



Concept of Establishing a Legal Entity for *Tabarru' Funds* as a Stakeholder Representative of Sharia Insurance Participants

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Abstract

This study explores establishing a legal entity as a representative body for participants in Islamic insurance, in light of current Indonesian regulations and the fatwas and guidelines issued by the National Sharia Board of the Indonesian Council of Ulama (DSN-MUI). Using a normative juridical method with statutory, comparative, and conceptual approaches, this research draws on primary legal materials—including statutory laws and DSN-MUI fatwas—and secondary sources such as scholarly literature and credible legal documents. The proposed legal entity aims to represent the collective ownership of Islamic insurance participants. It suggests forming an internal body comprised of participant representatives from various regions, modeled after the Badan Perwakilan Anggota (Member Representative Body) in mutual insurance. This initiative is intended to enhance participant rights and address conflicts of interest arising from Islamic insurance companies' dual role as both fund managers and supervisors. Despite its potential, forming such an internal legal body faces practical and legal obstacles, including financing issues, representative selection criteria, operational efficiency, and the absence of specific regulatory support. Furthermore, the existing authority of the Sharia Supervisory Board (DPS) is limited to Sharia compliance oversight. As a viable alternative, appointing an Independent Commissioner to represent participants is recommended. This solution is grounded in existing laws, such as the Company Law, Insurance Law, UUP2SK, and relevant OJK regulations. It can be enhanced by establishing a Dana Tabarru' Funds committee under Article 121(1) of the Company Law to ensure stronger accountability and protection of participants' interests.

Keywords: Tabarru Fund Legal Entity, Independent Commissioner, Sharia Insurance Regulation

Introduction

Justice in the aspects of life cannot be separated, because justice is a right that must be fulfilled for every citizen as stipulated in the constitution in Article 28 letter G of the 1945 Constitution, both the right to obtain protection for personal and assets owned. (Muhammad Natsir, et al 2022) Therefore, insurance often protects life and health and provides security for legal liability and goods and services whose value is shrinking or even potentially disappearing. (Heru Sugiyono, et al 2021) Meanwhile, the concept of justice that exists in sharia is to place something in its position. (Nurlaila Harun, 2021) Therefore, justice is also considered as the fulfilment of individual rights through establishing and enforcing the law as stated in Qs. An-Nisa verse 58:

...وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

‘When you judge between people to judge with justice’...

The relationship between positive law and sharia both affirm that justice should be upheld and absolutely fulfilled. (Srifariyati and Afsya Septa Nugrah, 2019)

Then if we draw the relevance of a justice based on positive law into the concept of forming a legal entity of sharia insurance tabarru funds, this is stated in Article 53 paragraph (1) of Law Number 40 of 2014 concerning Insurance (Insurance Law), where the rights of policyholders are guaranteed and protected by the state. (Wetmen Sinaga, 2022) Meanwhile, if referring to the objectives of sharia law, the term Hifz-Nafs or protecting human life is known, then the urgency of the concept of establishing a legal entity of tabarru funds is very relevant, because in addition to protecting oneself outwardly but maintaining the rights of policyholder participants from potential injustice in sharia insurance. (Nabila Farhana, 2024) Justice is often the main concern in advertising Islamic insurance products, in offering to the public, it is said that if sharia insurance justice will be felt among the participants, because they bear each other from health risks, damage to goods and vehicles, and there is no forfeit fund as in conventional insurance where the premium paid automatically belongs to the company. Without exception, the banking industry also requires insurance as a protection in channeling funds to the community. (Rahma Selina Yustika Yanti and Arief Suryono, 2024)

Conventional insurance companies and sharia insurance have very clear differences, namely in terms of legal standing conventional insurance is based on Article 264 of the Commercial law. (Karin Elizabeth and Christine Kansil, 2024) While sharia insurance is explained in Law Number 40 of 2014 which substantively confirms, ‘sharia principles in insurance activities based on fatwa’. (Iip Harnoto Prayogo and Syufa’at, 2023) Another basic differentiation is the principle of ta’awun or mutual assistance between participants in sharia insurance to protect each other. While in conventional insurance participants buy protection from the company directly. (Khotibul Umam, 2021) If this is drawn to the sharia aspect, the law of gharar (uncertainty) applies. (Haqiqi Rafsanjani, 2022) Not only that, maysir (Gambling) because buying and selling in sharia must be deliverable, known in size and time of delivery,

because a grant contract between participants can overcome this, because it is not limited in time and based on the principle of willingness. (Amalia Fadilah and Makhrus, 2019)

Then based on the Fatawa of the National Sharia Council of the Indonesian Ulama Council Number 52/DSN-MUI/III/2006 concerning Akad Wakalah bil Ujrah in Islamic Insurance and Islamic Reinsurance, it substantively states that Islamic insurance companies act as managers of funds deposited by participants to distribute claims and profit sharing on investments through a collection of tabarru funds or investments from private participants through insurance products linked to investment (PAYDI). (Emy Widyastuti and Anis Sholihah, 2022) Islamic insurance companies for their performance are entitled to get wages or ujrah and returns from investments in the event that Islamic insurance companies put their funds into investment. Also, Islamic insurance companies often take part if there is an underwriting surplus or the number of claims is less than the contribution, even though this fund is intended for participants. (Prudential Syariah, 2024)

The profits obtained by Islamic insurance companies, in fact, are not balanced with the fulfilment of the rights of participants so that justice is often not seen and this reaps several problems, namely the first issue of ownership where when participants who register with the company and pay every month, but the funds are put together in one place called the tabarru fund collection. Then the funds belong to the collective participants no longer individually, so this fund loses its representative because the participants are not in a position as representatives of other participants. (Amalia Fadilah and Makhrus, 2019) The written contract in the policy between the participant and the Islamic insurance company is wakalah bil ujrah or the participant's representative for the management of the participant's funds, therefore it is not possible at the same time to be the participant's representative to oversee the funds he manages himself, this is included in the second problem of the issue of unity of function. (Miftah Hanny Safira, et al, 2021)

Tabarru funds owned by collective participants, every activity involving these funds should have the permission of the participants, including in the matter of claims in the event of ex-gratia, where claims are given outside those stated in the policy, then who has the right to approve this while among the participants are not in a position to represent each other, therefore this is included in the third issue of claim distribution issues. (Surahmad, 2023) Meanwhile, the fourth issue is when the Financial Services Authority through POJK Number 11 of 2023 substantively encourages Islamic insurance companies to immediately spin off a maximum of 2026 with two options: creating a new entity or transferring the portfolio to another company. (Info Bank News, 2024) In the event that the company chooses the second option that has the potential to cause obstacles, the company is obliged to provide negative confirmation to active participants as approval for the transfer of the portfolio. As the provisions of Article 5 POJK Number 11 of 2023 that the rights of participants should not be reduced, if there are 1 million active policies, it is not impossible to hamper this process and the effectiveness and efficiency of the tabarru fund portfolio can be eroded.

The absence of a real legal form of ownership of tabarru funds results in a conflict of interest for the company as a manager of claims and investments. Participants have no power,

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when the policies taken by Islamic insurance companies are more favourable to them, because the business profit orientation that is built is different from the principle of ta'awun or mutual help in Islamic insurance. (Irvan Rahardjo, 2020) The fifth issue regarding underwriting surplus is in principle to be distributed entirely to the tabarru fund pool, which aims to make the next period's contribution costs cheap, but over time the company often takes policies to get it and although this is justified by the National Sharia Council Fatwa Number 53 / DSN-MUI / III / 2006 concerning Tabarru 'Akad, but whether the participants do not have bargaining power over this policy, who can represent the participants to bid for the underwriting surplus policy. (Galuh Vida Khumairoh and Renny Oktafia, 2020) Then the tabarru funds collected in addition to being allocated for claim needs, the company is entitled to a share of the contribution for its performance in managing. Currently, the maximum amount of ujah or upper limit wages is 50% of the contribution, but because tabarru funds come from Islamic insurance participants, participants should still have the right to make offers to companies in terms of fund placement which results in the deduction of tabarru funds for claims much less, therefore this is included in the sixth issue. (Dewan Syariah Nasional Majelis Ulama Indonesia, 2020)

Disputes between participants and Islamic insurance companies related to claims often occur, but the position of individual participants is often in the weakest position. Participants act on behalf of the owners of tabarru funds which are collective in nature because they feel they have rights in them, even though in essence tabarru funds are not funds belonging to personal participants but to the community. Meanwhile, the Surakarta Religious Court decided one of the cases, which had Number 660/Pdt.G/2021/PA.Ska. The plaintiff is an Islamic insurance participant where there is a problem of claims that Islamic insurance companies do not disburse. However, the panel of judges decided that the lawsuit was rejected. Then the Constitutional Court has also issued decision number 83/PUU-XXII/2024 which substantively states that the norms of Article 251 KUHD are revoked. (Mahkamah Konstitusi, 2025) This will certainly have an impact on the goodwill of participants for companies in terms of providing information that has the potential to be misused, so this is included in the seventh issue. (Kontan, 2025) Then if there is a discount given from the hospital (vendor), because of the collaboration between the sharia insurance company and the hospital, where the claim given by the company is given a discount, then the rest of the discount will be given to the participants as a whole or back to the tabarru fund pool, then this is whether approval needs to be given to each participant. If so, this causes inefficiency and effectiveness from the business side, therefore this is the eighth issue as the urgency of the concept of forming a body as a representative of the participants. (Sakinah and Yusrial, 2023)

Islamic insurance membership also has not yet obtained a strong legal position and is represented for its interests, while the Islamic banking sector has implemented protection of rights for customers receiving financing, namely through proof when delayed repayment of obligations in the event of default. (Mariya Ulpah, 2020) Other financial industries are basically familiar with the existence of representatives to safeguard user rights. In the capital market, for example, there are trustees who, based on the law, function as representatives of the interests of investors in securities such as bonds and sukuk. (Kaiji Natanael Pangihutan, et al, 2023) Then in the insurance industry, this representation is already known, but in the form of a

member representative body in insurance with a joint venture legal entity that functions to help members get their rights. (Kongres Advokat Indonesia, 2021)

Literature Review

Heru Sugiyono, Surahmad, Muhammad Helmi Fahrozi, Atik Winanti, Satino, "Problematics Of Insurance Companies That Failed To Pay The Customer", *Journal of Cardiovascular Disease Research* Volume 12 Issue 2, 2021. Relevant with studies, this paper have a conclusion insurance company defaults are poor management, weak insurance governance, lack of prudence in investment placement, and poorly implemented risk management. The responsibility of the insurance company if it fails to pay to customers can offer restructuring programmes to policyholders through registration schemes, socialisation, and agreements. With restructuring efforts, it is expected to minimise the risks and losses received by policyholders, so that the benefits of the policy will continue.

