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The Criminal Sanctions In The Object Transfer Crime On Fiduciary Guarantee By Debtor

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Abstract
This study aims to determine and examine the criminal sanctions in the criminal act of transferring the object of fiduciary security by the debtor. This study uses a normative juridical approach, which is descriptive analysis. The data used is secondary data obtained through literature study, which is then analyzed qualitatively. The results of this study are that criminal sanctions in the criminal act of transferring the object of fiduciary security by debtors are regulated in Article 36 of Act No. 42 of 1999. Article 36 of Act No. 42 of 1999 has similarities with Article 372 of the Criminal Code regarding embezzlement. The provisions of Article 36 of Act No. 42 of 1999 contain a penalty of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiah).
Keywords: Debtor; Fiduciary; Collateral; Criminal Sanction; Criminal Act.

1. Introduction

Credit as one of the economic activities has provided various possibilities in economic traffic, especially in the development sector of rural and urban development, in trade, transportation, business development, urban development and settlements. Credit is very vital for economic development, therefore credit is always needed for consumptive purposes even for business development by entrepreneurs, both large, medium and small entrepreneurs.

The provisions of Article 8 paragraph (1) and paragraph (2) of Act No. 10 of 1998 concerning Banking are the basis or basis for banks in channeling credit to debtor customers. Moreover, because lending is one of the main functions of banks, the provisions also contain and apply the precautionary principle as referred to in the provisions of Article 2 of Act No. 10 of 1998.[1]

In providing credit to the public, the bank or financial institution as the creditor must feel confident that the funds lent to the community will be returned on time along with the interest and on terms that have been mutually agreed upon by the creditor and the debtor concerned in the credit agreement. An agreement is

[1]Hermansyah, 2014, *Hukum Perbankan Nasional Indonesia, Ditinjau Menurut Undang-Undang No. 7 Tahun 1992 tentang Perbankan, Sebagai-mana Telah Diubah dengan Undang-Undang No. 10 Tahun 1998, dan Undang-Undang No. 23 Tahun 1999 jo. Undang-Undang No. 3 Tahun 2004 tentang Bank Indonesia, serta Undang-Undang No. 21 Tahun 2011 tentang Otoritas Jasa Keuangan (OJK)*, Second Edition, Eighth Printing, Kencana Prenadamedia Group, Jakarta, p. 63.

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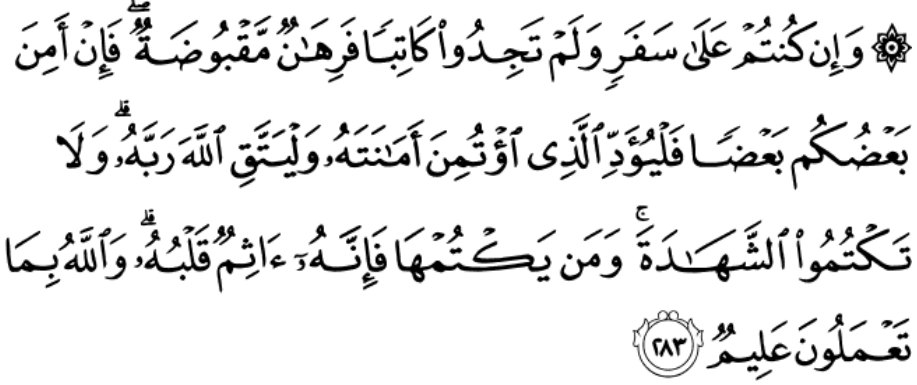
essentially an agreement between the parties who make the agreement, which creates an obligation for the parties to give, do, or not to do something.[2]

The ability of the debtor is a very important thing to be considered by the creditor regarding the repayment of the debtor's debt. To determine the ability and willingness of the debtor to return the credit on time in the credit application, the bank or financing institution needs to review the credit application, one of which is collateral, namely in the form of goods submitted by the debtor to the creditor as collateral for repayment of the credit which he received. Collateral in general is the creditor's way of guaranteeing the fulfillment of the bill, in addition to the debtor's obligation to his debt.[3]

Given the importance of the position of credit funds in the development process, it is appropriate for credit providers and recipients as well as other related parties to receive protection through a strong guarantee rights institution in order to provide legal certainty for all interested parties as an effort to anticipate the emergence of risks for creditors in the future.

