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Review the principle of trust in the marketing of investment-linked insurance products (PAYDI) in bancassurance

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ABSTRACT

Trust is an essential element in the realm of investment. This study examines two legal issues in Bancassurance's PAYDI marketing. This study employs normative legal research, a systematic scientific approach used to address legal concerns that result from regulation. The utilized data consists of secondary sources, including statutes, judicial rulings, legal doctrines, and scholarly viewpoints. This study suggests that it is important to examine the teleological contractual relationship between the parties involved, particularly those that place importance on the social and moral components of the contract's goal. The collaboration between PAYDI and life insurance firms in implementing bancassurance marketing strategies with distribution business models is essential.

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Introduction

A bank is defined as a business entity that carries out activities to collect public funds in the form of deposits with the authority to redistribute to the public in the form of credit based on Law Number 7 of 1992 which has been amended by Law Number 10 of 1998 concerning Banking (Law 10/1998) with the latest amendments under Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector. The function of collecting and redistributing is the most essential bank intermediation function, in addition, the existence of banking infrastructure in supporting payment traffic is another characteristic of the intermediation function in the bank's goal to support financial economic efficiency.

The dynamics of intermediation move along with economic growth that does not need to be proven anymore because it is felt that it has changed the current bank to resemble a one-stop financial institution. The opinion of Mohammed Nurullah and Sotiris K. Staikouras states that the bank's aggressiveness in carrying out cross-business strategic activities has transformed banks into "Financial Supermarkets" that not only provide banking services, but also insurance, credit, and investment products (Nurullah & Staikouras, 2008). One of the innovations in the financial industry is in the insurance sector. Now the choice of insurance companies for people in Indonesia is increasingly numerous and diverse. Each insurance industry favors its company as an insurance company that can answer all the security needs of its consumers. Consumer demands for self-protection are growing and diverse. Modern society with its higher mobility and increasingly dense activities

demands practicality in choosing protection for its security, besides that according to Djoko Prakoso, insurance is very important in raising the standard of living and welfare of the community (Prakoso & Murtika, 2004).

Based on Article 1 paragraph (5) and paragraph (6) of Law Number 40 of 2014 concerning Insurance (Law 40/2014) it is stated that insurance is known in people's business lives due to human inability to predict risks that may occur in the future. Insurance is divided into several forms, mainly consisting of 2 (two) forms, namely: First, General Insurance, which bears the risk of the insured in the form of reimbursement to the policyholder or insured due to loss, damage, costs incurred, loss of profit, or legal liability to third parties that may be suffered by the insured due to an event that may occur in the future; and Second, Life Insurance, which is a risk management service that provides payments to policyholders, insured, or other entitled parties if the insured dies or remains alive, or other payments that have been stipulated in the agreement.

The form of evolution is the issuance of one of the hybrid products known as Insurance Products Linked to Investment (PAYDI). Based on the Financial Services Authority Regulation (POJK) Number 23/POJK.05/2015 concerning Insurance Products and Marketing of Insurance Products, the essence of PAYDI has transferred the essence of insurance, which was previously an instrument and/or risk transfer institution, currently disguised with investment instruments with protection benefits and/or alternative investment institutions with life insurance benefits. PAYDI provides 2 (two) benefits at once, namely life insurance compensation protection benefits and investment benefits in the form of cash value. The insurance benefits available in PAYDI are no different from the protection provided by conventional types of life insurance, namely death benefits, health benefit benefits, and other benefits according to the chosen program. PAYDI provides investment return benefits from premiums placed in investment funds expressed in units, the yield performance depends on the performance of investment subfunds chosen by customers under stock market and money market conditions (Ketut Sendra in Santri et al., 2022).

The existence of investment features in an insurance product has made PAYDI more attractive than conventional insurance products. This causes PAYDI to dominate the sales of insurance products (Walfajri, 2020). Data obtained from the Indonesian Life Insurance Association (AAJI) noted that PAYDI contributed 63.9% to premium income until the third quarter of 2020, while traditional insurance contributions were only 36.1% of total premium income. Compared to the second quarter of 2020, PAYDI contributed 61.6% of total premium income, while conventional products contributed 38.4% of total premium income. From this comparison, it can be seen the dominance of PAYDI's contribution to the overall premium income of insurance products (Nurullah & Staikouras, 2008). In addition to investment features with life protection benefits, PAYDI's marketing success is supported by the existence of Bancassurance distribution channels. Bancassurance is a business collaboration that involves collaborative activities between insurance companies and banks to market insurance products through bank facilities and infrastructure. Marketing activities through bancassurance distribution channels are not only more effective but also more efficient. This efficiency is supported by the existence of bank branches that are already widespread. In addition, the existence of a large number of bank customers with customer data that is ready to be used greatly facilitates insurance product marketing activities through bancassurance marketing channels (Walfajri, 2020).

