

Legal Protection for Creditors Receiving Fiduciary Guarantees in the Event that the Guaranteed Object is Transferred to a Third Party

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ABSTRACT

Fiduciary guarantee is a form of material guarantee that is often used in financing agreements, especially in the motor vehicle financing sector. In the imposition of fiduciary guarantee, the object of the guarantee remains in the control of the fiduciary giver, while the ownership rights to the object are transferred to the fiduciary recipient. Problems arise when the debtor transfers the object of the fiduciary guarantee to a third party without the creditor's consent, which can cause losses to the creditor which can lead to disputes. This study aims to analyze the legal protection of creditors in agreements with fiduciary guarantees, as well as legal remedies that can be taken if the object of the guarantee is transferred to a third party unlawfully. The method used is normative legal research with a statutory, conceptual, and case approach. The results of the study indicate that legal protection for creditors depends on the fulfillment of all stages of the fiduciary guarantee imposition process. Creditors who do not register a fiduciary guarantee do not have a fiduciary guarantee. As a result, they do not have material rights to the object of the guarantee and are not protected if there is a transfer to a third party. Creditors can take legal remedies in the form of civil lawsuits, or criminal reports against the debtor. In addition, the effectiveness of legal protection is also influenced by the good faith of third parties and the existence of fiduciary guarantee certificates.

Keywords: fiduciary, legal protection, creditors, collateral objects, third parties

PENDAHULUAN

In financing practices, Guarantee is an important instrument to provide legal certainty and legal protection for creditors. In terminology, the term guarantee comes from the word guarantee which means liability, so that guarantee can be interpreted as liability. In this case, the liability for all obligations of a person as stipulated in Article 1131 of the Civil Code, which reads: "All objects owed, both movable and immovable, both existing and new, which will exist in the future, are liabilities for all individual obligations"[1]. Furthermore, Article 1132 of the Civil Code All of these objects become joint guarantees for creditors in balance according to their respective receivables, unless there is a legitimate reason to prioritize one receivable over another. This legitimate reason is if there is a special guarantee in the obligation. One of these special guarantees is a material guarantee.

One of the collateral that is widely used in Indonesia is fiduciary collateral. Fiduciary collateral is regulated in Law Number 42 of 1999 concerning Fiduciary Collateral. Fiduciary collateral is a collateral right that provides property rights to creditors over an object owned by the debtor, without the need to physically control the object. The legal construction of fiduciary collateral, the object that is the object of collateral is physically controlled by the Fiduciary Provider. Ownership of the object that is the object of fiduciary collateral is transferred to the Fiduciary Recipient based on trust[2]. Fiduciary guarantee is the transfer of

ownership rights to a creditor or fiduciary recipient as a debt guarantee, where control and enjoyment of the fiduciary guarantee object is in the hands of the debtor or fiduciary giver on a trust basis. The concept of fiduciary guarantee is the transfer of ownership rights to the fiduciary guarantee object from the debtor to the creditor based on trust[3].

In the practice of fiduciary guarantee imposition, it is not uncommon for violations to be committed by debtors. Violations that are often committed by debtors are the transfer of fiduciary guarantee objects without notification to the creditor.[4] This can make it difficult for creditors to execute fiduciary guarantees when the debtor experiences bad debts.[5] This action is usually carried out by debtors who have received financing from a finance company for the purchase of motor vehicles. In this case, the debtor's debt has not been paid off but the vehicle that is the object of the fiduciary guarantee has been transferred without the knowledge of the creditor. This practice raises quite complex legal problems. On the one hand, the creditor as the holder of the right to the guarantee suffers a loss due to the loss of the collateral object. On the other hand, the third party who receives or buys the object may not know that the item is the object of the guarantee.

Transferring the object of fiduciary guarantee without the creditor's consent is a violation of the provisions of Article 23 paragraph (2) of the Fiduciary Guarantee Law. In fact, in some cases, this act can be categorized as a criminal act, as regulated in Article 36 of the Fiduciary Guarantee Law. Article 23 paragraph 2 of Law Number 42 of 1999 concerning Fiduciary Guarantee states that the Fiduciary Provider is prohibited from transferring, pawning, or renting objects that are objects of Fiduciary Guarantee that are not inventory items, except with prior written consent from the Fiduciary Recipient. Such conditions will be further exacerbated if the creditor is negligent in registering the fiduciary guarantee, so that his position does not receive maximum legal protection.

