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# Tort As Absurd Claims In Credit Restructuring

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**Abstract**

Restructuring is a credit rescue process to mitigate the risk from the Bank against non-performing loans. The restructuring results from a mutual agreement between the Bank and the Debtor. Restructuring does not always solve credit problems, and if it fails, the Bank can take execution actions as the last step. The execution of the guarantee creates problems in banking practice. It is considered detrimental to the Debtor, thus giving rise to a civil lawsuit using the "Tort claim" under Article 1365 of the Civil Code. Based on this problem, the purpose of this paper is to examine what banks can take legal remedies in dealing with lawsuits against debtors in credit restructuring?. The results show that banks can take legal remedies in dealing with lawsuits against the Debtor's law in credit restructuring can be divided into preventive and repressive legal remedies. The research method used in this paper is normative juridical with a statute approach and conceptual (conceptual approach).

**Keywords**: Credit, Restructuring, Statute, Tort

## INTRODUCTION

Financial institutions are essential elements in the movement of economic activity in society. The role of intermediary institutions is to act as intermediaries between those who lack funds and those who have excess funds. Regulations permit several types of financial institutions to function as intermediary institutions. Banks are one of the most widely used intermediary institutions by the public in supporting their economic activities. The role of government policy dramatically affects the performance of banks. (Lawrence Uchenna Okoye, Felicia Olokoyo, Johnson I. Okoh, Felix Ezeji and Rhoda Uzohue (2020)) . The legal relationship in economic activity is a reality (Alan O Sykes, (2021). So that state regulation and intervention are needed in economic activity (Omer Y Pelled, 2019). Regulations regarding banking are regulated in Law No. 7 of 1992 as amended by Law No. 10 of 1998.

Because The bank function as an intermediary institution in economic activity, Banks collect public funds in savings agreements and distribute credit to the public in credit agreements. The definition of credit is further described in Article 1, number 1. That explains, "credit is a form of borrowing money by banks to other parties following what is stated in the Agreement which includes the obligation of the other party to pay the loan with a period and additional interest from the Bank. Credit comes from the Latin "credere," "credo," and "creditum," which means trust. Credit can be interpreted as a loan agreement for banking activities; trust regarding lending is an essential element in the existence of banking institutions. But it cannot be denied that disputes will still occur in the process of implementing the contents of the engagement, so the debtor party who refuses and is reluctant to do what is stated in the Agreement is called default (Ucok Parulianth Simamora, 2017). If not handled properly, default from the Debtor can lead to non-performing loans. Non-performing loans, if not handled properly it will cause bad credit. Non-performing loans, including non-performing ones, will negatively impact liquidity and bank health (Tam, Nguyen, 2020). Banks can make efforts to deal with non-performing loans to carry out restructuring. Restructuring according to POJK Number 40 / POJK.03/2019 Regarding Assessment Asset Quality of Commercial Banks, Article 1 number 25 states that Credit Restructuring is an Effort for Improvements Carried out by Banks in Activities

This situation is a serious legal problem that banks must face to obtain bank rights based on credit agreements. In the development of practice, there is litigation financing whose implementation is not based on achieving legal goals for justice. (Wheeler, M. & Benz, T. 2020) Based on the background of the problems above, the formulation of the problem that the author puts forward is: What banks can take legal efforts in dealing with lawsuits against debtors in credit restructuring?. Other previous studies have also examined legal issues related to this article such as those carried out by Duong, TTN, Phan, HT, Hoang, TN, & Vo, TTT ( 2020), also by Le Kieu Oanh Dao, Thi Yen Nguyen, Sarfraz Hussain and Van Chien Nguyen (2020). These research studies are presented to demonstrate the novelty of this research. Among other things, this research was conducted by Yulia Ayu Wardani (Yulia, 2021). This study examines the existence of lawsuits against the law because the collateral value is sold below the market price. Harumi, C., and Pranoto also conducted another study. They found that there were claims of default and against the law based on a contractual relationship. The study did not specifically examine lawsuits against the law in credit restructuring. Johannes I.K, Anak Agung S.L.D conducted another study, and I Made I.M.D, who discussed Default Lawsuits and Unlawful Acts in Bank Credit Agreements. One of the approaches taken is the case approach. This research is different from the results of the research in this study. This paper does not use a case approach. Still, it uses a conceptual and regulatory system to find the concept of legal remedies taken by banks in preventing and overcoming lawsuits against Debtor's law.

