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## **URGENCY OF LEGAL CERTAINTY TOWARDS IMPLEMENTATION OF CURATORS' DUTIES AND AUTHORITIES**

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### **ABSTRACT:**

**Bankruptcy is a special field in solving debts and receivables. There are still many people who misunderstand the contents of bankruptcy law, including curators. Curators have strategic duties and authorities in resolving bankruptcy disputes in the community. The purpose of this study is to analyze the duties and authorities of curators in carrying out verification of all claims submitted by parties who have receivables against bankrupt debtors. To a certain extent, the work of a curator must be considered as a "court representative", meaning that the task of curator is to settle company assets declared bankrupt by the court. Besides, the task of the curator is to execute bankrupt assets in practice. Problems will be analyzed using legal research. The research approach uses statutes and conceptual approaches. The results of the study are that there is a need for legal certainty and legal guarantees for curators in carrying out their duties. This is because curators in carrying out their duties and authorities often experience friction with the authority of the prosecutor's office, the police, and or district court judges. The results of this study found several things that curators**

**have two main obligations, namely curators carrying out statutory duties and curators holding the trust of the courts, debtors, and creditors (fiduciary duties/fiduciary obligations). This study contributes mainly to legal certainty for parties facing bankruptcy issues. To support its work, the curator must uphold honesty, independence, neutrality or impartiality in the interests of one party, both the debtor and the creditor. Besides, in carrying out its duties, it must uphold the values of integrity and objectivity for the achievement of objectives, namely the fair resolution of bankruptcy assets, both for creditors and debtors.**

**KEYWORDS: Bankruptcy; Curators; Debts and Receivables; Legal Certainty; Legal Protection.**

### **BACKGROUND OF STUDY:**

Problems in the business world arise when business actors are unable to pay their debts. Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as Bankruptcy Law), has accommodated efforts to resolve problems that occur in the business world known as bankruptcy institutions and postponement of debt payment obligations.

Although in a state of bankruptcy, debts owed by debtors cannot be written off. The debtor must continue to pay his debts to the creditor, for that the role of the curator is needed to achieve the objectives of the bankruptcy institution.

When a debtor is declared bankrupt, the curator may not act as an asset trader, but the curator must be able to uphold the principle of justice. The principle of justice for a curator is to be able to be fair when recording all bankrupt assets, both hidden and real assets, namely: seeking or maximizing bankruptcy assets; maintain or increase the value of bankrupt assets; sell bankrupt assets at the maximum price; dividing the proceeds of the sale of bankruptcy to each creditor wording the strata, and dissolving insolvent debtors.

Article 69 Paragraph (1) The Bankruptcy Law states that the curator as the party authorized to carry out the tasks of arranging and/or issuing bankrupt assets from the date the bankruptcy decision is pronounced, even if the decision is filed for cassation or reconsideration, and with such authority, the curator can take action to manage bankrupt assets including the act of increasing bankrupt assets. Then in Article 69 Paragraph (2) letter b states that the curator can make loans from third parties, only in the context of increasing the value of bankrupt assets. In this article, curators have been explicitly given authority to increase bankruptcy assets, one of which is by making loans.

The authority granted to the curator in Article 69 Paragraph (2) letter b can be used as a basis for the curator to take other actions to increase bankruptcy assets, not only limited to making loans but requires the curator's creativity to find other ways based on the authority has been given, provided such actions can maximize the value of bankruptcy assets. However, the curator is demanded to help the debtor manage and settle the

bankrupt assets including trying to increase the bankrupt assets, many debtors do not want to cooperate with the curator and sometimes complicate the curator's tasks, such as debtors who run away, embezzling part of their assets, conceal, transfer or sell assets bankruptcy, exaggerating bills or not in good faith, and not cooperative in solving the problem of accounts receivable that are due.

Another problem faced by curators in carrying out their duties is the reporting of curators by bankrupt debtors to police agencies. This shows that the protection of curators has not been maximized, among others related to legal protection of this profession, there is no clear legal guarantee to protect the duties of curators.

Article 15 Paragraph (3) of the Bankruptcy Law states that the curator must be independent and not have a conflict of interest with the debtor and creditor, the article gives the curator the authority to carry out his duties without being interrupted by the interests of the debtor or creditor. Therefore, curators can carry out their duties and focus on the maintenance process that can increase bankruptcy assets.

