

## Legal consequences of execution of fiduciary collateral sold or pledged by the debtor

Jayadi Prasetya<sup>1</sup>, Mochammad Nurwenda Faizal<sup>2</sup>, Ana Harlina<sup>3</sup>, Devi Mardianti<sup>4</sup>

<sup>1,2,3,4</sup>Universitas Pasundan

[jayadipras@gmail.com](mailto:jayadipras@gmail.com)

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### ABSTRACT

The writing of this scientific work entitled "Legal Consequences of the Execution of Fiduciary Guarantees Sold or Pawned by Debtors" describes the execution of fiduciary guarantees that are not registered and the legal consequences by Law Number 42 of 1999 concerning Fiduciary Guarantees. This writing is motivated by the facts regarding illegal fiduciary agreements and the existence of fiduciary guarantee agreements made privately without registering fiduciary guarantee objects. Based on these facts, it is essential to raise 2 (two) issues regarding the procedures for executing fiduciary guarantees by laws and regulations and settlement of cases in the event of a sale or mortgage on goods subject to fiduciary guarantees while the goods are experiencing bad credit. The purpose of writing this journal is to find out the correct procedure for executing fiduciary guarantees and the legal consequences if the execution of fiduciary guarantees is carried out unilaterally and to find out the resolution of problems that arise regarding bad loans on objects used as fiduciary guarantees. The method used in this research is the descriptive analytical method with a normative juridical approach. The data used in this study is secondary data obtained from literature sources that are relevant to the issues discussed. The results of the study show that the execution of fiduciary guarantees for bad loans can be carried out directly by the leasing company if previously the leasing company has registered a fiduciary guarantee at the Fiduciary Guarantee Registration Office if it is not registered then to be able to execute fiduciary guarantees it must go through filing a civil lawsuit to court. Suppose the debtor sells or pawns the fiduciary collateral object, and lousy credit occurs while the fiduciary guarantee has been registered. In that case, the leasing company has the right over the object to seize and sell the object directly used as collateral.



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## INTRODUCTION

The need for life for secondary and tertiary goods is increasing in Indonesian society, while the income earned is not proportional to these needs. Not only in big cities, the need for motorized vehicles has also become essential for all levels of society. As a result, due to insufficient income, people buy motorized vehicles with a credit system.

The public's high interest in applying for credit is the basis for many finance companies or what can be called leasing. This finance or leasing company is an institution that provides financing or funding for the purchase of goods or businesses whose payments can be made periodically or in installments. The types of goods financed are increasingly diverse, not only in the transportation sector but also expanding into the industrial sector, capital goods, etc.

Financing carried out by the leasing party is outlined in the credit agreement between the leasing party (the creditor) and the customer (the debtor). In the financing agreement, the leasing party usually includes the words guaranteed fiduciary, which means that in the credit agreement (as the main agreement), it creates a fiduciary guarantee agreement (as an assessor agreement), which burdens the object being financed as collateral for repayment of the debt if at any time later there will be bad credit or default.

In addition, the encumbrance of objects used as fiduciary guarantees must be registered at the fiduciary registration office. This is as stipulated in Article 11 paragraph (1) UUJF. Registration of fiduciary guarantees is carried out 1 (one) month after the credit or financing agreement is made. The fiduciary guarantee certificate must be made at the notary's office as stipulated in Article 5 paragraph (1) UUJF. Registering a fiduciary guarantee will make it easier for the leasing party to execute the fiduciary guarantee in the event of bad credit or default.

However, the facts in the field are that many leasing companies do not register fiduciary guarantees. In practice, the confiscation of collateral by the leasing party is carried out by force without prior notification to the debtor. This raises a legal problem, in which the confiscation of guarantees unilaterally by coercion without the existence of a fiduciary guarantee deed is contrary to the provisions in force in the UUJF and the Chief of Police Regulation No. 8 of 2011. In addition, the problem is regarding who is entitled to the fiduciary guarantee if the debtor cannot pay the credit installments. Regarding the right of execution for objects purchased in installments, there are regulatory differences between the Consumer Protection Act (UUPK) and the Fiduciary Guarantee Act (UUJF). In the provisions of Article 18 paragraph (1), letters d and f UUPK prohibit business actors from including a standard clause in the financing agreement regarding the granting of power over the object to the business actor to reduce the benefits of services or consumer assets that are the object of buying and selling services in the event of credit jam or default. Whereas in Article 15 paragraph (3), UUJF stipulates that fiduciary recipients have the right to sell objects used as objects of fiduciary guarantees of their own free will.

