douglas K Martin, Fairness, Accountability for Reasonableness, and The Views of Priority Setting Decision Makers, Health Policy, Vol. 61, 2002, p. 279.
25 Coral B Ingley and Nicholas T Van Der Walt, Corporate Governance, Institutional Investors and Conflict of Interest, Corporate Governance: An International Review, Vol. 12, 2004, 534.

The principle of prudence from insurance companies can be reviewed from the General Explanation of Article 68 paragraph (1) letter b POJK 2/POJK.05/2014 that basically the principle of prudence is applied in the business plan of insurance companies. The purpose of the inclusion of the prudential principle is as a juridical basis as well as an order that the mutual company organ in the implementation of mutual companies must always be careful, even in poor financial health conditions.[26]

2. Transparency

   Are openness in the decision-making process and openness in the disclosure and provision of relevant information about the company, which is easily accessible to Stakeholders in accordance with laws and regulations in the field of insurance as well as standards, principles, and practices for the implementation of a sound insurance business.

3. Accountability

   The clarity of the function and implementation of the accountability of the Insurance Company Organ so that the company's performance can run transparently, fairly, effectively, and efficiently.

4. Responsibility

   The conformity of the management of the Insurance Company with the laws and regulations in the field of insurance and ethical values as well as standards, principles, and practices for the implementation of a healthy insurance business.

5. Professionalism

   Tthe state of an Insurance Company that is managed independently and professionally and free from Conflicts of Interest and influence or pressure from any party that is not in accordance with the laws and regulations in the field of insurance and ethical values as well as standards, principles, and practices for the implementation of a sound insurance business.

6. Fairness

[26] Widodo, supra note 5.

The equality, balance, and fairness in fulfilling the rights of Stakeholders arising based on agreements, laws and regulations, and ethical values as well as standards, principles, and practices for the implementation of a healthy insurance business.

Apart from the fulfillment of GCG as a benchmark for the propriety of mutual company organ decisions, specifically in the allocation of losses there are additional aspects that must be implemented, namely proportional, reasonable, and based on actuary calculations. The explanation of proportional, reasonable, and based on actuarial calculations is as follows:[27]

a. Proportional

   The equivalent of the word proportional is prorata. When reviewing in its implementation, proportionality in mutual companies is the application of the principle of fairness. Reviewing fairness in GCG, is interpreted as fair and equal treatment of every stakeholder that arises either because of agreements or laws and regulations.

b. Reasonable

   Reasonable here means that it is applied with an acceptable ratio and based on the internal guidelines of the mutual company. The concept of reasonableness here must be seen as reasonableness in determining the allocation of losses broadly. This is obtained from the assessment and calculations that have been carried out so that the allocation of losses is seen as appropriate as a reasonable financial restructuring effort. In addition, the fairness aspect is considered by reviewing the financial condition and rights of mutual company members.

c. Based on actuary calculations

   Actuarial calculations serve as considerations for mutual company organs to implement the right decisions. The science used to carry out this calculation is actuarial science, which uses mathematical calculations and statistics to measure and assess company risks in real and actual terms so that if there is a dispute over it, it can be proven concretely.

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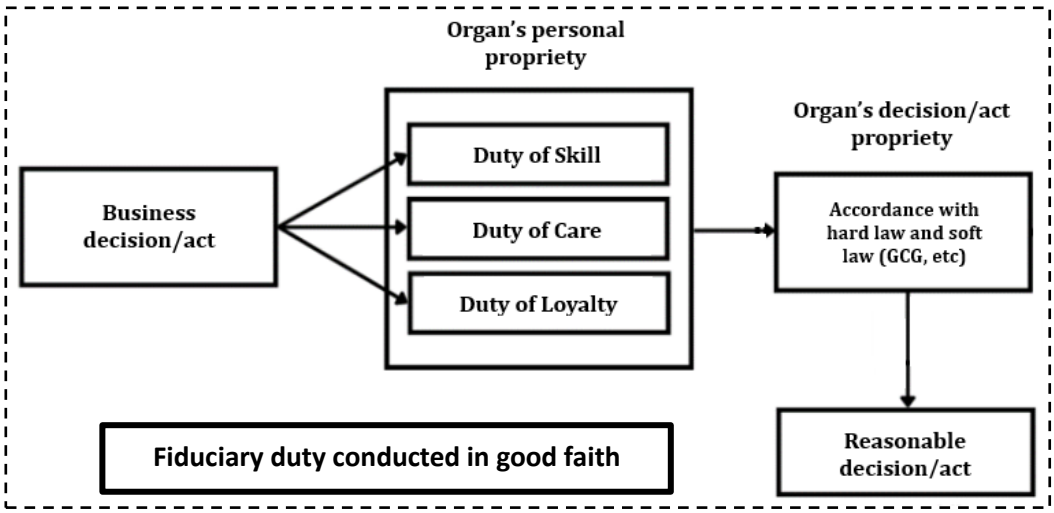
27 Id.

