

Legal Protection For Creditors During The Execution Parate Of The Fiduciary Guarantee's Purpose

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Abstract. The transfer of the object of fiduciary security by the debtor to a third party is one of the issues faced by many financial institutions that offer credit and financing services. The issue is complicated because as a result of the transfer of the object of guarantee by the debtor and the third party (either through selling, purchasing, leasing, or other means), there will be a conflict of rights between the third party as the ruler of the object and the debtor. This study will examine how the fiduciary security's object is performed separately as a result of the debtor transferring the security's object to a third party. Legal protection for creditors while the fiduciary security's object is being executed against the fiduciary security's object that is given to a third party. The research methodology employed is normative juridical, and it uses interviews as data collection instruments to gather primary data, secondary data, and tertiary data through fieldwork and library research. The findings are qualitatively examined. Moving forward, the issue is thoroughly examined through legal research.

Keywords: Legal Protection, Fiduciary, Auction.

1 Introduction

Procurement of motorized vehicles cannot always be fulfilled in cash, but sometimes it is done on credit, depending on the financial capacity, motivation and objectives of the person concerned. Due to limited funds, the presence of a consumer finance company is a solution. Credit, of course, has become commonplace in today's society, not only people who have low economic levels who use this facility, but people with middle to upper economic standards also use it, besides being able to make it easier to buy a vehicle, but also sometimes there are attractive promos offered to prospective buyers when using credit facilities to buy a motor vehicle. (Mamudi, 2017) Article 17 of the Regulation of the Financial Services Authority Number 29/POJK.05/2014 concerning the Implementation of the Business of Financing Companies describes that companies that carry out financing by way of purchases with payments in installments for motorized vehicles are required to apply down payment provisions to debtors. The definition of down payment in the general provisions of point 5 of Circular Letter of the Financial Services Authority Number 19/SEOJK.05/2015 concerning Down Payment for Motor Vehicle Financing for Financing Companies is an advance payment or cash advance which is sourced the funds come from

debtors (self-financing) in the context of procuring motorized vehicles using the purchase method with payment in installments[1].

The implementation of consumer finance institutions in Indonesia that provide financing facilities are bank and non-bank financial institutions. One of the banking institutions is Bank Syariah Indonesia Bandar Lampung. One of its offerings is funding, specifically for tasks that fall under the purview of financial institutions' line of work. In which leasing, factoring, credit card business, and consumer financing, including consumer financing, are among the commercial activities of finance organisations. The recipient of the facility is an individual or can be a legal entity. In general, the object to be financed in this financing agreement is a four-wheeled motor vehicle[2].

Debtors are not allowed to transfer or rent to other parties objects of fiduciary security that are not inventory objects without approval from the creditor, because objects whose control is in the hands of the debtor are very risky to change hands. The transfer of the subject of the fiduciary security by the debtor to a third party is a difficulty that financial institutions that offer credit and financing services sometimes run into. A more specific issue, namely how the debtor can deal with the issue of bad credit brought on by the transfer of the debtor's fiduciary guarantee object to a third party, arises from the situation where the debtor is negligent and feels free from his obligations because the guarantee's object has been transferred to a third party. Due to the fact that the object of the fiduciary promise itself has been transferred from the debtor to a third party against the creditor's will, it becomes unclear what type of execution mechanism will be used when the debtor defaults.

As a result of the transfer of the collateral item by the debtor and the third party (whether through purchasing and selling, renting, or another method), there will be a conflict between the rights of the third party as the object's ruler and the creditor as the item's legal owner. Implementation of the execution of fiduciary guarantees for moving objects for four-wheeled motorized vehicles in Bank Syariah Indonesia in Bandar Lampung often experiences difficulties, including the collateral goods in the form of four-wheeled motorized vehicles have been transferred, the identity of the collateral has been changed, the debtor has changed address and there has even been resistance from the debtor or a group of people who have not. accept the fact that the collateral is taken back by the creditor in order to settle the debts of the debtor, the fiduciary provider insists on having reasons that the fiduciary amount is too large or asks for a settlement in the transfer process which takes time, energy and large funds.

