

Legal Dynamics of Limited Liability Companies: Unveiling the Power of Commissioners and Shareholders to Take Legal Action Against Directors' Negligence

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ABSTRACT. The Limited Liability Company (LLC) is characterized by its distinct juridical entity, effectively segregating its management group from shareholders. Operating as a business entity, the primary goal of an LLC is profit generation. Functioning as a corporate legal entity with legal personality, an LLC comprises three key organizational components: the General Shareholders' Meeting, Directors, and Commissioners. Directors, or the Board of Directors (BOD), bear the responsibility of managing and representing the LLC both within and outside the legal realm. The position of BOD is mandated to be occupied by a natural person, or 'naturlijk person,' either as a single individual (Director) or collectively by two or more individuals (Board of Directors). Despite a stringent selection process for board positions, the inherent nature of directors as natural persons introduces the possibility of intentional or negligent errors in management, potentially leading to financial losses. In the face of such negligence, the pertinent question arises: can a commissioner (Board of Commissioners) and/or shareholders initiate legal action against a director or BOD, whose legal standing is as the company's representative? To address this query, a comprehensive library research initiative is undertaken, focusing on the analysis of Article 97 and Article 98 of the Limited Liability Company's legal statutes. This examination aims to elucidate the viable courses of action that can be pursued against the company in the event of directorial negligence. The research findings reveal that specific commissioners and/or shareholders, in the absence of a director's power of attorney, are granted the authority by the LLC's legal statutes to initiate legal proceedings against the director or board of directors in a court of law.

KEYWORDS. Legal Action against Director, Legal Action against the LLC.

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Introduction

Indonesia Judicial System recognizes two types of legal subjects, including Human Beings (*naturlijke persoon*) and legal persons (*rechtspersoon*, juridical entity, corporate legal subject). Legal Persons is known as attributed legal subjectivity, and it is not the same as either the human being or the non-human entity that is granted legal subjectivity. Its existence as an artificial subject or an avatar (that enables them to take specific role(s) in law) through a legal proceeding, and requires government involvement to establish its legal standing. In theory, legislators have the ability to grant legal personhood to non-human entities, for example corporation, associations, etc. Limited Liability Company ('LLC') is a juridical entity that has to comply with Indonesia corporate 'Law Number 40 of 2007', 'Limited Liability Company Act'² which will be referred as LLC

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² 'Law No. 40 of 2007, Limited Liability Company Act,' becomes a law and is assigned an official number 106 of year 2007 (Lembaran Negara No. 106 Tahun 2007) and has been revised through 'Law No. 6 of 2023 concerning the Stipulation of Government

Act. An LLC begins with an agreement among the shareholders, and a Public Notary³ will established and registered a formal LLC's establishment deed. The deed of establishment or amendments are then continued with the online deed registration process with the Directorate General of General Legal Administration (AHU) of the Ministry of Law and Human Rights. Having registered, the LLC is entitled to take its own legal action in its own independent private domain, which is outside the realm of the personal assets of the founders or its shareholders. The following consequences of the company's independency is to be held responsible of every legal action, including risks and liabilities, to the extent of its shares' value.⁴ In other words, an LLC is a firm whose shareholders have limited liability as much as the amount of initial capital that they have contributed to settle any of the company's liability. This means that the owners' and shareholders' liability is constrained by the amount of investment they made, and they are only liable to the company.

The underlining legal justification for the limited shareholder's liability is stated in the article 3 of LLC Act, "The LLC shareholders are not personally responsible for any agreements made on behalf of the company and are not responsible for company's losses or liabilities exceeding the value of the shares that they have," as is referred as *limited liability*. The limited liability's condition does not only applicable to the shareholders but also it is applicable to other organ of the company (director and commissioner).⁵ Limited liability's statue for director and commissioner is valid as long as the way they run the company is according to the scope of authority granted by the articles of association, then directors and commissioners are not personally responsible. This due to the their (director and commissioner) course of actions is only binding on the company, and not the individual

Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law'. The changes relate to expanding the Limited Liability Company concept by adding that individual companies within the scope of micro and small businesses can also be given juridical entity status. In this article, the company referred to is only a company with a minimum of 2 shareholders.

³ Ukilah Supriyatin, Nina Herlina, "Tanggung Jawab Perdata Perseroan Terbatas Sebagai Badan Hukum", *Jurnal Ilmiah Galuh Justisi* 8, no 1 (2020): 129

⁴ Irwan Saleh Indrapradja, "Kajian Yuridis Terhadap Tanggung Jawab Direksi Dan Dewan Komisaris Pada Struktur Organisasi Perseroan Terbatas Yang Bersifat Kolegialitas Menurut Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas" *Jurnal Ilmiah Magister Ilmu Administrasi (JIMIA)* XIII, no.1 (2019).

⁵ Sri Hapsah Isfardiyana, "Tanggung Jawab Direksi Perseroan Terbatas dalam Pelanggaran Fiduciary Duty", *Padjadjaran Jurnal Ilmu Hukum* 2, no. 1 (2015).

