

# THE STATE ROLE IN GUARANTEEING THE RIGHTS OF CONSUMERS (APARTMENT BUYERS) TO THE BANKRUPT DEVELOPERS

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**ABSTRACT:** This research purpose is to reveal the state role in guaranteeing the rights of consumers who buy apartments / housing to certificates guaranteed by the bankrupt developer. The research method used in this research is normative juridical or *doctrinal research*, which is research conducted by analyzing legal norms established by the competent institution. While, the approach used is *the statute approach* and *the conceptual approach*. The sources of legal materials in this study consist of primary and secondary legal materials. The results of this study indicate that the role of the state in guaranteeing the rights of consumers of apartment (housing buyers) to certificates guaranteed by the bankruptcy developer provides legal protection through legal tools (instruments) through state organs and apparatus in accordance with their respective duties and authorities. Purchasing an apartment / housing with a certificate guaranteed by the developer is a big risk for consumers because they will lose some of their rights. However, the responsibility of the developer does not just disappear, even though it is declared bankrupt by the court. The imposition of responsibility on the developer / developer still exists both from a civil and criminal perspective. Developers are still burdened with absolute responsibility (*strict liability*) to provide compensation to buyers / consumers according to the level of losses suffered. A bankruptcy statement on a court decision that has permanent legal force to the debtor (*developer*) does not obstruct his obligation to resolve the certificate problem guaranteed by the developer. Therefore, legally the developer still has the legal responsibility to continue the PPJB although the curator and supervisory judge have settled it. The existence of Article 34 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Liability which has provided restrictions not to carry out something that has been agreed upon prior to the pronouncement of the bankruptcy declaration can be distracted because it is considered to injure legal justice for buyers / consumers, so it becomes the judge's duty to explore and understand the values of law and a sense of justice that live in society to make legal discoveries and reforms (*mujtahid and mujaddid*), because a good law is the law that is in accordance with the values of community life and has benefits for society.

**Keywords:** Role, State, Consumer, Apartment, Developer, Bankruptcy

## I. INTRODUCTION

One of the objectives of the state being established is to guarantee and protect the public society's rights. The rights that exist within them that have been brought from birth are natural rights as a gift from a God Almighty, but the natural rights of the public societies will have no meaning if they are not recognized and guaranteed by the state. The guarantee and protection of public's rights will be very determined and dependent on the state. The state regulates and the state guarantees the protection of public's rights.

When a certain dispute or problem occurs between fellow citizens, the presence of the state is needed to resolve any disputes or problems that have occurred which are considered to be detrimental to certain parties or parties considered to be weaker than other parties. The case that has recently occurred is the purchase of an apartment / housing made by the people as consumers / buyers of apartments / housing, but the apartment / housing certificate is used as the collateral for the bankrupt developer. This is crucial and a big problem because the consumer is disadvantaged by the actions of the developer who went bankrupt.

In general, the developer in building apartments / housing uses loan money from the bank as a financial institution with a certificate guarantee, because it is impossible for the developer or developer to use personal money, so borrow money from the bank using a certificate guarantee. The certificate that is guaranteed to the Bank is the master certificate of the apartment or housing or the master certificate of the land to be built for the apartment or housing by the developer or developer before it is offered to consumers. The buyer/consumer as the basis for their purchase rights is a Sale and Purchase Agreement (PPJB) not AJB and does not hold a certificate. The absence of a certificate held by the consumer(buyer) is a reasonableness and inevitability, because the certificate exists when the payment has been paid by the consumer(buyer), but a very problem is when the consumer / buyer has paid full, but the apartment or housing certificate is used as collateral for loan money to the bank by a developer who later fell bankrupt.

Whereas in Article 46 of Law Number 20 of 2011 concerning Flats, states that:

- (1) Ownership rights over a system are separate individual rights over a syarusun with joint rights over common shares, common objects and common land.
- (2) The rights to common shares, common objects, and common land as referred to paragraph (1) will be calculated based on the NPP.

The loans of money to the banks made by a developer using a certificate guarantee are possible, because the developer is in a position with insufficient money and has not received yet the money from consumers. On the one hand, a developer can sell if it has entered the development stage with a certain percentage of working terms. In such circumstances, the certificate is still in the name of the developer.

If there is bankruptcy to a developer (who propose the bankruptcy, anyone who has a bill to the developer), then the guarantee holder, namely the Bank has a position as a separatist, the right takes precedence. Meanwhile, buyers / consumers are creditor with concurrent rating. If executed / resolved by being sold by the curator or by the Bank during the insolvency period as regulated in Article 59 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, confirms:

"After the time period as referred to paragraph (1) has passed, the Curator must demand the submission of the object which is the collateral for thereafter sold according to the method as referred to Article 185, without prejudice to the rights holder's Creditors on the results sale of the collateral".

If paying attention to the provisions of Article 59 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations mentioned above, the rights of consumers / buyers of Apartments or Housing do not get guaranteed legal protection rights, because it is possible that everything is distributed to the Bank, but the consumer / buyer does not want to be harmed because the consumer / buyer does not know at all that the certificate is used as the collateral for the loan money to the bank. On the one hand, normatively, the process of continuing the PPJB or AJB cannot be carried out, because it is obstructed by the provisions of Article 34 of Law Number 37 of 2004 concerning the Bankruptcy and Postponement of Debt Payment Obligations.