Thus, guarantee institutions need to receive serious attention in relation to the execution of fiduciary guarantees in the practice of peoples lives in the context of Indonesia development, especially in the field of law, because economic and trade developments will always be followed by developments in the need for credit, for example four-wheeled motor vehicle loans.

The transfer of the subject of the fiduciary security without notifying the creditor is one of the violations that debtors frequently commit, making it challenging for the creditor to execute the fiduciary guarantee when the debtor has a poor credit history. This action is usually carried out by debtors who have

received financing from finance companies for the purchase of motorized vehicles such as two-wheeled or four-wheeled vehicles, where the debt has not been paid off, but the vehicle has been transferred without the knowledge of the creditor, for this reason the author raised the title mentioned above.

2 Method

This research falls under the category of normative legal research, which analyses laws and rules within a cohesive legal system. In this instance, positive legislation is issued as the result of legitimate political power at a specific time and pertains to that situation. There are also many who claim that the research is normative or doctrinal when the issues and research goals of legal studies mirror the ideal field of law (philosophy, legal principles, rules of law, systematic logic, and fundamental concepts of law). [6]. Legal research that uses normative juridical methods has the ability and scope to use secondary data sources, namely legislation, legal theory, and the opinions of leading scholars. Based on the aforementioned concept, this research is a type of normative legal research (Legal Research), also known as Doctrinal Research, which examines law as a distinct system that is distinct from various other systems in society in order to provide a boundary between the legal system and the other systems of law.

In order to provide a more comprehensive understanding of legal issues (Legal Issues), several approaches will be used as part of a normative-prescriptive legal research project on the execution of fiduciary objects, including the following: the philosophical approach (Philosophical Approach), approach to legislation (Statute Approach), conceptual approach (Conceptual approach), comparative approach (Comparative approach), analysis approach (Analytical Approach), and the historical approach (Historical Approach).

3. Result and Discussion

The legal ramifications of parate execution of the fiduciary guarantee object at BSI Teluk Betung Branch in Bandar Lampung as a result of the debtor's transfer of the fiduciary guarantee object to a third party. Everything that can be possessed and transferred, including tangible property that is not moveable nor immovable and is not subject to a mortgage or mortgage rights, There is a fiduciary guarantee on this. Fiduciary assurance is covered under Article 1 paragraph 4 of the UUJF, Article 9 paragraph 1, Article 10 paragraph 1, and Article 20. Regarding the fiduciary guarantee's declared goal in UUJF Article 10. The person or organisation that owns the thing that is the subject of the fiduciary promise, as per Article 1 Point 5 UUJF, is the subject of the fiduciary guarantee. As stated in Article 1 number 6 UUJF, the fiduciary beneficiaries are "individuals or corporations who have receivables whose payments are guaranteed by fiduciary." Existing debt, debt that will exist in the future and has been agreed to in a definite quantity, and debt that at the time of execution can be calculated based on the principal agreement that generates an obligation to complete an achievement are all types of debt that can be guaranteed by fiduciaries.

In contrast, it can be said that if either the debtor or the creditor does not fulfil the obligation to make achievements, then it can be claimed that one of the parties is in default, which is the main concern in the matter of fiduciary guarantees, namely the

default of the debtor. This obligation to make achievements is stated in Article 4 UUJF. According to contract law, a debtor has defaulted and is subject to all related legal repercussions if they fail to fulfil the terms of the agreement or fail to take the actions that were promised. Do something that is against the rules or improper. This has legal repercussions, as the harmed party may demand that the accomplishments or other penalties outlined in the agreement be put into effect (compensation).