Diani Sadiawati, Rianda Dirkareshza, Anastasia Bernadin Dwi M., Mimin Mintarsih, Megafury Apriandhini, Rosalia Dika Agustanti. "Improving the Economy of Persons with Disabilities through Copyright Registration and Registration of Individual Legal Entities in Support of Sustainable Development Goals", *Journal Masyarakat Mandiri* volume 7 Issue 4, 2023. Relevant with studies, this paper have a conclusion about legal entity licensing procedure in Indonesian.

Heru Sugiyono, Suherman, Khoirur Rizal Lutfi dan Handar Subhandi Bakhtiar. "Legal Certainty of Application for Postponement of Debt Payment Obligations Against Insurance Companies that Fail to Pay". *Journal of Namibian Studies* Volume 34, 2023. This paper have a conclusion, the role of the Financial Services Authority as an authorised institution in managing bankruptcy applications against insurance companies to increase public confidence in insurance companies is not solely to bankrupt the company. Then there has been legal uncertainty when the Panel of Judges of the Commercial Court granted the PKPU application filed by the creditors against PT Asuransi Jiwa Kresna (Kresna Life).

Ucu Solihah, "Management of Islamic Insurance Contributions in Indonesia and Malaysia" Thesis UIN Syarif Hidayatullah Jakarta 2023. This research have a conclusion the similarity of the provisions between Indonesia and Malaysia, which covers the ownership status of *tabarru'* funds, the dichotomy of participant funds with company-owned funds, then in the scheme of Islamic contracts used, to the treatment in the event of an underwriting deficit and the return of *tabarru'* funds. While the significant difference lies in the use of *mudharabah musytarakah* and *qardh* contracts in Islamic insurance, then distribution when there is an underwriting surplus, as well as the existence of Participant Risk Fund (PRF) and Participant Investment Fund (PIF). Furthermore, when compared with legislation theory, the rules regarding the management of Islamic insurance contributions in Indonesia have accommodated the steps that must be taken based on rules, communication, interests, and processes. Meanwhile, Malaysian regulations only accommodate the steps taken based on indicators of regulation, communication, and interest. However, both the Indonesian and Malaysian

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regulations have not accommodated some of the measures to be taken based on the indicators of ideology, opportunity and capacity.

Heri Sugianto, “Sharia Economic Law Analysis of Premium Amounts Based on Age in Sharia Life Insurance”. Thesis UIN Raden Intan Lampung, 2023. This research have a conclusion the amount of premium or contribution of sharia life insurance in the context of sharia economic law rules in Indonesia based on age determination. That there is an understanding of corporate governance principles, insurance company regulations, and sharia guidelines. regulations in the Minister of Finance Regulation Number 152/PMK.010/2012, become the basis for the implementation of good corporate governance principles, while Government Regulation Number 81 of 2008 and Law No. 40 of 2014, become the basis for rules that accommodate aspects of the implementation of the insurance business as a whole. In the context of Sharia Economic Law, the Fatwa of the National Sharia Council Number 21/DSN-MUI/X/2001 is the spirit of the compliance aspect of sharia life insurance with sharia principles.

Fauziah, “The Effect of Insurance Premiums and Products on the Decision to Become a Customer of PT Asuransi Takaful Keluarga Pekanbaru”. Thesis UIN Sultan Syarif Kasim Riau, 2023. This research have a conclusion there is an influence of the amount of the contribution price or premium of an Islamic insurance product on the decision for the community to register as a participant or customer of Islamic insurance, this is evidenced by the results of the t test in the regression test besides that the benefits of Islamic insurance products also determine the community's decision in choosing whether to become a customer or not.

Research Method

According to Van Apeldoorn, the view related to juridical normative research is research that has critical power related to law. Meanwhile, Mark Van Hoecke's juridical normative research is closely related to legal teachings that emphasise legal positivism. So, it can be concluded that juridical normative research is useful for comprehensively and in depth analyses of rule by rule. (Djulaeka and Devi Rahayu, 2019) This research uses several approaches: legislation, comparative law, and conceptual. As follows:

1. Legislative Approach

This approach is closely related to regulations or legal positivisation. In this study, it is used as an illustration of the urgency of the formation of the legal entity of tabarru funds as a representative of the stakeholders of sharia insurance participants analysed through the lens of statutory law. (Mukti Fajar and Yulianto Achmad, 2010)

2. Legal Comparative Approach

This approach is often called legal comparative, which compares two different legal bases and looks for common ground. In this study, it is fundamental because there are two basic sources of arguments used, namely positive law and Islamic law, by using this approach,

it is easier to inventory and codify laws that are useful in answering problems. (Ratno Lukito, 2022)

3. Conceptual Approach

This approach can also be described as a study approach, because it is useful for analysing theories by conducting experimental methods through literature data. Then this approach can also be useful for mapping the theoretical and conceptual framework as a research knife where legal entities and sharia insurance are the studies in this research. (Mukti Fajar and Yulianto Achmad, 2010)

The type of research used is juridical normative, therefore in order to obtain maximum results, it is necessary to divide primary legal sources in the form of laws and regulations and fatwas, secondary legal sources in the form of draft legislation, books, journals, views of legal experts and interview results, and tertiary legal sources to help facilitate the translation of legal language using the Big Indonesian Dictionary, as well as through legal encyclopedias. (Muhaimin, 2020) The collection of material information in juridical normative legal research, as stated by Mukti fajar and Yulianto, is carried out through literature studies through legal materials, both primary, secondary and tertiary. The management of legal materials can be done through three steps, namely: (Mukti Fajar and Yulianto Achmad, 2010)

- a. Screening of materials or examination, through the materials obtained, inventorying whether there are still deficiencies and are appropriate and able to answer the hypothesis.
- b. The second process is through adjustments, after being codified from various existing sources, then the next sorting of the material that has been taken is combed again to adjust the research hypothesis problem.
- c. Systematisation, the material that has been combed since the initial process and edited, then arranged in order, to facilitate the process of analyzing the material.

Analysis of legal materials is carried out with both statutory, comparative law and conceptual approaches. The legal materials used are certainly based on the applicable statutory provisions combined with fatwas from the National Sharia Council of the Indonesian Ulema Council related to sharia insurance. In order to sharpen the results of a comprehensive analysis of the excavation of codified legal sources, the theory of legal entities and the theory of Islamic insurance became the analytical knife in this study. Then, the existing legal materials are interpreted systematically with hypotheses to identify the opportunities and challenges of the formation of legal entities of tabarru funds. If primary legal materials are insufficient, it is possible to conduct interviews with relevant stakeholders, namely the Financial Services Authority and the National Sharia Council of the Indonesian Ulema Council, as an addition to secondary legal materials, so that hypotheses can be proven to create solutions.

Result and Discussion

A. The concept of establishing a Tabarru Fund Legal Entity as a representative of stakeholders of Islamic insurance participants

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Islamic insurance is a dichotomous system from conventional insurance with a fundamental differentiation: each participant or customer helps each other and protects against risks in a group. (Azhar, et al, 2025) The participants commit to each other by paying contributions or premiums in the form of tabarru or benevolence in accordance with the policy they receive. Therefore, the funds paid are included in a container called a collection of tabarru funds. (Indah Gumala Andirasdini and Mutiara Nurtandhee, 2023)

Meanwhile, the Islamic insurance company is the party that needs to manage insurance and invest in tabarru funds. In its capacity as a representative, the insurance company can take care of all the needs of participants and is entitled to receive wages. As an investment manager, it is entitled to receive profit sharing from the investment of tabarru funds. (Kisanda Midsen, 2023)

The policy that is bound between the participant and the company is based on a sharia contract, so the following tabarru (social) and tijari (profit) contracts are used in Islamic insurance: (Nafisa Nur Apriyanti and Kustiawan Abdurrahman, 2024)

1. Tabarru

This tabarru contract is binding between individual Islamic insurance participants. In theory, tabarru contracts are non-commercial in which one party gives and the other receives. Meanwhile, in the theory of Islamic insurance, tabarru contracts give each other by paying contributions or premiums and receiving claims for the risks borne. (M. Syukran Yamin Lubis, 2022)

2. Wakalah bil Ujah

Wakalah bil ujah agreement as the basis for managing tabarru funds both managerially and investment. This agreement is commercial in nature with the consequence that participants must pay for the services provided by Islamic insurance companies. The commercial role of the company is not the main feature in the existence of Islamic insurance, because this role can be held directly by the participants themselves or the state. Therefore, the wakalah bil ujah contract is not the main contract in Islamic insurance, considering that Islamic insurance allows wakalah to be carried out without ujah or fee. This is based on Decision Number 200 (21/6) of the International Islamic Fiqh Academy which states:

“...Cooperative insurance is managed by an independent licensed body that works in compliance with the rules of Shariah and may take one of several forms of which most notable are the following:

- 1. A selected panel of policyholders.*
- 2. A specialized insurance management*
- 3. A Public institution established by and report to a state or number of...”*

This decree clarifies that Islamic insurance is managed by an independent body mandated to manage and work per sharia provisions. The form of this legal entity can be chosen from among insurance participants, companies specialising in managerial, or public institutions established by the state. Later in the decree an affirmation was added:

‘...Regarding management of insurance business: the relationship is according to agency contract, with or without...’