In such a position, the role of the state is needed to support and guarantee certainty, order, upholding and legal protection which is based on justice and truth by requiring developers not to sell apartments or housing if the basis of certificate rights is guaranteed by the Bank. In this regard, according to Immanuel Kant, the goal of the state is to form and maintain law, or it can be called the goal of a rule of law that wants to guarantee the legal position of individuals in society (Bintan R. Saragih, 1985), so that in this study the researcher formulates two legal issues, namely: (1) what is the role of the state in guaranteeing the rights of consumers who buy apartment / housing to certificates guaranteed by the bankrupt developer. (2) what is the right of legal certainty for the protection of consumers of apartment/housing buyers to certificates guaranteed by the bankrupt developer.

## **II. MATERIAL AND METHODS**

The research method used in this research is *normative juridical* or *doctrinal research*, which is research conducted by analyzing legal norms established by the competent institution. While the approach used is the *statute approach* and the *conceptual approach*. The *statute approach* is an approach that is based on laws and regulations relating to the legal issues to be analyzed. *Conceptual Approach* is an approach carried out by tracing the concepts / doctrines / opinions of scholars, which are found in the literature and seminar papers.

Sources of legal materials in this study consist of primary and secondary legal materials. Primary materials are legal materials that are binding in the form of applicable laws and regulations, namely Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations; Law Number 8 of 1999 concerning Consumer Protection; Law Number 1 of 2011 concerning Housing and Settlement Areas; Law Number 20 of 2011 Concerning Flats; and the Civil Code (Burgerlijk Wetboek). Meanwhile, secondary legal materials describe the source of primary legal materials, namely literature, journals, papers.

## **III. RESULT AND DISCUSSION**

### **1. The State Role in Guaranteeing the Rights of Consumers who Buy Apartments / Housing to Certificates Guaranteed by the Bankrupt Developer**

To analyze the role of the state in guaranteeing the rights of consumers who buy apartemedn / housing to certificates guaranteed by the bankrupt developer of the mortgage, the researcher starts from the nature of the basic conception of state functions when it is formed. The formation of a state cannot be separated from efforts to protect its people.

The public societies as the conceptual base for state functions. This departs from the history of the country to become a social system that must protect its citizens and must guarantee the welfare of its citizens.

When the state started from a process of interaction in a social life which gave birth to a commitment to create order and order and peace in social life, since then the idea got to create a forum that can accommodate all the desires and interests of its citizens. In the science of state studies, especially those that study the history of the origin of the state, almost all state science thinkers include the societies as an important element for the formation of the state. Even the public societies are one of the absolute prerequisites for the existence of a state, because the idea of a state got at the will of the people. (M. Nasroen, 1986)

As the obligation for the state, which is an important function of the state, namely to provide protection to its citizens as a logical consequence of the process of forming the state. The state through the ruler, carrying out its function is the limitation and diversification of power which must be clearly regulated in the constitution.

Regarding the nature of the function of the state, there are several theories of state function, both classic and recent, which describe the function of the state. In classical thinking, John Locke divides the state's functions into three, namely: (1) legislative power. (2) executive power which includes the power to carry out regulations and judicial powers and, (3) federative power. The function of the state which many people consider the refinement of John Locke's ideas was put forward by Montesquieu.

The government as a party that has an important role in the economy. In the economy, the government is tasked with regulating, controlling, and exercising control over the running of the economy so that the state does not abuse in the business world. The government has an important role in regulating the country's economy. Apart from that, the government also has a big role as an economic actor that plays an important role as producers and consumers.

The consumers or buyers should not be cheated or there should be no unclear information about every purchase of Apartments / Housing offered to consumers by the developers, it must be accompanied by clear and correct information in accordance with the actual conditions. This is intended to maintain the balance of rights and obligations and so that something unwanted happens in the future, for example the apartment / housing certificate and land are used as the collateral for the developer goes bankrupt. Meanwhile, consumers are in a position of not knowing at all, this is detrimental to consumers as buyers of Apartments / Housing.

The clarity of information in buying and selling apartments / housing is very important and necessary so that consumers do not have a wrong picture of apartments / housing. On the other hand, the developer is required to provide information on the condition of the apartment / housing being sold correctly according to the circumstances. The developer does not only informs the strengths, but also the weaknesses of the apartment / housing conditions. This must be done by developers so that the consumers are not harmed.

The apartment / Housing Development is closely related to regional development strategies. With multi-storey residential development, land use can be reduced so that it can provide a wider open area in the city and can also be used to reorganize or rejuvenate slum areas as well as reducing congestion in big cities in Indonesia. (Muntiasih, 2018).

In this case, Fakhri argues that development is a process and effort to improve economic, political, cultural, community infrastructure, and so on. With this understanding, development is equated with social change. (Mansour Fakhri, 2013).

According to Wiwik Pratiwi (2007), the position of consumers is obtained as a consequence of consuming goods and / or services through a transaction, it is necessary to know that consumer transactions are transactions carried out by consumers between buyers where the goods are purchased for the purpose of self-consumption and not for resale, resulting in a transfer of goods or services, including the transfer of enjoyment in using from sellers (business actors) to buyers (consumers).

A consumer transaction with a developer is an agreement that is primarily related to a civil engagement. In the optics of the civil law, the consumer transaction engagement does not just happen, there is an activity that precedes it. Consumer engagement is the implementation of the previous engagement which can be called a consumer pre-transaction. After a consumer transaction is carried out, there are still other agreements that must be fulfilled by both parties, which can be called post consumer transactions. (Erie Hariyanto, 2012).