By extending credit, the creditor authorizes/trusts the debtor to continue using the collateral in accordance with its intended usage. The debtor must be able to maintain the collateral as best they can while using it, though. This is consistent with the notion of good faith, one of the UUJF's guiding principles. According to this rule, the fiduciary guaranteeing party who continues to be in charge of the collateral object must act in good faith (te goeder troow, in good faith). The term "good faith" in this context refers to honesty rather than propriety or incontract law, which are both objective concepts. According to this theory, the fiduciary guarantee provider should be required to preserve the collateral item and not give, rent, or pawn it to third parties. In addition, the UUJF expressly states that debtors are the object's hands. However, the inventory-based object of fiduciary security is exempt from this property's exclusion. If the debtor breaks his commitment, the creditor, acting as the fiduciary recipient, can nevertheless enforce the automobile collateral object, truck, or bus, even though it has been sold and is now in the possession of another party or third party. This is an example of the *droit de suite* in action. This is so because the owner of the automobile, bus, or truck—the subject of the fiduciary guarantee—sells it to a different party. Therefore, the subject's owner's sale of the subject has no bearing on the creditor's authority to exclude the subject of the fiduciary assurance.

In order to secure the execution of goods that are burdened with a fiduciary, the Chief of Police of the Republic of Indonesia Regulation No. 8 of 2011 has been issued which has been in effect since June 22, 2011. In order to carry out the execution of a fiduciary guarantee in a safe, orderly, smooth and accountable manner, protecting the safety of the fiduciary recipient, fiduciary guarantee providers and/or the public from actions that can cause property and or life safety losses, then the request for securing the execution must be submitted in writing by the fiduciary guarantee recipient and/or his legal representative to the Head of the Regional Police or the Head of the Resort Police where the execution is carried out, if the application is submitted by the legal representative of the recipient of the fiduciary guarantee, it must attach a power of attorney from the recipient of the fiduciary guarantee. For the creditor receiving the fiduciary guarantee to carry out the execution of the fiduciary promise, the fiduciary donor must deliver the object that is the subject of the guarantee. If the provider of the fiduciary guarantee fails to deliver the item when the execution is carried out, the fiduciary recipient has the right to confiscate the object covered by the guarantee and, if necessary, can request help from the authorities. 4 the scheme of the fiduciary guarantee execution mechanism is as follows:

1. Beginning with the binding of the financing agreement between the consumer and the finance company. In the agreement system, the agreement between the two parties referred to here is the process of channeling credit to consumers, the finance company requires the consumer to complete the file requirements and pledge an object as collateral for debt repayment.
2. The next stage is to make a deed of fiduciary guarantee agreement. Motorcycles and automobiles are the items that are guaranteed in the finance company's fiduciary

agreement. For automobile guarantees, a fiduciary agreement deed is created by a notary, while an internal fiduciary agreement deed from the bank is made for motorcycle guarantees. According to Article 5 paragraph (1) UUJF, the assignment of objects with fiduciary guarantees is accomplished through a notarial deed and is a fiduciary guarantee deed.

3. The next stage, namely if the consumer is proven to have defaulted on the creditor with efforts to save the agreement by the creditor, the creditor as the holder of the fiduciary guarantee deed can execute the collateral object.
4. The last stage of the non-litigation process, namely the finance company will execute the guarantee after the guarantee is with the creditor, then the creditor will make an advertisement for the sale of the object of the fiduciary guarantee, containing information on the price and specifications of the object. The price stated for the collateral is the most profitable minimum price (floor price) with the aim that the collateral is sold quickly.

The fiduciary guarantee execution system is governed by Article 29 of the UUJF, which states that if the debtor or fiduciary grantor violates the terms of the agreement, the executorial title, which has the same force as a court order and is permanently enforceable, may be used to carry out the execution of the thing that is the subject of the fiduciary guarantee. Items that gain fiduciary guarantees may be sold with the approval of the fiduciary beneficiaries themselves through public auctions or by utilising the proceeds to settle outstanding debts. In order to acquire the maximum price that benefits both parties, underhanded sales are done with the consent of the fiduciary provider and recipient. [5]

The three executions of fiduciary guarantees mentioned above each have differences in their implementation procedures. The implementation of the sale of collateral items is subject to and complies with the Civil Procedure Law as specified in Article 224 H.I.R./258 Rbg, whose implementation procedure is time-consuming, for executions that use the executorial title based on a fiduciary guarantee certificate. Contrary to shady sales, the implementation must adhere to a number of conditions, such as a contract between the fiduciary recipient (debtor) and the fiduciary donor (creditor). The goal is to increase sales value in order to command the greatest price. [6]

Protection from the execution of the subject matter of the fiduciary guarantee against the subject matter of the fiduciary security that has been transferred by the debtor to a third party by BSI Teluk Betung Branch Bandar Lampung as a creditor. When the guarantee's object is transferred to a third party, issues frequently arise in the parate execution of the fiduciary guarantee. It is common in practise for the object of the guarantee to be executed to have been pledged or transferred to a third party when the parate execution of the fiduciary security is carried out.