This problem often occurs especially in the motor vehicle financing sector. The practice of transferring motor vehicles that are still objects of fiduciary guarantees to third parties is quite common. Therefore, a study on legal protection for creditors in the event of a transfer of fiduciary guarantee objects to third parties is important to do. This study aims to determine and analyze legal protection for creditors in fiduciary guarantees if the object is transferred to a third party without the creditor's knowledge. The expected benefits of this study are: Theoretically, it contributes to the development of legal science, especially in the fields of guarantee law and civil law. Practically, it becomes a reference for creditors, law enforcers, and third parties in understanding the legal aspects surrounding fiduciary objects that are transferred unlawfully.

MATERIAL AND METHOD

Material

Definition and Characteristics of Fiduciary Guarantee

A fiduciary guarantee is a right to guarantee property arising from an agreement guaranteed by a fiduciary guarantee. In a fiduciary guarantee, the ownership of an object is transferred to the Fiduciary Recipient in trust, but the object remains in the control of the Fiduciary Giver. This is emphasized in Article 1 number 1 and number 2 of the Fiduciary Guarantee Law. This fiduciary guarantee is to guarantee the payment of debtors' debts to the creditors of the Fiduciary Recipient. Fiduciary guarantees are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Jaminan Fidusia memiliki karakteristik utama antara lain:

1. Accessor nature: Fiduciary guarantees are attached to the principal agreement that is guaranteed by the fiduciary guarantee.
2. The physical object remains in the possession of the Fiduciary Provider: The object that is pledged remains in the possession of the debtor.
3. Property rights: Creditors have property rights that are in the nature of providing guarantees.

Legal Position of Creditors in Fiduciary Guarantees

In the legal relationship of fiduciary guarantee, the creditor has the position as the holder of the guarantee rights over the object transferred as a fiduciary. This position gives the creditor the right to be prioritized over other creditors in the event of a default by the debtor (preferential rights). Legal protection for creditors is very dependent on how the fiduciary guarantee is implemented. If the fiduciary guarantee has been implemented according to the stages in the process of the fiduciary guarantee, then a fiduciary guarantee occurs in accordance with the provisions of the Fiduciary Guarantee Law. The stages of the fiduciary guarantee include the stage of fiduciary guarantee imposition with a notarial deed and the stage of fiduciary guarantee registration. The fiduciary guarantee registration stage is emphasized in Article 11 of the Fiduciary Guarantee Law. If the fiduciary guarantee is not registered, then there is no fiduciary guarantee. This results in the creditor's position not having special guarantee rights in the form of property guarantee rights. In this case there is only a general guarantee as regulated in Article 1131 of the Civil Code. The creditor's position is as a concurrent creditor, not a preferred creditor.

Transfer of Fiduciary Guarantee Objects to Third Parties

The transfer of fiduciary collateral objects to third parties often occurs without the knowledge of the creditor, for example when the debtor sells a motor vehicle that is still the object of fiduciary collateral. In practice, this can cause legal problems, both for the creditor and the third party who receives the object.

According to Article 23 of the Fiduciary Collateral Law, debtors are prohibited from transferring, pawning, or renting fiduciary collateral objects that are not inventory objects without the written consent of the creditor. Violation of this provision can result in criminal penalties as regulated in Article 36 of the Fiduciary Collateral Law, with the threat of imprisonment and/or fines.

Legal Protection for Creditors in Cases of Transfer of Fiduciary Collateral Objects

Legal protection for creditors can be done in several ways as follows:

1. Execution of Fiduciary Guarantee: Creditors have the right to execute fiduciary objects without going through a court process if they have been registered and have a fiduciary guarantee certificate with executorial power.
2. Criminal Report: If the debtor makes a transfer without permission, the creditor can report a criminal act of fraud or embezzlement as permitted by criminal law.
3. Civil Claims against Third Parties: In the event that a third party purchases a fiduciary object in bad faith (knowing that the object is collateral), the creditor can sue the third party for the return of the object or compensation. If the third party obtains the object in good faith, then the creditor's protection becomes weaker, especially if the fiduciary guarantee is not registered, because the property rights are not publicly attached.