The purchase of an apartment / housing by a buyer or consumer, but the certificate is guaranteed mortgage by the bankrupt developer, in principle, the same as in an agreement, in general, the main elements of the sale and purchase agreement are goods and the price is part of the clause in Article 1320 of the Civil Code. This is in accordance with the principle of *consensualism*, that the sale and purchase agreement is born when the agreement is reached on goods and prices. The agreement is a very important pledge for the sale and purchase of Apartments / Housing transactions between consumers / buyers and developers.

The purchasing an apartment / housing with respect to a certificate guaranteed by the bankrupt developer is a big risk for consumers, because they will lose some of their rights. However, the responsibility of the developer does not just disappear, although it is declared bankrupt due to a court decision that has permanent legal force, the imposition of responsibility on the developer still exists both from a civil and criminal perspective. The position of developer is very dominant compared to consumers or buyers, on the one hand, consumers or buyers need low prices, on the other hand, the developers need large funds to build apartments or

housing, so the only road the master certificate is used as a guarantee of rights Dependent to the Bank, while the consumers or buyers do not know about it, it means that there is an element of deliberation on the part of the developer and when the developer goes bankrupt, then the loser is the consumer / buyer.

It has become a habit for developers to do marketing before apartments/housing are carried out, but apartments or housing that have been built can only be sold for occupation after obtaining an eligibility permit for occupation from the government or from the local government. In the event that marketing is carried out before the construction of an apartment or housing is carried out, the developer must show legal certainty to the buyer/consumer, such as certainty of land rights, certainty of tenure status of apartments / housing, and guarantees of apartment/housing construction from the guarantee institution, as well as legal certainty of the certificate is not guaranteed by the developer.

If marketing is carried out by the developer / developer prior to the construction of an apartment / housing, everything promised by the developer / developer is binding as a Sale and Purchase Agreement (PPJB) for the parties as regulated in Article 42 of Law Number 20 of 2011 Concerning Flats .

It is affiliated with the provisions of Article 42 jo. Article 42 paragraph (3) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states: If the legal action which is detrimental to Creditors is committed within 1 (one) year prior to the pronouncement of the bankruptcy declaration, the act is not obliged to be committed by the Debtor, unless it can be proven otherwise, the debtor and the party with whom the act was committed is deemed to know or should know that the act will result in losses to the creditor as referred to in Article 41 paragraph (2), in the event that the act:

- a) It is an agreement where the Debtor's obligations far exceed the obligations of the party with whom the agreement is made;
- b) Representing payment , or providing guarantees for debts that are not yet due to dateline or cannot be collected;
- c) Conducted by individual Debtors, or the purposes of:
  - a. husband or wife, adopted children, or their family up to the third degree;
  - b. a legal entity where the Debtor or party as referred to in number 1) is a member of the board of directors or management or if the party, individually or collectively, participates directly or indirectly in the ownership of the legal entity more than 50% ( fifty percent) of the paid-up capital or under the control of said legal entity.
- d) Conducted by a Debtor who is a legal entity, with or for the purposes of:
  1. A member of the board of directors or management of the Debtor, husband or wife, adopted children, or family up to the third degree of the member of the board of directors or management;
  2. Individual, either alone or together with husband or wife, adopted children, or family up to the third degree, who participates directly or indirectly in ownership of the Debtor more than 50% (fifty percent) of the paid-up capital or in control of the legal entity; 3) an individual whose husband or wife, adopted children, or their family up to the third degree participates directly or indirectly in the ownership of the Debtor of more than 50% (fifty percent) of the paid-up capital or in the control of said legal entity.
- e) Conducted by a Debtor who is a legal entity with benefit or for the benefit of another legal entity, if:
  1. The individual members of the board of directors or management of the two business entities are the same person;
  2. Husband or wife, adopted children, or family up to the third degree from an individual member of the board of directors or management of the Debtor who is also a member of the board of directors or management of another legal entity, or vice versa;
  3. The individual members of the board of directors or management, or the members of the supervisory body of the Debtor, the husband or wife, adopted children, or families up to the third degree, either alone or collectively, participate directly or indirectly in the ownership of another legal entity more than 50% (fifty percent) of the paid-up capital or under the control of said legal entity, or vice versa;
  4. The debtor is a member of the board of directors or management of other legal entities, or vice versa;
  5. The same legal entity, or the same individual either jointly with, or not with their husband or wife, or adopted children and their families to the third degree participate directly or indirectly in the two legal entities at least 50% (fifty percent) of the paid-up capital;
- f) Conducted by a Debtor who is a legal entity with or against other legal entities in a group of which the Debtor is a member; g. the provisions in letter c, letter d, letter e, and letter f apply mutatis mutandis in the event it is done by a Debtor with or for the following purposes:
  1. A member of the management of a legal entity, husband or wife, adopted child or family up to the third degree of the member of the management;

2. The individual, either alone or together with husband or wife, adopted children, or family up to the third degree who participates directly or indirectly in the control of said legal entity.

According to Imam Kuswahyono (2004), the Sale and Purchase Agreement (PPJB) between the two parties, namely the developer and the buyer/consumer, will be related to a risk that arises. Some of the risks that arise include the following:

1. The developer is too optimistic about the project, even though he has not controlled the land, even has not obtained a location permit, so that the prospective buyer will suffer losses;
2. Possible misuse of pre-marketing by paying the order money (pennant so) by a developer with bad intentions;
3. The standard agreement format for the sale and purchase agreement is usually determined unilaterally by the developer. This creates injustice, especially for prospective buyers.