Islam also strongly recommends providing guarantees in carrying out debt contracts as explained in QS Al-Baqarah verse 283:



Meaning: "If you are on a journey (and do *muamalah* not in cash) while you do not find a writer, then there should be collateral held (by the debtor). But if some of you believe in others, then let the one who is trusted fulfill his mandate (debt) and let him fear Allah his Lord; And do not (witnesses) hide your testimony. And whoever hides it, then indeed he is a sinner in his heart; and Allah is Knowing of what you do."

According to Ulama Hambali and Syafi'i, goods are collateral for debts that can be used as debt payments if the debtor cannot pay the debt.[4]

The implementation of guarantees to obtain loans by creditors has known the law of guarantees for immovable and movable objects. For immovable objects such as land, use a mortgage guarantee institution as regulated in Act No. 4 of 1996

[2]Koesparmono Irsan and Armansyah, 2016, *Hukum Tenaga Kerja, Suatu Pengantar*, First Printing, Erlangga, Jakarta, p. 61.
[3]Sri Kusriyah, Bambang Tri Bawono, and Suwanto, March 2020, *Criminal Aspects Of The Fiduciary Guarantee Transfer As Decision Basis On Criminal Justice Process*, Jurnal Daulat Hukum, Vol. 3 No. 1, Faculty of Law, Universitas Islam Sultan Agung, Semarang, url : http:// jurnal.unissula.ac.id/index.php/RH/article/view/8405/3940, p. 95.
[4]Ruslan Abd Ghofur N., 2012, *Gadai Syariah, Teori dan Prakteknya di Indonesia*, LKiS Printing Cemerlang, Yogyakarta, p. 4.

concerning Mortgage Rights, and for immovable objects using a fiduciary guarantee institution as regulated in Act No. 42 of 1999 concerning Fiduciary Guarantees.

For those who need funds, but do not have land as collateral, they can use movable objects to be used as collateral such as vehicles by using a fiduciary guarantee institution.

The birth of a fiduciary guarantee institution is motivated by the existence of a law (Civil Law) which regulates pawn institutions (pand) which in practice causes many difficulties and does not have a practical aspect in its implementation, this is caused by the goods that are the object of collateral must be submitted to the creditor , so that if the goods are related to means of subsistence, such as vehicles used for transportation or tools that are used as means of earning a living, then the conditions for surrendering the object of collateral in real terms to the creditor pose a major obstacle to the debtor.[5]

Fiduciary is a guarantee for the transfer of the debtor's property which is bound by a credit agreement on the basis of trust, which gives the debtor a position to maintain control of the collateral, even if only as a temporary borrower or no longer the owner.[6]

Fiduciary is one of the guarantee institutions by providing trust between debtors and creditors. The trust is in the form of the transfer of ownership rights to objects that are used as debt guarantees by the debtor. The purpose of the fiduciary is to provide guarantees for creditors' claims against debtors or reversed, guarantee debtors' debts to creditors and the Fiduciary Law, in addition to providing protection to fiduciary debtors, also intends to provide a strong position to creditors, then after the debtor defaults , the creditor must be given rights commensurate with an owner considering that the collateral is in the hands of the guarantor, namely to terminate his agreement to borrow the collateral object and demand it back.[7]

In the increasingly rapid development of the law, the realization of Act No. 42 of 1999 in the field is not in accordance with what is expected. In other words, there are still violations regarding fiduciary guarantees. This is triggered because a fiduciary guarantee is still considered the easiest and easiest institution to get credit or additional capital that is carried out by everyone, because in a fiduciary guarantee the transfer of a right is based on sheer trust. Such violations include the transfer of the object of a fiduciary guarantee by the debtor without the knowledge of the creditor, and a case that often occurs is the transfer of a motor vehicle as an object of a fiduciary guarantee by the debtor to another party, thus harming the financing institution (leasing).