## METHODS OF RESEARCH

This type of writing research is normative juridical (Andika PP and Mohamad Z, 2019). There are 2 approaches used, namely the statutory approach and conceptual approach. This study uses secondary data. Secondary data (Lego Karjoko, et. al, 2020) ) consists of primary legal materials ((Nadia Y, 2021) ) and secondary legal materials. The data are collected, separated, presented and analyzed. The analysis technique used is qualitative analysis technique (; Mustapha, Z, et all, 2021). The method of drawing conclusions is deductive.

## RESULT AND DISCUSSION

### Bank Credit Agreement in the perspective of the Principle of "Privity of Contract."

The credit agreement is the source of the engagement between the Bank and its customers. The credit agreement forms the basis for the rights and obligations of the parties who bind themselves in the Agreement. A credit agreement is an agreement that is generally subject to the provisions of Book 2 of the Civil Code, in particular the terms of engagement that arise from the Agreement. The principles of Agreement in general also apply to the credit agreement. These principles include the Principle of freedom of contract, the Principle of consensual, namely the Principle relating to the time of the Agreement, and the Principle of good faith, namely the Principle relating to the implementation of the Agreement. Thus, the credit agreement adheres to the Principle of freedom of contract. The natural law approach underlies the Principle of freedom of contract. The basic idea is that every individual can agree in the broadest sense, without interference from outside parties. Thus the law or the state cannot intervene in the Agreement made by the parties. (Johannes Ibrahim Kosasih, 2019)

Based on the description above, it can be seen that this is a universal view regarding the belief in the human ability to know what is best for him in the contractual relationship. This belief gave birth to the Principle of personality or privity of contract, namely that each person cannot make an agreement on his behalf other than for himself except for promises to third parties. This Principle is related to Article 1340 of the Civil Code, which states that "an agreement only applies between the parties who make it. An agreement, in this case, is an agreement. It means that the Agreement cannot harm third parties; the Agreement cannot benefit third parties other than in the cases specified in article 1317". This article contains the Principle of privity of contract, which can be understood that the Agreement made by the parties is only binding and has legal consequences for the parties who make it.

**Non-Performing Loans and Risk Mitigation.**

Banks, as intermediary institutions, act as intermediaries for people who lack funds (lack of funds) with parties who have excess funds (surplus of funds). Banks act as intermediaries for parties who lack funds based on credit agreements. From the entrepreneur's perspective, bank credit agreements are one source of financing. Funding as capital is essential in business continuity in achieving company profits. In the practice of banking, credit agreements have risks. The form of credit agreement risk is non-fulfillment of the obligation to pay installments according to the Agreement in the credit agreement. The Debtor has problems fulfilling the payment, which risks implementing the credit agreement. This situation is called non-performing loans. In the case of non-performing loans, the worse thing is the failure of the agreed installment payments or called terrible credit (bad credit is part of problem loans). The risk of non-performing and non-performing loans hurts banking institutions. The existence of non-performing loans for banks will worsen bank liquidity, further worsening the health of banks. Bad bank health will affect public confidence in banking institutions. Risk has the meaning of a situation originating from an agreement or a lawsuit, which can negatively impact the operations and condition of the Bank. Likewise, a lawsuit against the law directed at a bank is a form of bank risk in its function as an intermediary institution.

Whatever the definition of risk and its type, non-performing loans, which are very likely to be the beginning of bad loans for banking institutions, is a situation that is not good for the health of banks. Public confidence will be affected by the decline in a bank's health. On the other hand, the decline in public trust will have a terrible impact on the existence of a bank. Based on this thought, non-performing loans must be addressed immediately. Handling non-performing loans often referred to as Risk Mitigation, is something banks must do. The credit analyst must identify credit disbursement risk at the beginning of the Agreement. Early identification of risks is helpful to reduce the adverse effects of risks that may occur from business activity. Company regulation and supervision through the company's leadership is essential to ensure that the functions within the company can run well. It is called risk management. Concerning credit agreements, the risk of non-payment of credit is very likely to occur and harm the Bank. So it is necessary to regulate in the form of internal regulations or guidelines or bank standard operating procedures and supervision that the bank leadership in its implementation must ensure. The definition that is close to risk management terminology is risk mitigation. Risk Mitigation is a planned and continuous action taken by the risk owner to reduce the impact of an event that has potentially harmed or endangered the risk owner. In credit agreements, risk mitigation is an ongoing action by the Bank as the risk owner to reduce the impact of non-payment of credit recipients' obligations when they fall due.