If paying attention to Article 43 paragraph (1) of Law Number 20 Year 2011 concerning Flats, it is stated that the buying and selling process of a condominium before the construction of a flat can be carried out through PPJB which is made before a Notary. Furthermore, Article 43 paragraph (2) of Law Number 20 of 2011 also confirms that the PPJB as referred to in paragraph (1) will be carried out after fulfilling the certainty requirements for: land ownership status, IMB ownership, availability of infrastructure, facilities and public utilities, and development of at least 20% (twenty percent), according to what was promised. However, which is violated by the developer / developer and not the buyer's/consumer's knowledge, the certificate is guaranteed to be guaranteed by the bankrupt debtor.

In Article 1 paragraph (1) of the law of mortgage rights in Indonesia, it is stated that a security right is imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, following or not other creditors which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors.

In this case the role of the state is very much needed through state organs. The role of the state/government in directing and guiding its citizens requires a tool, namely through laws and regulations. To realize a democratic society requires understanding from its citizens universally and intact, so that it is not misinterpreted by its citizens. (Hendrikus Otniel Nasozaro, 2018).

The role of the state in this case is to provide legal protection through legal instruments, namely:

1. The Constitution of 1945, as the source of all sources of law in Indonesia, mandates that national development aims to create a just and prosperous society. The goal of national development is realized through a democratic economic development system, so as to be able to grow and develop a world that produces goods and services that are fit for consumption by the community.
2. The law Number 8 of 1999 regarding Consumer Protection. This law is here to provide hope for the people of Indonesia to obtain protection for losses suffered on transactions of a good and service as well as guarantee legal certainty for consumers.
3. The law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. This law is philosophically present to create a just and prosperous society based on Pancasila and the Constitution of the Republic of Indonesia of 1945 must be able to support and guarantee certainty, order, enforcement and protection of the law which has the core of justice and truth, and to solve problems of debt and credit that arise in society. .
4. The law Number 1 of 2011 concerning Housing and Settlement Areas. This law states that the state is responsible for protecting the entire Indonesian nation through the implementation of housing and settlement areas so that people are able to live and occupy decent and affordable houses in healthy, safe, harmonious and sustainable housing throughout Indonesia.
5. The law Number 20 of 2011 Concerning Flats. This law exists as a form of the state's responsibility to protect the entire Indonesian nation in the implementation of housing through flats that are appropriate for a healthy, safe, harmonious and sustainable life in all parts of Indonesia.
6. Civil Code / BW.
7. The legal protection is a necessity and an obligation that must be provided by the state in the context of a rule of law such as Indonesia through state organs and equipment, because legal protection is the right of every citizen. In SEMA Number 7 of 2012 section IX which states "protection must be given to buyers who have good intentions even though they are later discovered to be unauthorized persons".

The law as one of the working instruments of the social system must be able to accommodate the needs and interests and be able to provide equitable services to the community. The law must be able to integrate all interests and resources that exist in society, so that there can be order, security and peace (*social order*) in public's lives. related to the legal functions as mentioned above, especially the law in the sense of positive law or statutory regulations is one of the methods and instruments to regulate and direct people's lives towards the expected goals. The role of laws and regulations in community development or change has a more dominant role compared to other legal products. (Suryadi, 2010).

According to Satjipto Rahardjo (2010), the law can also be an existence of values, which means that its presence is to protect and promote values that are upheld by society. Thus, law is not yet a technical institution that is morally empty or morally sterile. The existence and ability of law is then measured to what extent it has realized justice.

It is not simple to say that a law creates security and order, but nowadays sometimes law can also cause problems in society. Lack of caution in making laws will pose a risk that the law is even troublesome or causes damage to society. (Satjipto Rahardjo, 2010)

If you want to build a new Indonesian law through the path indicated by the Constitution, you are required to pay attention to the atmosphere, changes and social dynamics that take place in society. Thus, it is possible to ask preliminary questions to get a picture of all the conditions of society. At this stage we are asked to carry out the role of a social analysis in order to capture the condition of society and its development trends. (Satjipto Rahardjo, 2010).

The use of the law as means of social engineering cannot be separated from the assumption and understanding that law is an instrument used to achieve clear goals. Thus, law has entered the political sphere, because a law has become a means of implementing political decisions. (Ellya Rosana, 2013).

The function of law as a means of change in society can also be seen from the change in the mindset of the community or the formation of a new mindset from the community after court rulings on specific issues. Thus, in the name of law, courts have become a means to legitimize certain problems or actions that are happening or controversy in society. Every change that occurs in the legal system, one of the consequences will culminate in a written arrangement. Written arrangements are legal documents according to modern law. In this context, all parties involved in what is regulated in the laws and regulations must comply with the principles of what has been regulated. In this condition, the parties who will take care of something, dispute, and seek the law to a higher level, will follow a predetermined pattern of rules. (Ellya Rosana, 2013).

The legislation which aims as a means of renewal can function as a means of renewal in the sense of changing people's mental attitudes. It is hoped that the legislation does not conflict with the socio-cultural values that live in society. (Lili Rasjidi & Ira Thania Rasjidi, 200).

The law as a tool to change society is very contrary to the theory / school of history put forward by Carl Von Savigny that "*das recht wird nicht gemacht, est ist und wird mit dem volke*", that is, the law arises and develops in society. It is a good law if the law comes from the soul of the people (*Volkgeits*) who are born together with legal awareness. (Lili Rasjidi & Ira Thania Rasjidi, 200).