The consequences if the transfer, mortgage or lease is carried out without the approval of the creditor (fiduciary recipient), then the debtor (fiduciary giver) can be categorized as having committed an act that violates criminal law.

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[5]D.Y. Witanto, 2015, *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen (Aspek Perikatan, Pendaftaran, dan Eksekusi)*, First Printing, Mandar Maju, Bandung, p. 78.

[6]Agus Budianto and Umar Ma'ruf, March 2019, *Law Enforcement Against Transfer of Objects Fiduciary in Kudus Police*, Jurnal Daulat Hukum, Vol. 2 No. 1, Faculty of Law, Universitas Islam Sultan Agung, Semarang, url : http://jurnal.unissula.ac.id/index.php/RH/article/ view/4214/2920, p. 103-104.

[7]Yurizal, 2015, *Aspek Pidana Dalam Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia*, Tenth Printing, Nusa Creative Media, Malang, p. 38-39.

Criminal law places the act of transferring, mortgaging or leasing the object of collateral by the debtor which is carried out without the consent of the creditor in the form of a crime. The essence of criminal law is the imposition of suffering or misery or other unpleasant consequences.[8]

Everyone who has violated the law will get a punishment that is appropriate for his actions and to provide a deterrent effect to the perpetrators of criminal acts, thus it is very important to obey the law for the community, and it is the community's obligation to create security and order.[9]

Misuse of fiduciary guarantee objects will lead to criminal violations of fiduciary guarantee disputes in Indonesia, because it is hoped that law enforcement officers and related agencies will be more focused on effectively taking action against debtors who commit these crimes in accordance with the law, so there are no more detrimental debtors.

The purpose of this study is to find out and examine the criminal sanctions in the criminal act of transferring the object of fiduciary security by the debtor.

2. Research Methods

The type of research used in writing this legal journal is normative juridical. Normative juridical research is research that is focused on examining the application of rules or norms in positive law,[10] which in this case relates to criminal sanctions in the criminal act of transferring the object of fiduciary security by the debtor. This research is descriptive analysis, because the researcher wishes to describe or explain the subject and object of research, which then analyzes and finally draws conclusions from the results of the study.[11]The data used in this research is secondary data. Secondary data is data obtained from library materials through library research, and this data is also obtained from agencies/institutions related to the purpose of this research.[12] According to the data that has been obtained during the research by reading library books, then it is analyzed. The analysis used in this research is qualitative data analysis.

3. Results and Discussion

Financial institutions, such as banks and non-banks, have an important role for economic development in Indonesia.[13] The main activity or main activity of a

[8]Sri Endah Wahyuningsih, 2013, *Prinsip-Prinsip Individualisasi Pidana Dalam Hukum Pidana Islam dan Pembaharuan Hukum Pidana Indonesia*, Second Printing, Badan Penerbit Universitas Diponegoro, Semarang,, p. 80.
[9]Jawade Hafidz Arsyad and Dian Karisma, 2018, *Sentralisasi Birokrasi Pengadaan Barang & Jasa Pemerintah*, First Printing, Sinar Graphic, Jakarta, p. 23.
[10]Jhonny Ibrahim, 2011, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia, Malang, p. 295.
[11]Mukti Fajar ND and Yulianto Achmad, 2010, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, p. 183.
[12]Soeratno and Lincolin Arsyad, 2003, *Metodologi Penelitian Untuk Ekonomi Dan Bisnis*, UPP AMP YKPN, Yogyakarta, p. 173.
[13]Riskha Amaliya Lubis and Maryanto, September 2018, *Outcome Measures Non-Performing Loans on BPR Sejahtera Klaten of Central Java*, Jurnal Daulat Hukum, Vol. 1 No. 3, Faculty of Law, Universitas

bank is as a financial institution that collects funds from the public and distributes funds.[14]The implementation of credit disbursement carried out by the bank certainly does not always run smoothly as desired, so that in its implementation the bank must be careful. Banks must be able to be wise in providing loans or credit to the community so that in this case the bank is obliged to pay attention to the principle of distribution or lending.[15]

