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Legal Consequences of Creditors Recipients of Fiduciaries who are not Registered Judging from Law Number 42 of 1999 concerning Fiduciary Guarantees

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ABSTRACT

The law of not registering fiduciary creditors has significant consequences for the enforceability and validity of fiduciary guarantees. Based on Law Number 42 of 1999 concerning Fiduciary Guarantees, creditors receiving fiduciaries must be registered as members of the Fiduciary Guarantee Council. Failure to register a fiduciary creditor can give rise to legal problems in terms of executing fiduciary guarantees, because the guarantee cannot be used as evidence or a legal resource. Therefore, efforts need to be made to prevent this from happening and ensure that creditors who receive fiduciaries meet the requirements to be registered as members of the Fiduciary Guarantee Council. This research uses a qualitative data analysis approach to conduct normative legal studies. The main legal sources in this research are primary legal sources. The conclusion of this research is that an unregistered fiduciary agreement has legal consequences, where the creditor does not have a preferred position in the event of bankruptcy and only acts as a concurrent creditor. And if the debtor defaults, the creditor does not have direct executorial rights over the fiduciary collateral, if the debtor is unable to pay off the entire debt at the agreed time.

 **Keywords:** Legal Consequences, Creditors, Fiduciary Guarantee

INTRODUCTION

In the midst of society's increasingly diverse lives in meeting their daily needs, guarantee is a term that is no longer foreign. In daily practice in society, collateral has a position to anticipate or prevent debtors or people who owe money from not carrying out or fulfilling their achievements or promises as mutually agreed upon. A treasury agreement is an agreement made by taking into account statutory provisions.¹ Meanwhile, according to Article 584 BW, it states that: "Ownership rights to an item cannot be obtained other than by taking it for ownership, by attachment, by passing of time, by inheritance, either according to law or according to a will, and by appointment or delivery based on a civil event for the transfer of ownership rights, carried out by the person who has the right to act on the item."

Fiduciary guarantees are one option that is often used by parties in debt or credit agreements. Fiduciary is "the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object."² A fiduciary guarantee is a guarantee of repayment of a debt in an additional agreement which is widely used because often, even though the object of debt collateral includes movable objects, the debtor is reluctant to hand over control over the item to the creditor, while the creditor has no interest and even finds it difficult if the item is handed over to him.

In principle, fiduciary guarantees are different from other guarantees, where in other forms of guarantee, the object of the guarantee must be handed over to the creditor. As with other debt security agreements, such as pledge agreements, mortgages or security rights, a fiduciary agreement is also an agreement that is accessory or complementary or additional, namely an agreement that does not stand alone, but follows the main agreement or main agreement.

Fiduciary was born in legal practice guided by jurisprudence, both jurisprudence in the Netherlands and jurisprudence in Indonesia. As a legal institution that was born from practice, and does not receive meaningful regulation in statutory regulations, there is no regulation in terms of procedures and processes. So, it is not surprising that the registration obligation as one of the links in the fiduciary birth procedure is not regulated, so there is no registration obligation for fiduciary guarantees. The absence of registration obligations is quite felt in practice in society, because apart from creating legal uncertainty, the absence of the obligation to register fiduciary guarantees causes fiduciary guarantees to not fulfill the element of publicity, making them difficult to control. So, in order to guarantee legal certainty for creditors, a Notarial Deed is made which is registered with the Fiduciary Registration Office in the Department of Law and

¹Herlien Budiono, *General Teachings of Contract Law and Its Application in the Notarial Sector*, PT. Citra Aditya Bakti, Bandung, 2014, p. 15

²See Article 1 number (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889)

Human Rights. This institution or institution will take care of all the administration of registration of the fiduciary guarantee. Later, Fiduciary Registration Offices will be established in each second-level region.