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management. This provision is quite attractive, and has made many business owner and practitioners choose to structure their businesses ‘Limited Liability Companies (LLCs).’

Limited liability is a fundamental principle that protects the personal assets of the owners (members) of a business entity, such as an LLC, in case the business incurs debts or legal liabilities. However, there are circumstances in which this protection may be pierced, potentially exposing the personal assets of the business owners. This concept is often referred to as "piercing the corporate veil."⁶ In other words, the company's management can be held responsible personally if they have failed or have carried out their scope of responsibility beyond what has been outlined or instructed upon which may cause a net loss to the company (or to the third party). It's important for directors and managers of LLCs to understand their legal responsibilities and obligations and to act prudently and in accordance with the law. While limited liability protection is a significant benefit of the LLC structure, it is not absolute, and there are circumstances where personal liability may apply.

The company's legal actions have implications for shareholders in the form of obtaining dividends as a benefit obtained or upholding losses and causing the share's value to decrease. Considering that a company is a mere juridical entity, in order operate effectively, the company requires the liable organs. The company's organs are a separate institution which is implemented by *naturlijke persoon* and accommodated through forums such as directors, commissioners and the ‘General Meeting of Shareholders’ (GMS). Each organ has a different position from the shareholders, although it is possible that the directors or commissioners are also shareholders. Shareholders are the owners of the company.

Article 92 point (1) LLC Act stipulates that director or BOD is the main representative of the company in running as well as making necessary decision for the company. The position of director is intended for individuals on an individual basis on the basis of appointment through the General Meeting of Shareholders.⁷ There is a mutual trusting relationship between LLC as an entity with its management which lead by a director or BOD. Referring to the ‘Fiduciary Duty’ doctrine, the connection between the

⁶ Isfardiyana.

⁷ Willy Farianto. *Pekerja Menjadi Direktur: Anotasi SEMA No.1 Tahun 2022*, <https://www.hukumonline.com/berita/a/pekerja-menjadi-direktur--anotasi-sema-no1-tahun-2022-lt6413d086eeec0/>

director and LLC is considered as a *Fiduciary* relation. The Director or BOD are acting as an agent who will dedicate and conduct business to the company's best interest.⁸

Through the director's or BOD's leadership, efforts, and policies, the company's performance and existence are expected to be improved.⁹ Consequently, the shareholders will benefit financial gain from the company's growth and improvement. Through the BOD's strategic policy to achieve the company's goal, the company will be heading to a better future. In carrying out their duty, they still have to be mindful on company's broader goals, values, and principles that guide a business and its activities. Director as the central important figure and judicial representative of an LLD obligated regulating and managing the company's available resources to the best of his ability. Therefore, it is paramount that this position be held by a professional in the field who are able to bring about the growth and development of the company by meeting specific company's objectives, values, or areas of focus.

A director in his capacity as the company's officer manages the company. Directors are not in an employee status, but as leaders in administering and managing the company, including managing, maintaining and growing the assets of the company. Director conducts his duties, including managing the system, for the best interest of the company, and has judicial authority as the representative of the company before and outside the court of law. The director or BOD act on behalf of the company and always at the company's best interests.¹⁰

Another personification character that is stipulated in Article 98 number (1) LLC Act is as followed "The Company has a legal standing before or outside the court of Law." As a Juridical entity, the LLC is represented by a director or board of directors. According to M. Yahya Harahap,¹¹ a company can appeal its case of breach of contract lawsuit in front of the court of the Law or a lawsuit for Wrongful Acts against a third party. On the other hand,

⁸ Marwan, *Kamus Hukum Dictionary of Law Complete Editon*, Cetakan Kesatu, (Surabaya: Reality Pubilser, 2009), p. 207.

⁹ Irwan Saleh Indrapradja, "Kajian Yuridis Terhadap Tanggung Jawab Direksi Dan Dewan Komisaris Pada Struktur Organisasi Perseroan Terbatas Yang Bersifat Kolegialitas Menurut Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas".

¹⁰ Article 1 number (5) and Artivle 99 number (1) LLC Act stipulate that director or bod has the authority to be company's representatives before and outside the court of law.

¹¹ M. Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta, Sinar Grafika, 2021), p. 349

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the company can be sued by a third party before or outside of court of the law.

The position of director must be filled and given to individuals individually. Even though recruits for director positions have been strictly selected, as a '*naturlijk person*', there is a possibility that directors will make mistakes, either intentionally or unintentionally, or be careless in managing the company, thereby causing financial and/or liability losses to the company.

The director or Boar of Directors are obligated to initiate a GMS annually (at least once a year). During the general meeting, many decisions and/or policies are usually taken through consensus deliberation or by majority vote. If the GMS does not reach consensus, shareholders with dominant voting rights tend to determine the outcome of the GMS decisions. For shareholders with minimal voting rights, their voting rights will not be able to influence the GMS decisions if voting is used in decision making. Such position will be dire, especially, the minority shareholders do not agree with the GMS decision in accepting the directors' accountability. If, in his view, there are alleged directors' coarse of actions that cause losses to the company, the directors have to be held responsible personally, and the company shall free from such liability. In this case, is it possible for shareholders to appear as representatives of the company to take a legal action against the directors?