Curators in carrying out their duties face many obstacles that are often encountered in the field, among others related to legal certainty of this profession. There is no clear legal guarantee to protect the duties of curators, even the court seems unconcerned with the verdicts that have passed bankruptcy decisions. For example when a debtor is declared bankrupt then his assets must be in a public confiscation, at that time the court appoints a curator to secure the bankrupt bankruptcy and the person must not take anything from the property, no matter how small the assets in the bankrupt bankruptcy are lost, the curator must be responsible.

Thus the problem is focused on answering what is the urgency of legal certainty and what

is the form of legal protection for the duties and authorities of curators?

#### **DISCUSSION:**

#### **The Urgency of Legal Certainty and Forms of Legal Protection against the Duties and Authority of Curators:**

The curator is obliged to secure bankrupt assets, the authority stated in Article 98 of the Bankruptcy Law states that from the moment of appointment, the curator must make every effort to secure bankrupt assets and keep all letters, documents, money, jewelry, securities, and other securities by providing receipts. This article gives the curator the authority to secure bankrupt bank loans so that the curator can maximize and optimize bankruptcy assets and avoid the possibility of losses.

In the framework of securing bankrupt assets, the curator is given the authority to request the sealing of bankrupt assets from the court, based on the reasons for securing bankrupt assets, through a supervisory judge. The curator's authority is stated in Article 99 of the Bankruptcy Law. In addition to securing bankrupt assets, the curator is given the authority as mentioned in Article 104 Paragraph (1) of the Bankruptcy Act to continue the business of the debtor declared bankrupt based on the approval of the temporary creditor committee.

Bankruptcy is a special area of settlement related to debt and debt problems. Bankruptcy is a condition where the debtor is unable to make payments to the creditor. The duties and authorities of curators are very important in bankruptcy law in the context of resolving bankruptcy disputes that occur.

Bankruptcy results in the debtor by law losing the right to take care of the wealth included in the bankruptcy. Therefore, the debtor's legal right to manage his wealth, which has the right to divide the assets of bankrupt debtors and carry out the tasks of

arranging and settling the debtor's assets, is a curator.

The curator is regulated in Article 15 of the Bankruptcy Act. Whereas Article 16 of the Bankruptcy Law stipulates that the curator has to administer and settle, in which the curator's one of the most important tasks is to carry out verification of all bills submitted by parties who have bills (receivables) against bankrupt debtors.

Bankruptcy Law refers to Article 1131 of the Civil Code which states that "all material debts, both movable and immovable, both existing and new will be in the future, shall be borne by all individual engagements".

The authorities granted to the curator in some cases indicate that the curator at a certain level of work must be considered a "court representative", meaning that the task of the curator is to clean up company assets that have been declared bankrupt by the court, in addition to the task of the curator is to execute bankrupt assets. Curators in their duties and authorities often conflict with the authority of prosecutors, the police, and or district court judges. Often the debtor is uncooperative with the existence of a curator for the management of bankruptcy assets, ie the curator is reported by the debtor to the police bankruptcy. Therefore, there must be a guarantee of legal certainty as to legal protection related to the duties and authorities in the form of separate laws for the curator profession. The law regulates all matters related to the limitation of the rights and obligations of curators in carrying out the management and/or settlement of bankrupt assets.

According to Jerry Hoft, the purpose of bankruptcy is to pay the rights of creditors that they should have obtained by the order level of their claims. The curator is obliged to ensure that all actions taken are in the interests of bankrupt assets.

According to Article 69 Paragraph (1) of the Bankruptcy Act, this law has given the curator the authority to carry out a certain act which has been further elaborated in the contents of the article in the said law.

The curator must be independent. The provisions regarding the principle of independence are emphasized in the Indonesian Curator and Management Association Code of Ethics which states that in every appointment received, members of the Indonesian curator and management association (hereinafter referred to as "Members") must be independent and free from anyone's influence. Thus, the independence of the curator is intended not to have a dependence on the parties to the bankruptcy, namely the debtor or curator, and is free from anyone's influence.