In this modern era, many financial institutions and banks provide financing for consumers, both in the form of *leasing* and *factoring*. The imposition or enforcement also follows the procedures of the agreement which includes a fiduciary guarantee for the object of the fiduciary guarantee. In reality, financing institutions provide movable goods that consumers demand, such as motorbikes or industrial machines, which are then used by consumers as debtors. This has the consequence that the debtor hands it over to the creditor in the form of a fiduciary. This implies that the debtor as the owner of the goods becomes a fiduciary to the creditor who is in the position of fiduciary recipient. A simple practice in fiduciary guarantees is for the debtor or party who owns the goods to apply for financing to the creditor, then both parties agree to use fiduciary guarantees for the objects belonging to the debtor and a Notarial Deed is drawn up.

Recently, developments in the economic and financial sectors in Indonesia have increased quite rapidly. In line with the increasing activity and rotation of the wheels of the economy, the need for funding also increases, the majority of which is obtained from lending and borrowing activities. The creditor as fiduciary recipient will obtain a fiduciary certificate, and a copy of it will be given to the debtor. By obtaining a fiduciary guarantee certificate, the creditor or fiduciary recipient immediately has the right of direct execution (*parate executie*), as is the case with loans in the banking sector.

Based on this background, this research was conducted with the aim of finding out and explaining what the legal consequences would be if a creditor received an unregistered fiduciary, so the title of this research is: **"LEGAL CONSEQUENCES OF CREDITORS RECEIVING UNREGISTERED FIDUCIA AS REVIEWED FROM LAW NUMBER 42 OF THE YEAR 1999 CONCERNING FIDUCIARY GUARANTEES"**.

Formulation of the problem

The problem formulation in this research is: "What are the legal consequences if a creditor receives a fiduciary that is not registered?"

RESEARCH METHODS

The type of research used is juridical-normative, by finding legal rules, legal principles and legal doctrines to answer the legal issues being faced.³ The approach used in this research is a statutory approach (*statute approach*).

RESULTS AND DISCUSSION

Fiduciary institutions have existed since the Dutch East Indies era as a guarantee born from jurisprudence. An example is the decision of the Dutch *Hoge Raad*, dated 25 January 1929 and 21 June 1929; Dutch East Indies Court Decision 1931. Fiduciary is a form of transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are held remains in the control of the owner of the object. This transfer of rights implies the transfer of ownership rights from the fiduciary giver to the fiduciary recipient on the basis of trust, with the condition that the object that is the object remains in the hands of the fiduciary giver.

The following are several elements of fiduciary guarantees, namely: **a)** the existence of collateral rights; **b)** the existence of objects, namely movable objects, both tangible and intangible, and immovable objects, especially buildings that are not encumbered with mortgage rights; **c)** the object that is the object of collateral remains in the control of the fiduciary; **d)** give priority position to creditors. ⁴A fiduciary guarantee is a guarantee that can be used to bind collateral objects in the form of movable and immovable property, especially buildings that cannot be encumbered with mortgage rights.

A fiduciary guarantee is a subsidiary agreement (*accessoir*) of a main agreement and is not an obligation for the parties to fulfill an achievement. An assessor agreement has the following characteristics: **a)** it cannot stand alone; **b)** its existence or emergence or deletion depends on the main obligation; **c)** if the main agreement is transferred, the assessor's agreement is also transferred. The implementation of fiduciary guarantees consists of two stages, namely the stage of imposition of fiduciary guarantees and the stage of registration of fiduciary guarantees. The provisions of article 5 paragraph (1) of the Fiduciary Guarantee Law state that the encumbrance of objects with fiduciary guarantees is made with the following conditions: **a)** notarial deed; **b)** in Indonesian; and **c)** is a fiduciary guarantee deed.

