

Investment Manager Legal Liability for Mutual Fund Losses Associated with Disgorgement Fund for Investor Protection

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ABSTRACT

In managing investors' funds, sometimes investment managers often make mistakes or commit crimes that cause losses for investors. Accountability given by investment managers is often unable to meet the demands given and this is what causes a lack of legal protection for investors.

Based on the results of the analysis carried out, the results obtained, first the current investment manager can provide a form of criminal and civil liability. Second, the role of the Disgorgement fund works more effectively than filing a lawsuit for civil compensation to the court or outside the court, which is more difficult to prove and the implementation process. Third, although the presence of the Disgorgement fund has several advantages over other legal protections, this cannot be separated from the drawbacks in the application of the disgorgement fund as well.

Keywords: Capital market, Disgorgement fund, Investment manager liability, Investor legal protection.

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I. BACKGROUND

Mutual funds are a forum and pattern for managing funds/capital for a group of investors to invest in investment instruments available in the market by purchasing Mutual Fund units. These funds are then managed by the Investment Manager (MI) into an investment portfolio, either in the form of stocks, bonds, money markets or other securities/security. And according to the Capital Market Law no. 8 of 1995 article 1, paragraph (27): "Mutual funds are a forum used to collect funds from the investor community to be further invested in Securities portfolios by Investment Managers." (Fuady, 1996).

There is an increase in public interest in investment, so there are also many loopholes in crime in the investment sector. So, it cannot be denied that in any country, the development of the capital market cannot be separated from crime. Law No. 8 of 1995 concerning the Capital Market (UUPM) has clearly explained the types of criminal acts in the capital market sector in Articles 90 to 98 such as fraud, market manipulation, and insider trading. However, so far, the perpetrators of crimes in the capital market are only processed through general criminal acts and cannot recover the losses suffered by investors. So that the consequences of crimes committed by certain parties in the capital market are very detrimental to investors. With the many incidents of criminal acts in the activities of transacting in the capital market itself, it makes investors feel worried or in making investments due to the lack of legal protection that overshadows them.

With this in mind, the Financial Services Authority (OJK) provides a legal instrument that can provide legal protection to investors called the Disgorgement fund system, which is a system that will collect refunds from perpetrators of criminal offenses in the capital market so that the refunds paid for The collected funds can be distributed to pay for the losses suffered by investors as a result of criminal violations that have been stated in the Capital Market Law itself. The Disgorgement fund system is regulated in POJK No. 65 /POJK.04/2020 concerning Return of Illegal Profits and Investor Loss Compensation Funds in the Capital Market Sector.

Disgorgement fund is very necessary for its existence in complementing the shortcomings of the criminal law policies in the Capital Market Law which have not been effective and there are still many capital market crimes. There are several examples of cases that can be used as a reference to the importance of protection from the Disgorgement fund system, such as the alleged insider trading case of PT Jouska Finansial Indonesia and the Case of Embezzlement of Customer Funds from PT Sarijaya Permana Sekuritas. So, from this, it can be said that the importance of implementing the Disgorgement fund system in providing legal protection for the community is very necessary in investment activities and also complements the lack of effectiveness of criminal law policies in the Capital Market Law.

II. DISGORGEMENT FUND ARRANGEMENTS IN THE PROVISIONS OF INDOONESIAN LAWS

Disgorgement fund itself is a legal effort taken by the United States initially in handling criminal cases in the capital market. In terminology, Disgorgement is “the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.”(Garner, 2004). Which is interpreted as giving up profits based on orders or legal coercion obtained illegally. Disgorgement fund can also be interpreted as an order from the competent authority as a result of an act that is detrimental and coercive, if it is not paid, "forced efforts" can be made through the court. Meanwhile, based on the regulation of the financial services authority of the Republic of Indonesia number 65/POJK.04/2020 concerning returns of illegal profits and compensation funds for investors' losses in the capital market sector, this is an order from the Financial Services Authority to return profits or losses that are illegally avoided by parties who commits and/or Parties that cause violations of the laws and regulations in the capital market sector.

There are several categories that can cause losses for investors who deserve to get a Disgorgement fund, namely:

1. Investors in the Indonesian capital market who suffer losses due to criminal acts committed by the perpetrators.
2. Investors who experience such losses file a claim within the specified timeframe.
3. Investors who experience such losses have not submitted other legal remedies, are currently filing other legal remedies, or will not file other legal remedies and have not received compensation from parties subject to illegal return of profits in connection with violations of laws and regulations in the same capital market sector unless otherwise stipulated by OJK.

