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Legal Protection For Creditors In Fiduciary Guarantee Agreements In Indonesia

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ABSTRACT

A fiduciary guarantee is one of the material guarantees known in positive law to carry out the function of a bank or creditor running its business, providing credit to its customer or debtor, and offering credit by the bank (the creditor) to its customer (the debtor), based on the ability and ability of the debtor to take debt advantage. In providing credit to customers (debtors), of course, there are conditions of a guarantee that must meet by debtors. There are problems from the results of the explanation, among others, first, legal protection for creditors in the fiduciary guarantee agreement, and second, the arrangement of fiduciary guarantee rights holders. This study uses a normative legal research method, which focuses on library studies, and this research uses a Legislation approach and is descriptive of qualitative analysis. Then from the first results, legal protection for the interests of creditors as fiduciaries is to provide definite provisions for creditors and complete data arrangements that must include in the fiduciary guarantee. Second, the performance of fiduciary rights holders in Indonesia, contained in Book II of the Civil Code, Law Number 42 of 1999 concerning Fiduciary Rights, and Law Number 4 of 1996 concerning Mortgage Rights..

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I. Introduction

According to the Republic of Indonesia's 1945 Constitution, Indonesia is a unitary state whose purpose is to "establish an Indonesian State Government that protects the entire Indonesian nation and the entire Indonesian homeland" in order to advance the common good and create a just and prosperous society based on Pancasila. Banking is one of the significant sources of funds in providing credit to customers (debtors) to increase the community's needs in running their business [1]. The provision of credit by banks must be based on the debtor's ability to pay off the debt. Banks or creditors in lending money to debtors, of course, there are conditions for a guarantee that must meet by debtors. The granting of credit can not only be carried out by state or private banks but in principle, it can be done by anyone who can do so through a debt agreement between the creditor providing the loan on the one hand and the debtor receiving the loan on the other [2]. The creditor must deliver the agreed-upon funds to the debtor and has the right to collect the funds at the agreed-upon time. As one example of a guarantee institution in law, the fiduciary guarantee institution is well-established. The fiduciary transfers ownership rights to an item on the basis of trust, with the original owner retaining authority over the item at all times. A fiduciary guarantee is an ancillary contract, as defined by the Explanation of Article 6 letter b of Law No. 42 of 1999 Concerning the Fiduciary Guarantee [3]. As one of the acknowledged material assurances in positive law, a fiduciary promise is an important tool for businesses. Fiduciary guarantees give the recipient priority over other creditors in the event of default on the guaranteed debt and are collateral rights to tangible and intangible assets as well as immovable objects, especially buildings that cannot be encumbered with mortgage rights that remain in the control of the fiduciary giver. Credit is one of the attempts made to facilitate the repayment of debts by borrowers [4].

Trusting the debtor in the form of a guarantee provides the creditor with a sense of confidence and legal certainty that the credit will be recouped on time, as stipulated in the agreement between the creditor and the debtor. In addition, the purpose of issuing guarantees is to allow the bank or creditor

the right and authority to obtain repayment with collateral items submitted by the debtor or guarantor if the debtor defaults and does not repay the loan by the credit agreement's maturity date [5]. So, the bank, as the creditor, can exercise the rights, and power over the loan collateral submitted by the debtor or guarantor. It is necessary first to carry out a formal juridical binding on the collateral goods following the applicable laws and regulations. In the bank's interest in guaranteeing the credit return given, the guarantee for the collateral submitted by the debtor must be bound or imposed by a warranty [6]. One of them is binding credit guarantees through a fiduciary guarantee institution. Fiduciary contracts have been used in Indonesia from the Dutch colonial era until the era of independence, called the Credietverband, which is nothing but a kind of mortgage applied to the Bumiputra (original Indonesian people) against guarantees for debts on uncertified customary lands [7]. In America, the development of collateral law is still the same principle as the concept of British law. Although many deviate from the idea of British law, in the US, the focus of pro-debtor guarantee law is still maintained, such as the anti-clogging theory is still held today, which limits the rights of debtors because it is considered to restrict the debtor's rights in the relationship between the creditor and the debtor [8].