Method

This study uses a normative legal research method, namely legal research conducted by examining library materials or secondary data. The focus of this study lies in positive legal norms, legal principles, and legal doctrines and theories related to legal protection for creditors in fiduciary agreements, especially when the collateral object is transferred to a third party. The approaches used in this study are:

1. Statute approach, by examining related laws and regulations, such as Law Number 42 of 1999 concerning Fiduciary Guarantees, the Civil Code, and the Criminal Code.
2. Conceptual approach, to understand concepts such as material collateral, property rights, and legal protection for creditors.
3. Case approach, by examining relevant court decisions as jurisprudence.

This study uses three types of legal materials:

1. Primary legal materials, namely relevant laws and court decisions.
2. Secondary legal materials, such as legal literature, expert opinions, and scientific journals discussing fiduciary and property rights.
3. Tertiary legal materials, in the form of legal dictionaries, legal encyclopedias, and legal indexes.

The collection of legal materials was carried out through literature studies by searching, recording, and reviewing relevant legal sources. The analysis technique used is descriptive-qualitative, namely by describing the legal data obtained systematically and then analyzing it to answer the legal problems discussed in this study.

DISCUSSION

Legal Protection of Creditors in Agreements with Fiduciary Guarantees

Fiduciary guarantees have existed in society since the Dutch colonial era because of the flexibility of objects that can be burdened with fiduciary guarantees, so there is an increasing need for legal certainty regarding fiduciary guarantees..[6]

The position of creditors in a financing agreement with fiduciary collateral is very different from if there is a fiduciary collateral. The position of creditors that is only based on a financing agreement without any fiduciary collateral against the collateral object will make the creditor a general creditor (concurrent), namely a creditor who is entitled to the distribution of the debtor's assets in the event of a default evenly after being reduced by priority rights (preferences). This is very different if the creditor has placed a fiduciary collateral in the financing agreement. With the existence of the fiduciary collateral, the creditor will become a preferred creditor who has special rights. As a preferred creditor, the creditor has special rights over the goods pledged to him, so that if at any time the debtor defaults, the creditor has the right to execute the object pledged to him.[7]

Fiduciary is the transfer of ownership rights to an object based on trust, with the provision that the object whose ownership rights are transferred remains under the control of the owner of the object. The debtor is the party who has a debt due to an agreement or law, and the creditor is the party who has a debt due to an agreement or law.[8]

Fiduciary Guarantee is one of the material guarantees. Material guarantees essentially function to guarantee the certainty that the debtor's debt will be paid off if the debtor does not fulfill his obligations. With the guarantee in the financing, it can be a protection for the creditor that the credit loan given by the debtor will be returned.[9] With the existence of guarantees or collateral, debtor customers will be more committed to carrying out all their obligations to creditors. With the existence of material guarantees, Islamic Banks can ensure that their interests and the interests of creditor customers can be well protected.[10]

In the Indonesian legal system, creditors holding fiduciary guarantees have preferential rights over the object of the guarantee (Article 27 of the Fiduciary Guarantee Law). This is because fiduciary guarantees create property rights that are attached to the object.[11] To obtain full legal force, fiduciary guarantees must be carried out through two stages, namely the fiduciary guarantee imposition stage and the fiduciary guarantee registration stage. The time when the fiduciary guarantee occurs is when the fiduciary guarantee is registered.[12] After registering the fiduciary guarantee at the Fiduciary Registration Office, a fiduciary guarantee certificate will be issued. This certificate has an executorial power that makes it easier for creditors to execute objects if the debtor defaults. Currently, fiduciary guarantee registration is done online through the Ministry of Law.[13]

In practice, there are still many creditors who do not register fiduciary guarantees, so that their legal position becomes weak, especially when the fiduciary object has been transferred to a third party.