Risk mitigation carried out by banks can be carried out before the occurrence of non-performing loans and after the event of non-performing loans.

Mitigating risk before non-performing loans is like applying the lending principles. The Principle applied to credit assessment is known as the 5C Principle. The 5C Principle consists of character (about the Debtor's character), capital (about the Debtor's capital), capacity (about the Debtor's ability to make payments), condition of economics (about the Debtor's economic situation), and collateral (about guarantees). This Principle is the Principle of risk mitigation before the occurrence of a credit agreement, which gives confidence to the Bank that the Debtor will carry out his obligations according to the agreed credit agreement. The Bank's efforts aim to reduce the impact of non-payment of debtor obligations when they fall due. Mitigation of risk after the occurrence of non-performing loans (including bad loans) can be done by restructuring loans. Non-performing loans are a problem for banks because banks must set aside funds allocated to form allowance for losses on productive assets. One option from the Bank is to restructure. A restructuring process is a form of credit settlement internally. It has not yet settled disputes, whether disputes are resolved through court (litigation) or non-litigation, such as through alternative dispute resolution (Achmad Giffary, 2021)

Restructuring can be carried out if the Debtor still has responsibility and good faith in repaying his credit. Debtors deserve to be protected because they have good intentions (goede through), such as maintaining communication with the Bank concerned, finding solutions for solving problem loans, and so on. The steps to restructuring non-performing loans are improvements or changes to the structure of the bank credit agreement itself. Credit restructuring is an effort to improve bank credit for debtors who have difficulty fulfilling their obligations. Credit restructuring is a policy carried out by banks to provide easy credit payments to debtors to avoid bad loans. Credit can be detrimental to both the Bank and the customer itself so that the handling or settlement efforts become the center of attention. Bank credit restructuring is a new beginning when debtor customers face the problem of paying bank credit. Changes to the credit agreement mean making a new credit agreement by adopting various aspects of the old credit agreement. The clauses in the new credit agreement resulting from the restructuring automatically delete the old clauses resulting from negotiations between the debtor customer and the Bank as the creditor. The change or replacement of the clause through a new bank credit agreement is the first and unique step for debtor customers in continuing their business activities.

If the credit restructuring effort cannot restore the Debtor's ability to make payments, then the execution of the guarantee is an action that the Bank must take. From the perspective of the credit agreement agreed by the parties, implementing the debt guarantee is a manifestation of the Bank's right to obtain the amount of money that is its right.

**Tort / Posita in Credit Agreement Lawsuit**

Based on the credit agreement agreed by the parties, if the Debtor stops paying, the Bank takes action to obtain his rights by executing the Debtor's guarantee. In practice, the Debtor does not always want to release the collateral. For the Bank's efforts to execute the debt guarantee, the Debtor makes an effort to file a lawsuit against the Bank based on an unlawful act. The case was filed as a form of the Debtor's unwillingness, the collateral for the credit agreement was executed.

Acts against the law are based on Article 1365 of the Civil Code. The article states, "Every act that violates the law, which brings harm to another person, obliges the person who because of his fault, published the loss, compensates for the loss." Based on these provisions, a lawsuit based on a lawsuit against the law must meet the elements. There must be an act against the law; there must be an error. There must be a cause and effect relationship between the action and the loss, and there must be a loss."

Tort unlawful acts are also connected with the field of private law (Keating, G., 2021).The element of Tort. The act or daad in violating the law is not only positive in the sense of doing a show but also includes an adverse action, namely not doing something according to one's subjective obligations. An act is positive if someone does something that violates the law, while a show is negative if someone by law or by emotional responsibility should do something, but he does not do the act to the detriment of others. The attitude of not doing something or being silent can be qualified as an act against the law. Wirjono Pradjodikoro mentions actions in Article 1365 of the Civil Code, including active activities and passive or quiet actions (Wirjono Prodjodikoro, 2018). An act that violates the law can also occur in a contractual legal relationship, provided that the elements of the unlawful act mentioned above can be proven. If the above aspects are not entirely fulfilled, then action cannot be said to be an act of violating the law as regulated in Article 1365 of the Civil Code. The judge will reject a lawsuit based on an unlawful act if all the elements contained in Article 1365 of the Civil Code are not fulfilled. Acts that violate the law are considered to have occurred by observing the perpetrators' actions. Those who are thought to have violated the law are contrary to the perpetrators' legal obligations. They are contrary to decency and public order or morality towards themselves and others.

