



## Legal Protection for Shareholders Against Losses to Limited Liability Companies Due to the Actions of the Board of Directors

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### ARTICLE INFO

Keywords: Legal Protection, Shareholders, Directors, Business Judgment Rule

*Received* : 12 February

*Revised* : 23 March

*Accepted*: 17 April

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### ABSTRACT

This study aims to analyze in depth the legal protection for shareholders against losses in Limited Liability Companies caused by the actions of the Board of Directors, who are often caught in a dilemma between business discretion and fiduciary obligations. In the corporate legal system, the separation between ownership and management functions creates vulnerability for shareholders, especially minorities, to potential abuse of authority and conflicts of interest. Using a normative juridical research method with a statutory and conceptual approach, this study dissects the inconsistency between the ideal norms in Law Number 40 of 2007 concerning Limited Liability Companies and the reality of practice in the field. The research findings show that although the regulation promises personal liability for negligent Directors through the fiduciary duty doctrine, in practice the Business Judgment Rule doctrine is often misused as a shield of absolute legal immunity to cover up managerial errors. By using E. Utrecht's theory of Unlawful Acts as an analytical tool, this study proves that such immunity must be declared void if the Directors' decisions violate the principles of propriety and professional diligence. Furthermore, it was found that the derivative lawsuit mechanism has not been effective due to procedural obstacles such as share ownership thresholds and the heavy burden of litigation costs. Therefore, this study recommends regulatory reform to lower the threshold for filing lawsuits and strengthen jurisprudence to encourage judges to pierce the corporate veil against directors.

## INTRODUCTION

Indonesia, as a state governed by law (*Rechtsstaat*), has a constitutional obligation to provide guarantees of fair legal certainty for every citizen, as explicitly mandated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Within the corporate legal framework in Indonesia, a Limited Liability Company (*Perseroan Terbatas* or PT) constitutes an independent legal entity whose continuity heavily depends on the integrity of its corporate organs, particularly the Board of Directors as the holder of management authority. Normatively, the Board of Directors acts as a trustee obligated to manage the company in the interests of the corporation and in accordance with its objectives, as stipulated in Article 92 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies (Company Law), as amended by Law Number 6 of 2023 concerning Job Creation. The moral and professional standards imposed on Directors are not merely ethical expectations but strict legal obligations under the doctrine of Fiduciary Duty. As emphasized by legal scholar M. Yahya Harahap, Directors bear absolute responsibilities of good faith (*duty of good faith*) and due care (*duty of skill and care*), whereby every action taken must prioritize the protection of shareholders' investment value as providers of capital.

The legal basis for this responsibility is reinforced in Article 97 paragraph (2) of the Company Law, which stipulates that each member of the Board of Directors is obliged to carry out management duties with full responsibility. In cases of misconduct causing losses to the company, Article 97 paragraph (3) guarantees shareholder protection by imposing personal liability on each Director if fault or negligence can be proven. This ideal legal construction is intended to create a balance of interests between management and ownership, whereby shareholders should have legal certainty that their invested capital is managed according to principles of transparency and accountability.

However, in empirical practice, there is often a wide gap between these ideal norms and the conduct of Directors in reality. A common legal phenomenon is the occurrence of Agency Problems, where Directors prioritize personal interests (*self-dealing*) or certain groups over corporate interests. Such practices are frequently justified under the Business Judgment Rule (BJR), as regulated in Article 97 paragraph (5) of the Company Law, which is often used as a shield against personal liability. As a result, many corporate losses lead to declining share values and the loss of shareholders' dividend rights, yet recovery remains difficult due to the complexity of proving fault or "bad faith" behind business decisions.

The imbalance between legal expectations and practical realities has generated discourse regarding the effectiveness of legal protection for shareholders. Although the law provides instruments such as Derivative Actions through Article 97 paragraph (6) of the Company Law, granting shareholders with at least one-tenth ownership rights the ability to sue Directors on behalf of the company, such instruments often remain ineffective in practice. Procedural barriers, high litigation costs, and limited access to internal corporate documents

place shareholders in a highly vulnerable position. This aligns with Munir Fuady's view that without progressive law enforcement, the doctrine of limited liability may instead be misused by Directors to commit unlawful acts detrimental to others.

Efforts to seek justice for shareholders may also refer to the general provision under Article 1365 of the Indonesian Civil Code concerning Tortious Acts (*Perbuatan Melawan Hukum*). This provision can serve as an additional analytical framework when Directors' actions not only violate the social contract embodied in the articles of association but also infringe upon shareholders' subjective rights. Furthermore, the right to request a corporate examination under Article 138 paragraph (1) of the Company Law should function as a strong preventive mechanism. In practice, however, resistance from corporate management often limits access to information, causing shareholders to lose opportunities to prevent greater losses.