The curator must uphold honesty, independence, neutrality or impartiality of the interests of one party, both the debtor and the creditor. Besides, in carrying out its duties, it must uphold the values of integrity and objectivity to achieve the objective of fair distribution of bankruptcy assets for both creditors and debtors. This is important because, in the management and settlement of bankrupt assets, curators are often faced with a difficult situation between the interests of debtors and creditors, even many temptations for the economic interests of the curator themselves so that they end up harming bankrupt assets.

The curator is responsible for his mistakes or negligence in carrying out the tasks of administration and/or ordering those cause losses to bankrupt assets. The term error or neglect here must be given a clear and broad understanding, because it will cause problems for the curator in carrying out his duties, in the sense that he will not be able to take immediate action because of being overshadowed by an error or negligence.

The curator's obligations are first, carrying out statutory duties, that is, obligations that are determined by law. Second, fiduciary duties or fiduciary obligations, namely curators developing the trust of the court, debtors, creditors, and shareholders to carry out their duties properly in the interests of these parties. Because the curator is a representative of the court and is trusted by risking the reputation of the court to carry out its obligations impartially. Curators in bankruptcy cases merely carry out the mandate of the law.

Sjahdeni expressed his opinion that bankruptcy law should also include provisions for criminal sanctions against debtors who are already in an insolvent financial situation. Besides, provisions must also include criminal sanctions against certain creditors who conspire with insolvent debtors or go to insolvency to benefit certain creditors but to the detriment of other creditors. Bankruptcy law should also contain provisions on criminal sanctions against debtors who engineer or create the existence of fictional creditors in the context of bankruptcy.

The task of ordering is the work of curators whose emphasis is more juridical. The task of clearing up, among others, is to sell bankrupt assets and the proceeds of the sale are distributed to creditors proportionately. Sales can be done by auction or under the hand. Underhanded sales must be with the permission of the supervising judge. The selling license granted by the Supervising Judge is essentially to increase the value of bankruptcy assets.

The essence of the curator's duty in managing and clearing bankruptcy assets is to increase its value to provide 'a little' satisfaction to creditors. Every curator's work can increase the value of assets, it means increasing satisfaction for the creditor. If in carrying out their duties, the assets of the

bankrupt will be damaged, the curator must be responsible for both civil and criminal.

To carry out its duties and authorities, a curator needs to sort out the authority he has based on the Bankruptcy Law.

- a. The authority that can be exercised without having to notify or obtain prior approval from the debtor or one of the debtor's organs, even for such actions if in circumstances outside the bankruptcy of such approval or notification is not required.
- b. The authority that can be exercised after observing the agreement of the other party, in this case, the supervisory judge. For example, the action of a curator to obtain a loan from a third party by burdening bankrupt assets with mortgages, liens or other collateral rights.

In other words, the curator carries the trust of the court, the debtor, the creditors, and the shareholders to carry out their duties to the best of their interests.

Concerning the creditors, the curator, according to Keay, is not responsible to the creditors individually but to the creditors as a whole (the body of creditors). According to Keay further that "the liquidator is a hybrid composite with elements of fiduciary trustee, agent, officer of the corporation and (in some instances) officer of the court."

Concerning the debtor company, the curator has the same position as the directors of the company because the curator replaces the position of directors after the company is declared bankrupt. Fiduciary obligations of the curator to the debtor company are required to carry out their duties and authorities as determined in the Bankruptcy Law in good faith and for the benefit of the company. The curator must not include or put forward his interests. His interests may not conflict with his duties. The curator must act impartially in the interests of the debtor and the interests of

certain creditors. The curator must act in the interests of the debtor and simultaneously in the interests of the overall creditor.

About creditors, the curator may not only be detrimental but also may not benefit one or a portion of his creditors. Profits obtained by some creditors alone will harm the other creditors. As stated above, the curator in carrying out his duties and authorities is not only for the interests of certain creditors, but for the whole creditor. As Keay said "... the fiduciary liquidators obligations are owed to ... the body of creditors and not to individual creditors ..."

So clearly, the personal responsibility of a curator is enormous. The broad authority granted by the Bankruptcy Law to the curator is a burden for the curator to be careful and responsible in carrying out his duties. For this reason, the professionalism of a curator is needed, because the lack of caution in managing bankruptcy assets will have juridical implications for the curator himself, in addition to impacting court authority.