## **RESEARCH METHODS**

The research method used by the authors in this scientific journal is the normative legal research method. Normative legal research is also called doctrinal, library, or document study. It is referred to as normative legal research because this research is carried out by examining written regulations or other legal materials. The object of normative legal research is to examine existing legal norms by looking at law from an internal perspective. The approach used by the author is using a statutory and fact-based approach.

## **RESULTS AND DISCUSSION**

### **Fiduciary Guarantee Execution Procedures**

As mentioned in Article 4 of Law no. 42 of 1999 that fiduciary guarantees are a follow-up agreement (assessor) of a principal agreement that creates an obligation for the parties to fulfill an achievement. What is meant by "achievement" in this provision is giving something, doing something, or not doing something, which can be valued in money. Because the fiduciary guarantee is a follow-up agreement (assesoir), there is a main agreement that is the main of the fiduciary guarantee agreement. For example, if the main agreement is a loan agreement, then the fiduciary guarantee can be a follow-up agreement to the loan agreement. Concerning fiduciary objects, Article 20 UUJF regulates as follows: "Fiduciary Collateral continues to follow the Objects that are the object of the Fiduciary Collateral in the hands of whomever the Objects are, except for the transfer of inventory objects which are the object of the Fiduciary Collateral." This article follows the principle of *droit de suite* concerning absolute property rights. Objects guaranteed fiduciary, the mastery of which remains with the debtor.

In general, execution is the implementation of a court decision or deed. Execution of fiduciary guarantees is confiscating and selling objects used as objects of fiduciary guarantees.

In principle, the execution of the Fiduciary Guarantee is extraordinary, considering that the object had previously been agreed upon by the debtor, so regardless of the condition of the Fiduciary Guarantee object, even though the object is a means of earning a living, it will still be executed.

The purpose of executing fiduciary guarantees is to sell fiduciary guarantees as payment for debtor obligations that have not been fulfilled. The leasing party can collect debtor performance, including all installments and other costs the debtor has not paid. It has the right to execute the leasing object used as collateral without having to return the excess price from the sale of the object. Execution of this fiduciary guarantee arises when the debtor defaults (cannot fulfill his achievements) or defaults. If, in practice, there is a default by the debtor which causes losses to the leasing company, then based

on Article 1239 of the Civil Code, the injured party can claim compensation in the form of costs, losses, and interest.

The basis for executing fiduciary guarantees is Article 29 UUFJ, which states that if the provider defaults, the fiduciary recipient can execute objects used as fiduciary guarantee objects. In UUFJ, the execution of fiduciary guarantees is regulated in Article 29 and Article 30 of UUFJ.

In executing fiduciary guarantees, two promises are prohibited in executing fiduciary guarantees, namely:

1. An agreement containing the execution of a fiduciary guarantee that is contrary to Article 29 UUFJ;
2. An agreement containing the authority for the recipient of a fiduciary guarantee to own objects used as objects of fiduciary guarantees if the creditor defaults or defaults.

If in the execution of the fiduciary guarantee, there is a term (provision) of the promise as above, then the agreement is deemed not to exist or is null and void by law.

Objects used as fiduciary guarantees must be registered. This is based on the principle of publicity that every right, whether mortgage rights, mortgage rights, or fiduciary rights, must be registered. Registration aims for third parties to know that the object is subject to a guaranteed charge. Registration of fiduciary guarantees is regulated in Article 11 UUFJ and Permen No. 86 of 2000 concerning Procedures for registration of fiduciary guarantees and the cost of making a fiduciary guarantee deed.

Suppose the leasing party has registered a fiduciary guarantee. In that case, the execution of the fiduciary guarantee can be carried out quickly based on the fiduciary guarantee deed, which has the same executive title power as a court decision that has permanent legal force (Article 15 paragraph (2) UUFJ) with the existence of a fiduciary guarantee deed this means that he has given the power over the guaranteed right to the guarantee recipient to be able to confiscate and sell the collateral object through a public auction and collect debt repayment from the proceeds of the sale. The sale of collateral is implemented after one month since it has been notified in writing by the Fiduciary Giver and Recipient to the parties concerned or with interest (Art. 29 paragraph (2) UUFJ). However, many leasing companies still make agreements, not before a notary (underhand agreement), and must be registered at the Fiduciary Guarantee Registration Office to obtain a fiduciary guarantee certificate. So, executing fiduciary guarantees is often carried out by force without prior notification to the debtor. This case often occurs in motorcycle loans through finance companies, where if the debtor is late in paying the installments, the debt collector will immediately and forcibly confiscate the vehicle. The debt collector only has the right to execute the object if a deed or fiduciary certificate accompanies it. This is contrary to the Fiduciary Guarantee Law and the Chief of Police Regulation No. 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees.