Based on the legal issues outlined above, there is a clear urgency to conduct an in-depth examination of shareholder legal protection mechanisms from both theoretical and practical perspectives. This study is essential to formulate clearer boundaries regarding when a business decision ceases to constitute a pure business risk and instead transforms into legal negligence subject to personal liability. By critically examining the conflict between the Business Judgment Rule doctrine and Fiduciary Duty obligations, this research is expected to contribute to strengthening legal certainty for investors and promoting healthier corporate governance in Indonesia.

## **RESEARCH METHOD**

### **1. Type of Research**

This study employs normative legal research (*legal research*), focusing on the examination of positive legal norms, legal principles, and relevant corporate law doctrines. The approaches used are the statutory approach and the conceptual approach. The statutory approach is applied to analyze the consistency of regulations concerning Directors' responsibilities under Law Number 40 of 2007 concerning Limited Liability Companies, as amended by Law Number 6 of 2023 concerning Job Creation. Meanwhile, the conceptual approach is used to construct legal arguments regarding the boundaries of the Business Judgment Rule and Fiduciary Duty based on legal scholars' perspectives.

### **2. Research Sources**

The data sources in this study rely entirely on secondary data classified into three levels of legal materials. Primary legal materials include sectoral regulations governing limited liability companies and the Indonesian Civil Code (particularly Article 1365 concerning Tortious Acts). Secondary legal materials consist of academic literature, corporate law textbooks, and national and international scientific journals providing critical analyses of agency problems and shareholder rights. Tertiary legal materials include legal dictionaries and encyclopedias to support the precision of legal terminology used in the study.

### **3. Data Collection Technique**

Data collection was conducted through library research involving document review, norm inventory, and data categorization based on the legal issues

examined. The collected data were then processed through source criticism procedures to ensure validity and relevance. Data analysis was carried out qualitatively using deductive reasoning, drawing conclusions from general legal premises such as Legal Protection Theory and Utrecht's Tort Theory toward specific conclusions regarding the effectiveness of derivative action mechanisms. The entire analytical process was directed toward identifying discrepancies between *das Sollen* (ideal norms) and *das Sein* (empirical practice), thereby producing a synthesis capable of offering solutions to the legal issues examined.

## RESULTS AND DISCUSSION

### 1. *The Essence of Legal Protection for Shareholders in the Indonesian Corporate Law Framework as an Expression of Balancing Capital Sovereignty with Managerial Discretion*

Fundamentally, the existence of a Limited Liability Company (*Perseroan Terbatas* or PT) as a *persona standi in iudicio* or an independent legal subject creates a clear separation between the entity's assets and the personal interests of its management. However, this independence also generates a systemic Agency Problem, whereby the Board of Directors, as the holder of operational authority, possesses significant opportunities to commit deviations detrimental to shareholders' equity. From the perspective of Satjipto Rahardjo's Legal Protection Theory, law should not merely function as a static text but must operate as an instrument integrating interests and providing genuine protection for shareholders' property rights. Therefore, Law Number 40 of 2007 concerning Limited Liability Companies, as amended by Law Number 6 of 2023, constructs such protection through two major dimensions: preventive (*ex-ante*) and repressive (*ex-post*) legal protection.

From the preventive perspective, the Company Law establishes safeguards through transparency and accountability of corporate organs. Article 67 paragraph (1) of the Company Law guarantees the right to information by obligating Directors to prepare annual reports, including audited financial statements, as instruments enabling shareholders to detect potential mismanagement at an early stage. This protection is strengthened by the existence of the Board of Commissioners under Article 108 of the Company Law, which is tasked with supervising management policies. Ideally, this mechanism should prevent *ultra vires* actions or excesses of authority by Directors. Furthermore, Article 79 grants shareholders the authority to initiate a General Meeting of Shareholders (GMS) to request direct accountability regarding corporate operations. Theoretically, these provisions constitute manifestations of preventive legal protection aimed at minimizing information asymmetry between management and capital owners.

However, when examined in practical reality, a significant gap emerges between legislative mandates and supervisory effectiveness. The phenomenon of Minority Oppression frequently occurs when hidden collusion exists between controlling shareholders and the Board of Directors. In such situations, the GMS mechanism regulated under Article 79 often becomes a mere administrative

formality used to legitimize decisions predetermined in advance. Information asymmetry remains a primary obstacle, as shareholders often become aware of losses only after corporate value has sharply declined or the company nears insolvency. This reality demonstrates that the supervisory role of the Board of Commissioners often becomes ineffective due to affiliation relationships or pragmatic interests, rendering preventive legal protection incapable of effectively reaching corruptive managerial actions.