Given the importance of the position of credit funds in the development process, it is appropriate for credit providers and recipients as well as other related parties to receive protection through a strong guarantee rights institution in order to provide legal certainty for all interested parties as an effort to anticipate the emergence of risks for creditors in the future.

As stated by Sri Soedewi Masjchoen who stated that: "In the interest of creditors who enter into debt, the law provides guarantees aimed at all creditors and regarding all debtors' assets. The existence of a guarantee for the debtor is for the sake of capital security and legal certainty for the financier of capital, this is where the importance of the guarantee institution.[16]

Mariam Darus Badrulzaman argues that a guarantee is to guarantee the fulfillment of obligations that can be valued in money arising from a legal engagement. Therefore, the law of guarantees is very closely related to the law of objects.[17]

Guarantees or collateral can be seen in the Elucidation of Article 8 of Act No. 10 of 1998 which states that credit provided by banks contains risks, so that in its implementation banks must pay attention to sound credit principles.

Additional collateral that is a movable object is a car, stock of merchandise, trucks, semi-finished goods, ships measuring not more than 20 cubic meters. The form of the guarantee agreement is a fiduciary guarantee. Some banking circles and notaries say that the fiduciary guarantee is only a complementary guarantee of the mortgage guarantee. Others argue that fiduciary guarantees are not a complement to mortgage rights but even without collateral rights, the bank will provide credit with fiduciary guarantees. From the results of this study, it can be seen that there is still an assumption that fiduciary security is not a primary thing, but a secondary guarantee as a complement to mortgage rights. This view is inaccurate, because when viewed from the legal system of material security, Fiduciary guarantees and mortgages have the same juridical power, only differ in the object. Fiduciary guarantees are always smaller in value when compared to credit loans provided

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Islam Sultan Agung, Semarang, url : http://jurnal.unissula.ac.id/ index.php/RH/article/view/3400/2509, p. 779.

[14]Kustriyo and Aryani Witasari, September 2018, *Abuse of Authority in Position and Redemption of Credit Fictitious Apparatus for Civil State (ASN) PD. Bank Perekreditan Rakyat (BPR) Sumber, Cirebon District*, Jurnal Daulat Hukum, Vol. 1 No. 3, Faculty of Law, Universitas Islam Sultan Agung, Semarang, url : http://jurnal.unissula.ac. en/index.php/RH/article/view/3396/ 2505, p. 754.

[15]Dhika Rachmat Pratama and Amin Purnawan, June 2018, *Default In And Credit Agreement And Implementation Of Solution Efforts (A Case Study Of Decision 336/Pdt/G/2016/Pn.Smg)*, Jurnal Daulat Hukum, Vol. 1 No. 2, Faculty of Law, Universitas Islam Sultan Agung, Semarang, url : http://jurnal.unissula.ac.id/index.php/RH/article/view/3272/2407, p. 345.

[16]Sri Soedewi Masjchoen, 2003, *Hukum Jaminan di Indonesia Pokok-pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty, Yogyakarta, p. 2.