When there is an allegation of manipulation by the debtor with a third party by making a sham agreement, the creditor who feels aggrieved can file a lawsuit for the cancellation of the sham agreement in question. If it is successful to prove the manipulation of the sham agreement, then the execution can be carried out on the fiduciary collateral. On the other hand, if the creditor cannot prove it, then the legal consequences of the parate execution of the object of fiduciary security if the object has been transferred to a third party, the execution cannot be executed (non-executable). The reason is that the execution cannot be executed because the item that will be used as the object of the execution does not exist because it has been switched to a third party. Regardless of the possibility of whether the guarantee agreement held by a third party is

an act of sham or not, if it is proven that the third party guarantee precedes the guarantee held by the execution decision, the execution of the guarantee object that is declared unexecutable (non-executable) for reasons of the guarantee object is more was in the hands of a third party.

Instead, the execution can be transferred to other debtor's goods and if the other debtor's goods do not exist other than goods that are guaranteed to a third party, then the execution is declared unable to be carried out. If the creditor as the applicant for execution still wants the execution of the object of collateral that is on the third party, he can try through a new lawsuit demanding that the guarantee agreement between the debtor and the third party is an act of sham. If it succeeds in proving it and the court cancels it, then the execution can be carried out. On the other hand, if it fails to prove, it means that the guarantee agreement between the debtor and a third party is valid and correct, thus the execution request must be declared unable to be executed on the goods in question.

Based on the sound of Article 34 paragraph (2) of the UUJF above, the completion of the execution of this matter does not erase the claim of the creditor's rights against his claim against the debtor. Juridical claims remain, only the execution cannot be executed, because the debtor's assets to be executed do not exist at the time the execution is executed. Therefore, the creditor's right to request execution at some point is still open if the creditor knows and can show the debtor's assets. Whenever there is debtor's property, it means that the right to request execution remains alive. Execution cannot be executed, it can only be said to be permanent, if at any time the debtor's assets that are the object of the guarantee never exist again. However, from a theoretical point of view as well as in terms of reality, it is more accurate to say that the nature of execution cannot be carried out in this case, which is temporary. However, there is still a high possibility that the debtor's assets will exist in the future. When it is found that the debtor's assets are found, the execution cannot be carried out which is attached to the execution and can be withdrawn.

The execution carried out by the BSI Teluk Betung Branch in the event that the guarantee has been transferred to a third party or changed hands is to report to the police first where the police will later provide a summons and usually the police will first provide mediation to the creditor and debtor. Where at the time of mediation the police notify what sanctions are obtained by the debtor if he does not submit the collateral to the creditor even though the collateral has changed hands. After mediation is held by the police, what usually happens is that the debtor will take the unit/collateral back to the creditor. If the mediation is not successful or is not heeded by the debtor, the BSI Teluk Betung Branch will again report to the police to carry out further investigation and examinations to find criminal areas that can be imposed on the debtor.

In the clause in the deed of the consumer financing agreement, there is Article 17 which states that if there is a dispute due to the implementation of the agreement, then both parties will resolve it by deliberation, but if a settlement is not reached then the parties agree to choose a permanent and unchanged legal residence for the next with does not reduce the right of the creditor to file lawsuits against the debtor before the court.

It is illegal for a loan firm to incorporate a power of attorney to sell the collateral item in the paperwork governing its consumer financing agreement. The finance company uses a power of attorney to sell the subject of the fiduciary guarantee because the object of the collateral is registered in the debtor's name, negating the consumer finance company's ability to do so. As a result, a power of attorney is made to sell the

subject of the guarantee. Legal smuggling carried out by finance companies is by using a power of attorney to sell the object of the guarantee to avoid registration of fiduciary guarantees in accordance with the provisions stated in the UUJF and the Regulation Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees [7].