In Indonesia, guarantee institutions are fiduciary guarantee institutions. Fiduciary, which refers to the relinquishment of property rights based on trust, allows the debtor to retain control over the collateral, even if just as a temporary borrower or no longer as the owner. Articles 11.13 and 15 of Law Number 42 of 1999 on Fiduciary Guarantees require that all objects (whether located within or outside the Republic of Indonesia) that are subject to fiduciary guarantees be registered with the Fiduciary Registration Office for which the application is submitted [9]. The fiduciary recipient files the registration by taking into account the article 13 criteria. The fiduciary receiver is issued a fiduciary fetal certificate upon approval of the registration request. Fiduciary recipients can be given to one person or several people together, for example, in granting credit in a consortium as stated in Article 8 of Law Number 42 of 1999 concerning Fiduciary. However, repeated fiduciary guarantees are prohibited, meaning that the fiduciary donor may not guarantee the object of fiduciary guarantees for fiduciary deposits a second time [10].

When people have their rights guaranteed by the law, it means that they can stop worrying about other people infringing on them and instead focus on living their lives to the fullest. The theory of legal protection, like Salim and Allies' view on the matter, is a theory that investigates and analyzes the nature and function of the security afforded to legal subjects and objects. The thing of legal protection is creditors' rights as fiduciary givers to customers/debtors as fiduciary recipients [11]. In contrast, the subject of legal protection by banks/creditors. There are two distinct sorts of legal protection: preventative and coercive. Preventive legal protection prevents future problems between the parties; with preventive legal protection, banks and creditors are motivated to provide fiduciary guarantee loans with caution. In contrast, the kind of repressive legal guardian is a sort of legal protection that focuses more on resolving conflicts in order to restore rights that have been violated [12].

Based on the description above, this study has several problems: a) how is the legal protection for creditors in the Fiduciary Guarantee agreement? b) how is the arrangement of fiduciary guarantee rights holders in Indonesia?.

II. Methods

The research method used in this study is a type of normative juridical research method, which focuses on literature studies based on secondary data, including legal materials in the form of Legislation - Invitations relating to Fiduciary Guarantees, namely Law Number 42 the Year 1999 Regarding Fiduciary Guarantee. This study uses a statute approach. This research is descriptive of qualitative analysis because it not only reveals or describes data but also intends to describe how best, or ideally, this research should be.

III. Result and Discussion

A. Legal Protection for Creditors in Fiduciary Guarantee Agreements

According to Article 1 point 5, Law Number 42 of 1999 concerning Fiduciary Guarantees. The fiduciary giver is "an individual or corporation that owns the object that is the object of the fiduciary

guarantee." The individual is an individual as a legal subject who is considered capable or mature according to the law. Meanwhile, under the law, minors are those who have not reached twenty-one years and are not yet married age. The corporation in question is a business entity, legal entity, or partnership, which is an agreement, is a party that provides its property as collateral with a fiduciary.

According to Article 1 number 6 of [Law Number 42 of 1999 concerning Fiduciary Guarantees](#), it is stated that Fiduciary Recipients are "individuals or corporations that have receivables whose payments are guaranteed by fiduciary guarantees." To qualify as a fiduciary recipient, an individual or business must have a legal relationship in the form of a receivable that is either owned by or is the obligation of the fiduciary donor. In exchange for the receivable, the recipient receives an item of collateral.

Legal protection of the creditor's interest as a fiduciary provides definite provisions for creditors. Must include complete data arrangement in the fiduciary guarantee. Legal protection for the claims of creditors can be seen in Article 20 of [Law Number 42 of 1999 concerning Fiduciary Guarantees](#), stating: "Fiduciary guarantees continue to follow Objects that are objects of Fiduciary Guarantees in the hands of whomever these objects are, except for the transfer of inventory objects that become the object of Fiduciary Security. The object of Fiduciary Guarantee".

The article highlights that fiduciary guarantees have material features and adhere to the *droit de suite* (material rights that accompany their owners) principle, excluding the transfer of inventory objects that are subject to fiduciary guarantees. Legal protection for fiduciary donors prohibits them from transferring, mortgaging, or leasing non-inventory objects that are the subject of fiduciary promises to third parties without the recipient's prior written consent. Will impose criminal sanctions of Rp. 50,000,000-, and one of the parties is aware that there is no fiduciary guarantee agreement, then that party must serve a minimum of 1 year and a maximum of 5 years in prison and pay a minimum of Rp. 10,000,000- and a maximum of Rp. 100,000,000- in fines.