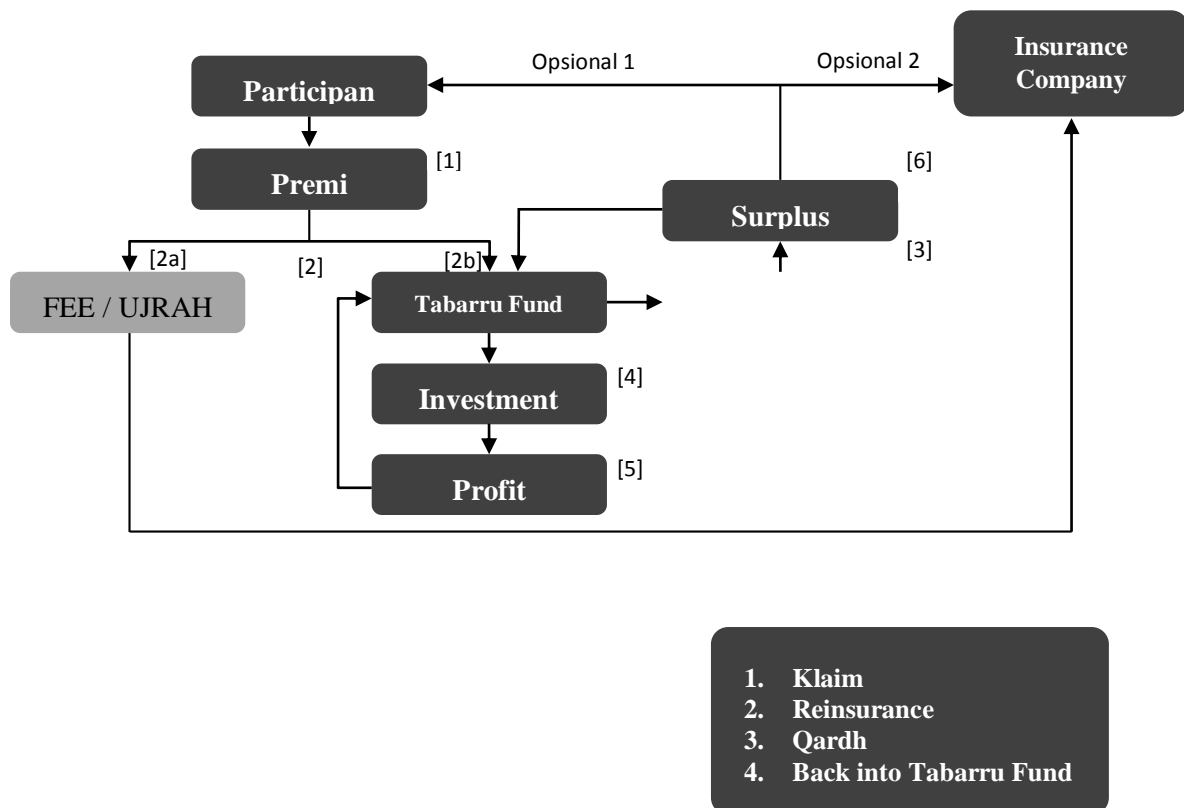
The sentence above means that the relationship between the manager and the participants of Islamic insurance can be carried out with the mechanism of wakalah bil ujah or without ujah.

Even in the Fatwa of the National Sharia Council, it is possible for the wakalah bil ujah contract to be changed to without ujah, in the midst of Islamic insurance practice. (Fatawa DSN-MUI Number 21/DSN-MUI/X/2001)

3. Mudharabah

Mudharabah agreement is included in cooperation and profit. However, this contract is not included as the main contract in Islamic insurance, the use of this contract is for investment management of tabarru funds owned by collective participants, another consideration for this contract is to increase assets so that the solvency of tabarru funds becomes large. In practice, mudharabah contracts in Islamic insurance by combining company funds with tabarru funds are often referred to as mudharabah musytarakah contracts. Then investment can also come from individual participant funds in the event that participants take unit link or PAYDI products. (Bayu D Sumaila and Abdul Mughits,2022)

The scheme of contracts in the management of Islamic insurance can be outlined as follows: (Interview Member of IKNB DSN-MUI Muhammad Faishol, Lc., M.A. on 05 February 2025)



Explanation of the scheme of Islamic insurance management contracts:

1. Participants pay contributions
2. Premium contribution is split into 2 (two) allocations;

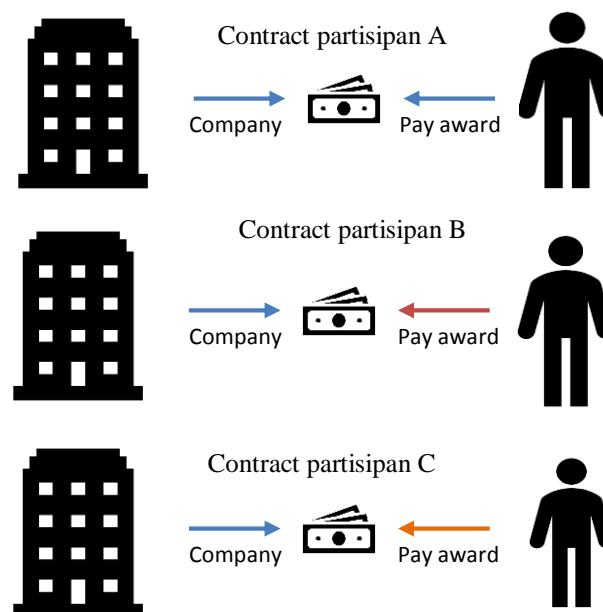
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- a. To the Company as ujah or fee for its work in managing and investing the Tabarru' Fund. (Fatawa DSN-MUI Number 52/DSN-MUI/III/2006)
- b. To the Tabarru' Fund account.
3. Tabarru' funds are used to pay compensation (claims), reinsurance, and return of Tabarru', Including paying debts (qardh) to the company if any. Funds.
4. Tabarru' funds can be invested.
5. Profit from investment is put back into the Tabarru' Fund account. With this model, the Company does not earn any profit from the investment. The Company's work has been paid with ujah or fee (number 2a).
6. Surplus (underwriting) if any is channelled to tabarru' account (mandatory), participants (optional 1), and company (optional 2).

Meanwhile, there are issues regarding the legal status of Tabarru Funds, as follows: (Interview Member of IKNB DSN-MUI Muhammad Faishol, Lc., M.A. on 05 February 2025)

1. The issue of ownership of collective funds (tabarru funds)

The funds obtained from the contribution of each participant are contained in a stand-alone policy for participants A, B, and C as illustrated below:



It can also be seen that all funds deposited into and mixed into tabarru funds belong to collective participants, in fiqh provisions it is not possible to assess participant A is the owner of the collective fund, as well as participants B and C, this is also called Haq Al-Musya, where the mixing of the assets of the participants based on value, because physically cannot be measured.

An example of the application of haqul musya in sukuk investment, the people who invest in sukuk are the owners of the object of the underlying asset building, but each participant cannot be measured, whether the participant who invests 1 million will he own the door or the first floor, or 100 million who owns the second floor,

of course not. So the value is the reference, therefore in sukuk investment there is a trustee who represents the stakeholders of sukuk holders. (Ziffany Firdinal, 2024) Meanwhile, in sharia insurance with mixed funds from participants, the loss of ownership until now no entity or party becomes a representative to take care of the interests of participants, therefore it becomes the cause of other problems.

2. The issue of the unity of the company's functions

The participant's contract with the Islamic insurance company is wakalah bil ujah, which is a contract that transfers the participant's role to the company to provide grants (claims) to other participants, on the one hand managing investments (profit sharing). Because this contract is limited to the management of tabarru funds, if you consider the company as a representative of tabarru funds, it will obscure the position and make it ambiguous regarding its status, because the company acts as a manager and supervisor of the funds managed, so the potential for dealing with itself is very large. This lack of representation has the potential to open up misappropriation of the management of tabarru funds, resulting in the position of participants becoming weak due to the control of safeguards that are eligible for conflicts of interest.

3. Compensation distribution issues

A potential problem is if there is an ex-gratia claim payment. We know that ex-gratia is a claim given beyond what is stated in the policy when participants do not meet the requirements but are considered to be in good faith. In the case of ex-gratia, the main funding source is tabarru funds. Therefore, there is no representative, so who has the right whether every ex-gratia must have the permission of all participants or the company can directly determine it without permission or other parties can become representatives.

Often companies in cooperation with vendors or hospitals get benefits in the form of discounts, such as medical expenses that should be 100 million, get a 20% discount from the hospital to 80 million. This 20 million will be used, as for the company's policy which stipulates that the rest is given to the participants listed on the policy, but on the one hand in the event of solvency conditions, a new policy is often formed, such as this discount is put back into the tabarru fund, then will the company need to ask for approval from all policyholder participants or do not need to be asked for approval as business efficiency and effectiveness.