The concept of bancassurance itself was first known in the UK in 1965 with the establishment of Barclays Life, then followed by France in 1970, and grew rapidly in Europe after that. In Asia itself, bancassurance began to be known in the 1990s, countries such as Malaysia, India, Korea, Thailand, and Indonesia experienced a new round of bancassurance that year (Tanta & Hartomo, 2020). The use of banks by insurance companies as an additional distribution channel for an insurance product known as bancassurance means that banks act as intermediaries that help insurance companies reach customers who have become their market share which aims to increase the number of insurance customers. Through bancassurance, both banks and insurance companies benefit. Insurance companies cooperate with banks and then banks will offer bank products with insurance protection to their customers. This form of cooperation is known as bancassurance (Tanta & Hartomo, 2020). Bancassurance can be done face-to-face with customers and/or by using telemarketing means, including through mail, electronic media, and bank websites. The role of banks in conducting marketing is limited to being an intermediary in forwarding insurance product information to customers or providing access to insurance companies to offer insurance products to banks. Telemarketing is a system of offering products and/or services using telephone communication facilities, Short Message Service (SMS), and so on (Haliwela, 2015).

Data from the Financial Services Authority (OJK) as of September 2020 139 insurance companies covering 54 life insurance companies, 74 general insurance companies, 6 reinsurance companies, 3 compulsory insurance companies, and 2 social insurance companies, but the development of insurance companies in Indonesia is also accompanied by complicated experiences where there are cases of default committed by insurance companies against their customers so that they can harm the interests of customers or the insured. The rise of insurance claim failure cases will certainly erode customer confidence in transferring their risks to insurance companies

(Haliwela, 2015). In fact, on the one hand, this has been regulated based on Article 4 paragraph (1) of the Financial Services Authority Regulation (POJK) Number 1 / POJK.07 / 2013 concerning Consumer Protection in the Financial Services Sector and Article 7 letter b of Law Number 8 of 1999 concerning Consumer Protection. According to Zahry Vandawati Chumaida, an insurance agreement that contains legal purposes is an insurance agreement that has the value of justice, legal certainty, and expediency. The insurance agreement must meet the elements of social justice that take into account the interests of the insured. Insurance agreements must meet the element of legal certainty within the scope of private law and insurance agreements must pay attention to benefits for all parties by avoiding benefits that only benefit certain parties (Chumaida, 2014).

In a study conducted by Tanoso (2022), various legal issues in the life insurance sector during COVID-19 were examined. The study concluded that certain adjustments or provisional measures should be made permanent, particularly in relation to the adoption and extensive utilization of information technology in the insurance industry. Efforts to enhance the utilization of information technology should persist beyond the conclusion of the COVID-19 pandemic. Consequently, it is crucial to establish and oversee the connection between the utilization of information technology in the insurance industry and consumer protection aspects. This will facilitate effective enforcement of sanctions and laws. Meanwhile, the objective of this research is to investigate and examine two problem formulations that constitute legal issues in the Bancassurance marketing of PAYDI. Firstly, to analyze the characteristics of trust principles involved in PAYDI Bancassurance marketing activities. Secondly, to assess the legal relationships formed between the parties in PAYDI Bancassurance marketing activities.

Method

This research is normative legal research according to Peter Mahmud Marzuki, legal research is a scientific process to find solutions to legal issues that arise by prescribing (Marzuki & Sh, 2020). Legal research involves logic with the skill of building legal argumentation as a process of legal know-how, not just legal know-how (Marzuki & Sh, 2020). The following procedures were utilized: 1) Identifying the legal matter at hand; 2) Locating relevant legal resources; 3) Conducting critical analysis and interpretation; 4) Engaging in legal argumentation; and 5) Formulating conclusions. The data used comprises secondary sources, such as statutes, judicial rulings, legal concepts, and scholarly perspectives. The problem approach in this study uses a statutory approach (statute approach), which is an approach carried out by reviewing all laws and regulations related to research legal issues. Furthermore, the conceptual approach (conceptual approach) is an approach that departs from the concepts of the relationship between law and justice in legislation and doctrines that develop in legal science. Finally, this legal research also uses a case approach (Marzuki & Sh, 2020).