Legal Issues Regarding the Transfer of Fiduciary Guarantee Objects to Third Parties

Problems arise when the object of the fiduciary guarantee is transferred (for example sold) to a third party without the creditor's consent. This violates the provisions of Article 23 paragraph (2) of the Fiduciary Guarantee Law which requires written consent from the creditor for the transfer. In the case where the object of the fiduciary guarantee is not an inventory object, in principle it may not be transferred to a third party without written consent from the creditor receiving the fiduciary. If the transfer is carried out without written consent, it can cause difficulties for the creditor in terms of executing the object of the guarantee if the debtor defaults. Fiduciary Guarantee is a right to guarantee property. This has consequences including:

1. Fiduciary guarantees create absolute property rights. This means that the guarantee rights can be maintained against anyone. Property rights always follow the object in the hands of anyone who the object is in, except for the transfer of inventory (Article 20 of the Fiduciary Guarantee Law).
2. Creditors Receiving Fiduciary also have rights as preferred creditors (Article 27 of the Fiduciary Guarantee Law).
3. Fulfills the principle of specialty and the principle of publicity so that it binds third parties and provides legal certainty to interested parties (Articles 6 and 11 of the Fiduciary Guarantee Law).
4. Easy and certain execution (Article 29 of the Fiduciary Guarantee Law).

Although there are characteristics of property rights as mentioned above, problems can arise if the collateral object is in the hands of a third party and its whereabouts are unknown, or the third party refuses to hand over the collateral object at the time of execution.

Article 24 of the Fiduciary Guarantee Law states that "The Fiduciary Recipient shall not bear any liability for the consequences of the actions or negligence of the Fiduciary Provider, whether arising from a contractual relationship or arising from an unlawful act in connection with the use and transfer of the fiduciary collateral object.

Article 30 of the Fiduciary Guarantee Law "The Fiduciary Provider is obliged to hand over the object that is the object of the fiduciary guarantee in the context of implementing the execution of the fiduciary guarantee. If the Fiduciary Provider does not hand over the object of the fiduciary guarantee, the Fiduciary Recipient has the right to take the object that is the object of the fiduciary guarantee and if necessary ask for assistance from the authorized party.

Debtors or Fiduciary Providers who transfer fiduciary collateral objects to third parties without written consent from the creditor may be subject to criminal sanctions as stipulated in Article 36 of the Fiduciary Collateral Law. For third parties who purchase fiduciary collateral objects, they will also be subject to legal impacts. This is because of the property rights owned by the Fiduciary Recipient. If the debtor defaults, the creditor has the right to execute the object in the hands of whoever the object is, because property rights always follow the object in the hands of whoever the object is.

Supreme Court Decision No. 3035 K/Pdt/2005, for example, emphasizes that third parties who purchase fiduciary collateral objects in bad faith can still be held legally responsible. However, in several other decisions, the Supreme Court emphasized the importance of fiduciary registration so that creditors receive maximum legal protection. In Supreme Court Decision No. 3035 K/Pdt/2005, the Supreme Court decided that creditors can still demand the return of fiduciary objects from third parties because the third party knows that the object is collateral. This decision shows that the bad faith of a third party is an important basis for creditors to obtain legal protection. On the other hand, in cases where the fiduciary is not registered and the third party purchases the object without knowing its legal status, the court tends to provide protection to the

third party as a good faith buyer, in accordance with the principle of "nemo plus iuris" and the principle of trust in transactions.

CONCLUSION

Based on the results of the research and discussion that has been conducted, several things can be concluded as follows:

1. Legal protection for creditors in fiduciary agreements is highly dependent on the registration of fiduciary guarantees. Without registration, there is no fiduciary guarantee, so that creditors do not have property rights. As a result, creditors do not have binding power against third parties, so that their legal protection becomes weak.
2. The transfer of fiduciary guarantee objects to third parties without the creditor's consent is a violation of Article 23 paragraph (2) of the Fiduciary Guarantee Law and can be subject to criminal sanctions as regulated in Article 36 of the same Law.
3. In the event that the fiduciary guarantee object is transferred to a third party, the creditor still has several legal remedies, including through execution, criminal reporting against the debtor, and civil lawsuits against third parties who act in bad faith. However, if the third party obtains the object in good faith and the fiduciary guarantee is not registered, then the protection for creditors is limited. Court decisions show that the good or bad faith of a third party is the main determining factor in determining who receives greater legal protection. Third parties who act in bad faith can be held legally liable, while those who act in good faith are generally protected by law, especially if the fiduciary guarantee is not registered.