4. Spin off policy issues

The obligation of Sharia business units in the Islamic insurance sector to spin off is stipulated in Article 87 of the Insurance Law with the condition that it reaches 50% of the value of tabarru funds, insurance funds, and investments, or more than 10 years since the regulation was issued, which falls in 2024. (Erny Arianty and Abdul Ghoni, 2023)

However, the P2SK Law Article 52 number 28 provisions relax the spin off time and must be regulated by the OJK, until finally the Financial Services Authority Regulation Number 11 of 2023 (POJK Spin Off) was issued which contained a renewal of the relaxation of the separation of the sharia business unit from its parent limited to 31 December 2026. (Hukum Online, 2024)

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The regulation provides options through the provisions of Article 3 paragraph (2) of the POJK Spin Off, namely first, standing as a separate entity and second, if the company does not continue the sharia insurance business, it is obliged to transfer portfolios, including the collection of tabarru funds, participant investments, ujah funds, and bailouts from the company needed during the transfer process. (Tatang Nurhidayat, 2021) Therefore, in Article 10 paragraph (8) POJK Spin Off, the company is obliged to announce the separation of units to participants, because the rights of participants must not be reduced, this is of course based on Article 5 POJK Spin Off which substantively explains also that the recipient of the portfolio transfer (existing insurance companies) does not violate statutory provisions. (Khotibul Umam, 2021)

When the company separates itself and continues its business this issue is not a problem, but if the Islamic insurance company does not continue and chooses to transfer its portfolio including the tabarru fund, it is obliged to ask for approval, but will it be effective if all participants are asked to approve this policy can be imagined if there are 1 million policies in the company Islamic insurance companies whose solvency has decreased must ask for approval of the entire portfolio which will certainly drain the portfolio itself in value.

Furthermore, if the Islamic insurance company no longer continues its business and there are no active participants, then is it appropriate to give authority to DPS as Article 5 of the Insurance PMK to give to social institutions.

5. Surplus Underwriting Issue

In the context of the distribution of underwriting surplus where there is an excess due to the small number of claims compared to contributions. The distribution of this surplus the company may get a share with the permission of the participants, but the problem arises who has the right to determine the amount, whether the participants collectively have the right to bargain to determine. Tabarru funds belong to collective participants, not specific participants, therefore there must be a party representing the interests of collective participants.

6. Ujah or fee issues and investment profit sharing

Ujah taken from contributions is the right of the company for its performance in managing tabarru funds, the basis for giving ujah is the existence of a wakalah bil ujah contract or giving power of attorney for its main task to help distribute claims to participants. Potential problems exist when the company arbitrarily increases the ujah during the policy period, even though there is currently an upper limit, which is a maximum of 50% of the total contribution. Who has the right to do the dealing so that the determination of ujah does not exceed and is still within the fair value will the participants have bargaining.

In terms of determining the profit sharing obtained from the investment management of tabarru funds, which belongs to collective participants, who have the right because often participants do not have the power to bargain for the amount of profit sharing that changes after the policy period.

7. Dispute Resolution Issue

Tabarru funds owned by collective participants belong to the collective, not individually, because when participants pay contributions every month are put together into a tabarru fund post so that they are mixed with other participants. Therefore, if there is a dispute in which one of the participants has difficulty making a claim, then whether he is litigating on behalf of the owner of the tabarru fund while the tabarru fund belongs to the collective participants. Then who has the right to represent participants, then with the existence of cases, such as the Surakarta Religious Court with Number 660/Pdt.G/2021/PA.Ska. where the plaintiff is the family of an Islamic insurance participant with the problem of claims that Islamic insurance companies do not disburse. However, the panel of judges ruled that the lawsuit was rejected, because ignorance of the law of the participant made him in a weak position.

8. Claim Discount Issue

The discount given from the hospital (vendor), due to the cooperation between the Islamic insurance company and the hospital, where the claim given by the company is given a discount, then the rest of the discount will be given to the participants as a whole or back to the Tabarru fund collection, then this is necessary for approval to each participant. Therefore, if every change in the discount policy requires participants' approval, the business climate will not be effective and efficient.

The eight issues above should be an important consideration by policy makers regarding the urgency of the existence of a real legal entity or other party representing the collective ownership of the Tabarru' Fund. (Interview Member of IKNB DSN-MUI Muhammad Faishol, Lc., M.A. on 05 February 2025)

This problem will not be found in conventional insurance considering that the premium directly belongs to the company. There are at least two options to fill the gap in the weakness of representation of the Tabarru' Fund, namely the formation of a legal entity or through the appointment of a representative on the organ of an Islamic insurance company, such as:

1) Internal legal entity

A legal entity formed by the participants and filled by several insurance participants who are selected or appointed. In principle, this legal entity is formed as in the body of mutual insurance or joint ventures, namely the Member Representative Body (BPA) where this legal entity in addition to representing the interests of policyholders, this body also has a supervisory function and has the power to form a policy decision-making forum. (Aluysius Prianka Driyarkara and Natalia Yeti Puspita, 2023) The appointment of BPA is 11 people with 20 electoral regions covering western to eastern Indonesia. Then, due diligence will be carried out on the selected names by the Financial Services Authority. (AJB Bumi Putera 1912, 2021)

Historically, BPA has played an important role in representing participants as policyholders several times, namely in 2020 BPA filed a lawsuit with the Constitutional Court to urge immediate clarity regarding the position of joint ventures in the insurance law, besides that BPA also represents participants in terms of preparing insurance

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restructuring plans where of course this concerns the interests of policyholders. (Finansial Bisnis, 2021)

The concept that exists in joint ventures, if adopted by establishing an internal legal entity by Islamic insurance participants where it will become a representative participant forum to help oversee and defend the rights of Islamic insurance policyholder participants.

This concept is in line with the basic principles of sharia insurance which is based on mutual assistance and the ownership of funds deposited equally belongs to the participants. Not only that, Islamic insurance contributed to the total assets of the Islamic non-bank financial industry of IDR 45.03 trillion in 2022, an increase compared to 2021 which only reached IDR 43.55 trillion. (Komite Nasional Ekonomi dan Keuangan Syariah, 2024)

Then the encouragement to spin off the sharia business unit from its parent conventional insurance is an amplifier. Therefore, the concept of an internal legal entity as a representative of the participants is possible. (Erny Arianty and Abdul Ghoni, 2023)

- 2) The alternative is not in the form of a legal entity, with components that already exist in sharia insurance with its limited liability company legal entity, as a representation or representative of the collective participants to the Tabarru' Fund through the Independent Commissioner or Sharia Supervisory Board. (Siti Khoiriyah Karina Ujung and Zainarti, 2025)

- a. Independent Commissioner

Through the provisions of Article 108 paragraph (1) and Article 114 paragraph (1) of the Limited Liability Company Law, the Board of Commissioners' main task is to supervise the company's management and policies and provide advice to the board of directors. (M.Yahya harahap, 2013) This responsibility is an obligation for all members of the board of commissioners without exception of independent commissioners. Article 117 of the Limited Liability Company Law allows for the board of commissioners to act to approve or even provide assistance for certain legal actions to the board of directors, as long as this is regulated through the company's articles of association. This legal action of the board of commissioners is also based on the provisions of Article 99 paragraph (1) letter b and Article 99 paragraph (2) letter c as well as Article 107 letter c and Article 118 paragraph (2) of the Limited Liability Company Law. (M.Yahya harahap, 2013)

Not only that, the board of commissioners is also in Article 96 paragraph (2) of the Financial Services Authority Regulation Number 23 of 2023 concerning Business Licensing and Institutionalisation of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies (POJK Licensing), substantively explaining the role that the internal audit report must be submitted to the board of commissioners. (Tedi Rustendi, 2018)

The board of commissioners consists of affiliated commissioners and independent commissioners. Article 120 of the Limited Liability Company Law states that the governance of independent commissioners comes from outside parties. This is intended to maintain objectivity and be free from all interests for the benefit of

participants as in subparagraph 2 of Article 73 paragraph (3) letter b page 324 of the P2SK Law.

Other regulations also strengthen the important role of the Independent Commissioner in sharia insurance, namely in Article 29 of the Financial Services Authority Regulation Number 73 /POJK.05/2016 concerning Good Corporate Governance for Insurance Companies (POJK insurance governance), stating that independent commissioners have a function to supervise and then voice aspirations for the interests of policyholders, the insured, insurance participants, and / or parties entitled to benefit.

Even in their performance, independent commissioners have immunity from being dismissed by the company, besides that, in the event of findings that are detrimental to insurance participants, independent commissioners can convene a meeting of the board of commissioners, this is stipulated in Article 30 and Article 32 POJK insurance governance. Therefore, the role and function is very powerful to represent the membership.

