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Legal Consequence of Fiduciary Object's Right Transfer Conducted Unofficially

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Abstract

The regulations concerning the transfer of fiduciary guarantee objects are delineated in Law Number 42 of 1999 on Fiduciary Guarantees, Article 21, paragraph (1). The Fiduciary Provider may transfer inventory items subject to the Fiduciary Guarantee according to the customary trade practices outlined in Article 23, paragraph (2). The Fiduciary Provider is forbidden from transferring, pledging, or leasing fiduciary collateral that is not inventory unless prior written consent is obtained from the fiduciary recipient. Nonetheless, the actual circumstances frequently

diverge from the established regulations. The study employs the normative juridical research technique. This research aims to analyze and elucidate the legal effects of the agreement about the transfer of rights over fiduciary items executed privately. The research findings indicate that the unauthorized transfer of rights over fiduciary objects by the debtor, without the creditor's consent, constitutes a breach of contract following the Constitutional Court ruling number 18/PUU-XVII/2-2019, affecting the execution of the executorial title.

Keywords: Legal Consequences, Rights Transfer, Fiduciary, Unofficial Transfer

Introduction

In principle, there is no credit without collateral; financial institutions will not provide loans in the form of funds without adequate collateral from the consumer (debtor). This is a generally applicable principle in credit provision, whether by banking financial institutions or non-bank financial institutions because every credit provision will always carry the risk of payment issues arising from the consumer (the debtor) in the future.

To ensure that if the debtor cannot pay their loan installments at any time, the collateral object must be used as an alternative for debt repayment by being sold at auction to cover the consumer's (debtor's) outstanding payment obligations. To ensure that the debt can be quickly settled in case of debtor default, the creditor or financing institution must choose a type of collateral that provides ease and practicality, by placing the creditor in a special position and prioritizing them ^[1].

A guarantee agreement is a special agreement between a creditor and a debtor or a third party who makes a promise by binding a certain object or the capability of a third party to provide security and legal certainty for the repayment of credit or the execution of the main agreement ^[2].

The term "guarantee" comes from the word "guarantee," which means to bear responsibility, so a guarantee can be interpreted as the responsibility for all obligations of a person as mentioned in Article 1131 of the Civil Code, hereinafter referred to as (KUHPerdata) "All the debtor's assets, whether movable or immovable, whether already existing or to be created in the future, become the collateral for all personal obligations."

Article 1132 of the Civil Code states, "The property shall serve as a joint guarantee for all creditors, and the proceeds from the sale of the property shall be distributed equitably, according to the amount of each creditor's claim, unless there are valid reasons among the creditors for prioritization." Article 1850 of the Civil Code states, "a mere postponement of payment granted by the creditor to the debtor does not release the guarantor, but the guarantor in such a case can demand the debtor to force him to pay or to release the guarantor from his guarantee."

Positive law Indonesia has legislation that fully regulates matters related to debt guarantees. Some of these provisions are found in the Civil Code and Law Number 42 of 1999 concerning Fiduciary Guarantees. Fiduciary security as a property guarantee has the main characteristic that fiduciary security remains attached to the object of fiduciary security in the hands of whoever the object is, except for the transfer of inventory items that are the object of fiduciary security. This is found in Article 20 of the Fiduciary Guarantee Law "The Fiduciary Guarantee remains attached to the object of the Fiduciary Guarantee in the hands of whoever the object is, except for the transfer of inventory items that are the object of the Fiduciary Guarantee." This provision is the *droit de suite* characteristic of fiduciary guarantees, and the granting of this characteristic is based on the intention to provide a strong position to the right holder^[3].

One of the fiduciary objects in society is movable property such as motorcycles and cars, which are used as collateral for installment payments. The document of vehicle ownership serves as this collateral. The registration of fiduciary guarantees provides legal certainty to the interested parties and grants preferential rights to the fiduciary recipient over other creditors. This is stated in Article 15 paragraph (2) of the Fiduciary Security Law (UUJF): "The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force." and Article 15 paragraph (3) of the UUJF "If the debtor defaults, the Fiduciary Recipient has the right to sell the object of the Fiduciary Guarantee at their discretion" followed by the Constitutional Court Decision Number 18/PUU-XVII/2019 stating that default according to Article 15 paragraph (3) cannot be determined unilaterally by the creditor, an agreement on the default must be made between the debtor and the creditor, if both parties do not agree on the default, the execution is carried out following the provisions of the legislation through a petition to the court^[4].