The failure of preventive mechanisms necessitates the operation of repressive legal protection as a means of restoring violated rights. The Company Law provides an emergency mechanism through Article 61 paragraph (1), granting shareholders legal standing to file lawsuits against the company for unfair prejudice. Additionally, Article 138 paragraph (1) provides the right to request investigative audits through court determination when strong indications of unlawful conduct harming the company exist. The culmination of repressive protection lies in the doctrine of personal liability under Article 97 paragraph (3), which states that Directors are personally and jointly liable for corporate losses caused by fault or negligence. This provision is crucial because it legally enables *piercing the corporate veil* to target Directors' personal assets for the recovery of corporate losses.

Although these repressive mechanisms appear promising textually, their implementation in judicial practice often encounters bureaucratic barriers and burdensome evidentiary requirements. In practice, examination rights under Article 138 are rarely fully realized due to high audit costs imposed upon applicants and resistance from management in providing internal corporate data. Shareholders frequently remain passive because litigation risks and legal costs are disproportionate to their ownership percentage. This condition creates unequal bargaining power, where Directors may use corporate resources for defense, while shareholders must rely on personal resources to seek justice. Consequently, repressive legal protection in Indonesia remains highly dependent on shareholders' financial capability and litigation endurance.

As a synthesis of these issues, a legal implication arises regarding the need to reorient shareholder protection from procedural-formal mechanisms toward active-substantive protection. Based on Legal Protection Theory, courts should not merely act as procedural referees but also as providers of substantive justice. Recommendations include strengthening supervisory authorities—such as the Financial Services Authority in the context of public companies—to intervene without requiring formal shareholder requests when significant losses are detected. Additionally, courts should adopt more progressive evidentiary standards, placing the burden of proving good faith upon Directors (*reverse burden of proof*) to demonstrate compliance with fiduciary duty. Without synchronization between transparent preventive mechanisms and accessible repressive mechanisms, shareholder legal protection will remain a normative illusion amid increasingly complex business realities.

## ***2. Analysis of Business Judgment Rule (BJR) Parameters as Limits of Directors' Personal Liability***

Doctrinally, the Business Judgment Rule (BJR) emerged as a protective instrument allowing Directors to make strategic decisions without fear of litigation for every business failure. Under Article 97 paragraph (5) of the Company Law, BJR grants legal immunity to Directors provided decisions are made in good faith, without conflicts of interest, and on an informed basis. This aligns with Fiduciary Duty theory, which views Directors' obligations as obligations of effort rather than obligations of result. Ideally, BJR should distinguish between pure market failure and pathological managerial failure, ensuring shareholders that their investments are managed according to the *Prudent Person Rule*.

However, in empirical practice, BJR implementation in Indonesia often suffers from interpretive ambiguity that excessively favors Directors. Courts frequently struggle to assess the subjective element of good faith in business decisions. Directors often invoke BJR to frame losses as consequences of external factors or economic fluctuations, even when negligence or disregard for due care standards exists. This creates imbalance, where shareholders bear financial losses while Directors remain shielded by corporate immunity. The absence of rigid parameters defining "adequate information" or "good faith" in jurisprudence transforms BJR into an almost absolute safe harbor, effectively limiting shareholders' recovery rights.

To overcome this challenge, E. Utrecht's theory of Tortious Acts (*Perbuatan Melawan Hukum* or PMH) becomes highly relevant. Utrecht broadens PMH beyond violations of written law to include breaches of legal duties and conflicts with societal norms of propriety and diligence. Within corporate contexts, Utrecht's framework can address conduct that may formally comply with corporate articles but materially violates professional care standards. If a Director undertakes high-risk decisions without adequate due diligence, such conduct may fulfill PMH elements because it breaches standards of prudence and caution. Consequently, BJR should no longer shield Directors whose conduct objectively deviates from that of an honest and prudent director.

The integration of Fiduciary Duty theory and Utrecht's PMH implies that BJR must not be viewed as automatic immunity. Rather, it should function as an affirmative defense requiring strict procedural proof. If shareholders can demonstrate PMH elements – such as hidden conflicts of interest or disregard for expert recommendations – BJR protection should become legally invalid. This shifts judicial focus from merely assessing outcomes (losses) to scrutinizing the decision-making process itself. Legal protection for shareholders is thereby realized through examination of whether Directors fulfilled their *Duty of Loyalty* or instead violated accepted standards of business propriety.

As a synthesis, fair application of BJR must rely on procedural transparency capable of exposing bad faith behind managerial decisions. Progressive law enforcement requires judicial willingness to apply *piercing the corporate veil* when Directors engage in self-dealing or fraudulent conduct causing significant harm. A key recommendation is the establishment of standardized indicators of good faith and due care within Indonesian business practice. By recognizing violations of professional diligence as PMH, BJR will no longer obstruct shareholders from seeking Directors' personal liability. This would strengthen accountability and professionalism within corporate governance.