The standards of propriety that can be used as reference standards to determine appropriate decision/act so as to produce appropriate business decisions so that reasonable are obtained are as follows:



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The Urgency of Expanding and Enforcing the Principle of Utmost Good Faith in the Allocation of Losses

As a special characteristic of mutual companies, the allocation of losses scheme has legal validity either in principle or legal norms. However, the problem is about the fate of the insurance agreement. In this case, the allocation of losses determined by the organ of the mutual company, especially AJB Bumiputera 1912, is unilaterally decided. As a result, the fulfillment of achievements does not go as it should and the most materially disadvantaged in the allocation of losses scheme is from the insured. Indeed, insurance is the most ideal and only business field that can be run by a mutual company, but without strict and clear restrictions on the actions of the mutual company's organs, it will cause arbitrariness and neglect of the basic concept and purpose of insurance itself.

In this scheme, policyholders must continue to carry out their obligations based on the insurance agreement, namely paying premiums. Meanwhile, the mutual company does not fully pay the claim. In the legal concept of agreement, of course, this condition does not reflect fairness and proportionality. This may be a

consideration by various companies in the form of mutual companies choosing to demutualize rather than maintaining the form of mutual companies around the world.

Due to the weakening of the concept of fair and proportional agreements, the author here considers it necessary to provide limitations in the form of legal benchmarks. In this case, because it is related to fairness in insurance agreements, Zahry Vandawati Chumaida stated that fairness in insurance agreements is obtained by upholding good faith.[28] The existence of good faith is often normed in various laws and regulations in Indonesia, but there is no clear and firm definition among them. In fact, the Black's Law Dictionary provides many definitions of good faith as "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or ob-ligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."

It is important to provide concrete limits on the principle of good faith in order to provide legal certainty to justice seekers.[29] In the scope of insurance law, the principle of good faith is specifically referred to as the principle of utmost good faith. Conceptually, the principle of utmost good faith is a principle that develops from good faith in the law of agreement as the basic form of insurance is an agreement. With the aim of providing fairness and proportionality for the parties, the principle of utmost good faith requires the parties bound by the insurance agreement to disclose and exchange information that affects the implementation of the agreement.

The principle of utmost good faith is implicitly regulated in Article 251 *Wetboek van Koophandel* (*Kitab Undang-Undang Hukum Dagang*/Commercial Code) stipulates that the provision of incorrect information will result in the cancellation of coverage. This article is inclined to the obligation of the insured to unilaterally disclose information on the insured object. However, in its development, the provisions of Article 31 number (2) of Act 40/2014 stipulate that insurers are also

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28 Zahry Vandawati Chumaida, Prinsip Iktikad Baik Dalam Perjanjian Asuransi Yang Berkeadilan, Revka Petra Media, Surabaya, 2014.

29 Zahry Vandawati Chumaida, Prinsip Keadilan dalam Asuransi, Prosiding Konferensi Filsafat Hukum Indonesia ke-4: Keadilan Eko-Sosial, 2014, p. 99.

obliged to provide correct information related to insurance products. Here the author finds a problem in the norm of the principle of utmost good faith in Indonesia from the side of the insurer or insurance company.

The provisions of Article 31 number (2) of Act 40/2014 are still very limited to the obligation to exchange information limited to "insurance products". This will not be a problem in an insurance agreement that is closed with an insurance company in the form of a Limited Liability Company, because the relationship between policyholders and insurance companies is limited to consumers and business actors. Of course, excessive disclosure of information based on a limited relationship will be useless and can even threaten the internal affairs of insurance companies in the form of Limited Liability Companies. However, by reviewing the legal relationship between policyholders and insurance companies in the form of mutual companies, this will create injustice and losses to policyholders.

With the dualism of position where policyholders are also influenced in decision-making by mutual company organs, information disclosure by mutual companies should not only be limited to "insurance products". Therefore, the provisions of Article 31 number (2) of Act 40/2014 cannot cover the implementation of mutual companies. Disclosure of information about mutual companies, such as assets, financial health, management structures and systems, as well as matters that will become risks in the future should be obligations that must be disclosed by mutual companies at the time of closing the insurance agreement. That way, the policyholder can project the benefits and risks of tying themselves in the coverage so that the risks arising from the agreement should be accepted by the policyholder.

In this case, the implementation of the principle of utmost good faith is not limited to the pre-contract stage and the formation of the contract, but also to the implementation of the contract.[30] This is based on the establishment of an insurance agreement based on the provisions of Article 1338 (3) *Burgerlijk Wetboek*/BW (*Kitab Undang-Undang Hukum Perdata*/Civil Code). According to Agus Yudha Hernoko who took the stated from Widjono Prodjodikiro, Article 1338 (3) defines

30 Chumaida, supra note 28.

good faith as something objective-dynamic.[31] The objective-dynamic concept means that it encompasses the entire contract process. Based on this statement, the principle of utmost good faith as a special form of good faith in BW must also be carried out objectively-dynamically. Thus, the author projects that the principle of utmost good faith is extended to penetrate the exchange of information about corporate governance and development for the implementation of insurance agreements.