An Indonesian law actually only accommodates the land ownership system collectively by calling it an apartment / housing. However, because the general public is familiar with the language of business that distinguishes the use of the term apartment / housing for multi-storey housing aimed at the lower class, apartments / housing for the middle class and condominiums for the upper class. (Muntiasih, 2018)

The various types of home purchases are made by consumers, namely purchases using the Home Ownership Credit (KPR) facility, purchases with hard cash, gradual cash or soft cash and purchases using in-house credit. Purchasing on credit in-house is a problem in itself because of high consumer expectations when a transaction occurs. Consumers have provided funds, time, energy and thoughts so as not to get caught up in making wrong decisions and potentially causing losses. (Sudaryatmo, 1999).

According to Shidarta (2006), talking about the responsibility, it cannot be separated from the principles of responsibility, because the principle of responsibility is a very important issue in consumer protection. In general, the principles of responsibility in law can be distinguished, namely:

1. The principle of responsibility based on fault (*liability based on fault*), namely the principle which states that a new person can be held accountable legally if there is an element of wrongdoing;
2. The principle of presumption of liability, namely the principle that the defendant is always held responsible until he can prove his innocence, so the burden of proof lies with the defendant.
3. The principle of presumption of non-responsibility, namely this principle is the opposite of the principle of presumption of responsibility, in which the defendant is always considered irresponsible until it is proven that he is guilty.
4. The principle of absolute responsibility (*strict liability*), in this principle determines error not as a determining factor, but there are exceptions that allow for exemption from responsibility, for example, a force majeure.
5. The principle of responsibility with limitations (*limitation of liability*), with this responsibility principle, business actors may not unilaterally determine clauses that are detrimental to consumers, including limiting the maximum of their responsibilities. If there are restrictions, then it must be based on the applicable legislation.

In the context of law as a regulating tool, it functions as a division and distribution as well as a means of control for efforts to control and utilize resources in society. Initially, law was constructed as a means of control for society, especially if other social control mechanisms could not function properly. The law as one of

the working instruments of the social system must be able to accommodate the needs and interests and be able to provide equitable services to the community. The law must be able to integrate all interests and resources that exist in society, so that there can be order, security and peace (*social order*) in public's lives. (Suryadi, 2010).

The law in its function which integrates the interests of society is carried out by regulating, law does not only pay attention to this relationship from the aspect of order, but also the law must be able to determine certain measurements or parameters called the value of justice, there are even people who think that law is inseparable and must be combined with justice so that law truly has a meaning as law. (Theo Huijbers, 1995). Therefore, the manifestation of the presence of the state in solving problems in society has been accommodated through legal norms and policies that have been made. In order to form and enforce regulations, the role of state organs and organs is needed.

## **2. Legal certainty rights to protect consumers of apartment / housing buyers to certificates guaranteed by the bankrupt developer**

The popular things of apartment building in this time is not only for the upper class of society, but also for the middle and lower class who are equipped with supporting facilities and infrastructure to create complete and functional settlements, which still use a separate individual ownership system in units. unit followed by joint ownership of parts and objects of the building and joint rights to the land on which the building is founded, all of which constitute one unit which is functionally inseparable. This is better known as the term strata title, which is the ownership system of objects that are located at different strata. (Ahmad Chairudin, 2007).

In order to avoid misunderstandings between developers and buyers in the concept of strata title, it is better if the concept of strata title sales has been prepared from the beginning that includes all aspects of the activities that must be carried out. With this concept, prospective buyers will know the environment they will enter later, know their rights and know their obligations. They will also know what facilities are jointly owned and which are not shared facilities, so that if there is a difference of opinion there will be a reference to resolve it. (Muntiasih, 2018).

The public interest in owning a house with a KPR system is increasing, but this is not supported by an understanding of the legal process related to ownership of the house. The legal process of house ownership starts from the Letter of Order (SP), the Sale and Purchase Agreement (PPJB), the Official Report of Handover (BAST / Hand Over), the Sale and Purchase Deed (AJB), to the issuance of the certificate. This lengthy process has the potential to cause problems, and the result of these problems is that it leads to losses that must be suffered by the consumer.

In this regard, Article 98 of Law Number 20 of 2011 Concerning Flats states that development actors are prohibited from making PPJB:

1. That is not in accordance with what is marketed; or
2. Before fulfilling the certainty requirements as referred to in Article 43 paragraph (2).

The majority of the offers and sales of apartments/housing made by the developers have used the bidding system to the public by simply showing the location and shape of the building in the picture. While the form of apartment/housing does not yet exist, this system is known as pre project selling.

*Pre - project selling* is selling a project or building whose object will exist in the future. When a business actor, in this case a developer, does marketing, the product does not yet exist and is only in the form of brochures or offer advertisements. Therefore, in the pre project selling there are 2 (two) agreements, namely the Sale and Purchase Agreement (PPJB) and the Sale and Purchase Agreement (PJB). An Order Letter (SP) is a letter containing a house order for people who are serious about buying. This SP is an initial transaction because after the prospective buyer signs it must pay fees such as booking fees and down payments (DP). (Anugrah Bhakti, 2019).