### ***3. Analysis of the Effectiveness of Derivative Actions as a Mechanism for Shareholder Recovery***

Normatively, Article 97 paragraph (6) of the Company Law grants shareholders representing at least one-tenth of voting shares the right to bring lawsuits on behalf of the company against Directors whose fault or negligence causes losses. This mechanism reflects Satjipto Rahardjo's Legal Protection Theory, empowering shareholders to act as guardians of corporate interests when Directors violate fiduciary duties. Ideally, derivative actions restore losses to the corporate treasury, indirectly recovering shareholder value through improved equity and dividend prospects.

In practice, however, derivative actions are often regarded as "paper tigers" that are difficult for minority shareholders to implement. A fundamental obstacle is the requirement of holding at least 10% of voting shares, which is often unattainable for retail investors in large-cap or publicly listed companies. This threshold effectively prevents smaller investors from seeking remedies, despite being among the parties most harmed by managerial negligence. Consequently, Directors may feel insulated from lawsuits as long as they maintain the support of shareholders representing ten percent ownership.

The effectiveness problem is worsened by economic disincentives and disproportionate litigation costs. Unlike ordinary civil claims, successful derivative actions return compensation to the company rather than directly to the suing shareholder. Meanwhile, plaintiffs bear legal fees, attorney expenses, and evidentiary costs independently. This creates a free-rider problem, where one shareholder incurs litigation burdens while others benefit from recovery without contribution. Because Indonesian procedural law lacks litigation cost-shifting mechanisms, many shareholders choose passivity despite awareness of mismanagement.

From Utrecht's PMH perspective, procedural barriers should not override substantive justice. The 10% threshold should be treated as an administrative requirement rather than an absolute barrier negating the unlawful nature of Directors' conduct. Courts should therefore possess discretion to accept derivative claims from shareholders below the threshold when strong preliminary evidence of fraud or abuse of authority exists. Without judicial

willingness to overcome rigid procedural requirements, Directors' accountability risks losing practical enforceability.

As a concluding synthesis, derivative action effectiveness in Indonesia requires structural reform in both regulation and legal culture. Integration of Legal Protection Theory and Utrecht's PMH calls for supportive mechanisms such as reimbursement of litigation costs from corporate funds when claims succeed. Simplified evidentiary burdens should also be adopted, requiring shareholders only to prove losses and indications of conflicts of interest, after which Directors must provide rebuttal evidence. Standardizing more investor-friendly derivative procedures would ensure equal legal protection for invested capital. Only through accessible and efficient litigation mechanisms can corporate integrity be preserved and shareholder protection become a reality rather than mere normative rhetoric.

## CONCLUSION

Based on the overall analysis, legal protection for shareholders against corporate losses caused by Directors' misconduct within Indonesia's legal system remains largely administrative and procedural rather than substantively just. Normatively, the Company Law provides preventive and repressive instruments ranging from information rights to litigation and corporate examination rights. However, these instruments are often undermined by majority shareholder dominance and severe information asymmetry, rendering legal protection largely illusory for minority shareholders. This demonstrates a gap between *das Sollen* (ideal norms) promising legal certainty and *das Sein* (empirical reality) revealing shareholders' vulnerability.

Critical analysis of Directors' personal liability indicates that the Business Judgment Rule should no longer be treated as absolute immunity. Using Utrecht's PMH theory, Directors' harmful actions may incur personal liability when they violate standards of propriety, diligence, and professional caution. BJR should protect only genuine business risks, not negligence disguised as managerial discretion. Meanwhile, derivative actions remain ineffective due to high ownership thresholds and disproportionate litigation costs. This condition necessitates a shift toward a corporate law enforcement paradigm more aligned with substantive justice.

## RECOMMENDATIONS

Several strategic recommendations are proposed for policymakers and legal practitioners. First, amendments to the Company Law should reduce the 10% ownership threshold for derivative actions, particularly in companies with dispersed ownership structures, to facilitate justice for retail investors. Second, the Supreme Court of Indonesia should encourage more progressive jurisprudence concerning Utrecht's PMH theory in corporate disputes, enabling judges to penetrate BJR protections when professional diligence standards are violated.

Finally, regulations introducing litigation cost-shifting mechanisms are necessary so that successful derivative actions may be reimbursed by corporate funds, thereby reducing financial barriers for good-faith shareholders seeking to protect company assets. Only through systemic strengthening can a healthy, accountable, and sustainable investment climate be realized in Indonesia.

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