However, an act that is considered a violation of the law must still be accounted for, namely whether it contains an element of error or not.
The element of error or Schuld is reprehensible related to behavior and its consequences, namely the emergence of losses. Theoretically, errors in unlawful acts can be narrow, namely only involving intentional acts. Meanwhile, errors in the broadest sense affect intention and include actions resulting from negligence or carelessness.
In the Dutch legal system, unlawful acts before 1919 by the Dutch Hoge Raad were defined narrowly as any act that contradicts the rights of others arising out of the law or any act contrary to one's legal obligations law. With this understanding, the party who feels aggrieved sometimes cannot claim compensation because there is no regulation in the law even though the act is straightforward and can be proven to be contrary to the norms in society. It will be contrary to the things required the direction of society or contrary to decency in the society.
Tort by the Dutch Hoge Raad was only comprehensively interpreted on January 31, 1919, in the Lindenbaum case against Cohen. Unlawful acts are not only acts that are prohibited by law, but also all acts that violate the rights of others' acts that are contrary to decency and the nature of caution, appropriateness, and propriety in social life in society. Furthermore, unlawful acts can also be referred to as a collection of principles in a society whose purpose is to control and regulate dangerous behavior and will later create a balance in the balance of society.

**The Bank's Legal Efforts In Dealing With Lawsuits Against The Debtor's Law In Credit Restructuring.**

As previously described, the Bank legally has higher legal standing than the customer. Understanding the position of the Bank that has a higher bargaining position can be shown from the authority of the Bank to determine the content and form of the Agreement. Likewise, in credit restructuring, whatever form of credit restructuring is agreed upon is the law for the party making it, according to the Principle of pacta sunt servanda in contract law. If, in practice, the Debtor who has been given credit restructuring and then still does not carry out its obligations as stated in the Agreement, it will result in losses for the Bank as a creditor. The form of loss for the Bank is not only in the form of financial/material losses but also non-material losses. The material loss is in the form of the influence of public trust in banking institutions (fiduciary relationship) due to the non-stipulation of the prudential Principle by the Bank. On the other hand, a lawsuit against the law is an action that the Bank cannot control. In this regard, the Bank must take legal measures both preventively and repressively in dealing with the Debtor's efforts.
The preventive legal action of the Bank as a creditor can be interpreted as legal action taken by the creditor before a dispute occurs. The Bank makes a credit agreement based on the Bank's belief in the 5 C terms before granting credit facilities to the Debtor. The credit analysis provided to the Debtor's eligibility objectively and based on the Bank's regulations and Standard Procedure is the key to the Bank's preventive protection efforts. The belief that the Debtor has good faith, which is the Principle of the Agreement, is essential.
After bad debts occur in the restructuring facilities provided, repressive legal remedies are legal remedies. Legal facts show that the Debtor should pay but instead sues the Bank with a lawsuit against the law. The situation is a legal irony. The elements of an unlawful act have been stipulated in Article 1365 of the Civil Code and its development. The Bank's effort in dealing with the lawsuit is to complete all data and documents for granting credit and restructuring facilities as evidence that the restructuring actions carried out by the Bank are following existing rules and regulations.

## CONCLUSION

Based on the discussion above, it can be concluded . Banks as intermediary institutions carry out their functions in channeling customer funds to people in need based on credit agreements. In implementing the credit agreement, the Debtor may be unable to fulfill the obligation to make payments. This situation has an unfavorable impact on banking institutions. If the credit restructuring is unable to improve the condition of the Debtor, based on the credit agreement, the

Bank takes action to execute the debt guarantee. In practice, the execution of the debt guarantee is constrained by the Debtor's lawsuit against the Bank based on Tort. It worsened the Bank's already bad position due to the cessation of debtor obligations in making payments. Banks can take legal remedies in dealing with lawsuits against the Debtor's law in credit restructuring can be divided into preventive and repressive legal treatments. These efforts are made to avoid financial losses and the potential adverse legal consequences of the credit agreement itself for banks.

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