Method

This article discusses joint ventures that are legal entities in the form of LLC which partake in legal environment and as consequent of a legal proceeding.¹² As a juridical entity (*juridical entity, legal person, rechts person*), LLC fundamentally is a form of joint venture by consist of shareholders. The shares with their monetary value are considered as company capital that was owned and be relinquished to the company by the shareholders. Hence, the relinquished assets are no longer belong to the shareholders, but they are totally separated, be controlled, and be managed by the LLC.

In order to have status as a juridical entity (LLC), there must be at least two shareholders. This is the specific type of juridical entity (a company who

¹² M. Yahya Harahap, *Hukum Perseroan Terbatas*, (Jakarta, Sinar Grafika, 2021), p. 33

has minimum two shareholders) that will be the object of study in the writing. This study does not include LLC whose shareholders has any affiliation with the States (directly or indirectly) or Single ownership LLC.¹³

Several articles related to shareholder lawsuit rights have been published in several journals. The published topic discussion is about minority shareholders' judicial protection. This article does not discuss shareholders' judicial protection, but it points out specifically their right to act on behalf of the company to go against the director before the court of the law. In principle, it is the directors who have the authority to represent the company, while the shareholders do not act as organs of the company except in the GMS forum.

To explore the problems raised, research was carried out (*research in law*)¹⁴ which focuses on the dissection of Articles 92 to 107 LLC Act. The study includes an in-depth examination of the concept of an LLC and directors, and an analysis by the authority to represent the company. This study is also supported by the research and literature of leading legal experts regarding the relationship among companies, directors, and shareholders. The source of literatures is taken from various books and articles that have been published in various journals through *interconnected network* media. The nature of this research is *law in the book*, in the form of a variety of doctrinal legal research.¹⁵ This research is described as *descriptive prescriptive* by explaining how shareholders should be able to sue the directors in order to sustain the company's interest.

Discourse of Limited Liability Company: Theories, Practices, and Developments

H.M.N Purwosutjipto stated that the concept of "*Limited Liability Company*" comes from two separate words, including "company" and "limited". The company's words refer to its capital in the form of "sero or

¹³ Single Ownership LLC, according to Article 109 Law Number 6 of 2023, is defined as an LLC with one Indonesian citizen owner as the main shareholder. This entity is designed for micro or small business enterprise.

¹⁴ Irwansyah, Ahsan Yunus, *Penelitian Hukum Pilihan Metode dan Praktik Penulisan Artikel*, (Yogyakarta, Mirra Buana, 2020), p. 96

¹⁵ Sutandyo Wignjosoebroto, "Ragam-ragam Penelitian Hukum" dalam Sulistyowati Irianto & Shidarta, *Metode Penelitian Hukum Konstelasi dan Refleksi*, (Jakarta, Pustaka Obor Indonesia, 2011), p.121

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shares". The "limited" term means the liability of shareholders that is limited to the maximum value of the shares they control.¹⁶ Article 1 number (1) LLC Act refer to the '*Limited Liability Company*' as a company.¹⁷ Having limiting liability as feature, this type of juridical entity is quite attractive and had made it primary option for entrepreneurs. Not only in the current state of business nature, but also in the future, LLC is still be one of the better option in forming a corporate legal subject for business community who are going to use it as a vehicle to mobilize their capital to obtain financial benefits.¹⁸

The company is deemed to have freedom to function as a juridical entity to take legal action like a human being, even though it is only limited to legal aspect of wealth management. An LLC has every right to control property rights, run a business and carry out business transactions in its own merit. This freedom to manage the company does not be interfered or empowered by the shareholders. The freedom to act in this case is understood as the authority to represent to take legal action in interests and on behalf of the party who has given the power of attorney.¹⁹ However, the company's growth and activities are not based on empowerment or entitlement. Such characteristic makes this legal entity as independent legal subject. The company's legal actions are done and directed on itself, though the company's ownership shares are controlled by the shareholders.²⁰

Companies as legal subjects is the product of a legal proceeding.²¹ As a juridical entity (*juridical entity, rechts person*) in the form of a joint venture in the form of a share partnership. The Company is a capital association for the purpose of raising funds for businesses that require large capital from

¹⁶ H.M.N Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia*, Jilid 2, (Jakarta, Djambatan 1982), p. 85.

¹⁷ Please pay attention Article 1 number 1 LLC Act. '*Limited Liability Company*' is a juridical entity which is a capital association, established on the basis of an agreement, carrying out business activities with capital which is entirely divided into shares and meets the requirements.

¹⁸ Agus Budiarto, *Kedudukan Hukum Dan Tanggung Jawab Pendiri Perseroan Terbatas*, Edisi Kedua Setelah Berlakunya UU No. 40 Tahun 2007 tentang Perseroan Terbatas, (Bogor, Ghalia, 2009),1

¹⁹ Umar Mukhtar Al Hadid, "Keabsahan Surat Kuasa Jual Berdasarkan Perjanjian Hutang Piutang Yang Dibuat Secara Notariil Akta Dihadapan Notaris", *Indonesian Journal of Criminal Law (IJoCL)* 1, no. 1, (2019).