Registration of fiduciary guarantees is carried out by submitting an application for registration of fiduciary guarantees by the fiduciary recipient, their proxy or representative to the Fiduciary Registration Office (KPF) which is established in each provincial capital throughout the territory of the Republic of Indonesia. This office is under the scope of duties of the Ministry of Law and Human Rights.⁵ The fiduciary registration office records fiduciary guarantees in the fiduciary register book on the same date as the date of receipt of the registration application. After the fiduciary registration is carried out, the fiduciary registration office issues and hands over to the fiduciary recipient a fiduciary guarantee certificate which is a copy of the fiduciary registration book containing records of the matters stated in the fiduciary guarantee registration, and fiduciary guarantees that were born on the same date as the date the guarantee was recorded fiduciary in the fiduciary register book. In the fiduciary guarantee certificate, the words are included: "for the sake of justice based on belief in the Almighty God" which has executorial power which is equivalent

³Peter Mahmud Marzuki Ali, *Legal Research*, Prenada Media, Jakarta, 2016, p. 25

⁴M. Bahsan, *Indonesian Banking Credit Guarantee and Guarantee Law*, PT. Raja Grafindo Persada, Bandung, 2012, p. 35

⁵Supianto, *Fiduciary Guarantee Law*, Garudhawaca, Sleman, 2022, p. 45

to a court decision which has permanent legal force. If after registration there is a change in the matters stated in the fiduciary guarantee certificate, the fiduciary recipient is obliged to submit an application for registration of the change to the Fiduciary Registration Office.

Fiduciary guarantees that are not followed by the creation of a fiduciary guarantee certificate give rise to complex and risky legal consequences. In connection with the aims and objectives of registering fiduciary guarantees as previously mentioned, namely to provide legal certainty, create fiduciary guarantee bonds for creditors, give priority position to creditors (preferred creditors), which means that debts bound by fiduciary guarantee agreements are *preventive debts*. *Preferential debt* is a debt that must be paid first to the fiduciary recipient from other creditors from the proceeds from the sale of the fiduciary collateral object, and fulfills the principle of publicity. So, if the object charged with a fiduciary guarantee is not made with an authentic deed and is not registered, you will not get the benefits of the aim and purpose of registering the object of the fiduciary guarantee.⁶

If the debtor defaults, the creditor cannot exercise his right of execution and the creditor, who acts unilaterally and arbitrarily, directly owns the collateral. However, if the fiduciary guarantee is not registered, then the provisions in Articles 27 and 28 of Law Number 42 of 1999 concerning Fiduciary Guarantee do not apply, so it can be stated that if the soul of the object charged with the fiduciary guarantee is not registered then the fiduciary recipient is not classified as a separatist creditor or not, including preferred creditors but also concurrent creditors (equal in position to other creditors). So, if the fiduciary recipient does not register the object charged with fiduciary guarantees at the fiduciary registration office, then the fiduciary recipient (creditor) in particular and the parties in general cannot enjoy the benefits contained in the provisions of Law no. 42 of 1999 concerning Fiduciary Guarantees. In other words, creditors do not have a priority position or a preference for holding the same position as other creditors (*concurrent*).

In realizing legal certainty, Article 11 of Law Number 42 of 1999 concerning Fiduciary Guarantees requires that objects that are burdened must be registered at the fiduciary registration office. Registration contains legal meaning such as a circuit that is inseparable from the implementation of a fiduciary guarantee agreement, after registration a fiduciary guarantee is a manifestation of the principles of publicity and legal certainty. Article 13 of the Fiduciary Guarantee Law regulates Fiduciary Guarantee Registration, namely:

(1) *The application for registration of Fiduciary Guarantee is made by the Fiduciary Recipient, their proxy or representative by attaching a Fiduciary Guarantee registration statement; (2) The registration statement as intended in paragraph (1) contains: a. identity of the Fiduciary Giver and Recipient; b. date, Fiduciary Guarantee deed number, name and location of the notary who made the Fiduciary Guarantee deed; c. data on the principal agreement guaranteed by fiduciary; d. description of the objects that are the object of Fiduciary Guarantee; e. guarantee value; and f. value of the object that is the object of the Fiduciary Guarantee. (3) The Fiduciary Registration Office records the Fiduciary Guarantee in the Fiduciary Registration Book on the same date as the date of receipt of the registration application."*