In addition, the prospective buyers must comply with and be bound by the terms and conditions of the SP. After the buyer pays a certain amount (usually 30% of the house price), a Sale and Purchase Agreement (PPJB) is executed. The PPJB was signed by the parties along with the witnesses. In this process, SP becomes an integral part of the PPJB. The PPJB contains provisions that will be used in the process of building up to the delivery of the house, for example the issue of house costs, payment methods, time of handing over the house, to the conditions for submitting the certificate. The provisions in this PPJB, which will later act as law for prospective buyers and developers, will end at the signing of the Sale and Purchase Deed (AJB). Therefore, the PPJB becomes the binding between the SP and AJB transaction processes. The signing of the AJB is carried out in front of the Notary/PPAT who will take care of the housing certificate. The requirement for signing the AJB is that the buyer will pay the house price and witnessed by a Notary Public /PPAT. If the repayment has been made through the bank before the signing of the AJB, then the apartment / housing payment receipt will be submitted to the Notary /PPAT and used as evidence for the certificate issuance process. If you have reached this stage, the home buying process has been completed, the seller has received payment of the fee and the buyer has received a house along with a certificate of proof of ownership. (Anugrah Bhakti, 2019).

The *pre-project selling* system carried out by housing developers as business actors often causes losses to consumers. If the consumer suffers a loss, the consumer has the right to claim the compensation for the loss from the housing developer in question. This claim for compensation is made possible by law and is fully regulated in the form of legal protection, both in the Consumer Protection Law and the Civil Code. (Anugrah Bhakti, 2019).

The occurrence of PPJB when viewed from the optics of civil law, has shown that there is a legal relationship between legal subjects which is marked by an agreement between the parties in the form of PPJB between buyer /consumers and developers. The existence of an agreement in the form of this PPJB, the parties have bound themselves in the agreement to carry out their obligations and rights. The violation of the agreement that has been formulated in the agreement results in losses to the other party, so that the injured party must receive legal protection and compensation.

In purchasing apartments (housing buyers) and consumers only based on their purchase rights, namely PPJB. When viewed from its function, this PPJB can provide a sense of security to buyers / consumers, because the position of PPJB is legally strong and binding on both parties, and PPJB is no different from agreements in general, but it turns out that in practice this PPJB often causes problems, when This PPJB does not include a clause that the certificate is guaranteed by the developer. The PPJB is an agreement that got from an open system from Book III of the Civil Code that gives legal subjects the freedom to enter into an agreement that contains something as long as it does not violate or conflict with applicable laws and regulations and values that live in society, and as long as it is carried out in good faith.

When the PPJB is made and signed by both parties, namely buyers or consumers and developers, there has been a legal relationship between consumers and developers based on PPJB where the developer is the provider of the apartment / housing and the consumer / buyer. The bank as the recipient of power from the buyer or consumer is a developer partner who provides funds for development.

The legal relationship between the consumer and the developer / developer based on the PPJB will comply with the provisions of Article 1320 of the Civil Code (*Burgerlijk Wetboek*). To assess the validity of a contract (PPJB) made by the parties, it must meet the following elements: :

1. Agreed
2. Proficient
3. A certain thing
4. Causa is allowed

Based on Article 1320 of the Civil Code (*Burgerlijk Wetboek*) mentioned above, the parties must fulfill the four conditions for validity of the agreement (PPJB), namely:

1. The element of agreement, both parties are not under pressure, in a conscious state and in a normal condition, natural or non-natural, and both parties want the implementation of the commitment agreement which is contained in the form of a legally made contract.
2. The competent, both parties are allowed according to law and are not in a condition that is not allowed by law.
3. A certain thing, there is an object that the parties agree upon to carry out according to law.
4. The causa is allowed, the parties are allowed by law to carry out the contract / agreement that has been agreed upon. Civil law experts, in this point, translate *halal causa*, meaning that an item or an agreement has an object that is agreed upon is lawful and the way is lawful. In this context, it is the goods or things that are agreed upon by law.

If the four valid conditions of the agreement above are not fulfilled or violated, then by law the agreement cannot be carried out because it does not fulfill the validity conditions of the agreement determined by law. In the study of civil law experts in Indonesia, the four conditions for the validity of the agreement in Article 1320 of the Civil Code (*Burgerlijk Wetboek*) are divided into subjective and objective requirements. If the subjective conditions are not fulfilled, then the agreement can be canceled or can be requested for cancellation by one of the parties, whereas if the objective conditions are not met, then the agreement is null and void or the agreement is deemed to have never existed and the purpose of the parties who entered into the agreement is to give birth a legal agreement has failed, thus there is no basis for the parties to sue each other before a judge.

The legal relationship between the buyer or consumer and the developer will have legal consequences. Legal consequences will occur if the business actor does not carry out his obligations properly or the certificate is guaranteed mortgage and the debtor goes bankrupt, so that the buyer or consumer loses. Violation of PPJB is a form of default, because the developer does not perform well. Default is not carrying out the achievements or obligations as agreed in the PPJB. This act of default results in the loss of part of the rights of the buyer / consumer of the apartment / housing, thus demanding that the developer who defaults to provide compensation for the losses suffered.

At the Article 1239 of the Civil Code it is stated that each engagement is to do something, or not to do something, if the debtor does not fulfill his obligations, he will get the settlement in the obligation to provide



compensation for expenses, losses and interest. Furthermore, in Article 1243 of the Civil Code, that compensation for expenses, losses and interest due to non-fulfillment of an agreement will only begin to become compulsory, if the debt after being declared negligent in fulfilling the commitment, continues to neglect it or if something that must be given or made can only be given or made within a grace period. has been over.