²⁰ Bonifasius Aji Kuswiratmo, *Keuntungan dan Risiko Menjadi Direktur, Komisaris dan Pemegang Saham Perseroan* (Jakarta, Visimedia Pustaka, 2016), p. 5

²¹ M. Yahya Harahap, *Hukum Perseroan Terbatas*, (Jakarta, Sinar Grafika, 2021), p. 33

many sources.²² A company is a collection of shareholders who have the similar goal of making profits as much as possible according to their own interests. Abdul R. Saliman²³ calls this collection of shares capital accumulation.

It is undeniable that the cyclical company's business transactions is part of business' norms, which is expected to bring profits, but the risk of losses cannot also be avoided.²⁴ If there is a net loss in any of the business transaction or a rise of liability, the company as an LLC will be accountable and the company's own assets will be utilized in this event. In this case, it is none other than assets that have been handed over or relinquished by shareholders to become company assets in the form of a collection or accumulation of capital. Shareholders as owners of the company have limited liability.

In essence, an LLC has a division of functions and roles between shareholders and management or directors. The company has a commissioner who has supervisory duty. In the hierarchy of controlling authority in an LLC, the General Meeting of Shareholders (GMS) forum²⁵ and its decision reside at the top level. In general, a company is born from a legal agreement so that it requires at least two parties where each party controls a certain share of shares. Any corporate juridical entity with limited liability policy has to have a minimum two shareholders. Control of shares by two parties is a minimum requirement, without any minimum regulation of share control by one party. Control of 1% (one percent) of the shares compared to 99% (ninety-nine percent) of the shares of the other party meets the minimum requirements of two parties. However, control of company shares by two people as husband and wife without a prenuptial marriage agreement does not qualify as two parties or two shareholders. In fact, an LLC is a collection of capital from various different assets and not a couple (nuptial couple). Meanwhile, the

²² Rudhi Prasetya, *Perseroan Terbatas, Teori dan Praktek* (Jakarta, Sinar Grafika, 2011), p. 4

²³ Abdul R. Saliman, *Hukum Bisnis untuk Perusahaan*, (Jakarta, Kencana Prenada Media, 2016), p. 95

²⁴ Maya Sari, Abdul Rachmad Budiono, Hanif Nur Widhiyanti, "Analisa Perlindungan Hukum Bagi Pemegang Saham Minoritas Dalam Proses Akuisisi Berdasarkan Pasal 126 Undang-Undang Nomor 40 Tahun 2007", *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 2, no. 2 (2017)

²⁵ Tengku Agung Kurniawan, "Perlindungan Hukum Hak Pemegang Saham Dalam Pembubaran Perusahaan Berdasarkan Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas (Studi Kasus Putusan Mahkamah Agung Nomor 1618 K/PDT/2016)", *Jurnal Kertha Wicaksana* 16, no. 1 (2022).

assets of husband and wife in marriage as joint assets (joint accounts) are considered essentially one single asset (or a single matrimony's assets) which cannot be separated from one to the other as long as they are bound in marriage. Unless the husband and wife have separate assets from each other based on a valid marriage agreement or prenuptial marriage agreement of which case the separation of legal asset ownership of each party is apparent and each party has his/her own right to do as his/her wish. So, we get different property ownership between husband and wife. The assets acquired by the husband belong to the husband and are under his control. Likewise, the property obtained by the wife belongs to the wife and is under her control. In this case, it is possible for the husband and wife to act as shareholders in the company.

The Right to Represent an LLC

The existence of an LLC as a legal subject is a mere legal construction. To achieve its goals, the LLC is led by a board of directors of whose primary responsibility is to manage and grow the company to the best of their ability. The directors' authority to manage the company to the best of company's interest is called *stewardship or representation*. Representation is an act of representing another party to carry out a legal action. Representation means carrying out the affairs of another party and those who are bound by the act of representing are the party being represented.²⁶

There are some representations that are according to an agreements and others on judicial provisions. Being a representative for the company in called *wettelijke vertegenwoordig or legal mandate*.²⁷

Article 1 number (5) LLC Act determines that the BOD as a company organ has the authority to represent the company before or outside the court of Law. This means that referring to Article 1 number (5) of LLC Act which gives authority to directors to act on behalf of the company, hence it is considered as a legal mandate. The authority of directors to represent the LLC is reaffirmed by Article 98 number (1) LLC Act which determines that directors obligated to represent the company inside and outside the court. It is further determined that the authority of the directors to represent the LLC

²⁶ M. Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan* (Jakarta, Sinar Grafika, 2008), p. 9

²⁷ *Ibid*

applies before or outside the court of law. Any course of actions that are taken by the directors are considered binding to the LLC that they represent. In general, the definition of management is within the scope of carrying out administrative actions and maintaining LLC assets.²⁸

Every act or deed of the directors will be considered and treated by law as an act or deed of the LLC, provided that "be considered and treated as an act or deed of the LLC" if and only if and as long as the directors' actions are *intra vires*. Their course of actions should not be an act of '*ultra vires*'. In other words, their course of actions does not exceed their authority that has been determined in the articles of association.²⁹ This is to point out that there are restrictions on the actions and actions of the directors and managing and administering the LLC.