Results and Discussions

Characteristics of the Trust Principle in PAYDI Marketing Bancassurance Activities

Bancassurance is a type of insurance product distribution channel through cooperation between insurance companies and banks. The interesting thing about this bancassurance concept is that its existence is legally regulated by 3 (three) laws and regulations, namely laws and regulations related to banking activities, laws and regulations related to insurance businesses, and laws and regulations related to the Financial Services Authority (OJK). In the concept of financial institutions, 2 (two) types of institutions are recognized, namely (i) bank financial institutions and (ii) non-bank financial institutions. Insurance companies are the second type, namely non-bank financial institutions, while banks under the literal understanding are the first type, namely bank financial institutions. The existence of non-bank financial institution products marketed through bank financial institutions is a manifestation of the principle of freedom of contract; that with an agreement, cooperation can be carried out even though the parties are both financial institutions but with different types. However, because the nature of financial institutions is to carry out activities to raise public funds, the government must protect the public interest by implementing laws and regulations related to the activities of financial institutions quo.

The existence of banks as trust institutions have been recognized as stated in the Explanation to Article 29 of the Banking Law before being amended by Article 29 of the Law on the Development and Strengthening of the Financial Sector (Law 4/2023): "Given that banks primarily work with funds from the public deposited in banks based on trust, every bank needs to continue to maintain its health and maintain public trust in it". Therefore, a banking contract born on a customer's agreement with the bank is a contract that is fundamental to trust. Nevertheless, the trust referred to in the Banking Act has never been further described and/or elaborated on its elements. To find contract rules based on trust, this study through conceptual methods explores the nature of fiduciary contracts that underlie bank relationships with their customers with the assumption that fiduciary rules can be equated with existential trust rules in banking institutions.

The study found that in countries with Common Law systems, contracts between banks and their customers are identified as fiduciary contracts. Some of the bases that can be considered for how banking contracts should be qualified as fiduciary contracts based on the review of court considerations in countries adhering to the Common Law legal system are as follows: (1) The application of the theory of trust and reliance provides the basis that customer trust in the bank and the existence of customer dependence (sometimes blind trust) on the advice provided by the bank, cannot be ruled out – instead, trust and dependence must be emphasized as the main driving factors that give birth to agreements on banking contracts; (2) The application of the theory of control provides the basis that the bank has control over the customer's financial assets in the bank, thus controlling the economic interests of its customers; (3) Consideration of the nature of banks as quasi-public bodies (publicly chartered bodies that provide public services and are supervised by boards, commissions, or appointed committees), so that banks as quasi-public bodies can be forced to apply higher standards of business conduct than business actors in general; (4) There are disparities and inequalities between customers and banks, including professional knowledge, technical skills in managing and controlling financial activities, financial capabilities, and negotiation skills, all of which are asymmetric and unbalanced. The inferiority of customers in dealing with banks characterizes every stage of their relationship, namely from the negotiation stage to the signing of banking contracts, throughout the term of contract execution, to the termination of customer relations with banks. Customer inferiority is also reflected in cases of legal disputes with banks, considering that not all customers have a large financial ability to carry out legal proceedings, as well as evidentiary difficulties stemming from lack of complete information, which is also caused by the low bargaining position of customers in the negotiation stage and the lack of previous customer experience in legal conflicts (Plato-Shinar, 2012).

As for trust, this is defined by Moorman as a desire to depend on a trusted exchange partner (Moorman et al., 1993). However, the relationship of customer trust to banks in Indonesia in the definition of trust relationship has not been interpreted as a relationship with legal obligations which should be classified as certain legal relationships that can give rise to certain rights and obligations. The problem of understanding trust relationships which are simply interpreted as ordinary (general) civil law relationships tends to cause conflicts of interest in bancassurance business activities. The Bank as a dual trust holder is not only obliged to maintain and maintain customer trust, but also responsible to shareholders to bring profits to the company. Freedom to innovate and collaborate as in PAYDI's marketing bancassurance activities that bring fee-based income for banks, must not conflict of interest with customers. If the bank's obligation as a trust institution is not regulated carrying a certain obligation, namely prioritizing the interests of its customers before the interests of shareholders, then activities allowed by laws and regulations can give the bank the legality of carrying out business activities that are precisely contrary to the interests of customers as trustees.