Even though there is immunity for independent commissioners, there is the potential to be tied to the company, because their appointment must go through the GMS, this is based on Article 19 paragraph (4) POJK insurance governance. (Cahaya Permata, 2019) The board of commissioners also has the power to temporarily dismiss the directors if they make mistakes, because if you wait for the GMS, it will take a long time. (M.Yahya harahap,2013)

b. Sharia Supervisory Board

Sharia Supervisory Board (DPS). The task of the DPS is to ensure that the business activities of the sharia insurance company do not violate the provisions of the sharia economic law corridor. (Cahaya Permata, 2019) The obligation for companies whose business is bound by the sharia system to have DPS is based on Article 109 of the Limited Liability Company Law. (Atin Meriati Isnaini,2022) In addition, other provisions strengthen the position of DPS in sharia insurance, namely in Article 35 paragraph (3) POJK insurance governance. Essentially, DPS is required to be independent and objective in deciding whether the policy direction taken is in accordance with sharia, including regarding the collection of collective tabarru funds belonging to participants, both related to supervision and management. (Siti Khoiriyah Karina Ujung and Zainarti,2025)

Not only that, DPS also has the authority, this is stipulated in the provisions of Article 3 paragraph (6) of the Financial Services Authority Regulation Number 72 /POJK.05/2016 concerning the Financial Health of Insurance Companies and Reinsurance Companies with Sharia Principles (POJK sharia insurance financial health), to provide considerations regarding the establishment of funds or the merger of tabarru in the sharia insurance line of business. In addition, Article 6 paragraph (2) letter b POJK sharia insurance financial health explains that the approval of the distribution of underwriting surplus is also in the hands of DPS.

The main function of the Tabarru' Fund legal entity or other potential parties is to represent the Islamic insurance participants collectively in terms of safeguarding,

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supervising, and fighting for their interests in their collective funds. This function can be derived in more detail in supervision: (Interview Member of IKNB DSN-MUI Muhammad Faishol, Lc., M.A. on 05 February 2025)

- a. Payment of claims;
- b. Management of Tabarru` Fund investment;
- c. Distribution of investment profit sharing;
- d. Determination of the amount of interest for the company in the event of an underwriting surplus.

B. Analysis of Positive Law Regulations and Fatwa of the National Sharia Council on the concept of the establishment of the Tabarru Fund Legal Entity as a representative of stakeholders of Islamic insurance participants

The establishment of sharia insurance cannot be separated from the provisions of Article 29 paragraph 2 of the 1945 Constitution (UUD 1945), in which the state guarantees the freedom of citizens to practice their worship. Not only that, the state also guarantees a decent life and even provides health services through Article 28 letter H paragraph (1) of the 1945 Constitution. (Sodikin, 2021) Therefore, sharia insurance is also included to have its own rules in Law Number 40 of 2014 concerning insurance (Insurance Law) and amended some of its provisions to be adjusted to business developments through Law Number 04 of 2023 concerning Strengthening and Development of the Financial Sector (UUP2SK). (Budi Praptawismacaya Amir, 2024)

Article 6 of the Insurance Law explains that the legal entity applicable to insurance in Indonesia consists of Limited Liability Companies, Cooperatives, and Joint Ventures that have existed at the time of enactment. Meanwhile, the majority of legal entities in insurance in Indonesia both conventional and sharia-principled, are 134 companies in 2023. Therefore, looking at the legal basis of limited liability companies as the foundation of insurance is necessary. (Otoritas Jasa Keuangan, 2023)

Law No. 40/2007 on Limited Liability Companies (Law on Limited Liability Companies) provides the basis for the legal entity of a limited liability company, regulating its establishment, management and operations. The authorised capital of this entity is in the form of shares and the founders' separate assets. The highest organ of a limited liability company is the general meeting of shareholders, in addition two external organs of the company have the function to oversee the practices and provide advice to the directors of the company to stay in the corridors of law and sharia, namely the Board of Commissioners in this case the Independent Commissioner and the Sharia supervisory board. (Rima Rizki Syahputri and Yusrizal, 2023)

Eight problems and issues exist related to the party representing tabarru funds, even though insurance participants have collectively submitted their funds in large amounts, which the company manages. It could even be that the funds collected could be greater than the company's own assets. Suppose a company with a smaller amount of funds has a legal entity and a board of directors and/or management structure that is ready to protect its interests. Why do the participants who collectively have larger funds not have a legal entity that is expected to defend and defend their interests.

Meanwhile, the Islamic banking industry has also been supported in forming representatives for customers in terms of representing their interests as owners of third-party funds that invest in deposit products. Where deposit products use mudharabah contracts, the interests of the owners of funds (sohibul al-mal), without being directly tied to the management company (mudharib). Thus, each party involved has a clear responsibility. Individual fund owners only have rights and responsibilities limited to the capital included, not to the entire mudharabah funds collected. Meanwhile, the company is the main manager of mudharabah funds, which has its rights and responsibilities. The third party, in this case a legal entity or a party representing it also has its own independent role, rights and responsibilities. (Lisa Wahyuni and Surya Sukti, 2025)

In one of its decisions, the Majma al-Fiqh al-Islamiy under the Organisation of the Islamic Conference (OIC) stated:

ثامناً: تأليف لجنة متطوعة لحماية حقوق أرباب المال (لجنة المشاركين)

حَيْثُ إِنَّ لِلْمُسْتَعْتِمِرِينَ (أَرْبَابَ الْأَمْوَالِ) حُقُوقًا عَلَى الْمَضَارِبِ تَتِمَثَّلُ فِي شُرُوطِ الْاسْتِثْمَارِ الْمُعْلَنَةِ مِنْهُ وَالْمُوَافَقِ عَلَيْهَا مِنْهُمْ بِالْدُخُولِ فِي الْمَضَارِبَةِ الْمُشْتَرَكَةِ، فَإِنَّهُ لَا مَانِعَ شَرْعًا مِنْ تَأْلِيفِ لَجْنَةٍ مُتَطَوِّعَةٍ تُخْتَارُ مِنْهُمْ لِحِمَايَةِ تِلْكَ الْحُقُوقِ، وَمُرَاقَبَةِ تَنْفِيدِ شُرُوطِ الْمَضَارِبَةِ الْمُتَّفَقِ عَلَيْهَا دُونَ أَنْ تَتَدَخَّلَ فِي قَرَارَاتِهِ الْاسْتِثْمَارِيَّةِ إِلَّا عَنْ طَرِيقِ الْمَشُورَةِ غَيْرِ الْمُلْزِمَةِ لِلْمَضَارِبِ.

'Given that the investors have rights towards the manager that are reflected in the announced terms and conditions of the investment and have their consent to engage in joint mudarabah investments, there is no shar'i barrier to forming a voluntary committee chosen from among themselves to protect these rights and monitor their implementation without intervening in the investment decisions, except through non-binding advice to the manager'.

This Majma' decision concludes that under the mudharabah system, investors (owners of capital) have rights that must be respected and safeguarded by the fund manager. These rights include agreement on the terms of the investment that have been announced and agreed upon in advance. In order to safeguard and protect these rights, the Shariah allows for the formation of a voluntary committee consisting of the investors.

This committee has the task of overseeing the implementation of the agreed terms and protecting the rights of investors. However, this committee is not allowed to intervene directly in investment decisions made by the fund manager, except to provide non-binding advice. (The International Islamic Fiqh Academy, 2001) Therefore, tabarru funds that are used for claims as well as investment should be possible to obtain the position of the party that represents the participants of Islamic insurance.

Tabarru funds belong to Islamic insurance participants who the company assists to take care of the needs of participants throughout the policy period remains active. (Mar'atus Soliha dan Irvan Iswandi, 2023) This management does not change the status of ownership, therefore in the event that an internal legal entity of participants is formed as a representative of their interests with the duties and functions as a supervisor and defender of the interests of policyholders.

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With the significant development of the Islamic insurance industry, the state is obliged to form regulations to adjust the business climate through Article 52 in Chapter VIII of the Policy Guarantee Programme Article 80 paragraph (1) of the UUP2SK, as a basis for adjusting. (Amalia Fadilah and Makhrus, 2019) The location of changes that can be focused on for the Islamic insurance industry is the obligation for companies to register as members of insurance policy guarantees. The purpose of the obligation of Islamic insurance to become a member of the policy guarantee is certainly to secure the position of participants as owners of tabarru funds and also as drivers of the company's wheels.

So the existence of participants in sharia insurance is very important and their rights are prioritised. This is also evidenced by the regulation of several provisions including Article 21 of the Insurance Law which substantively explains that there needs to be a separation between company funds and funds belonging to participants, then added through Article 52 number 9 of the UUP2SK which explicitly shows that apart from separation, companies are required to provide information related to the risks of the funds they manage. In the event that the company changes its control, the status of tabarru funds belonging to collective participants remains unchanged. Even if the company is bankrupt, the rights of sharia insurance participants take precedence. This is based on Article 40 of the Insurance Law and is reinforced in Article 52 number 18 of UUP2SK. (Ferial Fatimah, et al, 2021)

Meanwhile, Sharia business units in the Islamic insurance sector must spin off as stipulated in Article 87 of the Insurance Law with the condition that it reaches 50% of the value of tabarru funds, insurance funds, and investments, or more than 10 years since the regulation was issued, which falls in 2024. (Erny Arianty and Abdul Ghoni, 2023)

However, the P2SK Law Article 52 number 28 provisions relax the spin off time and must be regulated by the OJK, until finally the Financial Services Authority Regulation Number 11 of 2023 (POJK Spin Off) was issued which contained a renewal of the relaxation of the separation of the sharia business unit from its parent limited to 31 December 2026. (Hukum Online, 2024)

The regulation provides options through the provisions of Article 3 paragraph (2) POJK Spin Off, namely first, standing as a separate entity and second, if the company does not continue the sharia insurance business, it is obliged to transfer portfolios, be it a collection of tabarru funds, participant investments, ujah funds, and bailouts from companies needed during the transfer process. (Tatang Nurhidayat, 2021) Therefore, in Article 10 paragraph (8) POJK Spin Off, the company is obliged to announce the separation of units to participants, because the rights of participants must not be reduced, this is of course based on Article 5 POJK Spin Off which substantively explains also that the recipient of the portfolio transfer (existing insurance companies) does not violate statutory provisions. (Khotibul Umam, 2021)

Meanwhile, Islamic insurance companies as managers of tabarru funds are in fact also required to establish an internal audit organ, this is intended to maintain accountability and transparency. (Abdul Ghoni and Erny Arianty, 2024) Where based on Article 73 of the Regulation of the Financial Services Authority of the Republic of Indonesia Number 23 of 2023 concerning Business Licensing and Institutionalisation of Insurance Companies,

Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies (POJK Licensing). The provisions of this norm certainly contradict literally from the theory of sharia insurance, because internal audit as a supervisor of tabarru funds which certainly has a conflict of interest, after all, an entity manages the funds belonging to the collective participants as well as being a supervisor for itself. Meanwhile, the regulation regulates the sanctions contained in Article 74, which will substantively provide administrative sanctions if the organ requirements in the company are not fulfilled.