Restrictions are placed on directors as long as their plan are in line with the articles of association and other related regulations. As long as their actions and policies are in line with what has been provisioned in articles of association, the board of directors is on a safe path without the possibility of being held personally responsible. However, if the directors' actions divert away from and deviate from the provisions of the company's articles of association, and their actions cause losses to the company for the directors, the principle of *piercing the corporate veil* can be applied. LLC act does state a provision of the principle *piercing the corporate veil* or *lifting the veil* which referring to removing the corporate identity in order to reveal the people hiding it when they defraud other while posing as a corporate entity,³⁰ and its consequences is to jeopardize the corporate entity's personal assets as a way to be responsible of one's own act.

The position of director is sometimes held by one person alone or by more than one person on the board of directors. The position structure of the board of directors is referred to as director. If there is more than one director position, the structure consists of several directors and is overseen by the

²⁸ Shenti Agustini, "Pertanggung Jawaban Dalam Perseroan Terbatas Yang Pengurusannya Dilakukan Oleh Anggota Dewan Komisaris Pasca Uu Cipta Kerja" *Jurnal Supremasi* 12, no. 1 (2022).

²⁹ Hasbullah F. Sjawie, "Tanggung Jawab Direksi Perseroan Terbatas Atas Tindakan Ultra Vires", *Jurnal Hukum Prioris* 6, no. 1 (2017).

³⁰ Indah Siti Aprilia, "Aspek Hukum Pemegang Saham dalam Perseroan dengan Satu Pemegang Saham (Single Share-holder) (Studi Komparasi Indonesia dengan China)", *Jurnal Supremasi Jurnal Hukum* 3, no. 1 (2020).

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president director or main director, who are collectively referred to as the board of directors, collectively collegial.³¹

The directors' serving term has been pre-determined, and they are eligible to be reappointed again.³² Per Article 92 paragraph (1) LLC Act, it stipulates that the authority to appoint and dismiss a director lies on the GMS, and cannot be transferred to other organs of corporation. Directors as an organ of LLC are the same as shareholders or the corporation itself, at the same time, sometimes, some directors are the shareholders of the company themselves.

Directors are appointed and dismissed by the GMS.³³ The appointment of directors is solely the authority of the GMS and this authority cannot be transferred to any other organs of the corporation. This is part of the implementation of Article 75 paragraph (1) LLC ACT³⁴ which emphasizes that the GMS entrusts the management and operations of the corporation to the board of directors solely for the interests of the LLC.

The essence of an '*Limited Liability Company*' is the director or board of directors as one of the company organ who is responsible as an interface or facet to any issue related to the corporation within or outside the corporation. Directors, who position in the front line, often becomes the main targets when the company has issues with other parties.³⁵

Directors are given authority in a large scale by the statutes (LLC Act) to act on behalf of the corporation. There are no other company organs that have the authority to represent the company apart from the directors. The authority of the directors to represent the company as a proxy on the basis of the law includes the position of director. Directors' activities are for the benefit of and represent the company without requiring authorization from the company. In general, the directors also have the authority to appoint other

³¹ Willy Farianto. *Pekerja Menjadi Direktur: Anotasi SEMA No.1 Tahun 2022*, <https://www.hukumonline.com/berita/a/pekerja-menjadi-direktur--anotasi-sema-no1-tahun-2022-lt6413d086eeec0/>

³² Article 94 number (4) LLC Act, "The articles of association regulate the procedures for appointing, replacing and dismissing members of the Board of Directors and can also regulate the procedures for nominating members of the board of directors.

³³ Article 94 number (1) LLC Act, Board of Directors is assigned by GMS.

³⁴ Article 75 number (1) LLC Act, "The GMS has authority that is not given to the directors or board of commissioners within the limits specified in the Law and its articles of association."

³⁵ Arlan Okman, et al, "Tanggung Jawab Direksi Dalam Perseroan Terbatas Di Makassar (Studi Kasus Putusan Nomor 11/Pdt. Sus-PHI/2019/PN.Mks)", *Clavia: Journal Of Law* 18, no. 1 (2020).

parties to represent the company. The authority of the directors to represent the company is not limited and does not require conditions, unless otherwise determined by the articles of association or related regulations.³⁶

The Board of Directors carries out the function of managing corporation affairs (managerial) and the function of representing the company.³⁷ In carrying out the company's operations, the directors are supervised by the commissioners, and taking certain actions may require the approval of the commissioners if so specified in the articles of association.³⁸

The position obtained by directors from shareholders is based on a sense of trust (fiduciary) to manage the company for the sake of the company itself, and it is not other interests.³⁹ Based on the *fiduciary doctrine*, the corporation's duty is the same as the directors and the directors are the same as the corporation.

