



LEGAL PROTECTION AGAINST A DEBTOR IN THE IMPLEMENTATION OF THE FIDUCIARY GUARANTEE EXECUTION PROCEDURE

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ABSTRACT

The implementation of the fiduciary guarantee execution is settled in the Article 29 till the Article 34 Law No. 42 of 1999 on fiduciary guarantee, but in practice still cause legal issue, for example in the implementation of the fiduciary guarantee execution, creditor does against the law in a way taken forcibly that become the fiduciary guarantee object without showing the certificate of fiduciary guarantee. While in the procedure execution, at the time of the fiduciary guarantee execution shows the certificate of fiduciary guarantee. Legal issue that will be the writer discusses in this paper is the legal protection against a debtor in the implementation of the fiduciary guarantee execution procedure conducted in against the law by the creditor. The writing of legal method uses normative juridical approach namely invested against the positive law related to the effectiveness of the legislation. Legal protection for debtor in the fiduciary guarantee execution by filed a lawsuit to state court in the basis of against the law that has been done by creditor.

Key Words : *fiduciary guarantee, debtor, legal protection*

1. Introductions

The fiduciary guarantee agreement is an ancillary agreement, which is in accordance with the provisions of Article 4 of Law No. 42 of 1999 concerning Fiduciary Guarantee (hereinafter referred to as the Fiduciary Law). The ancillary agreement means that the birth and abolition of the fiduciary guarantee agreement depends on the underlying agreement (debt agreement receivable or financing agreement). In the Article 4 of the Fiduciary Law states that "fiduciary guarantee is a subsequent agreement of a principal agreement which creates an obligation for the parties to fulfill an achievement." Fiduciary guarantee shall be registered thereof the fiduciary

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registration office shall issue and submit a Certificate of Fiduciary Guarantee to the recipient of fiduciary guarantee and it is caused by registration.

The intended guarantee is a material guarantee in the form of moving goods bound by fiduciary guarantee in accordance with the provisions of Law No. 42 of 1999 regarding Fiduciary Guarantee. Prior to the enactment of Law No. 42 of 1999 on Fiduciary guarantee, the existence of fiduciary practice in Indonesia was based on the jurisprudence of Dutch *Hoge Raad* known as the verdict of *Bier Brouwerij Arrest*, in which the judge for the first time authorized the existence of such a guarantee mechanism.

In fact, there are still frequent executions by forcibly robbing vehicles that become goods by the elements of charities financiers. Based on the problem above, the discussion in this research is the binding and fiduciary guarantee execution object, where according to Law No. 42 of 1999 on Fiduciary Guarantee, it can only give the fiduciary privilege (preferential right), when it has been made with Notarial Deed and registered at the Fiduciary Guarantee Registration Office. Therefore, the author conducts the research on Legal Protection against a Debtor in the Implementation of Fiduciary Guarantee Execution Procedure.

The legal protection may be construed as protection by law or protection by using the legal means. Linguistically, the legal protection is a protection measure by law or protective action of certain parties determined by law, shown to certain party (the producers) or something (such product or goods), by using the legal means. The legal protection can be implemented in certain ways, namely by:

1. Giving regulation, aims to:
 - a. Giving rights and obligations
 - b. Ensure the rights of legal subjects
2. Law enforcement, through:
 - a. State administrative law that serves to prevent the occurrence of violations, with registration and supervision.
 - b. Criminal law that serves to be repressive the law violations by enforcing criminal sanctions such imprisonment and / or fines.
 - c. Civil law that serves to recover or restore the violated rights (remedy), by paying compensation.

2 Materials and Methods

The problem approach contained in this article uses the juridical approach of normative and empirical. The normative juridical approach is the problem approach by looking at, examining and interpreting the theoretical matters concerning the legal principles of conception, legislation, views, legal doctrines and related legal systems. This kind of approach emphasizes the acquisition of information in the form of a legal text relating to the object under study. While the empirical juridical approach is procedure used to solve the research problem by researching secondary data firstly and continued by conducting research on primary data in the field.

The source and type of data used in this study are legal material associated with social fact because the study of empirical law reviewed is not only legal material but in addition to the opinion of experts. This article written uses primary data, that is data obtained directly from the source, either through interview, observation or report of unofficial document which then processed by researcher, and secondary data, that is data taken from library consist of 3 (three) sources of legal material namely primary, secondary and tertiary legal materials. For more details the author will put forward as follows:

1. Primary Legal Material

Primary legal material is a legal material that binds or makes people obey the laws such as legislations, and the judge's decision. The primary legal material used in this article is:

- a. Law No. 42 of 1999 on Fiduciary guarantee.
- b. Circular Letter of the Supreme Court No. 3 of 1963 on the Civil Code.
- c. Article 1 subsection 1 and Article 2 of Regulation of the Minister of Finance No. 130/PMK.010/2012 on Fiduciary Guarantee Registration for Financing Company which conducts Consumer Financing for Motorcycle with Fiduciary Guarantee Fulfillment.
- d. Presidential Decree No. 139 of 2000 on the Establishment of Fiduciary Registration Office in every Provincial Capital in the Territory of the Republic of Indonesia.
- e. Government Regulation No. 86 of 2000 on Procedure for Registration of Fiduciary Guarantee and Fiduciary Guarantee Fee Deed.