In addition to being enforced to mutual companies, the principle of utmost good faith must also be enforced to policyholders. In the sense that when mutual companies try to implement the principle of utmost good faith, policyholders also cannot act arbitrarily. Policyholders must have awareness of their rights and obligations as insured and owners at the same time.[32] The dynamic nature of the covenant means that there is honesty in the human heart and one should not use the negligence of the other party to benefit oneself. This dynamic concept of agreement can also be understood in the concept of force majeure. In a *force majeure* situation, where there is an exception to the fulfillment of achievements that are not met.[33] The same applies to the allocation of losses as a mutual liability for mutual company losses as a mutual liability for company losses. The existence of a reciprocal relationship on the application of the principle of utmost good faith will have implications for fairness and proportionality in the agreement.

In mutual companies, the expansion of the principle of utmost good faith has implications not only as an instrument of justice in insurance agreements, but also to avoid agency problems between owners and operators *in casu* organ mutual companies. Therefore, the principle of utmost good faith in mutual companies is close to the application of GCG principles, especially transparency, accountability, and fairness.[34] The statement was obtained because the policyholder is a stakeholder in the mutual company, so it seems like killing two birds with one stone. With the disclosure of information as the principle of utmost good faith, mutual

31 Hernoko, supra note 18.
32 Meutia Aulia Devi, Tanggung Jawab Pemegang Polis Asuransi Pada Perusahaan Asuransi Yang Berbentuk Usaha Bersama, Universitas Airlangga, 2013.
33 Hernoko supra note 18.
34 Martin supra note 24.

companies will be open to stakeholders, so that the actions of the organs in it can be measured and accounted for and justice can be obtained in their governance.

In its implementation, the principle of utmost good faith basically has no clear basis for evidence. There is no sure way to prove the honesty of one's conscience. The only way to get certainty in the application of utmost good faith is to set limits in the application of this principle either in laws and regulations or in agreement clauses. In this case, the author takes an example of the limitation on the application of the principle of good faith from the state of Maine, United States, to the provisions of §3366 on Title 24-A: Maine Insurance Code, that:

> (1) The insurer shall notify each member of the amount of assessment to be paid, and the date, not less than 20 days after mailing date, by which payment is to be made, by written notice mailed to the member at the member's address last of record with the insurer. Failure of the member to receive the notice so mailed, within the time specified therein for the payment of the assessment or at all, is not a defense in any action to collect the assessment.
>
> (2) If a member fails to pay the assessment within the period specified in the notice, the insurer may institute suit to collect the same.

In this provision, a time limit is given in the application of the principle of utmost good faith at the time of determining the allocation of losses. As for when the mutual company notifies the determination of the allocation of losses in less than 20 days, the mutual company does not have the legitimacy to determine the allocation of losses. A different restriction was set by the ICMIF which stated that the right of members was to attend the RUA.[35] The existence of the rights of policyholder is a limitation on the RUA in the application of the principle of utmost good faith in the application of allocation of losses. With the presence of members at the RUA, members will definitely receive information that will have an impact on their coverage directly in the meeting.

Legal norms in Indonesia itself are only limited to the inclusion of the rights and obligations of policyholders as members of mutual company insurance policies

[35] International Cooperative and Mutual Insurance Federation, supra note 10.

based on Article 10 number (3) POJK 7/2023. These provisions certainly cannot accommodate the application of the principle of utmost good faith which is proper, considering that the business in mutual companies is dynamic and the nature of the agreement has the risk of mutual liability. Another factor that triggers the importance of the utmost good faith principle is the absence of normative regulations that regulate and require limits on the amount of losses charged to policyholders, and with the principle of utmost good faith providing opportunities for policyholders to check and balance in the fiduciary realm.

Conclusion

Mutual company is a legal entity engaged in the insurance sector. In Indonesia, there is only one mutual company that was ever established, which was AJB Bumiputera 1912. Even so, there is an absence of positive laws that regulate mutual companies since the establishment of AJB Bumiputera in 1912. This brings many problems involving the governance of AJB Bumiputera 1912, one of which is a legitimacy dispute in determining the allocation of losses by mutual company organs. As for determining the decision of the mutual company, in terms of the mutual company organ, it must apply propriety as a form of applying good faith principle. In the assessment of propriety, it is carried out by assessing the mutual company organs personally, and afterwards assessing whether the business decisions made are in accordance with hard law and soft law. Especially in the allocation of losses, propriety must also be assessed from the concept of proportionality, reasonableness, and based on actuarial calculations. This propriety is the validity to determine the allocation of losses within the scope of fiduciary.

With the allocation of losses, there is a reduction in rights and material losses to the insured. Therefore, it is necessary to provide proportionality and fairness to insurance agreements that can cover future risks without reducing the obligations of the policyholder as the owner. It was found that the principle of utmost good faith is the key to obtaining justice and proportionality in allocation of losses, although in its application it is necessary to develop a concept where the information disclosed by mutual companies is not limited to insurance products, but also about internal facts of the company. However, there are obstacles regarding the limits of application

if the application of the principle of utmost good faith is only limited to legal "principles". By reviewing the legal regulations in the state of Maine, the United States and the standards by ICMIF, it would be better if the principle of utmost good faith in mutual companies was normed into a positive law for legal certainty.

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