Making or imposing a fiduciary guarantee that is notarized and continues to be confirmed by the registration of the agreement deed gives rise to the legal protection for creditors in a fiduciary guarantee agreement. Concretely, under a system that implements protection through the execution of fiduciary guarantees, which ultimately provides creditors an option to pick the peaceful road, which results in supplying more costs, and insufficiently and poorly appreciating the legal protection for creditors [8].

By entering into a consumer financing principal agreement with the imposition of a fiduciary guarantee that is made in a notarial manner and continues to be confirmed by the registration of the agreement deed, so that the creditor can be domiciled as a preferred creditor, the provision of consumer financing has the potential to risk legal protection to creditors due to default debtors in consumer financing with fiduciary guarantees. Although the costs incurred do not equal the amount of creditor financing, the creditor's position is concurrent for those who are not registered with the Fiduciary Registration Office. Execution of items related to consumer finance contracts with fiduciary guarantees if the defaulting debtor has the same executive authority as the court's determination to sell items related to fiduciary guarantees if the items are registered, in this case via an auction mechanism. Additionally, the subject of a fiduciary guarantee may be withdrawn along with the right of surrender of property rights on a fiduciary basis and the number of the approved fiduciary agreement by those who specifically handle the withdrawal of the object of collateral with the voice of the power of attorney from the company. [9].

In terms of fiduciary promises, the scope of executions determines the level of legal protection for creditors. The BSI Teluk Betung Branch notarizes a fiduciary guarantee deed, which is then registered online with the Ministry of Law and Human Rights of the Republic of Indonesia's Fiduciary Office and issued with a Fiduciary Guarantee Certificate that has the same executory power as a court order with irrevocable legal effect. Additionally, creditors are permitted to sell items that are the subject of fiduciary guarantees at public auctions and to use the proceeds to settle outstanding debts (underhand sales are carried out based on mutual agreement between the parties), through voluntary submission from the debtor to the creditor to pay off the debtor's debt.

Preventive protection for creditors is that the provision of fiduciary guarantees must go through registration in accordance with Article 3 of the UUJF with the aim of ensuring creditors. So that in order to realize creditor protection, every agreement related to fiduciary guarantees must be registered and requires the debtor to obtain written approval in terms of providing a replacement guarantee of equivalent value, so that in an argument a contrario, the debtor cannot replace the object of the fiduciary guarantee without written approval [10]. In addition to the preventive protection provided to debtors, it is through consultation with a notary in order to understand the meaning in the agreement so that it does not cause misinterpretation and can also be through affirmation of the contents of Article 23 paragraph (2) and Article 36 contained in UUJF or by adding a clause in the agreement that Fiduciary guarantee rental may be carried out on condition that there is approval from creditors and is intended to fulfill ongoing credit.

It is explicitly stated in Article 36 of the UUJF that debtors who transfer the

subject of a fiduciary security without the creditor's consent are condemned to 2 (two) years in prison and a maximum fine of 50,000,000 regardless of the debtor's economic condition or condition. If the debtor transfers the object of the fiduciary guarantee without the approval of the creditor, but has good faith in fulfilling the bills or installments that must be paid by the debtor to the creditor, the sanction can be said to be ineffective. The fiduciary recipient or creditor must also register the subject of the guarantee with the fiduciary registration office, which is the Ministry of Law and Human Rights, in order to receive legal protection. If the registration has been completed, the provisions of UUJF will be applicable. While repressive defence attempts to settle conflicts. If the dispute cannot be settled amicably and the debtor transfers or rents the subject of the fiduciary guarantee with the intent to do so in bad faith, repressive protection for debtors who do so without the creditor's consent may be imposed. In addition to the criminal sanctions described in Article 36 of the UUJF, there is an act of withdrawing the object of a fiduciary guarantee if the debtor cannot pay off or pay the agreed bill.