The provisions on the contents of a fiduciary guarantee agreement where the notarial deed is carried out by the legislator should be interpreted as a legal norm that is imperative and not facultative. In practice, registration of fiduciary guarantees is carried out by a Notary as the proxy of the party receiving the fiduciary. Then, the registration date which can later have important consequences is the same date as the date the registration application is received.⁷ Fiduciary guarantees are born as intended in Article 14 paragraph (3) of the Fiduciary Guarantee Law, that: " *Fiduciary guarantees are born on the same date as the date the Fiduciary Guarantee is recorded in the Fiduciary Register Book.*" Because registration in the register is carried out on the day of receipt, the date of birth of the fiduciary guarantee is also the date the application for registration is received. Because in principle, no fiduciary is carried out repeatedly in a row for the same fiduciary collateral object, so the registration date which is also the date of birth of the fiduciary guarantee has an important meaning, in the event that the fiduciary debtor grants the fiduciary collateral twice or more than 2 different creditors.⁸

In principle, registration is carried out to protect the interests and rights of parties carrying out legal actions, against possible violations of their rights by third parties. The provisions regarding registration of fiduciary guarantees as regulated in Articles 11 to 18 of the Fiduciary Guarantee Law are intended to provide legal protection to the party receiving the fiduciary. Therefore, this law places the obligation to register fiduciary guarantees on the party receiving the fiduciary. If the party receiving the fiduciary does not register the fiduciary guarantee, then he cannot enjoy the benefits that the law intends to provide.⁹

The fiduciary guarantee registration stage is a very important and crucial moment in providing certainty and legal protection for creditors. The fiduciary guarantee rights have not yet been born when the fiduciary guarantee deed is made by a Notary, but the birth of the fiduciary guarantee is when the fiduciary guarantee is recorded in the Fiduciary Register Book at the same time as the fiduciary guarantee is registered

⁶M. Yahya Harahap, *Scope of Execution Issues in the Civil Sector*, Sinar Graphics, Jakarta, 2005, p. 18

⁷See Article 13 number (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) jo. Article 7 Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making a Fiduciary Guarantee Deed (State Gazette of the Republic of Indonesia of 2015 Number 80, Supplement to the State Gazette of the Republic of Indonesia 5691)

⁸J. Satrio, *Guarantee Law, Fiduciary Property Security Rights*, PT. Citra Aditya Bakti, 2020, p. 43

⁹Supianto, *op. cit.*, p. 113

at the Fiduciary Registration Office. The purpose of registering a fiduciary guarantee is not only to obtain legal certainty for the parties and third parties, but also to create material rights.

Based on the Transitional Provisions of Article 37 paragraphs (2) and (3) of the Fiduciary Guarantee Law, it is stated that:

" (2) Within a period of no later than 60 (sixty) days from the establishment of the Fiduciary Registration Office, all Fiduciary Guarantee agreements must comply with the provisions of this law, except for the provisions regarding the obligation to make a Fiduciary Guarantee deed as intended in article 5 paragraph (1); (3) If adjustments are not made within the time period as intended in paragraph (2), then the Fiduciary Guarantee agreement does not constitute a collateral right for the property as intended in this Law. "

The provisions of Article 37 paragraph (2) of the Fiduciary Guarantee Law provide a time limit of sixty days calculated from the establishment of the Fiduciary Registration Office, where all fiduciary guarantee agreements must conform to the provisions contained in this law. Meanwhile, in paragraph (3) it is expressly stated that if within a period of sixty days after the establishment of the Fiduciary Registration Office no adjustments are made, then the consequence is that the guarantee agreement is not a material collateral right, but only an individual right.