In practice, banks in carrying out their business use other people's money, therefore banks are obliged to maintain public trust through the application of the principle of trust (Putera, 2020). However, the relationship of customer trust with banks has never been known in Indonesian law or at least has never been elaborated as the definition of Fiduciary Relationship in the legal concept that binds Fiduciary Duty obligations in Common law legal system countries. The structural characteristic of fiduciary relationships is the presence of asymmetries of power where trust is placed by one person to another placing that trust results in dominance, superiority, or undue influence on the stakeholder (called fiduciary) (Gold & Miller, 2014). Trust bestowed upon trustees should be tied to a fiduciary duty. Only by providing legal certainty to the existence of the obligations of trustees born because of fiduciary relationships can the position of trustees be guaranteed by law at least, although not completely. The issue of understanding trust relationships as a legal concept concerning PAYDI's marketing bancassurance activities is the essence of this study.

The existence of customer trust in banks is not only a social symptom but has become a principle that has simultaneously become the seed of the existence of the principle of trust in Law 10/1998. As the purpose of law according to L.J. van Apeldoorn is to maintain public order, according to Peter Mahmud Marzuki (Marzuki & Sh, 2020), legal order is maintained in a balanced manner to protect the interests that exist in society. Furthermore, Roscoe Pound stated that the interests that exist in society can be distinguished as private interests, public interests, and social interests (Bodenheimer, 1974). In this case, the customer's interest in giving trust to the bank is the essence of social interests that must be protected by law. Customer interest as the essence of social interest is stated in Article 29 paragraph (3) of Law 10/1998 along with its explanation before being amended by the provisions of Article 29 Law 4/2023, it is stated that banks are obliged to maintain and maintain public trust. This indicates that the provisions of Article 29 paragraph (3) of Law 10/1998 have the aim of protecting the interests of the public from the arbitrariness of banks as parties with superior resources. Protection of public trust who have become bank customers should be carried out by maintaining the morale of banking business actors. Especially in Bancassurance activities which Gilles Benoist in The Geneva Papers on Risk and Insurace 2002 called a global movement that must be taken into account and the most important thing in Bancassurance activities is to build strong relationships with insurance participants. (Benoist, 2002).

The deciphering of the principle of belief, in this case, is done using an approach to the context of Fiduciary Relationship as the concept is part of Fiduciary Law, which Andrew S. Gold and Paul B Miller stated: "fiduciary law is a distinctive body of law" (Gold & Miller, 2014). The specificity of fiduciary law in different legal forms is due to its characteristics characterized by the presence of power asymmetry (Gold & Miller, 2014). The power in question is in the civil scope, the power is used by the trustee in exercising the power of the trustee in this case the party who receives the benefits of the trust relationship. The existence of power asymmetries requires control, and this control is carried out by the common law system by imposing fiduciary law. This fiduciary law requires fiduciaries to act in the interests of the beneficiaries through various main legal obligations called fiduciary duties. According to Andrew S. Gold and Paul B. Miller, "fiduciary relationships generate at least one distinctive legal duty, the duty of loyalty and fiduciary relationships ordinarily attract other legal duties, including duties of care, candor, confidence, and good faith" (Gold & Miller, 2014). Another characteristic that exists in fiduciary law is the demand for compliance with high fiduciary duty so that violations can compensate beneficiaries when harmed by trustees, namely a compensation that is more favorable than the existing remedy provisions in common law law through constructive trust or disgorgement order". (Gold & Miller, 2014).