Article 23 paragraph (2) of the UUJF states that: "The debtor is prohibited from transferring, pledging, or leasing to another party the object of the Fiduciary Guarantee that is not an inventory item, except with prior written consent from the Fiduciary Recipient." This provision states that the object of the fiduciary guarantee cannot be transferred to another party without the consent of the fiduciary recipient. However, it is still often found that the transfer of rights over fiduciary objects without the creditor's approval for items that are not inventory items occurs, indicating that many debtors still commit fraud in the fiduciary object agreements with creditors. Here are examples of cases of unauthorized transfer of fiduciary objects, such as in Decision Number 109/Pid.Sus/2020/PN Plw, Decision Number 211/PID/2021/PT BNA, and Decision Number 6/Pdt.G.S/2022/PN Cjr. Based on this, the purpose of this research is to analyze and explain the juridical consequences of the transfer of rights over fiduciary objects conducted unofficially.

Research Method

The type of legal research used is normative legal research, which is doctrinal legal research as library research or document study. This research uses three types of approaches, namely the statute approach, the case approach, and the conceptual approach^[5]. The data sources used in this research come from legal research reports, which were

sought through library research. This research is primarily based on secondary data. The secondary data for this research uses primary, secondary, and tertiary legal sources. The method used for analysis is the qualitative method.

Results and Discussions

Fiducia is the transfer of ownership rights over movable objects to another person based on trust. Fiducia is transferred to the fiduciary holder who possesses the fiduciary collateral object, but the control of the movable object remains with the fiduciary giver (debtor). Fiduciary security is not the same as other types of security because, in principle, the object of other securities must be handed over to the fiduciary recipient (creditor). This is by the provisions of Article 1152 of the Civil Code, which states: "if the security is allowed to be controlled by the debtor, then the security will be invalid"^[6]. In a fiduciary agreement, the debtor has the obligation and responsibility to maintain the object of the fiduciary guarantee so that the object does not perish during the credit agreement period^[7].

Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security, hereinafter referred to as UUJF, states that "fiduciary is the transfer of ownership rights of an object based on trust with the condition that the object whose ownership rights are transferred remains in the possession of the owner of the object." Based on Article 23, paragraph (2) of the Fiduciary Guarantee Law (UUJF), which states, "The Fiduciary Provider is prohibited from transferring, pledging, or renting out to other parties the object of the fiduciary guarantee that is not inventory, except with prior written consent from the fiduciary recipient."

The transfer permitted under Article 21, paragraph (1) of the UUJF states: "The Fiduciary Provider may transfer inventory items that are the object of the Fiduciary Guarantee in the manner and procedures commonly used in trade." This means that with the approval of the creditor acting as the fiduciary recipient, the debtor acting as the fiduciary provider can transfer the fiduciary collateral. However, Article 21 paragraph (2) explains that as referred to in paragraph (1), this does not apply if there has been a breach of contract by the debtor and the fiduciary provider to a third party. According to Jal, a source from the leasing company, he explained that the numerous cases of debtors transferring the Fiduciary Guarantee Object are caused by debtors not reading the contract clauses at the time of the initial credit agreement. These contract clauses are one of the important conditions that must be agreed upon and signed directly by the debtor in a legally competent state. Article 1329 of the Civil Code states that "every person is competent to make commitments unless declared incompetent by law." currently, many debtors have had their fiduciary collateral transferred without the creditor's knowledge, which will certainly become a problem in the future. After the transfer, many vehicle holders flee after obtaining the unit from the debtor, and the debtor does not know the whereabouts of the vehicle holder. Because of that, the debtor does not want to pay the installments anymore, feeling that the vehicle is no longer in their possession. Then some debtors transfer the collateral to a third party because they can no longer afford to pay the installments or need quick funds for other purposes^[8].

When transferring financing to a third party, the debtor offers a price by returning only the down payment, and then

the remaining installments are paid by the third party until a price negotiation occurs, resulting in a transaction that is beneficial for one of the parties. However, the leasing company does not have an issue with this as long as the first buyer reports to the leasing company, because the data used remains the first buyer even though the collateral object has been transferred and without any transfer fee charged by the leasing company. Each leasing company has its requirements. In the initial stages, leasing companies provide varying tolerances depending on the policies and conditions of each debtor. If there is a significant delay in payment or a lack of good faith from the debtor, and the delay exceeds 60 days after the tolerance period, it will be handled by a Debt Collector. The Debt Collector is tasked with directly observing the debtor's house to remind them of their overdue payments, ensuring the debtor is still at the registered address at the time of the contract agreement, confirming that the fiduciary object or vehicle is still being used by the debtor, and issuing a warning letter/summons to the debtor to settle their arrears immediately.