The purpose and objective of the fiduciary guarantee agreement for the legal protection of creditors is to provide them with special or priority rights to collect debts from the debtor.

UUJF endorses the principle of registering fiduciary promises in accordance with the principle of ensuring legal clarity. It is anticipated that the registration will provide legal certainty to fiduciary donors, beneficiaries, and third parties.

Creditors and debtors often enter into guarantee agreements in order to bolster the creditor's position and bind third parties once the arrangement has been registered. All promises made in the fiduciary guarantee deed (which, as per Article 13 paragraph (2) b, are entered in the register of the Fiduciary Registration Office) bind third parties and must be registered in the register of the Fiduciary Registration Office, which includes the guarantee bond.

The foregoing synopsis shows that the fiduciary guarantee Act protects both the fiduciary recipient and the fiduciary provider who are participants to the fiduciary guarantee agreement. If the guarantor defaults, the collateral object will not be given preferential rights over the guarantor's receivables under the UUJF or the *droit de suite* principle, and the guarantor's receivables will be subject to the *droit de suite* principle as applied to collateral objects. The principle of publicity in a fiduciary guarantee agreement will inform third parties about the fiduciary object.

As required in Article 11 of the UUJF, fiduciary promises must be recorded. With this registration, UUJF satisfies the concept of publicity, which is one of the fundamental elements of the law governing material guarantees. This provision ensures that any items presented as evidence belong to the debtor or fiduciary donor and provides notice to any third parties who may have a claim to them.

The Fiduciary Registration Office was established for the first time with jurisdiction over the entire territory of the Republic of Indonesia to handle the registration of fiduciary guarantees. This office operates under the auspices of the Ministry of Justice and Human Rights of the Republic of Indonesia. Legal protection and the interests of creditors in the UUJF can be seen in Article 20 UUJF: "Fiduciaries continue to follow objects that are objects of fiduciary guarantees in the hands of whoever the objects are, except for the transfer of these objects, except for the transfer of inventory objects which are objects of fiduciary guarantees".

For all the actions and omissions of the fiduciary giver, the fiduciary recipient, based on the negligence, is not responsible, as referred to in Article 24 UUJF: "The Fiduciary Recipient shall not

bear any liability for the consequences of the actions or omissions of the Fiduciary Giver, whether arising from a contractual relationship or arising from an unlawful act in connection with the use and transfer of objects that are objects of Fiduciary Collateral".

B. Regulation of Fiduciary Guarantee Rights in Indonesia

The legal arrangements for guarantees are contained in Book II of the Civil Code and outside the Civil Code. Book II of the Civil Code regulates legal rules and provisions closely related to the law of guarantees, such as Articles 1150, 1161, and 1162 to Article 1232 of the Civil Code concerning Pawn. The legal provisions of guarantees outside the Civil Code include:

- a. Law Number 5 of 1960 concerning Basic Agrarian Laws
- b. Law Number 4 of 1996 concerning Mortgage Rights
- c. Law Number 42 of 1999 concerning Fiduciary Guarantees
- d. Book II of the Civil Code on Materials.

Collateral guarantees the fulfillment of obligations valued in money arising from a legal engagement. A guarantee is everything the creditor receives and submits to guarantee debt in the community. In the Law of Guarantees, it is known that there are guarantees in general and in particular; guarantees, in general, are guaranteed arising from the law, while guarantees, in particular, are guarantees arising from an agreement, both in the form of material agreements and individual agreements main agreement. With general guarantees, the guarantee law has protected the form of guarantees to creditors to repay debtors' debts. However, guarantee agreements are often made in the form of material and individual guarantees in practice to provide a sense of security.