Another problem arises, when the collection of tabarru funds belonging to participants is deposited through a tabarru account which is certainly made in one of the Islamic banks under the name of the company, while the funds essentially belong to the participants, so it should be returned in the name of the participants' representatives. Through the provisions of Article 4 of the Minister of Finance Regulation Number 18 / PMK.010 / 2010 concerning the Application of Basic Principles for the Implementation of Insurance Business and Reinsurance Business with Sharia Principles (PMK Sharia Insurance), companies are required to form tabarru funds in each line of business, if one product experiences a shortage, tabarru funds from each line of business can be combined, and this merger must be informed to participants.

Through Article 5 Paragraph (3) of the Sharia Insurance Regulation, the position of DPS is also very concerned, as a consideration in the event that a company no longer has participants and the company will stop its business activities, the tabarru funds are transferred to social institutions at the discretion of DPS. In addition, in the provisions of Article 10, the objects that can be represented from participants to the company are:

- 1) administrative activities;
- 2) fund management
- 3) payment of claims;
- 4) underwriting;
- 5) risk portfolio management;
- 6) marketing; and/or
- 7) investment.

In the case of investment management with a wakalah bil ujah contract, both from tabarru funds and investment funds, the company is not entitled to a share of investment returns. (Noer Hasanah and Anna Zakiyah Hastriana, 2024) In Article 13 of the Sharia Insurance PMK, the distribution of underwriting surplus is divided by 3 options, which can be included entirely in the tabarru fund, returned to participants and tabarru funds, and also distributed to the company. However, this choice cannot be changed until the end of the policy. (Syasa Anbar Pratiwi, 2024)

Then in 2012 there were changes to several articles in the Sharia Insurance PMK, namely with the issuance of Minister of Finance Regulation Number 227 / PMK.010 / 2012 (PMK Changes in Sharia Insurance). significantly changed the provisions for the distribution of underwriting surplus where Article 13 paragraph 1a contextually details the requirements of recipient participants.

Apart from the regulatory side, it is also necessary to review the Islamic economic fatwas that have been issued by the National Sharia Council of the Indonesian Ulema Council (Fatwa DSN-MUI) related to insurance and legal entities. National Sharia Council

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Fatwa Number 21/DSN-MUI/X/2001 concerning Sharia insurance guidelines. Substantially, this fatwa is the foundation and explains that sharia insurance is an effort to tolerate each other both protecting and working together to help by a number of people either through asset investment and or tabarru (social) by providing returns to each other to face future risks. (Linda Pertiwi and Atik Abidah, 2021)

Furthermore, Fatwa of the National Sharia Council of the Indonesian Ulama Council Number 51/DSN-MUI/III/2006 concerning Mudharabah Musytarakah Agreements in Islamic insurance. This fatwa is regarding the use of mudharabah musytarakah contracts in Islamic insurance. In general, this contract is the result of a combination of mudharabah (cooperation) contracts between participants as capital owners and companies as managers, but in addition, the company also has capital that is placed in its business to manage investment funds, also called musyarakah contracts, profit sharing can be given according to proportions and in the event of a loss the company bears according to the portion of capital or funds included in the investment. (Juliani, 2023)

Not only that, a fatwa was also issued in 2006, namely Fatwa of the National Sharia Council of the Indonesian Ulama Council Number 52/DSN-MUI/III/2006 concerning Wakalah bil Ujrah Agreements in Islamic Insurance and Islamic Reinsurance. This fatwa is related to the use of the Wakalah Bil Ujrah contract where the company authorises the Islamic insurance company to manage with ujrah or wages. Objects that can be applied with a wakalah bil ujrah contract in Islamic insurance are administrative activities, management of funds and claims, determining the amount of premium or underwriting process, and marketing. The position of the parties in this fatwa is that the company is the authorised recipient of the participant either as an individual or as a institution or group. (Khabibah Nurhalizah, et al, 2024)

Then the National Sharia Council Fatwa No. 53/DSN-MUI/III/2006 concerning Tabarru' Agreements in insurance. This fatwa essentially reviews the tabarru agreement in Islamic insurance, where tabarru funds must be separated from other funds managed by the company. Then, the tabarru funds collected can be invested, and the results are returned to the tabarru fund pool. In the event that there is an underwiring surplus in the tabarru fund, it can be divided into 3 placements, namely returned to the tabarru fund, kept as a reserve and distributed to participants, and can be kept as a claim reserve fund and can also be shared with the company with and with the permission of participants. The choice must be agreed upon in the insurance policy. In addition, this fatwa also discusses if there is an underwriting deficit, the company is obliged to provide a bailout with a qardh contract and the return is set aside through the tabarru fund collection. (Hardiyanti Ridwan, et al, 2024)

Furthermore, Fatwa of the National Sharia Council of the Indonesian Ulama Council Number 81/DSN-MUI/III/2011 concerning the Return of tabarru funds for insurance participants who quit before the end of the agreement period. This fatwa explains the return of tabarru funds to participants who quit before the policy period is completed. Individual participants cannot request their funds that have been given to the tabarru fund pool, but participants can collectively form provisions regarding the utilisation of tabarru

funds and their return before the policy period ends. (Muhamad Said and Mohammad Ghozali, 2025)

Fatwa of the National Sharia Council of the Indonesian Ulema Council Number 155/DSN-MUI/V/2023 concerning Sharia Pure Endowment Life Insurance Products. This fatwa reviews Sharia Pure Endowment Life Insurance Products. Participants who use this product get two facilities at once, namely the existence of life protection and investment provided when the policy period ends. If the participant dies before the policy period ends, they get the benefits of the life and the investment. Collective participants play an important role in providing an agreement if there is a refund policy before the end of the policy. (Rahmatina A Kasri, 2023)

DSN-MUI Fatwa Number 159 of 2024. This fatwa reviews the ownership of joint property or Al-Mal al-Musyarak in sharia terms and Al-Musya or ownership of property that does not recognise its physical boundaries. This fatwa explains the sale and purchase of jointly owned property, where one party sells a portion of ownership of joint property. The correlation of this fatwa if it is related to Islamic insurance, namely the essence of haqul musya or joint rights from the collection of tabarru funds, whether active or inactive participants, the property is mixed. (Sri Mulyani Dewi et al, 2025)

In addition to fatwas, there are taklimat or edicts that provide guidance on requests for opinions from the Islamic financial industry. Ta'limat can be used as a guideline for the industry, especially Islamic insurance. here are some taklimat regarding Islamic insurance specifically on tabarru funds. First ta'limat with number U-209/DSN-MUI/V/2020. This ta'limat explains the purpose of granting grants from the company to increase the benefits to participants. Not only that, this ta'limat also explains about the maximum ujah limit of 50% of the participant's contribution each month.

Then, the second ta'limat number U-0665/DSN-MUI/X/2023 discusses the transfer of the Tabarru Fund Portfolio in Sharia Insurance and Reinsurance Companies. This transfer is not allowed with a sale and purchase contract, because Tabarru funds cannot be traded. So that the alternative that can be used is the Taukil al-Wakil Ghairahu contract, where a representative gives power to another party provided that the permission of the direct participant or through negative confirmation.

Furthermore, the third ta'limat with number U-0727/DSN-MUI/X/2023, this ta'limat reviews the overcoming of underwriting deficits in tabarru funds, which often use qardh or bailout contracts taken from company funds, through this ta'limat raises another option, namely with a grant contract. The company grants its funds to the tabarru fund, which must be taken from company funds.

Based on the fatwas and ta'limat reviewed above, the interests of participants are prioritised as owners of tabarru funds and drivers of the wheels of Islamic insurance companies. Participants' interests such as getting information on every company policy including the distribution of claims and profit sharing, even if there is a deficit the company is obliged to help, but looking at fatwas and ta'limat has not been reviewed also related to the specific interests of who has the right to represent participants on policies that require confirmation of participants, therefore the absence of restrictions on who can represent tabarru funds, it is necessary to establish a legal entity of tabarru funds or parties that can represent them.

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If you look at one of the applications of sharia law, namely Sadd al-dzara'i which is a legal construction built by preventing or anticipating bad potential in the future. When a legal expert (Islam) sees that an action A has the potential or can be a gap that results in the occurrence of action B which has been decided to be haram, then this action A must be prevented from the beginning. In the context of the Tabarru' Fund, the absence of an independent legal entity on the Tabarru' Fund assets potentially opens up opportunities for misappropriation and other undesirable things such as the cases mentioned in the issues above. To prevent this, using the principle of sadd al-dzara'i, the legal entity of the Tabarru' Fund or a party that can represent this interest must be realised. (Muhammad Luthfi Abna and Andi Muhammad Ikram, 2025)

In addition, through the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Standard No. 26 related to Islamic insurance in number 5/7, it is stated that:

أَفْضَلِيَّةُ مُشَارَكَةِ حَمَلَةِ الْوُثَائِقِ فِي إِدَارَةِ عَمَلِيَّاتِ التَّأْمِينِ مِنْ خِلَالِ إِيجَادِ صِيْغَةٍ قَانُونِيَّةٍ مُنَاسِبَةٍ
لِمُمَارَسَةِ حَقِّهِمْ فِي الرِّقَابَةِ وَحِمَايَةِ مَصَالِحِهِمْ

'Prioritising the participation of policyholders in managing insurance operations by creating an appropriate legal entity so that they can exercise their right to control and protect their interests'.