[17]Salim HS, 2014, *Perkembangan Hukum Jaminan di Indonesia*, Rajawali Pers, Jakarta, p. 22.

through the binding of mortgage rights. However, according to banking circles and notaries, legally, mortgages and fiduciary guarantees have the same security function in credit agreements, namely as material guarantees recognized in positive law.[18]

The juridical function of the fiduciary guarantee stated in the fiduciary guarantee deed further confirms the bank's position as a preferred creditor. In addition, creditors receiving fiduciary will obtain certainty on the repayment of debtors' debts. This juridical function will also reduce the risk level of banks in running their business as referred to in the Banking Law.[19]

As mentioned, for those who need funds but do not have land as collateral, they can use movable objects to be used as collateral such as vehicles by using a fiduciary guarantee institution.

The term fiduciary comes from the Dutch language, namely *fiduce,* the full term is *fiduciare* eigendom *overdracht*,[20] while in English it is called fiduciary transfer of ownership, which means trust. Act No. 42 of 1999 also uses the term fiduciary as an official term in the legal world.[21]

Fiduciary (*Fiducia Eigendoms Overdracht*) is the transfer of ownership, based on trust. The word "fiduciary" means "trust", where the parties give each other their trust, namely one party gives full trust to the other party to transfer his property rights, but the objects that are used as collateral are debt guarantees.[22]

Even though it is only based on trust, a fiduciary requires the debtor to comply with the provisions in the credit agreement, such as prohibitions that are not allowed, such as transferring collateral goods to other parties without the knowledge of the creditor. The creditor gives confidence to the party receiving the loan (the debtor) that the debtor will fulfill his obligations to repay the loan in accordance with a certain agreed period of time.[23] The prohibitions on fiduciary guarantees are: [24]

1. The fiduciary giver is prohibited from repeating the fiduciary to objects that are objects of registered fiduciary guarantees;
2. The fiduciary giver is prohibited from transferring, mortgaging, or leasing to other parties objects that are objects of fiduciary guarantees that are not inventory items, except with prior written approval from the fiduciary recipient;
3. The fiduciary guarantee can only be charged to material rights, not to individual rights.

All laws, as well as contract law, contain orders and prohibitions for something (*gebodsen verhodsbepalingen*) and are aimed at a situation, in which

[18]Tan Kamello, 2014, *Hukum Jaminan Fidusia, Suatu Kebutuhan yang Didambakan, Sejarah, Perkembangannya, dan Pelaksanaannya Dalam Praktik Bank dan Pengadilan*, Second Edition, First Issue, Alumni, Bandung, p. 187.
[19]Ibid., p. 189.
[20]Munir Fuady, 2013, *Hukum Jaminan Utang*, Erlangga, Jakarta, p. 101.
[21]Munir Fuady, 2000, *Jaminan Fidusia*, Citra Aditya Bakti, Bandung, p. 3.
[22]Adrian Sutedi, 2006, *Implikasi Hak Tanggungan Terhadap Pemberian Kredit Oleh Bank dan Penyelesaian Kredit Bermasalah*, Cipta Jaya, Jakarta, p. 32.
[23]Ismail, 2011, *Manajemen Perbankan, Dari Teori Menuju Aplikasi*, First Edition, Second Printing, Kencana Prenada Media Group, Jakarta, p. 94-95
[24]Irma Devia Purnamasari, 2014, *Panduan Lengkap Hukum Praktis Populer : Kiat-kiat Cerdas, Mudah, dan Bijak Memahami Masalah Hukum Jaminan Perbankan*, First Issue, Kaifa, Bandung, p. 85-86.

members of the community behave well for the safety and happiness of the community. With these legal regulations alone, society will not be good. For this it is necessary for community members to submit and obey these regulations. Efforts in law to achieve this state are to impose a punishment on people who do not keep their promises. This punishment is commonly called a *sanctie* (sanction).[25]

For this violation, the debtor has violated not only the credit agreement but also the applicable laws and regulations, in this case is Act No. 42 of 1999. The criminal provisions in Act No. 42 of 1999 are a form of legal protection for creditor against the debtor's "naughty" actions. Repressive legal protection is provided by providing criminal sanctions for acts that are considered as acts that violate criminal law or are included in criminal acts or criminal acts.