The theoretical framework of the concept of trust relationship in fiduciary relationships that applies to fiduciary law has a function as a compass and research basis in finding the principle of trust in PAYDI marketing bancassurance activities, namely: in the implementation of bancassurance, the Bank as a party that has a major influence on the birth of an agreement between bank customers and insurance companies, must uphold a standard of conduct by taking into account 3 (three) main rules contained in the principle of trust, namely: (i) no-conflict of interests, (ii) no-conflict of duties, and (iii) no-profit rules. If in the implementation of PAYDI marketing bancassurance activities, it turns out that the bank is in a state of conflict of interest and/or conflict of obligation with its customers, then according to the principle of trust, the bank must prioritize the interests and obligations of its customers over itself (or in this case the interests of the bank in obtaining fee-based income that benefits shareholders).

Legal Relationship of Parties in PAYDI Marketing Bancassurance Activities

The relationship between the bank and its customers is a contractual relationship that is fundamental to the contract between parties (Plato-Shinar, 2012). Therefore, the legal relationship between banks and bank customers is a type that is subject to the scope of contract law. The contractual relationship between the bank and its customers must be carried out fairly and proportionately. Justice is also a major idea in Law 10/1998 as conveyed by Uswatun Hasanah who stated that the precautionary principle that has been stated in the provisions of Article 2 of Law 10/1998 as the main principle of carrying out banking activities, needs to be complemented by the principle of justice as a banking principle (Uswatun Hasana in Pujiono, 2014). Thus, the application of the principle of justice to protect customer rights in legal relations with banks from pre-transaction to post-transaction is necessary to integrate the principle of proportionality which Agus Yudha Hernoko stated as the principle governing the exchange of rights and obligations of the parties in contracting under their proportion or part from before the contract was made until the contract was implemented. Only with proportional balance can the exchange of rights and obligations in contracts achieve fairness (Hernoko, 2016).

Bancassurance itself involves 3 (three) parties involved in a legal relationship (rechtsbetrekkingen), namely Banks, Insurance Companies, and Customers (consumers). The legal relationship itself by Soeroso is defined as the relationship between 2 (two) or more legal subjects regarding the rights and obligations of one party vis-à-vis the rights and obligations of the other (Soeroso, 2020). According to Peter Mahmud Marzuki, a legal relationship is defined as a relationship regulated by law, which can occur between a person and another person, between a person and a legal entity, and between a legal entity and another legal entity (Marzuki & Sh, 2020). The commercial contract dimension generally tends to emphasize aspects of respect for partnerships and business continuity such as profit-oriented efficiency, so they no longer dwell on mathematical equilibrium. The construction of the legal relationship of the parties in a commercial business contract revolves around the proportionality of the exchange of rights and obligations between the perpetrators. This was conveyed by Agus Yudha Hernoko supported that the fact of the acceptance of universal principles such as good faith and fair dealing; reasonableness and equity; redelijkheid en billijkheid; propriety and fairness) in business practice, proves that the priority is to assure that differences of interest between the parties have been regulated through a burden-sharing mechanism obligations proportionally, regardless of what proportion of the final result the parties receive (Hernoko, 2016).

The legal relationship between the Bank, Insurance Company, and Customers (consumers) in the course of Bancassurance activities on hybrid insurance products (PAYDI) is not completely safe with no legal risks. Proven in October 2018 the oldest insurance company in Indonesia PT. Asuransi Jiwasraya (Persero) publicly announced the company's liquidity problems, resulting in a default in the payment of Cash Value Due for the Investment Period to Bancassurance customers who have become Provest Saving Plan Policyholders. Liquidity

problems of PT. Asuransi Jiwasraya (Persero) continued with the company's financial examination which led to the disclosure of criminal acts of corruption committed by PT. Asuransi Jiwasraya (Persero).

In mid-2021, the examination in the trial of corruption cases at PT. Asuransi Jiwasraya (Persero) based on Decision Number 30 / Pid.Sus-TPK / 2020 / PN.Jkt.Pst and Decision Number 34 / Pid.Sus-TPK / 2020 / PN.Jkt.Pst which has legal force has still disclosed substantial facts including the following: (1) Modification of unit link products into fixed income PAYDI, attracting more customer interest so that they are highly sold; (2) Bank cooperation partners (bancassurance) provided significant premium growth for the company which at that time was experiencing insolvency; (3) There has been a PONZI practice within the insurance company that was not detected by the cooperating bank's risk management work unit; (4) To generate the fixed interest promised to Policyholders, the company places bancassurance customer funds in engineering stocks (fried stocks).