The Debt Collector is also authorized to secure the vehicle if necessary, under the fiduciary collateral security regulations as per the Constitutional Court Decision Number 18/PUU-XVII/2019, which prohibits Debt Collectors from collecting debts through coercion and threats. Typically, the Debt Collector will reach an agreement with the debtor regarding the breach of promise that has occurred. The creditor can take the collateral object based on the initial agreement. The next step is for the creditor to implement the unit deposit procedure. The unit deposit is a step to provide a grace period of 7 days to the debtor. If the debtor still cannot settle the arrears within this grace period, the leasing company will proceed with an auction.

When the Debt Collector discovers that the debtor has unilaterally transferred the fiduciary collateral, it will become a problem because many cases have been found where the fiduciary collateral is intentionally removed or hidden by the vehicle holder after the transfer, and the debtor does not know the whereabouts of the vehicle holder. Usually, in such cases, the Debt Collector will assist in searching for the debtor's vehicle by coordinating with the field team. The responsibility for this remains with the first buyer who entered into the credit financing agreement. This is the main issue where the debtor believes this is no longer their responsibility^[9].

In an agreement in any form, both parties are binding themselves to perform something that has been promised (performance), in reality, it is not impossible that one party may not fulfill what has been promised. Performance is an obligation that must be fulfilled or carried out by the debtor in every obligation, whether the obligation arises from an agreement or the law. Article 1234 of the Civil Code states, "Every obligation is to give something, to do something, or not to do something." This is the manifestation of an obligation, and sometimes the obligation cannot be fulfilled by the debtor as it should be.

Article 4 of the UUFJ states that "fiduciary collateral is a secondary guarantee from a principal agreement that creates an obligation for the parties to fulfill a performance." Conversely, it can be said that if the debtor or creditor fails to fulfill their obligation to perform, then one of the parties can be said to be in default. The main concern regarding Fiduciary Guarantees is the default by the debtor in contract law. If a debtor fails to fulfill the terms of the agreement or

does not perform the promised actions, then the debtor has committed a default with all its legal consequences^[10].

Regulations regarding the execution of Fiduciary Guarantees can be found in Articles 29 to 34 of the Fiduciary Guarantee Law. Article 30 of the Fiduciary Guarantee Law states that "the Fiduciary Grantor must hand over the object of the Fiduciary Guarantee in the execution of the Fiduciary Guarantee." If this provision is violated, the creditor is entitled to take the object of the Fiduciary Guarantee with the assistance of the authorized parties if necessary. Article 34 of the Fiduciary Law states, "if the execution results exceed the value guaranteed, the fiduciary recipient is obliged to return the excess to the fiduciary giver," but if the execution results are insufficient to settle the debtor's debt, the debtor remains responsible for the unpaid balance.

Regarding the execution of fiduciary guarantees in the latest regulations, namely the Constitutional Court Decision No.:PUU-XIX/2021, it emphasizes that the execution of fiduciary guarantees can be submitted to the district court by the creditor as an alternative. The alternative referred to is the option that if there is a default but no agreement is reached and there is no voluntary handover of the fiduciary collateral by the debtor, then the execution option cannot be carried out by the creditor alone, but must request the assistance of the district court to carry out the execution. This decision by the Constitutional Court is the latest ruling on the lawsuit filed by Joshua Michael DJami, who submitted a judicial review request against Article 15 paragraph 2 of the Fiduciary Security Law. This judicial review request is part of the Constitutional Court's decision number 18/PUU-XVII/2019. In the 2019 Constitutional Court ruling, there were several differing interpretations regarding the execution of fiduciary guarantees. With the latest Constitutional Court ruling No. 2:/PUU-XIX/2021 on page 83, paragraph 3, it is clearly stated that the execution of fiduciary guarantee certificates through the district court is only an alternative and not an obligation. This Constitutional Court ruling states that the court is only pursued if the debtor or one of the parties objects to the seizure process.