The development of national law, especially in Indonesia, can be observed from the Legislation - Invitation. It is due to the consideration of legal needs. The legal construction in the fiduciary guarantee agreement is a breakthrough in making movable objects as collateral without needing to hand over the object to the creditor physically. The legal structure of a fiduciary guarantee institution is in the context of providing guarantees for debts, not intended to transfer a property right to collateral. Article 1131 of the Civil Code states, "All objects of the debtor, movable and immovable, both existing and new will exist in the future, become dependents for all individual engagements". Based on the provisions in the article, a debtor is guaranteed to each of the debtor's assets creditors, but this article does not provide a strong position for creditors..

IV. Conclusion

Legal protection for the interests of creditors as fiduciaries is to provide definite provisions for creditors and complete data arrangements that must include in the fiduciary guarantee. Legal protection for the claims of creditors can be seen in Article 20 of Law Number 42 of 1999 concerning Fiduciary Guarantees, which states, "Fiduciary guarantees continue to follow objects that are objects of fiduciary security in the hands of whomever the thing is, except for the transfer of inventory objects that are objects of collateral fiduciary. The legal arrangements for guarantees are contained in Book II of the Civil Code and outside the Civil Code, such as Law Number 42 of 1999 concerning Fiduciary Guarantees and Law Number 4 of 1996 concerning Mortgage Rights. Thus, Law Number 42 of 1999 concerning Fiduciary Guarantees to protect Banks (creditors) and customers (debtors) needs to be revised so that there is legal certainty for the interests of the bank (creditors) as fiduciary givers to customers (fiduciary recipients). Such as Articles 1, 7, and 9 of Law 42 of 1999 concerning Fiduciary Guarantees.

References

- [1] R. B. Suharto, "Strengthening The Law In Order To Keep Existence The Unitary State Of The Republic Of Indonesia," *Int. J. Law Reconstr.*, vol. 4, no. 1, p. 34, Apr. 2020, doi: 10.26532/ijlr.v4i1.9680.
- [2] I. Atikah, "The Urgency Of Mortgage Agreement As An Effort To Realize The Trust By Bank As Creditor," *J. Huk. dan Peradil.*, vol. 10, no. 1, p. 31, Apr. 2021, doi: 10.25216/jhp.10.1.2021.31-63.
- [3] W. R. Rhodes *et al.*, "Debt transparency: the essential starting point for successful reform," *Cap. Mark. Law J.*, vol. 17, no. 3, pp. 383–408, Jul. 2022, doi: 10.1093/cmlj/kmac010.