As an independent legal subject, the company interacts with other third parties through the board of directors for the interests of the company.⁴⁰ The actions of the board of directors with all their policies are intended and aimed at the interests of the company. In this way, the responsibility of the directors representing the company is directed towards third parties and is also addressed internally to shareholders through the GMS.

Shareholders are the parties who have legal control over the company.⁴¹ This means that the company is jointly owned by the shareholders.⁴² Joint ownership of the company, as undivided ownership. Company shares are unitary in one unified whole.⁴³

The LLC Act provides protection to shareholders. Among other things, protection in the form of liability is limited to shares stated in the deed of establishment, or limited to shares controlled by the rights holder.

³⁶ Harahap, *Hukum Perseroan Terbatas*, p. 350

³⁷ Ridwan Khairandy, *Perseroan Terbatas Doktrin, Peraturan Perundang-Undangan dan Yurisprudensi*, Edisi Revisi, (Yogyakarta: Total Media, 2009), p. 204.

³⁸ Lestari Victoria Sinaga, Citra Indah Lestari, "Analisis Yuridis Pertanggung- Jawaban Direksi Terhadap Pailitnya Suatu Perseroan Terbatas", *Jurnal Rectum* 3, no. 1 (2021).

³⁹ Khairandy, *Perseroan Terbatas Doktrin, Peraturan Perundang-Undangan dan Yurisprudensi*.

⁴⁰ Abdulkadir Muhammad, *Hukum Perusahaan Indonesia*, (Bandung, Citra Aditya Bakti, 2010), p.124

⁴¹ Adrian Sutedi, *Buku Pintar Hukum Perseroan Terbatas*, (Jakarta, Raih Asa Sukses, 2015), p. 50

⁴² Munir Fuady, *Hukum Perusahaan dalam Paradigma Hukum Bisnis*, (Bandung, Citra Aditya Bakti, 2002), p. 39

⁴³ Fuady.

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Shareholders have rights and obligations over the company. However, shareholders are not included as organs of the LLC.

The company's organs are only the directors, commissioners and the GMS forum. A GMS is a forum that does not only consist of one shareholder but a group of shareholders. GMS is a joint forum with shareholders as scheduled by the board of directors. Shareholder activities are not clearly visible in the company's operations.⁴⁴ Because shareholders do not step down to take care of the company except for shareholders who also hold positions as directors or commissioners, and even then, they are not in the capacity of shareholders.

Article 97 number (5) LLC Act stipulates the director's legal protection or legal limited liability from any of company's debts and legal liabilities as long as he can justified his course of action in good faith. On the contrary to the article 97 number (2) and (3), the director has to justify and prove the following (as the content of Article 97 number (5)): "(a) The loss was not due to his fault or negligence; (b) Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company; (c) Have no conflict of interest, either directly or indirectly, regarding management actions that result in losses; and (d) Have taken action to prevent the occurrence or continuation of such losses."

LLC Act requires that the directors have tried and endeavoured to prevent losses from occurring. As long as he can prove that there is good faith and has acted with great care in the interests of the company. Moreover, if there is strong evidence that every action that he has taken has no conflict of interest with the corporation. In this case, ultra vires condition does not applicable to him, and he cannot be held personally liable. Any losses as the result of implication of the director's action as per above's condition are at the risk of the corporation itself.

This means that the directors are obliged to be personally responsible for the company's losses if they are guilty or negligent in carrying out their duties.⁴⁵ This responsibility is binding as long as his negligence in carrying

⁴⁴ Yanli Gandawijaya, "Kesepakatan Para Pemegang Saham dalam Rapat Umum Pemegang Saham Melalui Media Elektronik", *Proceeding APHK IV*, Palembang 2017, p. 461.

⁴⁵ Monica Caecilia Darmawan, "Perlindungan Hukum bagi Pemegang Saham Minoritas yang Dirugikan Akibat Direksi Melakukan Kesalahan atau Kelalaian", *Jurnal Jurist-Diction* 2, no. 3 (2019).

out his duty is not part of or the same as circumstances that are stipulated in Article 97 number (5) LLC Act.

The Shareholders' Structural Position in a Corporation

The parties who control company shares must have assets that are different from each other. Shareholders may be between individuals and other individuals, between individuals and other companies or by companies and companies carrying out joint business activities in the form of capital partnerships.⁴⁶ For a couple who have joint account or single asset portfolio, these two shareholders cannot count as two shareholders due to their marital status. For example, a husband and wife who own property together in marriage are categorized as owners of the same property. There is no opportunity for the two of them to set up a '*Limited Liability Company*'. However, if a husband and wife have different or separate assets based on a marriage agreement, including prenuptial or postnuptial marriage agreement, it is possible that each of them is a shareholder in the same company.

The identity of a company does not depend on the existence of its owner or its organs. Even though there is a replacement or change of shareholders or a replacement of management, this replacement will not change the existence of the company as *persona standi in judicio*.⁴⁷ This is also one of the advantages of the company because it is relatively easy and fast to carry out the transformation and the company's existence is still maintained.⁴⁸ Ensure that there are no obstacles in carrying out the company's operations, even though there are changes and shifts in the company's internal affairs.