Based on the above description, the legal consequence of the debtor's default in transferring the rights to the fiduciary collateral under the credit agreement results in the creditor not receiving the fulfillment of their rights that should have been obtained with the existence of the agreement. Because a contract serves as a binding agreement in civil law between two or more legal subjects, where one party has the right to something and the other party is obligated to fulfill it. The legal consequence of this breach of contract is that the debtor can be charged under Article 372 of the Criminal Code regarding embezzlement and Article 36 of the Consumer Protection Law, while the buyer will be charged under Article 480 of the Criminal Code regarding receiving stolen goods with a maximum prison sentence of four years. Post the Constitutional Court's decision number 18/PUU-XVII/2-2019, it has implications for the execution title against creditors that has been granted by the fiduciary guarantee law. First, the executory power contained in the fiduciary guarantee certificate with the inscription "For Justice Based on the One and Only God" becomes void. The interpretation of "executorial power" that execution can be carried out directly without the assistance of the court, as stated in the explanation of Article 15 paragraph (2) of the UUFJ, will automatically become null and void. The

creditor holding the fiduciary guarantee certificate can no longer carry out the execution without the assistance of the court. The process of executing the collateral object must go through stages similar to the execution of a judge's decision that has obtained permanent legal force in general. The process begins with the execution request, *aanmaning*, the court chairman's decree, execution seizure, and ends with the sale of the execution object.

In line with that, the following implication is the abolition of the *parate executie* institution in fiduciary guarantees if the provision is interpreted concerning fiduciary guarantees where there is no agreement on the occurrence of a breach of contract (*wanprestasi*) and the debtor is reluctant to voluntarily hand over the object that is the fiduciary guarantee because the object has been transferred to another party. With the abolition of this *parate executie*, the main characteristic of fiduciary collateral, which is the ease of execution when the debtor defaults, is also lost. Disputes between creditors and debtors regarding the determination of when a breach of promise or default has occurred, coupled with the debtor's unwillingness to voluntarily surrender the collateral, will lead to a default lawsuit that actually takes longer. With the removal of the executorial power of the fiduciary guarantee certificate and the *parate executie* institution, the fiduciary law no longer has the characteristics typical of collateral law such as pawn, mortgage, and mortgage rights.

After the creditor has issued a warning/summons but there is no response from the debtor, the creditor can file an execution request with the chairman of the District Court just like a civil judgment according to Article 196 HIR, which states: "If the defeated party does not want or neglects to fulfill the content of the decision peacefully, the winning party submits a request, either orally or in writing, to the chairman of the District Court, to execute the decision. The chairman of the District Court orders the defeated party to be summoned and warned to fulfill the decision within the time determined by the chairman of the District Court, which is no longer than eight days." Although it may seem that the Constitutional Court's decision No. 18/PUU-XVII/2019 aims to equalize the positions of the parties amidst the issue of arbitrariness by the creditor, the execution of fiduciary guarantees will take longer because it must wait for a court decision to carry out the execution. Meanwhile, the court process takes a considerable amount of time, while the dynamic business world requires speed and ease.

This decision also impacts the court institution. The Constitutional Court Decision Number 18/PUU-XVII/2019 has the potential to increase the number of new cases for the District Court, which contradicts the process of simple, quick, and legally certain adjudication. From the perspective of substantive law, the litigation process in the District Court takes a long time, starting from the registration of the lawsuit, the trial process, the evidence presentation, and then the reading of the verdict by the judge. In this case, the items being pledged usually have a nominal value that is not large, therefore the cost of imposing a fiduciary guarantee, including its execution, must also be carefully considered to remain efficient.

Conclusion

The legal consequences of transferring a fiduciary object without the creditor's approval can be subject to penalties

according to Articles 35 and 36 of the Fiduciary Law and default. The execution of fiduciary collateral can only be justified using the fiduciary collateral certificate if the relationship or default conditions are regulated in the agreement and the execution does not face rejection from the debtor. This means the debtor voluntarily surrenders or compensates for the loss related to the fiduciary collateral and acknowledges the breach of contract. This is in line with Decision No. 18/PUU-XVII/2019, which provides an alternative for resolving the execution of fiduciary collateral objects. If an agreement cannot be reached where the debtor still refuses the execution of the fiduciary guarantee and does not acknowledge the state of default, then the last option that can be pursued by the creditor is a legal lawsuit in court by proving that the debtor has defaulted.

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