In this case, Subekti (2005) argues that someone is said to be in default if he has met the elements of default, namely:

1. Not doing what he was supposed to do;
2. Carry out what he promised, but not as promised;
3. Doing what he promised but too late;
4. Doing something according to the agreement not allowed to do.

The existence of a certificate guaranteed by the bankrupt developer will be assessed from several things, namely:

1. Does the buyer /consumer know that in the PPJB it has been agreed that the certificate has been used as a guarantee of security by the developer and will be issued if the buyer / consumer pays all the agreed prices? If the buyer / consumer finds out, then the buyer or consumer can claim compensation after repayment has been made and the certificate is in a position of guaranteed mortgage in accordance with the value of the loss suffered by the buyer / consumer. The condition for developer bankruptcy is not a form of bad faith, but a natural condition that occurs beyond their ability.
2. Does the buyer/consumer do not know that in the PPJB it has been agreed that the certificate has been used as a guarantee of mortgage by the developer, if not knowing, the consumer can sue criminally because the developer has committed fraud.
3. If the PPJB stipulates standard clauses that are determined unilaterally by the business actor (developer), to transfer or remove responsibility that should be the responsibility of the developer, it means that the buyer / consumer only has two choices, namely approving or rejecting. If this happens, the PPJB made by the developer has violated the provisions of Article 18 paragraph (1) letter a of Law Number 8 of 1999 concerning Consumer Protection.
4. If in the PPJB that has been agreed upon only regulates payment and does not regulate anything related to certificate guarantees and bankruptcy, then the developer must be responsible for providing compensation according to the value of the loss. Whether the buyer / consumer takes precedence over other creditors (banks), it depends on the curator and the supervisory judge. However, the position of the consumer / buyer as a weak party must take precedence even as a concurrent creditor.

In accordance with the bankruptcy law in Indonesia through Article 189 paragraphs (3) and (4) and Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, it states:

The concurrent creditors must be given a portion determined by the Supervisory Judge ". The Payment to Creditors:

- a. Those who have privileged rights, including those whose privileges are denied; and
- b. Holders of pledge, fiduciary security, mortgage, mortgage, or other collateral rights for property, as long as they are not paid according to the provisions referred to in Article 55, can be made from the proceeds from the sale of objects to which they have special rights or which are pledged as collateral to them.

According to Yatmi Nengsih and Arief Suryono, in principle, the position of creditors is the same (*creditorium parity*) and cannot be differentiated in terms of guaranteed rights. This same right is the right to the result of the execution of the bankruptcy assets in accordance with the amount of their respective bills (*pari passu pro rata parte*). However, this principle recognizes exceptions, namely the creditors who hold the collateral rights over material and the creditors whose rights take precedence based on the PKPU Law and other laws and regulations.

Otherwise, to continue the PPJB is not possible, because bankruptcy law in Indonesia prohibits as stated in Article 34 of Law Number 37 of 2004 states, "unless otherwise stipulated in this Law, an agreement that intends to transfer rights to land, change the name of the ship, the imposition of a guarantee, mortgage, or fiduciary security that has been agreed in advance, cannot be implemented after the pronouncement of the bankruptcy declaration".

If paying attention to Article 34 of Law Number 37 of 2004, the legal logic is that if a debtor (developer) is declared bankrupt on a court decision that has permanent legal force, the debtor cannot take legal action including continuing PPJB between buyers or consumers. with the developer / developer, but the rights of consumers or buyers do not just disappear because it is the authority of the curator and supervisory judge. This is where the role of the judge is needed to show progressive justice.

On the other hand, Article 20 paragraph (1) of the law of mortgage rights in Indonesia states that if the debtor defaults / defaults, then:

1. The right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6, or
2. The executorial title contained in the Certificate of Mortgage as referred to in Article 14 paragraph (2), (Article 20 paragraph (1) UUHT)

The researcher assessed that consumers / buyers can still take legal action to continue the PPJB with the debtor (developer), even though the debtor (developer) is declared bankrupt by the court. The existence of Article 34 of Law Number 37 of 2004 is not an obstacle to continuing the PPJB because it is deemed not to reflect the sense of justice of the community. When a law or law established by an authorized institution injures the sense of justice in the community, the law or law must be violated. This is intended to save the people (consumers / buyers), because people's safety is the highest law (*salus populi suprema lex*), and besides that it is to cover the legal impasse so that consumers / buyers who are disadvantaged in the position of concurrent creditors get an equal position. Therefore, the right to take precedence and continue the PPJB must be fulfilled by the state.

Related with this case, Haryanti argues, the existence of law in society is very urgent, because the law regulates human behavior. Law is inseparable from society, and vice versa, because besides the law functions passively, law also functions actively in controlling every individual action and always tries to bring society into a planned change. The applied law should always pay attention to juridical, philosophical, utility / sociological principles, so that it doesn't conflict with the values that live in society. Laws made in society have the aim of creating peace, peace and order in society and providing legal certainty. The purpose of law can be felt comprehensively in society, if the law can function in society. Thus, law and society have a very significant correlation. A society without law, there will be chaos and there will be arbitrary actions, and vice versa, law without society is meaningless. (Tuti Haryanti, 2014).

To protect consumers in Indonesia to the actions of apartment / housing developers that can harm consumers, in general Indonesia has regulated consumer rights in general in Law Number 8 of 1999 concerning Consumer Protection. The presence of Law Number 8 of 1999 is to realize a balance of protection of the interests of consumers and business actors, so as to create a healthy economy.