The curator in carrying out administrative and administrative tasks also has the following responsibilities:

1. The Principle of Liability Based on Fault;
2. The Presumption of Liability Principle;
3. The Presumption Principle Is Not Always Responsible (Presumption of Nonliability Principle);
4. The Principle of Absolute Responsibility (Strict Liability);
5. The principle of Limitation of Liability.

The curator can be sued and must pay compensation if due to negligence, even more so because of his mistakes (done intentionally) has caused the parties concerned with bankrupt assets, especially the creditors who were harmed.

## **B. Limitation of Curator's Authority in Managing and Settling Bankrupt debtor assets:**

Hadi M. Shubhan argues that there needs to be a specific affirmation in the provisions of bankruptcy regarding the accountability of the curator because the curator's authority is so broad that it requires definite legal guidelines and avoids widespread interpretations and recalls the scope of the norms contained in Article 1365 of the Civil Code flexible also in practice, not a few curators abuse their power as curators.

In the event of bankruptcy there are many interests involved, in addition to the interests of the creditors as well as the interests of other stakeholders of the debtor declared bankrupt, especially if the debtor is a company. Law No. 40 of 2007 concerning Limited Liability Companies recognizes that those related to the life of a company are: a) Company interests; b) Interests of Minority Shareholders; c) Interests of the Company's Employees; d) Public Interest; e) The interests of fair competition in doing business.

How do we see the interests of the parties mentioned above? It is in the interest of the state not to lose the source of taxes, which mostly come from companies. Therefore, the state has an interest so that companies should be able to maintain their existence. In the interest of the state itself, the state/government is even obliged to create a business climate that is conducive to the existence and growth of companies. Therefore, it is in the interest of the state that a company that is in debt cannot easily be declared bankrupt.

It is not only the country that has an interest in the existence and development of companies, but also the wider community. Companies provide employment opportunities to the community. Certainly, the bankruptcy of a company results in the termination of

employment of workers and employees of the company.

The company also provides life opportunities to its suppliers, both suppliers of goods and services. Many of these suppliers are medium and small companies that the government should protect. Medium and small companies usually have only one or two dominant buyers, so their lives are very dependent on one or two companies only. Therefore, the bankruptcy of a company will also be able to kill other companies that are suppliers.

The bankruptcy of a company will also affect the supply of goods and services produced by the bankrupt company to the public. The further effect is on the traders involved and dependent on the trade in goods and services produced by the bankrupt company. Once again they generally consist of small and medium traders. Of course, consumers who need these goods and services will also be affected by the bankruptcy of a company.

Based on what has been described above regarding the duties of the curator's authority in managing and clearing bankrupt assets, several articles that have the potential to abuse the duties and authority of the curator in managing bankrupt assets. Article 16 paragraph (1) of the Bankruptcy Law which reads "The curator has the authority to carry out the task of administering and / or issuing bankrupt assets from the date the verdict of bankruptcy is pronounced, even if the decision is filed for cassation or reconsideration". In paragraph (2) it says "If a decision on a bankruptcy statement is canceled as a result of a cassation or reconsideration, all acts that have been carried out by the curator before or on the date the curator receives notification of the cancellation decision as referred to in Article 17 of the Bankruptcy Law remain valid and binds the debtor." The article has the

potential to abuse authority by the curator because it gives such broad authority to the curator. In the elucidation of Article 16 paragraph (2) what is meant by "all acts that have been carried out by the curator", includes every act of handling and issuing bankruptcy assets, and what is meant by "remaining valid and binding on the debtor" is that the actions of the curator cannot be sued in any court. With the existence of this article gives broad authority to the curator and everything that has been a curator is carried out in the process of handling and ordering it is binding on the debtor if a bankrupt statement is canceled and according to the explanation in article 16 paragraph (2) the curator cannot be sued in any court.

According to Article 104 paragraph (1) of the Bankruptcy Law, the curator can continue the business of the debtor which is declared bankrupt even though the appeal is appealed for appeal or review and the paragraph (2) reads if the creditor committee is not appointed, the curator needs the permission of the supervising judge to continue business as referred to in paragraph (1). For debtors who are still going concern or prospectus to be continued, the curator has the authority to run the debtor business based on the article above, the question is whether the curator has the competence to run a business to secure bankrupt assets or increasing bankrupt assets. Because not everyone can play a role as a board of directors of a company, whether by running the business there is a guarantee that the curator can increase bankruptcy assets, or can result in losses because they do not have the competence (expertise) to run a business. For example, a company engaged in the field of aviation, television, petroleum, and other fields that require special expertise to run it, then not necessarily a curator has competence in that field. This has the potential to cause losses to bankrupt assets.