2. Secondary Legal Material

Secondary lawmaterial is defined as non-binding legal material but explains the primary legal material which is the result of the processed opinion or the mind of the experts who study a particular scientific that will give clues to where the researcher will lead. The meant of secondary law materials is the doctrine contained in the books, law journals and the internet.

3. Tertiary Law Material

Tertiary legal material is a legal material that supports primary and secondary legal materials by providing insight and understanding of other legal materials. Legal material used is Indonesian dictionary, legal dictionary, and so on.

3.Results

The Certificate of Fiduciary Guaranteeheld by the Fiduciary Recipient has a function as evidence for the creditor that it is the holder of the fiduciary guarantee which, if in a dispute, makes them have the right as the Preferred Creditor, that is the Creditor prior to the grant of his receivable from the other creditors. This precedence depends on the date of registration at the Fiduciary Registration Office. It means that the right is granted to the first party to register it as of the unrecorded fiduciary agreement does not have preference rights either inside or outside bankruptcy and / or liquidation.

At the very top of the Certificate of Fiduciary Guaranteein accordance with Article 14 subsection (1)The Law on Fiduciary Guarantee is listed aphrase"FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD". This certificate has the power to execute which its position is likened to a court decision that is already obtained a permanent legal force. It means that the Certificate of Fiduciary Guaranteecan be directly used to execute without going through court proceeding and hearing, and it is final and binding on the parties to implement the decision.

The execution is a must and important thing to do if the debtor is owed negligence, so that creditors get compensation from the execution. The losses suffered by creditors in the presence of debtors negligence is delayed turnover of creditor profits in a long period of time in which the gain is obtained from the interest payment obligations and principal of debtor's debt. Inexecution implemention carried out is fiduciary guarantee object taking which is in the debtor's control to be able to do something for example; taking the guarantee at the place, auction or sale privately made pursuant to Article 29

of Fiduciary Guarantee Law. The Article 29 of the Fiduciary Guarantee Law regulates the Fiduciary Guarantee Execution, which specifies if the debtor or Fiduciary provider breaches the pledge; the execution of the object to the Fiduciary Guarantee may be made by:

1. Carry out executions by using or displaying a Certificate of Fiduciary Guarantee.
2. Fiduciary recipients may sell fiduciary guarantee by auctioning, and then proceed of the auction sale is used to pay off the Fiduciary provider's debt to the fiduciary recipient.
3. The fiduciary guarantee is sold privately made of an agreement between the fiduciaries recipient and provider, with the aim of obtaining the highest sales so as to benefit both parties.

The object execution procedure burdened with fiduciary guarantee is in accordance with the provisions of Law No. 42 of 1999 on Fiduciary Guarantee, namely:

1. In accordance with the provisions of Article 1 of Law No. 42 of 1999 on Fiduciary guarantee, point (1), "FIDUCIARY" means "the assignment of ownership toward an object on the basis of trust under the condition that it shall remain in the possession of the owner object".
2. Fiduciary Guarantee is the guarantee right of tangible and intangible moving objects and immovable property especially buildings which cannot be burdened with the dependent rights as referred to in Law No. 4 of 1996 on Mortgage Rights which remain in the control of fiduciary provider, as guarantee for certain debt repayments, which gives priority to fiduciary recipients to other creditor.
3. Fiduciary guarantee objects cannot be burdened mortgage.
4. The imposition of objects with fiduciary guarantee shall be made by notarial deed in Indonesian which at least contain of:
 - a. The identity of the fiduciary provider and recipient;
 - b. The principal agreement data which is guaranteed by fiduciary;
 - c. Description of the fiduciary guarantee object;
 - d. Guarantee value; and
 - e. The value of fiduciary guarantee object.
5. The fiduciary guarantee shall be registered by the fiduciary recipient or its proxy to the Fiduciary Registration Office Subsequently the Fiduciary Registration Office shall issue and deliver to the fiduciary recipient about the Certificate of Fiduciary

Guarantee which contains a phrase "FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD".