If paying attention to Law Number 8 of 1999 concerning the Consumer Protection, apartment / housing developers are categorized as business actors. Article 1 point 3 states that "Business actor is any individual or business entity, either domiciled or carrying out activities within the jurisdiction of the Republic of Indonesia, either individually or collectively through an agreement to carry out business activities in various economic fields".

From the Article 1 number 3 of Law Number 8 of 1999, the apartment / housing developer as a business actor must also comply with the provisions and regulations stipulated in Law Number 8 of 1999. Therefore, every consumer who is disadvantaged can sue business actors through institutions that are tasked with resolving disputes between consumers and business actors or through courts that are within the general court. Consumer dispute resolution can be pursued in court or outside the court based on the voluntary choice of the disputing parties. Settlement of disputes outside the court does not eliminate criminal responsibility as regulated in the Law in accordance with Article 45 paragraph (1), (2) and paragraph (3) of Law Number 8 of 1999

According to Eman Rajagukguk (2000), the legal culture of society is one of the factors that influence the importance of resolving business disputes outside the court. The traditional culture that emphasizes community, kinship, harmony, *primus inter pares* has encouraged dispute resolution outside the formal court. Thus a culture that emphasizes efficiency and effectiveness is equally strong in encouraging the resolution of business disputes without going through court.

The law was created as a means to regulate the rights and obligations of legal subjects, both persons and legal entities to be able to carry out properly and obtain their rights fairly. The law functions as a protection for human interests, for that it must be implemented and implemented. (Eman Rajagukguk, 2000).

According to Mariam Darus Badruzaman (2011), to provide protection for consumers in buying and selling commercial flats here are in the form of rights, namely:

1. The right to demand fulfillment of the agreement;
2. The right to demand termination of the agreement;
3. The right to claim compensation;
4. The right to demand fulfillment of the agreement with compensation;
5. The right to demand termination or cancellation of the agreement with compensation.

Related with the Article 4 of Law Number 8 of 1999 concerning Consumer Protection states consumer rights, namely:

- a. The right to comfort, security and safety in consuming goods or the services;

- b. The right to choose goods and the services and to obtain these goods and / or services in accordance with the exchange rates and conditions and guarantees promised;
- c. The right to correct, clear and honest information regarding the condition and guarantee of goods and / or services;
- d. The right to have their opinions and complaints heard about the goods or services used;
- e. The right to get advocacy, protection, and proper consumer protection dispute resolution efforts;
- f. The right to receive consumer guidance and education;
- g. The right to be treated or served properly and honestly and not to discriminate;
- h. The right to get compensation, compensation or replacement, if the goods or services received are not in accordance with the agreement or not as it should be;
- i. The rights regulated in the provisions of other laws and regulations.

The various rights mentioned above are a form of protection for consumers in buying and selling apartments / housing if the business actor does not perform the achievements mentioned in the agreement that has been made by both parties, because the business actor is also burdened with the obligations as referred to in Article 7 of Law Number 8. 1999, namely:

- a. Having the good intentions in carrying out business activities;
- b. Providing the true, clear and honest information regarding the condition and guarantee of goods and / or services and provide an explanation of the use, repair and maintenance;
- c. Treating or serving consumers properly and honestly and not discriminatory;
- d. Ensuring the quality of goods and / or services produced and / or traded based on the prevailing provisions on the quality of goods and / or services;
- e. Providing the opportunity for consumers to test, and / or try certain goods and / or services and provide guarantees and / or guarantees for goods made and / or traded;
- f. Providing the compensation, compensation and / or compensation for losses resulting from the use, use and utilization of traded goods and / or services;
- g. Providing the compensation, compensation and / or replacement if the goods or the services received or used are not in accordance with the agreement.

#### **IV. CONCLUSION**

The state role in guaranteeing the rights of consumers who buy apartments or housing to certificates that are guaranteed mortgage rights by the bankrupt developer provides legal protection through legal tools or instruments through state organs and apparatus in accordance with their respective duties and authorities. The consumers or the buyers should not be cheated or there should be no unclear information about every purchase of Apartments or Housing offered to consumers. This is intended to maintain the balance of rights and obligations so that something unwanted happens in the future, for example an apartment or housing certificate is used as a guarantee for mortgages by developers and the developer goes bankrupt so that consumers suffer losses.

The purchase of an apartment/housing with respect to a certificate guaranteed by the bankrupt developer is a big risk for consumers because they will lose some of their rights. However, the responsibility of the developer does not just disappear, even though it is declared bankrupt by the court. The imposition of responsibility on the developer still exists both from a civil and criminal perspective. The developers are still burdened with absolute responsibility (*strict liability*) to provide compensation to buyers or the consumers according to the level of losses suffered. The bankruptcy statement on the court decision which has permanent legal force to the debtor (*developer*) does not obstruct his obligation to resolve the certificate problem guaranteed by the developer. Therefore, legally the developer still has the legal responsibility to continue the PPJB even though the curator and supervisory judge have settled it. The existence of Article 34 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Liability which has provided restrictions not to carry out something that has been agreed upon prior to the pronouncement of the bankruptcy declaration can be distracted because it is considered to injure legal justice for buyers / consumers, so it becomes the judge's duty to explore and understand the values of law and a sense of justice that live in society to make legal discoveries and reforms (*mujtahij and mujaddid*), because good law is law that is in accordance with the values of community life and has benefits for society.

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