From these two aspects of law, either from international standards or one of the branches of ushul fiqh, it is already required that there is a need to appoint representatives of the interests of Islamic insurance participants, so will the concept of the legal entity of the tabarru fund be realised or appointed by other parties such as independent commissioners or DPS.

Based on Indonesian positive law as well as fatwa and ta'limat from the National Sharia Council of the Indonesian Ulema Council are not found specifically regulating the legal entity of tabarru funds, meanwhile if you look at the standards and provisions from abroad found some reinforcement as the basis for the formation of an entity that can represent the interests of Islamic insurance participants, therefore it is necessary to adopt concepts from abroad to alleviate the problems that have been described.

The prospect of applying the concept of an internal legal entity from a collection of participants, tabarru funds as stakeholders of Islamic insurance participants, in fact, cannot be realised, several causes of problems if the legal entity of this tabarru fund is formed, namely the first issue of cost, when this internal legal entity is formed from where the initial funds as a foundation, if taken from company funds, the independence of this institution is questionable, but if it is based on participant tabarru funds, contributions will be expensive and the portion for claims will be reduced, so this is not healthy for the Islamic insurance industry with high costs, fewer people are insured. (Muhammad Farhan Abdillah Lubis and Rahmayati, 2022) When premiums become expensive, it will make it difficult for people to gain access to protection. (Diani Sadiawati, et al, 2023)

The second problem is the election of representatives for each region. The Member Representative Body encounters this problem with the legal form of a joint venture as the

insurance entity. (Wicaksono Y.A, 2024) In 2022, the dualism of policy representatives clashed between Southern Sumatra and the Jakarta-Banten Special Region. Potential disputes between representative election areas may occur if this internal legal entity is formed. (CNBC Indonesian,2022) The third obstacle is the criteria of the parties who can be representatives of the participants, if they come from professionals, then there will be honorariums that need to be paid for their performance, in this way adding to the list of burdens for tabarru funds. If it is done on a social basis, then the participants can't agree because each participant has made their contribution, so it is unlikely that they want to take on the task without feedback.

Then the fourth obstacle is the level of insurance complaints in the last period based on data released by the Financial Services Authority in 2022 increased significantly, therefore this is an obstacle, because public confidence in insurance has the potential to decline. Not only that, the low level of Islamic financial literacy and inclusion also adds to the list of problems. (Otoritas Jasa Keuangan, 2023)

From the explanation above, the concept of an internal legal entity is experiencing obstacles, even though there is no regulation governing it and the principle of legality applies, '*Nullum delictum, nulla poena sine praevia lege poenali*', substantively confirming that the formation of an internal legal entity as a representative of participant stakeholders is allowed to materialise as long as it is not regulated by prohibition. (Yudia Mahfudz, 2025)

The obstacle to the application of this internal legal entity comes from the sociological aspect, where if drawn to the adage '*Ubi societas ibi ius*', meaning that where there is society there is law. Therefore, if it is drawn in the context of applying the concept of the legal entity of tabarru funds, because the social situation of society to the Islamic insurance business does not guarantee the formation of this internal legal entity, it cannot be enforced. Thus, two alternatives remain between the Independent Commissioner and the Sharia Supervisory Board. (Firdaus Rizky Utama and Eka Nanda Ravizki,2025)

The Sharia Supervisory Board (DPS) is an independent party that has sharia principles that must exist in every financial company. (Siti Khoiriyah Karina Ujung dan Zainarti,2025) The duties and functions of the DPS are to: (Alvera Zahvania Putri, et al, 2025)

a. Overseeing sharia compliance in the company's operations:

The DPS is tasked with ensuring that all of the company's operations, from product marketing to claims payment, follow sharia principles. This includes:

- 1) The use of appropriate contracts, such as tabarru' contracts (grants with benevolent purposes) and tijari contracts (commercial) in the management of insurance funds.
- 2) The absence of riba (interest), gharar (uncertainty), and maysir (gambling) in the products and services offered.
- 3) Ensure that the funds raised are only invested in halal instruments and are in accordance with sharia principles.

b. Providing Advice and Recommendations to the Board of Directors

DPS acts as a sharia advisor to the company's management in:

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- 1) Development of new products that must comply with sharia principles before being marketed.
 - 2) Formulation of internal company policies to remain within the corridors of Islamic law.
 - 3) Problem solving related to sharia non-conformity in the company's operations.
- c. Reviewing and Approving Sharia Insurance Products
- The DPS must approve every Islamic insurance product before it is launched to the market. This process involves:
- 1) Analyse the contract used and whether it is in accordance with the principles of Islamic muamalah.
 - 2) Evaluation of the claim mechanism, whether it is transparent and fair.
 - 3) Examine the costs and funds used, including fees and underwriting surpluses, to ensure no element of usury or injustice.
 - 4) Issuing an opinion on the products issued
- d. Submitting Fatwa Requests to DSN-MUI
- If there is a new product or policy innovation that does not yet have a fatwa, DPS is responsible for:
- 1) Submit a fatwa application to the National Sharia Council (DSN-MUI).
 - 2) Ensuring that new products or policies to be implemented have obtained clear sharia legitimacy.
- e. Conducting Sharia Compliance Audit and Reporting
- DPS is responsible for conducting periodic audits of all aspects of the company's operations and preparing reports that must be submitted to:
- 1) The National Sharia Council (DSN-MUI) as the authorised institution in providing sharia fatwa.
 - 2) The Financial Services Authority (OJK) oversees Indonesia's Islamic finance and insurance industry.

This reporting is an important evaluation tool to ensure that the company consistently implements sharia principles.

The potential of DPS as a representative of the participants as the owner of the collective tabarru fund, from the regulatory side, is in Article 5 paragraph (3) of the Sharia Insurance Regulation, which clearly states that: (Alfian Widiyanto and Dini Selasi, 2024)

'If the Company no longer has Participants and the Company will cease its business activities at its own request, the existing Tabarru' Fund must be donated to social institutions at the discretion of the Sharia Supervisory Board. '

This provision intends that tabarru funds originate from participants' property, not the company's property; therefore, the distribution must be based on sharia provisions. So it is handed over to social institutions based on the consideration of the DPS, this has also been based on the provisions of DSN-MUI Fatwa Number 123 of 2018 concerning the Use of Funds that Cannot Be Recognised as Revenue for Sharia Financial Institutions, Sharia Business Institutions and Sharia Economic Institutions. (Hasim, et al, 2024)

However, this potential is in fact not enough to make DPS a representative of the stakeholders of Islamic insurance participants, because the role and influence of DPS is

only as a consideration and supervisor from the sharia side. While the complexity of the issue of the urgency of representing the collective interests of tabarru funds is not simple. Therefore, an independent commissioner is possible, but we need to explore the basics of its reinforcement.

In terms of the role and position of independent commissioners as a corporate organ that is certainly independent and has the power because it is part of the Board of Commissioners, the duties and roles and functions of independent commissioners include: (M.Yahya Harahap, 2013)

- a. Supervision of the Performance of the Board of Directors:
 - 1) Ensuring that company policies and operations are carried out in accordance with the principles of good corporate governance.
 - 2) Overseeing the implementation of business strategies, including monitoring schedules, budgets, and the effectiveness of these strategies.
 - 3) Ensure that the company's policies do not harm insurance participants as policyholders.
- b. Maintain Independence in Decision Making:
 - 1) Overseeing that there is no conflict of interest that can harm insurance participants.
 - 2) Ensuring that company policies, including in the investment of participant funds (tabarru'), are carried out fairly and in accordance with prudential principles.
 - 3) Preventing conflicts of interest in company decision making.
 - 4) Ensure transparency and disclosure of information to all shareholders.
- c. Providing Advice and Recommendations:
 - 1) Provide strategic input to the board of directors regarding company policy.
 - 2) Identify potential risks and suggest necessary mitigation measures
- d. Maintain Regulatory Compliance:
 - 1) Ensure the company complies with all applicable laws and regulations and the ethical values applied in its operations.
 - 2) Ensure that insurance claim policies are applied transparently and fairly.
 - 3) Supervise the implementation of the distribution of underwriting surplus so that it is in accordance with sharia principles and does not harm participants.
- e. Collaborate with the Sharia Supervisory Board (DPS):
 - 1) Ensuring that the company's business decisions have received DPS approval and do not deviate from sharia principles.
 - 2) Overseeing the effectiveness of the DPS function in ensuring sharia compliance in insurance operations.
- f. Evaluation of Company Performance:
 - 1) Assessing the effectiveness of the board of directors' performance and the policies implemented.
 - 2) Provide recommendations for operational improvements and increase the efficiency of the company.