6. In the event of any change to the matters contained in the Certificate of Fiduciary Guarantee, the Fiduciary Recipient shall apply for registration of such amendment to the fiduciary registration office; the fiduciary registration office shall then issue a statement of amendment which is an integral part of the certificate of fiduciary guarantee.
7. Fiduciary provider is prohibited from re-fiduciary of fiduciary guarantee object which is already registered.
8. The fiduciary guarantee may be assigned to the new creditor, and the assignment must be registered by the new creditor to the Fiduciary Registration Office.
9. If the debtor or fiduciary provider is injured, the execution of the object to which the fiduciary guarantee may be followed:
 - a. The assignment to the credit is also guaranteed by fiduciary which results the lawful assignment and obligations of the fiduciary recipient to the new Creditor.
 - b. The object sale that becomes an object of Fiduciary Guarantee on the power of Fiduciary Recipient itself through public auction and take the credit settlement from the sale.
 - c. Under-hand sale is made under the Fiduciary Provider and Recipient Agreement if at that way can be obtained the highest favorable price to the parties (See Article 29 of Law No. 42 of 1999).
10. The execution procedures subsequent carried out as in the mortgage execution.

An agreement is born if there is a deal between the parties making the agreement. In addition, the agreement that have been made between the parties will be personally binding, and it does not prevail to other parties. It is set out in the terms of the valid agreement under article 1320 Civil Code; the agreement is valid if there is a deal between the parties, the ability to make a commitment, the existence of a certain matter, and a lawful cause. The agreement made between the debtor and the creditor under a fiduciary guarantee agreement is an ancillary agreement born from a previously agreed upon standard agreement. The debtor as the fiduciary guarantor is also entitled to legal protection in the event of an unlawful act committed by the creditor in the fiduciary guarantee execution procedure.

The fiduciary financing agreement is regulated in Law No. 42 of 1999 on Fiduciary Guarantee, in Article 4 of the Fiduciary Law states that "Fiduciary guarantee is a subsequent agreement of a principal agreement which creates obligations for the parties to fulfill an achievement". But the implementation of the fiduciary agreement is often a legal issue, especially in the case of fiduciary guarantee execution, so to obtain legal information that failed, the author studies some research on the object of the Office of the Ministry of Justice and Human Rights in Lampung domiciled in the legal area of Bandar Lampung, State Court Office Class 1B of Metro, Notary Office of MGS Edi Putra SH domiciled in Metro, several financing institutions in Metro, as well as some respondents of service users of financing institutions. The author conducts research using the method of interviewing and spreading the questioner with some questions related to the research. As for the results of the answers of questioners that have been submitted from the authors to the speakers, the authors summarize in such a way, so as to facilitate understanding.

In the consumer financing agreement, the object is a moving object that can be charged by fiduciary guarantee then in the fiduciary guarantee agreement must be poured in the notarial deed which is then registered. But in fact, the agreement is not done on table of the notary, it is only signed by both parties namely the representative of the company financing (creditor) and debtor. Nevertheless, the consumer finance agreement which is agreed by both parties is a law to them, in which the consumer finance agreement is the same as the law. Both parties must implement the agreed achievement and if any of the parties violate it will be subject to sanctions according to the contents of the agreement.

The expiry date of notarial deed of fiduciary is valid for 30 days after the creation of the certificate of fiduciary guarantee. Whereas the certificate of fiduciary guarantee is valid until the loan of agreement is completed. If more than 30 days the notarial deed has not been registered, then the notarial deed is no longer valid. Therefore the creditor must make a new notarial deed or make improvements with the affirmation of a long deed at the notary office.

In the fact, there are still many unscrupulous parties from the creditors who neglected in that case. They may not register the notarial deed at the fiduciary guarantee registration office, then in the event of default or bad credit to the creditor just execute the object of the guarantee. Such acts are included in the category of

unlawful law, because the execution carried out is an illegal asset execution. If the certificate of fiduciary guarantee is not registered at the fiduciary registration office, it has no executorial force, because it has no material properties. Because of the deed of guarantee is not registered at the fiduciary registration office, so it is not recognized by the government. When there is bad credit or negligence, then the creditor may sue to the district court. The implementation of the object execution that becomes the guarantee will be started after receiving a decision from the district court judge.

In the conception of criminal law, the execution of fiduciary object privately made is included in the criminal offense of Article 368 of the Criminal Code if the creditor carries out coercion and threat of deprivation. This Article states:

1. Anyone with the intent to benefit himself or others unlawfully, forcing a person with violence or the threat of force to give something, wholly or partly belonging to that person or other person, or in order to make debts or to write off accounts, is threatened by extortion with a maximum imprisonment of nine months.
2. The provisions of article 365 of the second, third and fourth subsections apply to this crime. The situation can occur if the creditor coerces in the execution and takes the goods unilaterally, whereas the good belongs to others partly or wholly. Although it is known that some of the goods are owned by creditors who want to execute but not registered in the Fiduciary Office Registration. Even the imposition of other articles can occur where execution is not an easy thing to do. Therefore, it requires legal guarantee and support of apparatus. This is the urgency of equal legal protection between creditors and debtors. Even if the debtor assigns the fiduciary object undertaken privately made of the other party, they cannot be charged under Law no. 42 of 1999 concerning fiduciary guarantee, because the fiduciary is illegitimate or a fictitious guarantee agreement is made. It is probable that the debtor who assigns the fiduciary guarantee object is reported on the allegation of embezzlement under Article 372 of the Criminal Code stipulates: "Whoever intentionally and unlawfully, owns something wholly or partly belongs to another person, but which is in his power not because the crime is threatened about embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah ".