According to the provisions of Article 11 paragraph (1) of the UUJF, objects that are burdened with fiduciary guarantees must be registered. The protection of rights afforded by the provisions of Article 27 of the UUJF can be implemented in relation to objects that have been burdened with a fiduciary guarantee as stated in the Fiduciary Guarantee Deed, and this can be done if the object that is the subject of the fiduciary guarantee is According to the required mentioned in the article, the Fiduciary Guarantee Law does not intend to dismantle the fiduciary guarantee institutions that have been in place up to this point and are based on customary law and jurisprudence.

One way to protect the interests of creditors as fiduciary recipients is to provide definite provisions to creditors. The availability of complete data that must be contained in the Fiduciary guarantee (Article 6 UUJF), indirectly provides a strong grip for creditors as fiduciary recipients, in particular which claims are guaranteed and the amount of collateral value, which determines how much the preferred creditor's claim is. As stated in Article 20 UUJF, fiduciary guarantees continue to accompany objects that are objects of fiduciary guarantees in the hands of whoever these objects are, with the exception of the transfer of inventory objects that are objects of fiduciary guarantees. With the exception of the transfer of inventory goods that are constituted the subject of the fiduciary promise, the provision upholds the fiduciary guarantee's fundamental elements and applies the *droit de suite* principle to it.

The issue with legal protection is how to defend fiduciary recipients against dishonest fiduciary givers. Regarding the fiduciary assurance as discussed in the earlier portions of this study, UUJF utilises a registration system to realise the principles of publicity and specialisation. Additionally anticipated benefits of this registration method include protection assurances for fiduciary beneficiaries and parties with an interest in the item. [11]. Article 20 of the UUJF states that fiduciaries must continue to follow any objects that are the subject of fiduciary guarantees in the possession of whoever owns them, with the exception of the transfer of inventory objects that are subject to fiduciary guarantees. This provision provides legal protection and protects creditors' interests. In addition to registering the guarantee, BSI Teluk Betung Branch as the fiduciary recipient has other legal options, including requiring the debtor to obtain written approval before providing a replacement guarantee of equal value. The debtor cannot replace the fiduciary guarantee's subject matter without written consent. [13]. Legal protection for creditors, where in its implementation BSI Teluk Betung Branch has carried out based on

the provisions of the applicable legislation which is a form of legal protection for creditors, but the implementation did not go well due to several factors. The factors that became obstacles in providing protection to BSI Teluk Betung Branch, namely the list of receivables did not meet standard standards, weak legal protection in the execution of executions, BSI Teluk Betung Branch did not apply the precautionary principle, Life insured credit guarantees [14]. BSI Teluk Betung Branch in overcoming obstacles to administrative settlement and legal settlement, BSI Teluk Betung Branch sorting out the definitive list submitted by debtors in applying for credit, BSI Teluk Betung Branch updating the fiduciary of accounts receivable.

4. Conclusion

The legal ramifications of the debtor giving the subject of the fiduciary guarantee to a third party in the financing agreement, which would cause the fiduciary agreement to be void because the subject of the fiduciary guarantee is one of its key components and there would be a legal repercussion if the subject of the fiduciary guarantee lost its property rights. According to Article 372 of the Criminal Code in conjunction with Article 36 of the UUJF, the debtor is considered to have committed an act of default and may be punished for theft and/or renting out the subject of a fiduciary promise without the recipient's prior written consent. If the debtor is shown to have transferred the fiduciary security object, which is not an item of inventory, to a third party, namely the BSI Teluk Betung Branch, the execution of the fiduciary security object will be carried out through separate execution as a result. If this occurs, the dispute will be resolved by the debtor forcibly withdrawing or surrendering the fiduciary security object. voluntary actions taken by creditors or others as a result of the BSI Teluk Betung Branch. The legal protection for creditors in a fiduciary guarantee arrangement is created by a notarial deed of imposition of fiduciary guarantees, and this legal protection is further strengthened by registration with the Fiduciary Registration Office in order to get a fiduciary guarantee certificate. Creditors have legal certainty that their receivables from debtors will be recovered when the notion of publicity is realised through the registration of a fiduciary guarantee.

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