The mechanism that the leasing party must take if he does not have a fiduciary deed is by giving a warning letter to the debtor who has terrible credit; after giving SP1 to SP3, if the debtor does not also fulfill his obligations, then the execution of the fiduciary guarantee can be taken by filing a civil lawsuit to court, so it must be based on the court ruling.

### **Settlement of Objects Used as Fiduciary Guarantees that are Sold or Pawned, While the Credit of the Item is Bad**

Standard clauses often state that the object being credited is collateralized in underhand financing agreements entered into by leasing companies with debtors. This clause gives rise to the birth of an additional agreement, namely a fiduciary guarantee agreement. This raises problems related to the right to guarantees because there are regulatory differences between the Consumer Protection Law (UUPK) and the Fiduciary Guarantee Law (UUFJ). In Chapter V, Article 18 UUPK states the prohibition against finance or leasing companies making standard agreement clauses that are detrimental to creditors, such as clauses that state that the granting of power of attorney from consumers to business actors over goods purchased through installments or credit, either by giving power of attorney directly or indirectly (Article 18 letter d UUPK). Alternatively, a clause states that granting rights to business actors reduces the benefits or the consumer's assets, which are the object of buying and selling services (Article 18 letter f UUPK). This provision is certainly not in sync with Article 15 (3) UUFJ, which states that if the debtor defaults, the recipient of the fiduciary guarantee has the right to trade objects that are the object of the guarantee in his power.

Related to the problem of selling or pawning objects used as fiduciary guarantees while these objects are experiencing bad credit, this raises problems regarding the right to the fiduciary. As previously explained, registration of a fiduciary guarantee gives full power of attorney to the fiduciary recipient. Suppose the fiduciary recipient does not register the object burdened with a fiduciary guarantee at the fiduciary registration office. In that case, the fiduciary recipient (the creditor) and the parties generally cannot enjoy the benefits stipulated in Law No. 42 of 1999 concerning Fiduciary Guarantees. In other words, creditors do not have a priority or preferential position, but the same position as other creditors (concurrent). This is based on Article 14 paragraph (3) UUJF: A fiduciary guarantee is born on the same date as the date the fiduciary guarantee is recorded in the fiduciary register book. With a fiduciary guarantee certificate in the deed containing an executorial title with the legal force equivalent to a court decision with permanent legal force (Article 15 paragraph 2 UUJF), the leasing company has the right of *parate executie* (direct execution) for fiduciary guarantees.

### **Legal Consequences for Debtors Who Sell or Pawn Fiduciary Collateral Objects**

In Article 23 paragraph (2), UUJF reads, "Fiduciary Givers are prohibited from transferring, mortgage, or renting to other parties Objects that are objects of fiduciary guarantees that are not inventory objects, except with prior written approval from the Fiduciary Recipient". This means that the fiduciary giver can pawn objects that are used as fiduciary guarantees, provided that there is written approval from the fiduciary recipient. However, suppose the debtor does not obtain written approval from the fiduciary recipient (the creditor), based on Article 36 UUJF. In that case, the debtor is threatened with imprisonment for a maximum of 2 (two) years and a fine of up to Rp. 50,000,000.- (fifty million rupiah).

### **CONCLUSION**

Based on the description above, it can be concluded that the execution of fiduciary guarantees for bad loans can be carried out directly by the leasing company if it has previously registered fiduciary guarantees at the Fiduciary Guarantee Registration Office. Execution of fiduciary guarantees is carried out by the Indonesian National Police Regulation Number 8 of 2011 concerning Security for the Execution of Fiduciary Guarantees. If the leasing company does not register the fiduciary guarantee, to execute the fiduciary guarantee, it must go through filing a civil lawsuit to the court. If the leasing company has registered its fiduciary guarantee, if there is a pledge or sale of the fiduciary guarantee while the credit for the object is wrong, then the leasing company has the right over the object to confiscate and sell the object directly used as collateral. This is because the existence of a fiduciary guarantee certificate means that the debtor has given power over the object to the guarantee recipient so that the position of the leasing company becomes a creditor whose interests take precedence.

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