The criminal provisions in Act No. 42 of 1999 are regulated in Articles 35 to 36. There are 2 (two) criminal acts regulated in Act No. 42 of 1999, namely deliberately committing forgery and granting fiduciary without written consent from the recipient fiduciary.

Fiduciary counterfeiting is regulated in Article 35 of Act No. 42 of 1999. Article 35 of Act No. 42 of 1999 states that:

> Any person who intentionally falsifies, changes, omitted or in any way provides misleading information, which if it is known by one of the parties does not give birth to a fiduciary guarantee, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least IDR 10,000,000 (ten million rupiah) and a maximum of IDR 100,000,000 (one hundred million rupiah).

Article 35 of Act No. 42 of 1999 focuses more on the process of the birth of the agreement, meaning that the crime occurred before the fiduciary agreement or at least became the cause of the birth of the fiduciary agreement. If Article 35 of Act No. 42 of 1999 is described, the following elements will be obtained:[26]

- Everyone's element;
- Elements on purpose;
- The element falsifies, changes, removes or in any way provides information that is misleading;
- The element if it is known by one of the parties does not result in a fiduciary guarantee agreement;
- Elements of a criminal threat (to be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least IDR 10,000,000 (ten million rupiah) and a maximum of IDR 100,000,000 (one hundred million rupiah) .

The element of every person in Article 35 of Act No. 42 of 1999 is general in nature, not only interpreted for the fiduciary giver (debtor) or the fiduciary recipient (creditor), even third parties outside the parties who entered into the guarantee agreement can also subject to the provisions of Article 35 of Act No. 42 of 1999.

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[25]Wirjono Prodjodikoro, 2011, *Azas-Azas Hukum Perjanjian*, Tenth Printing, Mandar Maju, Bandung, p. 57.
[26]DY Witanto, op.cit., p. 146.

If the perpetrator is proven to have committed the crime, then they are subject to imprisonment and a fine. The prison sentence is a minimum of 1 year and a maximum of 5 (five) years. Meanwhile, the minimum fine is IDR 10,000,000.00 (ten million rupiah) and a maximum of IDR 100,000,000.00 (one hundred million rupiah). Both types of punishment are cumulative, meaning that both sentences must be applied to the perpetrators simultaneously in the judge's decision.[27]

This is different from Article 36 of Act No. 42 of 1999 which only provides limitations on the subject of criminal acts that are only addressed to the fiduciary giver, this can be seen from the following elements which do not limit it to certain subjects. If viewed from the content of Article 35 of Act No. 42 of 1999, it is similar to the crime of fraud in Article 378 of the Criminal Code because it contains misleading content, so that other people want to do certain actions to bind a fiduciary agreement with him. The legislators provide a benchmark that if it was previously known that there was an act of falsifying, changing, eliminating or in any way providing misleading information, then the other party in the fiduciary agreement may not want to agree to it.[28]

Article 35 of Act No. 42 of 1999 does not provide a condition that the fulfillment of the article must cause harm to one of the parties, so it can be concluded that the provisions of Article 35 of Act No. 42 of 1999 are a category of formal offenses which will be considered fulfilled a crime with the proof of all the elements in the article.

Article 35 of Act No. 42 of 1999 is classified as a formal offense, but the loss factor is quite important to determine the element "if it is known by one of the parties that it does not produce a fiduciary guarantee agreement", meaning that the loss factor can be a measure that if previously one of the party is aware of the actions described in the formulation of the third element, then surely the creditor will not want to close the fiduciary agreement, although that does not mean that the loss is the only measure to determine whether or not the fourth element is fulfilled.[29]

The condition described in the formulation of Article 35 of Act No. 42 of 1999 is an act intended to deceive the other party, so that he is moved to make a fiduciary guarantee agreement or at least circumstances that are not known to one of the parties will become a barrier to the occurrence of a guarantee agreement if it is known earlier before the agreement is signed. Examples of actions that can be applied to Article 35 of Act No. 42 of 1999, for example:[30]