In this case, there are also several parties that may be subject to disgorgement funds in carrying out activities in the capital market, including:

A. *Brokers and Capital Market Supporting Professionals*

Stock Broker or broker is an individual or legal entity company that acts as an intermediary for buying and selling shares in the capital market and has the responsibility to carry out duties or directions from investors to carry out securities buying and selling activities in accordance with applicable regulations on the stock exchange, providing data and information for investors or customers, help manage investor or customer funds and provide advice or considerations regarding the sale and purchase of investors' securities.

B. *Issuer*

Issuers are parties that make public offerings to sell securities to the public in accordance with the provisions stipulated in the applicable laws and regulations. In UUPM, issuers themselves are described as parties conducting public offerings.

C. *Tippee*

Tippee is a person who can be categorized as a party who is not an insider but gets information from insiders so that he can be charged with insider trading.

D. *Corporate Insider*

In this case, the parties included in the Corporate Insider are explained in the Capital Market Law which explains that the Commissioners, directors, employees of issuers, public companies, major shareholders of issuers or public companies, Individuals who because of their position or profession or because of their business relationship with the issuer or a public company allows that person to obtain inside information, and a Party that within the last 6 (six) months is no longer a party involved in it.

III. ANALYSIS OF THE ACCOUNTABILITY OF INVESTMENT MANAGERS WITH THE DISGORGEMENT FUND SYSTEM FOR INVESTORS

An investment manager has a role in managing investors' mutual funds, which in this case means an Investment Manager has an important role and responsibility that is not light in managing investors' funds. So that success or failure in managing is fully the responsibility of the Investment Manager.

The liability of the investment manager in a civil manner based on unlawful acts has been determined in Article 1365 of the Civil Code in which the form of responsibility can be in the form of providing compensation to investors who are harmed due to the negligence of the investment manager.

Meanwhile, the criminal liability of an investment manager is regulated in Article 104 jo. Article 96 of Law Number 8 of 1995 concerning the Capital Market stipulates that investment managers and anyone related to stock investment product transactions, including insider trading as referred to in Article 95 of Law Number 8 of 1995 concerning Markets Capital that influences other parties including customers or provides information to any party so that the purchase or sale of securities can be punished by a maximum of 10 (ten) years and a maximum fine of Rp. 15,000,000,000 (fifteen billion rupiah).

So, from this, it can be said that an investment manager can be held criminally or civilly responsible for his negligence in the form of liability in the form of providing compensation to investors by surrendering their assets, canceling existing agreements, or can be punished with a maximum of 10 years imprisonment. (ten) years.

The presence of the Disgorgement fund system can be said to be a new step that will be implemented by OJK in providing protection for investors. The Disgorgement fund mechanism acts as a form of refund, which is a form of settlement effort that is facilitated by OJK internally and this is done in the administrative settlement, which results in the imposition of the Disgorgement fund not being independent but attached to when OJK imposes administrative sanctions on perpetrators of regulatory violations. capital market legislation.

Where the Disgorgement fund itself in Indonesia, it can provide legal protection for investors in it, where the Disgorgement fund can work more effectively than filing a lawsuit for civil compensation to the court or outside the court which is more difficult to prove, and the implementation process. And later it is hoped that the Disgorgement fund can increase investor awareness of losses as a result of violations of laws and regulations in the capital market and investors have the opportunity to receive a refund of their funds through the Disgorgement fund mechanism.

There are several positive things that can be obtained by the community with the presence of the Disgorgement fund system, namely:

- 1) The crime rate in the Indonesian Capital Market can decrease with the Disgorgement fund, where the Disgorgement fund is a form of repressive legal protection where the application of sanctions in the form of an *ultimum remedium* for parties who violate the legal rules in capital market regulations (Dimiyati, 2014). So with this, it is hoped that in the future the crime rate in the Indonesian capital market can decrease due to remembering that the compensation that must be borne by the perpetrators of crime and other penalties is very large so that later it can provide a deterrent effect and decrease the number of existing crimes.
- 2) The Disgorgement fund system can recover investors' losses due to fraud committed by criminals in the capital market. In general, if investors do not want to remain silent, then a civil lawsuit can be the only option that can be used, but on the one hand we can see that by filing a civil lawsuit, many things need to be prepared and this can take a lot of time. . So that it is rarely done by investors who experience losses in the capital market. This is what the government is trying to fix by implementing a disgorgement fund system. Disgorgement fund is the right choice for investor protection in the Indonesian capital market, with a disgorgement fund, investors do not have to bother to get compensation for the crimes they have experienced. In this case, investors only need to follow the procedures described in POJK No.65/POJK.04/2020 and investors who experience losses need to prove that they are entitled to the compensation funds that have been collected.
- 3) The integrity of the capital market in Indonesia can be maintained with a Disgorgement fund where market trust and credibility are the main things that must be reflected in the partiality of the capital market legal system in the interests of investors from actions that can destroy investor confidence so that protection of investors is a crucial point in capital market activities itself (Nasaruddin and Indra, 2004). Lack of trust from the public on the legal protection that the government can provide in the Indonesian capital market sector can have a significant impact on the economy itself. The presence of a Disgorgement fund can provide a sense of deterrence and make perpetrators think again about committing crimes in the capital market because what they are responsible for is quite large. So, from this, it can be said that with the presence of the Disgorgement Fund, the government can provide a sense of trust and security to investors which in the future can increase the sense of trust, credibility, and integrity of the capital market in Indonesia can be maintained properly.

In addition to positive things that can be accepted by the community, there are also negative things that arise with the implementation of the Disgorgement Fund, namely:

- 1) The impact of losses received by investors due to disgorgement funds imposed on perpetrators of capital market crimes. Where in the application of the disgorgement fund there are several parties that can be subject to the disgorgement fund, one of which is the issuer. If the disgorgement fund is imposed on the issuer, then the issuer is the one who is subject to the disgorgement fund, not the representatives or individuals who committed the crime. With the occurrence of a crime committed by the issuer, the issuer itself is subject to a disgorgement fund and this can have a detrimental impact on investors. So, it can be said that the imposition of disgorgement funds on issuers is an inappropriate action, which can have a negative impact on investors who own shares in the issuer so that it can harm other investors instead of providing legal protection to investors.
- 2) There is an inability to pay the parties subject to the disgorgement fund. The inability to make payments is of course something that is often done by the parties concerned. These things can arise due to the unavailability of cash or assets owned in making the compensation payment. In Article 9 of POJK No.65/POJK.04/2020 concerning Return of Illegal Profits and Investor Loss Compensation

Funds in the Capital Market Sector, which makes the process of refunding funds difficult for investors and takes quite a long time. So, in this case, it can be said that the disgorgement fund system still has several shortcomings in providing legal protection for investors considering that if something happens such as the inability to make compensation, investors still need to file a lawsuit and file for bankruptcy which is time consuming and costly. which is quite a lot in the process.

- 3) There are difficulties in proving crimes in the capital market. In some cases, such as insider trading or market manipulation, things often happen which are difficult to carry out the proof process, which can be categorized as white-collar crimes which are carried out in an orderly manner so that it is difficult to prove. So, it can be said that proving a crime in the capital market is very difficult to do, which has a huge impact on the disgorgement fund system itself. With the difficulty of proving the crime, investors will also experience difficulties in getting compensation for a crime in the capital market and can also provide an opportunity to provide an opportunity for elements in the capital market.

IV. CONCLUSION

The responsibilities of an Investment Manager based on Article 27 of Law Number 8 of 1995 concerning Capital Markets are in the form of criminal liability, the imposition of administrative sanctions or forms of compensation, and cancellation of agreements between investment managers and investors. Meanwhile, the role of the Disgorgement fund system in legal protection for investors for losses that occur due to criminal acts in the capital market is to be able to provide legal protection for investors in it, in which the disgorgement fund can work more effectively than filing a lawsuit for civil compensation to a court or out of court. which is more difficult to prove and the implementation process. The advantages of the disgorgement fund system are the reduction in the crime rate, the recovery of funds due to the loss of fraud in the capital market and the integrity of the Indonesian capital market can be maintained, but if we look at the other side, the disgorgement fund still has several shortcomings in it. , such as the difficulty in proving a crime, and the difficulty if there is an inability to pay the parties subject to the disgorgement fund as well as the inaccuracy in the imposition of the disgorgement fund on certain parties. However, in this case, it can be said that the disgorgement fund, which is a remedial action, is more effective than just an administrative fine to provide a deterrent effect to perpetrators of violations of capital market laws and regulations, and is more effective than filing a lawsuit for civil compensation in court or out of court which is more difficult to prove.

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