This proves that bancassurance activities even though they have been supervised by the Financial Services Authority (OJK) through regulations in the Financial Services Authority Circular Letter (SEOJK) Number 33 / SEOJK.03 / 2016 concerning the Application of Risk Management in Banks that Carry Out Marketing Cooperation Activities with Insurance Companies (Bancassurance) jo Financial Services Authority Regulation (POJK) Number 18/POJK.03/2016 concerning the Implementation of Risk Management for Commercial Banks, does not guarantee that PAYDI bancassurance is free from crime. Thus, the Financial Services Authority Circular Letter (SEOJK) Number 33/SEOJK.03/2016 has regulated the obligation for banks to implement prudential principles such as fulfilling the obligation to evaluate and analyze the financial health of the bank's partner insurance companies periodically and/or at any time when there is a change in the performance condition and/or reputation of the bank's partner insurance company, it cannot reverse the condition of bancassurance customers who already suffered PAYDI losses when the bank's partner insurance companies experienced financial difficulties.

Initially, from a legal aspect, bancassurance is carried out based on an agreement between the insurance company and the bank based on an agreement where the bank acts as a selling agent for insurance products in the market coverage area owned by the bank. From the proceeds of the sale of the insurance product, the bank will get payment in the form of a fee or commission according to the amount agreed by the bank with the insurance company. The legal relationship between the insurance company and the insured / customer is fundamental to the provisions of Article 6 and Article 9 of Law 10/1998, so that in the bancassurance system the consequences of the engagement arising between the bank and the insurance do not result in an engagement between the customer and the bank, but an engagement between the customer who changes his position as the insured and the issuing insurance (Haliwela, 2015). The existence of bancassurance when referring to Law 10/1998 is contrary to banking business activities because banks are prohibited from conducting insurance business. Law 40/2014 also requires the closure of insurance on credit based on the insurer's freedom of choice, except for some social credits. If we look closely, bancassurance does not place banks as businesses that run insurance, but bancassurance cooperation places banks only as agents to market insurance products.

In essence, the contract between these 3 (three) parties must be proportional, where the bank's influence on PAYDI's marketing bancassurance cooperation with the distribution business model must be taken into account as the main factor that brings customers into an agreement to move their deposit funds to PAYDI. Due to the bank's act of providing financial advice to customers in PAYDI's marketing bancassurance activities, the bank no longer performs agency functions for insurance companies, but also at the same time establishes a relationship of trust with its customers. That is when the bank provides financial advice to its customers, the bank must prioritize the interests of its customers with a standard of conduct, namely applying no-conflict of interests and no-conflict of duties. Therefore, it is not appropriate if, in the cooperation of PAYDI marketing bancassurance with the distribution business model, the bank is not responsible for the financial advice provided, which influences customers to divert their savings funds to PAYDI bancassurance products. This is where there is a disproportionate between the rights and obligations carried out by the bank to bank customers in bancassurance activities. The problem of legal relations that harm customers is certainly a challenge for jurists to provide the best solution for the realization of mutually beneficial contracts for the parties (Saragih, 1988).

Conclusions

The series of discussions above reveals that the dynamics of economic activities, which frequently rely on measurable profits for business contractual relationships, have integrated banking and insurance activities. The innovation of the bancassurance business has blurred the previously distinct legal boundaries between these two business activities. The fundamental idea of economic law revolves around economics, not law, as its philosophical foundation lies in the effectiveness of law in facilitating economic activities. This must be paid attention to, lest the law be used to legalize economic activities, which results in the value of justice being reduced

or even lost. Don't let laws only serve economic interests, just for reasons of efficiency and the need to support the development of economic activities. The provisions of SEOJK Number 33/SEOJK.03/2016, as with agency relationships in general, prohibit banks from bearing or contributing to risks arising from the offered insurance products, thereby transferring all insurance product risks to the bank's partner insurance company. Therefore, PAYDI bancassurance marketing cooperation with a distribution business model should be carried out together with the Policy Insurance Company as regulated in the provisions of Article 53, paragraph (2) of Law 40/2014. Article 4 of Law 24/2004 has been updated with the provisions of Article 4 of Law 4/2023 as a guarantee in order to protect the interests of policy holders, insureds, or bancassurance participants. Without a policy insurance company, PAYDI's bancassurance marketing collaboration with a distribution business model will not provide contractual fairness to bank customers.

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