⁴⁶ Article 7 number (7) LLC Act, Pasal 7 ayat (7) The LLC Act makes an exception for companies founded by two or more people to companies whose shares are all controlled by the State.

⁴⁷ Sovia Hasanah, "Arti dan Ciri Personalitas Perseroan Terbatas", <https://www.hukumonline.com/klinik/a/arti-dan-ciri-personalitas-perseroan-terbatas-lt5b3057223eb8f/>

⁴⁸ Wachid Aditya Ansory, Krisnadi Nasution, "Reformulasi Hukum Tentang Hak Gugat Bagi Pemegang Saham Dibawah 1/10", *Jurnal Hukum Bisnis Bonum Commune* 5, no. 1 (2022).

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The company also provides freedom for shareholders to transfer or trade the shares they control to other parties.⁴⁹

The GMS is a "meeting" forum for all owners as the highest authority in the company. So, shareholders through the GMS have the highest rights to make important decisions.⁵⁰ Company shareholders are the owners of the company, in the context of the company as having material rights. But shareholders are not part of the company's organs. The power of shareholders is in the GMS forum. The GMS forum is held at least once a year. The GMS is initiated by the board of directors as an annual obligation.

Through the GMS, directors are asked to be held accountable for the management of the company. The directors' accountability whether accepted or not accepted is stated in the form of a GMS decision. Shareholders have voting rights equal to the shares they control. There is a strong relationship between share ownership and voting rights. The greater the percentage of shares controlled, the more influence it will have on decision making. On the other hand, the voting rights of minority shareholders may have no influence in decision making based on voting.

The decision-making mechanism at the GMS forum is attempted through consensus deliberation. If deliberation fails, the next mechanism is to take a majority vote (voting). When a decision is taken based on a majority vote, it can be expected that minority shareholders will have less votes than the majority shareholder's vote. In terms of decision-making procedures based on the percentage of share ownership.⁵¹

This decision-making mechanism only provides security for majority shareholders based on the principle of majority rules and one share one vote as contained in the norms of Article 87 paragraph (1) in conjunction with Article 87 paragraph (2) linked to the norms of Article 84 paragraph (1) of the LLC Act. The substance of the content determines that all decisions in the GMS forum are taken on the basis of deliberation and consensus. However, if the forum is unable to produce consensus deliberation, it is

⁴⁹ Imam Hakim Masyhuri, et all "Efektifitas Perlindungan Hukum Pemegang Saham Dibawah 1/10 Dalam Mekanisme Pelaksanaan Gugatan Derivative Action", *Deposisi: Jurnal Publikasi Ilmu Hukum* 1, no. 3 (2023).

⁵⁰ Adji Suryapranata, Sunarmi, T Keizerina Devi Azwar 3, Dedi Harianto "Kedudukan Direksi Dalam Mewakili Perusahaan Dalam Perkara Kepailitan (Studi Perkara No.3/PDT.SUS- PAILIT/2020/PN NIAGA MDN)". *Jurnal Hukum dan Kemasyarakatan Al-Hikmah* 4, no. 2 (2023).

⁵¹ Erlinda Vivi Yusanti et all, "Keabsahan Rapat Umum Pemegang Saham Yang Tidak Sesuai Anggaran Dasar", *Locus Journal of Academic Literature Review* 1, no. 3 (2022).

determined that the decision is deemed to have validity if it obtains approval exceeding 50% or more than half of the total voting rights at the GMS.⁵² As a result, shareholders whose shareholding is relatively small cannot fight for their aspirations in the general meeting of shareholders forum other than by consensus deliberation. If minority shareholders have different views regarding the decision to accept the directors' responsibility, they will not be able to change the GMS decision which could have stated acceptance of the directors' responsibility. If some shareholders do not agree with the GMS decision regarding the acceptance of directors' responsibilities, LLC Act through Article 97 paragraph (6) has provided facilities for them.

As an alternative for the shareholders who do not agree with the GMS decisions, they can seek directors' unacceptable accountability through Article 97 paragraph (6) LLC Act. The rule stipulates that "On behalf of the company, shareholders representing a minimum of 10% (ten percent) share ownership with voting rights, have the authority to file a lawsuit in court against directors whose errors and negligence cause the company to suffer losses."

The method in Article 97 paragraph (6) LLC Act contains formal legal authority for shareholders with share control of at least 10% (ten percent), so they can act on behalf of the company to hold the directors responsible by filing a lawsuit in court. This means that the provisions of Article 97 paragraph (6) of the LLC Act allow and require the shareholders to represent the corporation before the court. It is understood that the authority of shareholders to represent the company is limited.

Shareholders represent the company to fight for the company's interests in dealing with directors who are deemed to have brought losses to the company. Shareholders acting on behalf of the company as representatives do not require power of attorney from the company, because their authority comes from the law with certain requirements. The requirements are only intended for shareholders with a minimum share ownership of 10% (ten percent).