The legal protection for the debtor, they may submit a lawsuit to the State Court on the basis that in the agreement it is mentioned that the fiduciary charge imposition shall be stated in a notarial deed and then registered at the fiduciary registration office, therefore the binding of the object is under fiduciary guarantee. The creditor does not implement the content of the consumer financing agreement that has been agreed upon by both parties. If the fiduciary charge is put forth in a notarial deed and registered, then there will be protection and legal certainty for the parties concerned, the provision in the Law on Fiduciary Guarantee (LFG) orders it to provide better protection for the parties concerned and provide legal certainty to the parties. Then the registration (article 11 subsection (1) LGF) also aims to meet the principle of publicity so that people can access information and know the existence and state of the object that is fiduciary object. Likewise to provide certainty to other creditor concerning object that has been encumbered with fiduciary guarantee. It prevents the occurrence of re-fiduciary as prohibited in Article 17 LGF and the existence of illegal execution if the debtor neglects.

Therefore, the debtor needs to get legal protection. The legal protection given is preventive legal protection and repressive legal protection. The preventive law protection is legal protection whereby a person is given an opportunity to file an objection or opinion before a decision gets a definitive form, whereas a protection repressive law is the legal protection provided by the authorities to resolve the dispute.

The preventive legal protection can be realized by a consumer financing agreement with a fiduciary guarantee agreement, in which the agreement is made by both parties. It means that both parties formulate each of the existing clauses of the agreement. And the compensation is rights and obligations for both parties. If both parties in this case formulate agreements and can negotiate with each other, then both parties are equally obtained a balanced position. With the result, both parties are benefited and do not cause arbitrariness. In addition, if the consumer financing agreement given the imposition of fiduciary guarantee should be on the charge of fiduciary guarantee made notarial deed and registered at the fiduciary guarantee office, so that the fiduciary certificate issued has executorial power. It functions if the debtor is negligent. The financing company (creditor) can directly execute the guarantee object, because in the fiduciary certificate there is phrase "FOR THE SAKE OF JUSTICE UNDER

THE ONE ALMIGHTY GOD" in which the certificate has the same executorial power as the judge's decision that has permanent legal force.

The repressive legal protection for the disadvantaged debtor can be done in two ways: litigation and non-litigation. The settlement of dispute through non-litigation channel can be done through an agency charged with resolving dispute between the debtor as a consumer and creditor as a consumer finance company through the Consumer Dispute Settlement Agency (hereinafter referred to as CDSA). The protection provided by CDSA to consumer is through dispute resolution between consumer and business actor as well as providing consumer protection consultation, monitoring the inclusion of standard clause, and accepting consumer complaint, as well as other duties.

The legal protection through litigation in this case if the debtor feels aggrieved may commit a lawsuit addressed to the consumer financing company (creditor) to request legal protection from the court with the reason of the agreement clause is stated that the imposition of this guarantee is called fiduciary, which the creditor will incur the charging fiduciary by notarial deed and then register it to get the certificate of fiduciary. Unfortunately, the creditor does not perform the agreement.

4. Conclusions

Starting at the existing problem and supported by research that has been implemented, it can be concluded as follows:

1. Based on the data that occurred in the field after the author conducted research, it is still a lot of creditors who do not register objects that become fiduciary guarantee to the fiduciary registration office; then the creditor does not exercise legal protection of their fiduciary rights. Thus in case of negligence, the creditor must make a civil lawsuit process first to the district court until the execution. If the creditor is unable to provide proof of certificate of fiduciary guarantee at the time of the execution of the object, the debtor may file a lawsuit to the state court on the basis of an offense under Article 368 of the criminal code if the creditor exerts coercion and threat of deprivation.
2. Fact proves that the fiduciary guarantee execution used by the creditor tends to sell privately made based on the agreement of the parties. The reason is to find the right buyer in hopes of getting a high price. In addition, this way is considered not to spend a lot of cost, energy and time. The fiduciary guarantee execution on

the basis of an executorial title or through a public auction will take a long time and quite expensive cost. The fiduciary guarantee execution by sale privately made is preferred by the creditor, since the debtor may seek for himself the buyer who wishes to buy the guarantee goods such a vehicle, either two or four wheels with a high price or desired by the creditor. Thus it will take a short time and low cost.

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