In companies whose management does not carry out fiduciary duties so that they do not do the best for the company they lead, it will be able to cause or cause the company concerned in an unhealthy condition. If it is associated with a curator who takes over duties as a board of directors, the curator to cause a company to be in an unhealthy state because it does not have the expertise or ability to run a business.

Article 39 paragraph (1) which reads "Workers working for debtors may terminate employment, and conversely, the curator may terminate it by observing the period according to the approval or provisions of the applicable legislation, with the understanding that the employment relationship can be terminated with the shortest notice. 45 (four-five) days before. "And paragraph (2) "Since the date of the pronouncement of the bankruptcy statement pronounced, the wages owed before or after the decision of the bankruptcy statement is pronounced is a debt of bankruptcy assets." The provisions in the article not only have the potential to cause harm to workers but also the debtor. With such provisions, the curator can just lay off anyone who works for a company whose business is continued by the curator. If the curator does layoffs of workers who have the competence and are very influential in a company, then it has the potential to cause harm to the debtor company. Moreover, if after the termination of employment is carried out by the curator, the bankrupt statement is canceled by the Supreme Court but the termination remains valid and binding for the debtor based on Article 16 paragraph (2) of the Bankruptcy Law, which in the explanation referred to as "permanent legal and binding on the debtor "is that the act of the curator cannot be sued in any court.

Article 69 paragraph (1) which reads "the duty of a curator is to administer and / or procure bankrupt assets." (2) In carrying out their duties, the curator is not required to

obtain approval and or deliver prior notice to the debtor or one of the debtor organs, even though in circumstances outside the bankruptcy of such approval or notification is required and can make loans from third parties, only to increase the value bankruptcy property. Because the main task of the curator is to administer and settle bankrupt assets, according to article 69 paragraph (2) the curator is not required to obtain approval in taking care of or ordering the debtor. This has the potential to cause losses to debtors and bankrupt assets. If the curator continues his business based on permission from the creditor committee or supervisor judge, but it turns out that the curator does not have competence in that field, then the curator has the potential to incur losses on bankruptcy assets. If it turns out there is a cancellation of the bankruptcy statement by the Supreme Court, this will potentially cause harm to the debtor if it will resume its business. If the curator has "fiddled" with the company's management, recruited workers, and then there is a bankruptcy cancellation, the debtor will have difficulty continuing his business again. It is better if the curator still wants to continue the business of a debtor but the curator does not have competence in the field carried out by the debtor, then the curator can consult with the debtor first.

In carrying out their duties, it does not mean that the curator is free to administer or settle, the curator still has the responsibility as stated in Article 72 of the Bankruptcy Law which reads "the curator is responsible for his mistakes or negligence in carrying out the administration and/or settlement that causes losses to bankrupt assets." And Article 78 of the Bankruptcy Law paragraph (1), if to act as a third party, the curator needs a power of attorney or permission from a supervisory judge but it turns out that the power or permit does not exist or is not obtained or the curator

in conducting the act does not heed the provisions of Article 83 and Article 84 of the Bankruptcy Law, acts against these third parties are legally valid. However, the consequences, according to Article 78 paragraph (2), the curator must personally be responsible for the bankrupt debtor and the creditor. As a consequence of the provisions of Article 72 and Article 78, the curator may be sued and obliged to pay compensation if due to his negligence, even more so because of his mistake (done intentionally) has caused the parties concerned with bankrupt assets, especially, of course, are concurrent creditors harmed. The loss is especially if the bankrupt assets are reduced in value so that the concurrent creditors get the value of the settlement of bills less than they should have received from the sale of the bankrupt assets as a result of the actions of the curator.