> A gave a debt to B of Rp100,000,000 (one hundred million rupiah), B's debt to A was guaranteed by a Toyota Innova brand car made in 2010 on a fiduciary basis, but B had engineered such a way that the Toyota Innova car was recorded as in 2012, so that A wanted to give his debt because he felt guaranteed by the latest Toyota Innova car because A found out the car was released in 2012, later it was found out that B had falsified the year of manufacture in the STNK, BPKB, and all the car documents that were guaranteed, then B is considered to have deceived

[27]Salim HS, op.cit., p. 92.
[28]DY Witanto, op.cit., p. 146 and 147.
[29] Ibid.
[30]Ibid., p. 147 and 148.

A and therefore can be punished by using the provisions of Article 35 of Act No. 42 of 1999.

From the example above, it is not certain that A will suffer a loss with the actions taken by B on his car documents, because it must be remembered that the guarantee will be important when the debtor defaults, meaning if the debtor continues to pay his debt until it is paid off. , then at all creditors or fiduciary recipients will not experience any losses, so that losses do not always have to be a measure, but it also cannot be denied that the loss is sometimes important to be used as a measure, for example when creditors know of incorrect data in the financial statements the object of the fiduciary guarantee given to him after the debtor's debts are paid off.[31]

With the settlement of the creditor's receivables that are guaranteed by the debtor's property, the creditor's interest in the fiduciary guarantee object has ended, this is based on the assumption that the guarantee will always be important when the debtor does not carry out his achievements, but if the debtor's performance is carried out in accordance with what is stated by the debtor. agreed upon, then the existence of the object of guarantee seems to have ceased to exist at all, because the creditor may not collect repayment using the object of the guarantee, if the debtor performs his performance well, or in other words, the right to collect repayment using the object of the guarantee will only arise when the debtor default as a form of payment by substitution.[32]

The granting of a fiduciary without the consent of the fiduciary recipient is regulated in Article 36 of Act No. 42 of 1999. Article of Act No. 42 of 1999 states that: "Giving a fiduciary that transfers, mortgages, or rents out objects that are fiduciary objects, which is carried out without written consent first from the fiduciary recipient, shall be sentenced to a maximum imprisonment of 2 years and a maximum fine of IDR 50,000,000 (fifty million rupiah)".

The provisions of Article 36 of Act No. 42 of 1999 have similarities with Article 372 of the Criminal Code concerning Embezzlement which reads as follows: "Anyone who intentionally and unlawfully owns something that wholly or partly belongs to another person but is under his control not because of a crime is threatened with crime offense of embezzlement with a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs.

The phrase “owning” as formulated in Article 372 of the Criminal Code can be exemplified in the form of concrete actions, including “selling”, “transferring”, “mortgaging”, or “leasing” other people's property that is in their power not because of a crime.

If the elements are described in Article 36 of Act No. 42 of 1999, several elements will be obtained, as follows: [33]

- The element of the fiduciary giver;
- The element of transferring, mortgaging, or renting out;
- Elements of objects that are objects of fiduciary guarantees as referred to in Article 23 paragraph (2);

[31] Ibid.
[32] Ibid.
[33]Ibid., p. 149.

- Elements are carried out without prior written consent from the fiduciary recipient.

The legal subject designated by the provisions of Article 36 of Act No. 42 of 1999 is only intended for the fiduciary giver, which in this case is the debtor or third party owner of the goods guaranteed by fiduciary security.