In the Preamble to Law Number 42 of 1999 concerning Fiduciary Guarantees, it is formulated, among other things, that the existence of a fiduciary guarantee law is expected to provide legal certainty and provide legal protection for interested parties and these guarantees need to be registered at the Fiduciary Guarantee Registration Office. The use of words, such as "necessary, mandatory" contains ambiguity or multiple interpretations which are far from the principle of legal certainty. However, because there is no provision in the Fiduciary Guarantee Law which states that unregistered fiduciaries are invalid, the above provisions are interpreted to mean that for the provisions of the Fiduciary Guarantee Law to come into effect, the conditions must be fulfilled, that the fiduciary guarantee object it is registered. Fiduciaries who cannot enjoy the benefits of the provisions in the Fiduciary Guarantee Law.

The aims and objectives of Fiduciary Guarantee registration include, among other things, to provide legal certainty for the parties, create fiduciary bonds for creditors, provide priority rights and fulfill the principle of publicity. There are several legal consequences if the object charged with fiduciary guarantees is not registered and of course this will have a detrimental impact on the parties.¹⁰

Thus, fiduciary guarantee agreements that are not registered do not obtain the rights and benefits as regulated in the fiduciary guarantee law. These rights include:¹¹

1. Property rights;
2. Preemptive rights (preferences);
3. Executorial rights;
4. Criminal provisions.

The legal consequence of a fiduciary agreement that is not registered is that it does not give rise to a material agreement for the fiduciary guarantee, so that material characteristics such as *droit de suite* and preferential rights are not attached to the creditor providing the fiduciary guarantee. The actions of financial institutions and banks that do not register fiduciary guarantees at the Fiduciary Registration Office are not in accordance with the provisions of Article 11 paragraph (1) of the Fiduciary Guarantee Law. The Fiduciary Guarantee is born on the same date as the fiduciary guarantee is recorded in the fiduciary register book, if the fiduciary guarantee is not born, then the execution of the object of the fiduciary guarantee if the debtor is in default or breaks his promise and cannot pay off his debt, the execution of the object of the fiduciary guarantee cannot be carried out in accordance with the provisions of Article 29 UUJF.

Failure to register objects subject to fiduciary guarantees results in the invalidity of the provisions in the Fiduciary Guarantee Law, especially provisions that could benefit the parties concerned. However, this does not mean that a fiduciary agreement is not an invalid agreement if it is not made in the form of a notarial deed or is not registered, because based on the provisions in Article 1320 paragraph (1) of the Civil Code regarding the principle of mutual agreement between those who bind themselves, Article 1320 paragraph (2) regarding the principle of equal standing and Article 1338 regarding the principle of *Pacta Sunt Servanda*, then a fiduciary agreement that is not made in a Notarial deed is still a valid agreement as long as it meets the principles mentioned above.

CONCLUSIONS AND RECOMMENDATIONS

The conclusions from this research are:

The legal consequence of a fiduciary agreement that is not registered is that it does not give rise to a material agreement for the fiduciary guarantee, so that material characteristics such as *droit de suite* and preferential rights are not attached to the creditor providing the guarantee. So, if fiduciary objects are created without being registered, then the agreement is only a private deed which does not have the executorial power to directly execute the goods under the control of the debtor. And the position of the creditor if the object charged with the fiduciary is not registered, then the creditor has a preferential position in the event of bankruptcy and only has the position of concurrent creditor. In the event that the debtor is in default, the creditor does not have direct executorial rights over the fiduciary collateral if the debtor is no longer able to pay.

The recommendations from this research are:

Because many financial institutions and banking institutions do not register fiduciary collateral objects at the Fiduciary Guarantee Registration Office, it is necessary to create regulations

¹⁰J. Satrio, *Law on Guarantee of Fiduciary Property Rights*, PT. Citra Aditya Bakti, 2002, p. 18

¹¹Supianto VI, *op. cit.*, p. 115

containing sanctions for failure to register and legal protection must be emphasized, both for creditors, debtors and third parties.

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