This rule shows that apart from directors who receive the authority to represent the company, shareholders are also given the authority to represent the company. However, there are differences between the authority obtained

⁵² Dian Aprilliani, "Penerapan Prinsip Keadilan Dalam Good Corporate Governance Terhadap Pemenuhan Hak-Hak Pemegang Saham Minoritas", *Jurnal Ilmu Hukum Legal Opinion* 3 (2015)..

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by directors and the authority obtained by shareholders. The authority of the directors to represent the company is unconditional and unlimited. Meanwhile, shareholders have the authority to represent the company by fulfilling strict requirements, namely:

- a. Shareholders who are given the authority to represent the company if they control at least 10% of the shares (individually or collectively);
- b. Shareholders have the authority to represent the company only when dealing with directors whose mistakes and negligence have brought losses to the company.
- c. Shareholders have no authority to represent the company towards other third parties.
- d. The shareholder's claim to represent the company is merely a '*petitum*' asking for compensation for losses for the benefit of the company due to the fault or negligence of the directors which caused losses to the company.

In principle, there are only two types of disputes submitted to court in the form of claims for the right to receive compensation for losses, namely because of a breach of contract or because of an unlawful act.⁵³ In relation to the right to sue shareholders in representing the company's interests in court, it is only aimed at challenging unlawful acts committed by the directors against the corporation.

The claim for shareholder rights based on the provisions of Article 97 paragraph (6) of the LLC Act is different from the claim of rights based on Article 61 of the LLC Act. Article 61 stipulates that every shareholder has the right to file a lawsuit against the company in court if the company's actions are considered unfair and without any reasonable reason, as a consequent of the GMS decision, decision of the board of directors or board of commissioners. In this case, shareholders act in their own interests against the corporation through the board of directors based on the *directors' mandatory legal authority*. The context of these demands by shareholders is purely for their own personal interest. These demands that emphasized by the shareholders is to require the corporation to discontinue their course of actions that are detrimental to the shareholders. Meanwhile, the shareholder's right to sue is based on Article 97 paragraph (6), in fact the shareholder acts

⁵³ Muzakkir Abubakar, "Hak Mengajukan Gugatan Dalam Sengketa Lingkungan Hidup Right to Submit a Law In The Environmental Disputes", *Kanun Jurnal Ilmu Hukum* 21, no. 1 (2019).

for and on behalf of the company in an effort to sue the directors personally before the court. This means that shareholders apply for the right to sue not only for their direct interests as stipulated in Article 61 of the PT Law, but also the shareholders have a right to sue on behalf of the corporation's interests.

It can be seen that the authority of shareholders to represent the company based on Article 97 paragraph (6) of the LLC Act is granted by law in order to hold the directors personally responsible for the corporation's financial loss. This means the demands of shareholders in order to fight for the interests of the company so that losses suffered by the company are transferred to the personal responsibility of the directors. The transfer of liability is breached by using and proving the existence of *ultra vires* based on a court decision. Court decisions become a legal source for parties in dispute to neutralize the losses suffered.

Based on the provisions of Article 97 paragraph (6) of the LLC Act, shareholders who meet the requirements have the authority to represent the company without requiring authorization from the board of directors. This provision provides space for shareholders to participate in supervising the company's operations by the directors, and act on behalf of the company when the directors are in an *ultra vires* condition.

It should be point out that shareholders are not organs of the company, but under certain circumstances and certain requirements it is possible for shareholders to represent the company as a legal mandate to sue the directors in court. In this case, the law through Article 97 paragraph (6) gives a mandate to shareholders. The mandate given by law to shareholders is to represent the company's interests in dealing with the personal directors and is called a derivative lawsuit mechanism.⁵⁴ This derivative lawsuit is opposed to a direct shareholder lawsuit against the company for the benefit of the shareholder as plaintiff.

The lawsuit filed by shareholders in this case is not for personal interests. But acting for and on behalf of the company. If the lawsuit is granted, the corporation will obtain the remedy or compensation for the loss.

This means that if there is a dispute between shareholders and directors who are deemed to have committed *ultra vires* actions and caused losses to the corporation. If the dispute cannot be resolved by deliberation and

⁵⁴ Imam Hakim Masyhuri, et.al. "Efektifitas Perlindungan Hukum Pemegang Saham Dibawah 1/10 Dalam Mekanisme Pelaksanaan Gugatan Derivative Action".

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consensus, then resolution through court is the final resort (*ultimum remedium*). Shareholders who can represent the company when in conflict with the directors personally are not only minority shareholders.

Conclusion

The LLC carries out its legal activities through representation by the board of directors. The authority of the directors to represent the company is based on Article 1 point (5) and also Article 98 paragraph (1) of the LLC Act. Management of the company is the responsibility of the directors. In legal terms, companies are the same as directors. The company organs are the Directors, Commissioners and General Meeting of Shareholders. Shareholders are not an organ of the company, but in certain circumstances shareholders are given the authority by law (*legal mandatory*) to represent the company before the court when dealing with directors who have acted to bring losses to the company.

Shareholders' authority to represent the company before the court in dealing with the directors is only with the requirement of controlling at least 10 percent of the shares, either individually or collectively. However, shareholders still have no authority to represent the company against other third parties either before or outside the court.

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