In the interest of creditors, concurrent creditors should appoint curators who have sufficient financial backup. Such conditions are not determined by the Bankruptcy Law, but if in practice this is not done then it will be futile for creditors to sue the curator if the curator makes a mistake or negligence to cause harm to bankrupt assets as referred to in Article 72 and Article 78 the. A court ruling punishing a curator to compensate will only be a victory on paper for the plaintiff's creditors if the curator does not have sufficient financial capacity because the execution of the ruling cannot be realized satisfactorily.

It needs to be reminded once again that as a result of the position of the curator who replaced the position of the bankrupt debtor, the Bankruptcy Law adheres to the principle of "free power" (free power). It means that the curator is free to carry out his duties without the need for anyone's approval (Article 184 paragraph (1), Article 16 paragraph (1), and Article 69 paragraph (2) of the Bankruptcy Act, except by law determined otherwise.



Therefore, to prevent the misuse of duties and authority by the curator, it should be given strict limits on the duties carried out by the curator in handling or issuing the matter. Provide strict limits on the duties of curators so broad.

The authority granted to the curator is as stipulated in Article 16 paragraph (1) and paragraph (2), as well as Article 69 paragraph (2) letter a and letter b The bankruptcy law is balanced with responsibilities which are also borne by the curator as regulated in Article 72 of the Bankruptcy Law which states "the curator is responsible for his mistakes or negligence in carrying out the tasks of administration and/or settlement that causes losses to bankrupt assets"

The authority and responsibility of the curator is an implementation of the principle of balance and the principle of justice adhered to in the Bankruptcy Law. In the form of the principle of balance that there are provisions that can prevent the misuse of institutions and bankruptcy institutions by dishonest debtors, on the other hand, there are provisions that can prevent the misuse of institutions regarding bankruptcy that can fulfill a sense of justice for the parties concerned. The principle of fairness is to prevent the arbitrariness of collectors who seek to pay the bills for each debtor, without paying attention to other creditors.

Thus, the authority given to the curator is also offset by heavy responsibilities to him. Arranging and clearing bankrupt assets is a daunting task for curators. Besides, the form of curatorial responsibility in the management and settlement of bankrupt assets, among others, is carried out through the submission of reports as regulated in Article 74 of the Bankruptcy Law, which in that article requires the curator to submit a report to the Supervisory Judge regarding the state of bankrupt assets and the performance of their duties at each 3 (three) months. The report is

open to the public and can be seen by anyone for free.

The basic principle/juridical substance of a bankrupt institution is the expropriation of the ownership of bankrupt debtor assets through a public confiscation of which the management and/or settlement is carried out by a curator under the supervision of a supervisory judge. The decision of the bankruptcy statement by the commercial court and its handling was carried out under the supervision of the supervisory judge based on the Bankruptcy Law.

The authority inherent in the curator is not free from civil law liability if due to his mistake or negligence causes losses to the parties concerned to bankrupt assets. Not only the debtor, but the creditor can also sue a civil suit against the curator (vide Article 72 of the Bankruptcy Act). Besides, there are efforts to resist the supervisory judge if objections to the activities carried out by the curator (vide Article 77 paragraph (1) of the Bankruptcy Act), even objections to the provisions of the supervisory judge can appeal to the commercial court (vide Article 68 paragraph (1) of the Bankruptcy Act).

To prevent abuse of authority over bankruptcy assets by the curator, legal remedies provided in the Bankruptcy Law are available, namely that the applicant can submit an objection to the actions taken by the curator, either through the replacement of the curator or the civil liability request to the court. In the case of bankruptcy, both the debtor, creditor, and curator have the potential to abuse their authority or act in bad faith.

#### **COCLUSION:**

The existence of the Bankruptcy Law is to resolve the issue of accounts payable and receivable in the world of trade and business. This law needs to be revised, that norms and criminal sanctions do not need to be

specifically regulated and included in the Bankruptcy Law. The existence of criminal sanctions in Article 234 paragraph 2 of the Bankruptcy causes the discrimination of regulations because it is only intended for curators or administrators. Whereas norms and criminal law sanctions are aimed at anyone who commits a crime, regardless of one's profession, gender or social status. There should be clearer provisions that define the limits of the curator's authority in carrying out his duties, namely the management and acquisition of bankrupt assets so that different interpretations do not occur in various circles. The Bankruptcy Law must also contain clearer arrangements regarding the liability of the curator, or be explained under the Bankruptcy Law itself to the extent that the liability of the curator can be requested.

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