The appointment of a legal subject to the fiduciary giver because even though the ownership rights have been transferred to the creditor (fiduciary recipient), the object of the fiduciary guarantee remains in the power of the owner of the goods or the debtor himself, so the provisions of Article 36 of Act No. 42 of 1999 intend to protect the interests of the fiduciary recipient from the fraudulent actions of the fiduciary giver, such an arrangement is very useful considering that the object of a fiduciary guarantee in general is a movable object that is easy to transfer to another party, even though the fiduciary guarantee adheres to the *droit de suite* principle, so that wherever the object changes the hands of the fiduciary recipient creditor can still carry out the execution of the settlement of his receivables, but if the object is transferred and then its whereabouts are no longer known, then it will cause difficulties for creditors receiving fiduciary executions as stipulated in Article 29 of Act No. 42 of 1999.[34]

Article 36 of Act No. 42 of 1999 can only be applied if the fiduciary agreement has complied with the provisions of Article 11 paragraph (1) jo. Article 14 paragraph (3) of Act No. 42 of 1999 concerning registration obligations, because a fiduciary is considered to have been born if it has been registered and recorded in the Fiduciary Registration Book. Fiduciary registration is also a point of prey for material rights.

The fiduciary guarantee is born with the issuance of a fiduciary certificate. Fiduciary agreements as contained in the Fiduciary Guarantee Deed only give rise to rights and obligations for the parties who make them as obligatory agreements in general.

The provisions of Article 36 of Act No. 42 of 1999 contain a penalty of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiah), whereas when compared with the provisions of Article 372 of the Criminal Code, it includes a more severe criminal threat, namely: 4 (four) years in prison.

Article 36 of Act No. 42 of 1999 is formulated in the form of a formal offense, meaning that a criminal act as stated in the article is considered to have been proven if all the elements formulated have been fulfilled regardless of whether the creditor (fiduciary recipient) has suffered losses for the actions taken by the guarantor or not, and conversely the fiduciary giver cannot avoid by saying that he continues to carry out his achievements well even though he has transferred the object of the fiduciary guarantee that is in his power.[35]

Many cases arise in practice where the debtor transfers the fiduciary security object, but it turns out that the fiduciary guarantee has not been registered, then the debtor is sentenced to the provisions of Article 372 of the Criminal Code regarding embezzlement, even though it becomes an oddity if Article 372 of the Criminal Code can be applied to the transfer of unregistered fiduciary objects because the act of transferring a fiduciary object that has been registered is only punishable by a 2

[34] Ibid.
[35] Ibid., p. 150.

(two) year imprisonment based on Article 36 of Act No. 42 of 1999, while transferring a fiduciary object that is not registered is actually threatened with a more severe criminal provision, namely 4 (four) years in prison as stipulated in Article 372 of the Criminal Code.[36]

It is natural if the creditor demands his right to get the debtor's debt repaid, so the creditor must get legal protection for the debtor's actions that are detrimental to the creditor. Legal protection efforts are needed so that the parties get justice if there is a problem in the legal actions carried out by the parties.

John Rawls stated that justice is needed to balance conflicting interests, so that according to John Rawls, justice is that everyone has an equal right to basic freedoms, as wide as the same freedom for everyone and the existence of social and economic differences/inequalities should be regulated in such a way as to provide benefits, positions and positions that are open to all.[37]

It is appropriate if criminal sanctions are applied to debtors who have bad faith in transferring the object of fiduciary security. Besides being able to provide legal protection for creditors, it can also provide legal certainty for the repayment of debtors' debts. Of course, these criminal sanctions can provide a deterrent effect for debtors who have bad intentions and also learn lessons for the Indonesian people to be more honest and trustworthy when given trust by anyone.

4. Closing

Criminal sanctions in the criminal act of transferring the object of fiduciary security by the debtor are regulated in Article 36 of Act No. 42 of 1999. Article 36 of Act No. 42 of 1999 has similarities to Article 372 of the Criminal Code concerning Embezzlement. The provisions of Article 36 of Act No. 42 of 1999 contain a penalty of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiah). Furthermore, it is suggested that in granting credit with fiduciary guarantees, banks can ask for additional guarantees from debtors, as a preventive measure if the debtor has bad intentions.

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Journal

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