- [4] D. S. Wieke, "Reconstruction Of Legal Liability Of Registration By Notary Fiduciary Based On PP No. 21 of 2015," *J. Pembaharuan Huk.*
- [5] D. K. Harjono, A. Tehupeiry, and H. Kandou, "Guarantee of Legal Assurance and Justice for the Implementation of Consumer Financing," *J. Magister Huk. Udayana*, vol. 11, no. 2, pp. 263–283, 2022.
- [6] S. Sherhan, P. Pagar, and M. K. Rokan, "Execution of fiduciary guarantee in Sharia Banking after the court's decision number 18/PUU-XVII/2019," *JPPI (Jurnal Penelit. Pendidik. Indones.)*, vol. 8, no. 3, p. 530, Sep. 2022, doi: 10.29210/020222047.
- [7] F. Muhammadi, N. F. M. Razif, and R. A. bin Abdul Rahim, "Al-Rahn in Malaysia and Indonesia: Legal History and Upcoming Trajectory," *Asy-Syir'ah J. Ilmu Syari'ah dan Huk.*, vol. 55, no. 1, pp. 153–179, 2021.
- [8] F. J. Arias Varona, J. Niemi, and T. Hupli, "Discharge and entrepreneurship in the preventive restructuring directive," *Int. Insolv. Rev.*, vol. 29, no. 1, pp. 8–31, May 2020, doi: 10.1002/iir.1369.
- [9] R. Hamzah and F. A. Adinda, "The Existence of A Norm Regarding The Execution of Fiduciary Guarantees After The Issuance of The Constitutional Court Decision Number 18/PUU/XVII/2019," *J. Penelit. Huk. Jure*, vol. 22, no. 1, p. 81, Mar. 2022, doi: 10.30641/dejure.2022.V22.81-92.
- [10] M. Hevia, "Surrogacy, privacy, and the American Convention on Human Rights," *J. Law Biosci.*, vol. 5, no. 2, pp. 375–397, Aug. 2018, doi: 10.1093/jlb/lxy013.
- [11] F. Ahsany, A. F. Alamsyah, and S. Al-Fatih, "Legal Protection of Labor Rights During the Coronavirus Disease 2019 (Covid-19) Pandemic," *J. Pembaharuan Huk.*, vol. 7, no. 2, pp. 100–115, 2020.
- [12] U. R. Tajrina, "Legal Protection of Cooperative Member Savings that are Not in Accordance with the Business License: A Case Study of the Supreme Court's Decision Number 1267k/Pid. Sus/2020," *J. Optoelectron. Laser*, vol. 41, no. 8, pp. 71–74, 2022.
- [13] M. T. Bodie, "The Law of Employee Data: Privacy, Property, Governance," *Ind. LJ*, vol. 97, p. 707, 2022.
- [14] G. Eckstein *et al.*, "Conferring legal personality on the world's rivers: A brief intellectual assessment," *Water Int.*, vol. 44, no. 6–7, pp. 804–829, Oct. 2019, doi: 10.1080/02508060.2019.1631558.
- [15] H. Hamzah, "Civil law agreement and its implication on regulation for prevention of corruption within Covid-19 Pandemic," *J. Soc. Stud. Educ. Res.*, vol. 11, no. 3, pp. 156–176, 2020.
- [16] M. R. Kelly and B. T. Harding, "Bergson's theory of war: A study of libido dominandi," *Philos. Soc. Crit.*, vol. 44, no. 5, pp. 593–611, 2018.
- [17] B. Kozolchyk, "Legal reasoning and Latin America's economic development," *Unif. Law Rev.*, vol. 27, no. 2, pp. 344–390, Sep. 2022, doi: 10.1093/ulr/unac017.
- [18] A. Mashdurohatun, O. S. N. Gunarto, and O. S. Nugroho, "Concept Of Appraisal Institutions In Assessing The Valuation Of Intangible Assets On Small Medium Enterprises Intellectual Property As Object Of Credit Guarantee To Improve Community's Creative Economy," *J. Pembaharuan Huk.*, vol. 8, no. 3, 2021.
- [19] J. Mensah, "Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review," *Cogent Soc. Sci.*, vol. 5, no. 1, p. 1653531, Jan. 2019, doi: 10.1080/23311886.2019.1653531.
- [20] X. Nugraha, K. Murti, and S. Putri, "Third Parties' Legal Protection over Agreed Authorized Capital Amount by Founders in Limited Liability Companies," *Lentera Huk.*, vol. 6, p. 173, 2019.
- [21] M. D. Prihartanto, "Settlement of Auction Disputes over Land and Building Collateral

- Objects,” *J. Law Leg. Reform*, vol. 2, no. 2, pp. 197–210, Apr. 2021, doi: 10.15294/jllr.v2i2.46613.
- [22] U. Salamah, I. Rumadan, and C. Handrianto, “The Role of Mediation Agencies in Divorce Cases As an Effort to Provide Protection Against Women and Children,” *MUWAZAH J. Kaji. Gend.*, vol. 14, no. 1, pp. 45–56, 2022.
- [23] Sulistiyanto, U. Saprudin, B. Sutomo, and T. B. Hartono, “Pendampingan Pembuatan Website Menggunakan Content Management System & Plugin bagi Mahasiswa Manajemen Haji dan Umroh Institut Agama Islam Negeri Metro,” vol. 2, no. 2, pp. 8–12, 2021.
- [24] T. Sulistiyono, P. H. Herlambang, S. D. Chandra, M. F. Abdulaziz, and N. A. I. binti M. Roki, “Protection of Indonesian Migrant Workers in China: The Government’s Role and Legal Aspects,” *Lex Sci. Law Rev.*, vol. 6, no. 1, pp. 93–120, Jun. 2022, doi: 10.15294/lesrev.v6i1.55112.
- [25] W. U. Zhicheng, “A Comparative Study of the Chinese Law of Constructive Delivery from an English Common Law Perspective,” *Front. Law China*, vol. 13, no. 2, pp. 291–308, 2018.

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