Meanwhile, the potential use of independent commissioners as stakeholder representatives is based on several regulations:

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- 1) Article 99 Paragraph (1) letter b of the Limited Liability Company Law:
Members of the Board of Directors are not authorised to represent the Company if:
 - a....
 - b. the Board of Directors member concerned has a conflict of interest with the Company.
- 2) Article 99 Paragraph (2) letter c of the Limited Liability Company Law:
In the event of the circumstances referred to in paragraph (1), those entitled to represent the Company are:
 - b....
 - c. The Board of Commissioners in the event that all members of the Board of Directors have a conflict of interest with the Company; or....
- 3) Article 107 letter c of the Limited Liability Company Law:
The articles of association shall contain provisions regarding:
 - b....
 - c. the party authorised to carry out management and represent the Company in the event that all members of the Board of Directors are absent or temporarily dismissed.
- 4) Article 117 Paragraphs (1) and (2) of the Limited Liability Company Law:
 - (1) *The articles of association may provide for the granting of authority to the Board of Commissioners to grant approval or assistance to the Board of Directors in carrying out certain legal acts.*
 - (2) *In the event that the articles of association stipulate the conditions for granting approval or assistance as contemplated in paragraph (1), without the approval or assistance of the Board of Commissioners, the legal act will still bind the Company so long as the other parties to the legal act are in good faith.*
- 5) Article 118 paragraph (2) of the Limited Liability Company Law:
 - (1)
 - (2) *The Board of Commissioners which in certain circumstances for a certain period of time performs management actions as referred to in paragraph (1) shall apply all provisions regarding the rights, authorities and obligations of the Board of Directors towards the Company and third parties.*
- 6) Article 11(1) of the Insurance Law
 - (1) *Insurance Companies must implement good corporate governance.*
- 7) Article 52 point 5 of the P2SK Law:
Amendment to Article 11 Paragraph (1) of the Insurance Law:
 - (1) *Insurance Companies must implement good corporate governance including investment structuring, risk management, and internal control in conducting their business activities'.*
 - (3)
 - (4) *Insurance Companies and sharia Insurance Companies in managing Premiums from Policyholders must be able to calculate the risks and benefits that Policyholders will obtain and ensure that there is no failure of Insurance Companies and sharia Insurance Companies in fulfilling obligations to Policyholders, Insured, or Participants.*
- 8) Article 96 paragraph (2) letter b POJK Licensing:

(2) *In carrying out its duties, the internal audit work unit as referred to in paragraph (1) must submit reports to:*

a.

b. Board of Commissioners.

9) Article 29 POJK Governance

Independent Commissioners have the main task of carrying out supervisory functions to voice the interests of policyholders, insured, participants, and / or parties entitled to benefit.

10) Article 30 POJK Governance

Insurance Companies and Sharia Insurance Companies are prohibited from dismissing Independent Commissioners due to the actions of Independent Commissioners in carrying out their duties as referred to in Article 29.

11) Article 32 Paragraph (1) POJK Governance

In the event that the Independent Commissioner assesses that there are policies or actions of members of the Board of Directors that are detrimental or potentially detrimental to the interests of policyholders, insured, participants, and / or parties entitled to benefit, the Independent Commissioner must propose the holding of a Board of Commissioners meeting.

12) Article 34 Paragraph (1) POJK Governance

Independent Commissioners must make an annual report on the implementation of their duties related to the protection of the interests of policyholders, insured, participants, and/or parties entitled to benefit, both settlements regarding claims, including report services and regarding disputes that are in the process of being resolved at mediation bodies, arbitration bodies, or judicial bodies.

The provisions of these articles form the basis for independent commissioners to take the necessary legal action. It can also be interpreted that in Articles 99 to 107 of the Limited Liability Company Law, the board of commissioners can represent the company in case of a conflict of interest of the directors regarding legal actions with the company. (M.Yahya Harahap, 2013)

Article 117 provides a basis for the board of commissioners to carry out legal acts as long as they are regulated in the articles of association, but the editorial of certain legal acts is explained in the explanatory article that paragraph (1) is not for management, such as daily operations. However, in the event of conditions as in Article 99, but if there is no reason, the board of commissioners has the potential to exceed its authority and contradict legislation or also known as *ultra vires*, then Article 118 also explains the scope of rights, authorities and obligations that are the same as the directors and third parties. (M.Yahya Harahap, 2013) Therefore, the board of commissioners in this case is an independent commissioner by regulation can be a representative of the stakeholders of the *tabarru* funds belonging to the collective participants of sharia insurance.

This is also reinforced by some of the provisions above, such as Article 11 paragraph (1) of the Insurance Law which explains that the company must comply with governance. Article 52 number 5 of the UUP2SK describes the amendment to the provisions of Article 11

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of the Insurance Law, which in addition to complying with the governance of the company must ensure that there is no failure in the management of tabarru funds.

Then the power of independent commissioners is also considered feasible because every time an internal audit is carried out, they must receive a report, this is stated in Article 96 paragraph (2) POJK licensing, not only that in Article 29 POJK governance confirms its function as a representative of policyholder participants, as owners of tabarru funds to voice their rights. In terms of work activities, independent commissioners cannot be dismissed because of their performance, this is also stated in Article 30 POJK Governance. Even independent commissioners can conduct a board of commissioners meeting in the event that the board of directors carries out business activities that make losses to participants as policyholders.

However, independent commissioners cannot work alone to carry out a very large mandate, so in carrying out the work of independent commissioners, they can be assisted by a special committee to monitor tabarru funds in order to represent participants. Of course, this formation is also based on Article 121 paragraph (1) of the Limited Liability Company Law, even though it only contains audit, remuneration and nomination committees. According to M. Yahya Harahap, the limited liability company law does not limit the board of commissioners to form other committees, as long as it is necessary to support the supervisory function and in its work the committee is directly responsible to the board of commissioners. (M.Yahya Harahap, 2013)

Thus, issues related to representation can be resolved, so that the role of independent commissioners and forming special committees can be expanded. However, the regulation needs to add to the existing functions in the POJK insurance governance by adding the authority to represent the interests of participants and assisted by a special committee for tabarru funds, then this can close the issue of existing problems, both problems 1 to 8.

However, regarding issues related to dispute resolution where Indonesia adheres to *pacta sun servanda* in Article 1320 of the Civil Code and Article 1338 of the Civil Code which substantively states that the agreement made applies regulations for both, then the parties signed in the policy, namely between the participant and the company, become bound to each other, in addition, potential disputes related to claims are part of the participant's right to ownership, so that participants are allowed to file claims if a dispute occurs. (Mohamad Yuflih Huda Maheswara, 2022)

However, the company can prioritise internal dispute resolution, of course this is the duty of independent commissioners as recipients of information and have the power to represent participants in terms of fighting for their rights by forming a forum that certainly provides input and emphasis to the board of directors as in Article 34 Paragraph (1) POJK Governance. (Veny and Merry Putri, 2023)

If the opportunities and strengths that make independent commissioners as representatives of stakeholders, then Article 19 paragraph (4) POJK insurance governance becomes a provision that can hinder because independent commissioners are appointed through the GMS, therefore there is potential for alignment with shareholders rather than sharia insurance participants. However, the potential alignment of independent commissioners can be overcome by neutral selection involving OJK as a pit and proper test. (Veny and Merry Putri,

2023) Not only that, collaboration between independent commissioners and DPS for supervision both in governance and sharia aspects. Adjustments to OJK regulations and company articles of association can contain specifically to provide a mandate to independent commissioners as representatives of stakeholders of sharia insurance participants, therefore both aspirations voiced regarding issues in numbers 1 to 7 can be resolved, because independent commissioners have full power to receive input from participants and decision makers to convey to the GMS and OJK. In addition, there are also sanctions that can be applied by OJK to independent commissioners who do not carry out their obligations or even prove to be affiliated. (Alfian Widiyanto and Dini Selasi, 2024)

Conclusion

The Tabarru' Fund Legal Entity concept aims to provide legal representation of the collective ownership of sharia insurance participants through the establishment of an internal legal entity filled with representatives of participants from various regions, such as the Member Representative Body model in joint venture insurance. This concept was born from the need to protect participants' rights and avoid conflicts of interest due to the company's dual role. Alternatively, if forming an internal legal entity is not possible, the Independent Commissioner or Sharia Supervisory Board can be appointed as participant representatives with strengthened mandates and roles.

Analysis of Government regulations and the fatwa of the National Sharia Council on the concept of forming a Tabarru Fund Legal Entity as a representative of the stakeholders of Islamic insurance participants, states that an internal legal entity as a representative of participants is not yet possible, because starting from the aspects of capital, management criteria, and business efficiency, and there is no specific regulation. Meanwhile, the authority of DPS is limited to Sharia aspects. Therefore, the Independent Commissioner is considered the most appropriate to represent sharia insurance participants with a strong legal basis based on Article 117 of the Limited Liability Company Law, Article 11 of the Insurance Law and Article 52 number 5 of the P2SK Law, Article 96 POJK Licensing, Article 29, Article 30, and Article 32, and Article 34 POJK Governance, and can be supported by a special committee of the Tabarru' Fund to strengthen accountability based on Article 121 paragraph (1) of the Limited Liability Company Law.

Recommendation

An internal legal entity as a representation of Islamic insurance participants is important for the protection of rights and participation of participants in the supervision of the Tabarru' Fund. This concept should be encouraged because it aligns with the principle of mutual assistance and can reduce conflicts of interest. Since establishing such a body is not yet possible, the alternative is to appoint an Independent Commissioner or Sharia Supervisory Board to represent the participants, with a strengthened mandate through regulation.

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In the absence of special regulations, the impossibility of forming an internal legal entity of participants, and the limited function of the DPS, the Independent Commissioner is considered the most appropriate representative of Islamic insurance participants. For this reason, it is necessary to develop a legal framework that strengthens this role, supported by the formation of a Special Committee for Tabarru' Funds to increase accountability and protection of participants.

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