RECOMMENDATION

1. For creditors, it is important to always register fiduciary guarantees to obtain binding legal force against third parties and can be executed without going through the courts.
2. For policy makers (legislators), it is necessary to evaluate and strengthen the fiduciary registration mechanism, including encouraging digitalization and openness of information regarding the status of collateral objects, so that third parties can easily find out whether an item is a fiduciary object or not.
3. For third parties, it is better to conduct a thorough check on the legal status of movable goods, especially motor vehicles, before making a purchase, in order to avoid legal disputes in the future.

REFERENCE

1. Supriyadi, "Reconstruction of the guarantee's objects in the fiduciary agreement in Indonesia," *Utop. y Prax. Latinoam.*, vol. 25, no. Extra1, pp. 260–271, 2020, doi: 10.5281/zenodo.3774640.
2. S. M. Badriyah, "Problematic of Fiduciary Guarantee in the Consumer Finance Agreement Without a Notarial Deed," *Int. Journal Humanit. Soc. Stud.*, vol. 3, no. 6, pp. 284–288, 2015.
3. A. T. WIBOWO, "Legal Basis for Reporting Embezzlement of Motorized Vehicles (Objects of Fiduciary Guarantees) Transferred To Third Parties By Fiduciaries With Pawning," *Authentica*, vol. 6, no. 2, pp. 146–160, 2024, doi: 10.20884/1.atc.2023.6.2.433.
4. L. K. Putri and B. Djaja, "Edunity WHOSE MOVABLE OBJECT HAS BEEN TRANSFERRED," vol. 2, no. 9, pp. 1086–1102, 2023.
5. Z. Zulfikri and S. Sagala, "Legal Protection of Creditors on the Transfer of Four-Wheel Vehicles By the Debtor To Third Parties in Pekanbaru City," *PENA LAW Int. J. Law*, vol. 1, no. 2, pp. 99–108, 2022, doi: 10.56107/penalaw.v1i2.45.
6. K. Anwar, "International Journal of Social Science Research and Review in Indonesia," vol. 7, no. 5, pp. 83–95, 2024.
7. T. M. A. Bahar, T. Kamello, S. Suhadi, S. Saidin, and R. H. B. Trihasworo, "Contractual Obligations in Financing with Fiduciary Security in Indonesia in the Context of Justice," *Lex Sci. Law Rev.*, vol. 7, no. 1, pp. 215–248, 2023, doi: 10.15294/lesrev.v7i1.69318.

8. H. Hirwansyah and J. Heber Ambuwaru, "Legal Protection for Creditors Regarding Default and Unilateral Transfer of Fiduciary Guarantee Vehicles Based on the Principle of Justice," *J. World Sci.*, vol. 2, no. 1, pp. 32–45, 2023, doi: 10.58344/jws.v2i1.197.
9. N. A. Putri and S. M. Badriyah, "The Results of Fiduciary Law Warranties which the Objects are Transferred to Third Parties," vol. 5, no. 225, pp. 125–139, 2023.
10. Miswardi, Darmawan, and M. Adli, "Constraints to the execution of the object of fiduciary guarantee in murabahah contracts at the," vol. 7, no. 6, pp. 130–133, 2021.
11. R. Suharto, S. M. Badriyah, Marjo, M. S. Wafi, and M. H. F. Allam, "Fiduciary security execution after constitutional court decision," *Indian J. Forensic Med. Toxicol.*, vol. 14, no. 4, pp. 3058–3062, 2020, doi: 10.37506/ijfmt.v14i4.12055.
12. S. M. Badriyah, R. Suharto, Marjo, R. Saraswati, and M. S. Wafi, "Implementation of the constitutional court decision regarding the execution of fiduciary guarantees and inclusion of default clauses in Indonesia," *Int. J. Criminol. Sociol.*, vol. 10, pp. 33–38, 2021, doi: 10.6000/1929-4409.2021.10.05.
13. S. M. Badriyah, R. Suharto, and H. Kashadi, "Legal Protection for Creditor in the Online Registration of Fiduciary Guarantee in Consumer Finance," *IOP Conf. Ser. Earth Environ. Sci.*, vol. 175, no. 1, 2018, doi: 10.1088/1755-1315/175/1/012215.