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# The Legal Consequences of Default in Consumer Financing with Fiduciary Guarantees by Debtors

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***Abstract.*** *Providing the financing with a fiduciary charge will make it easy for the consumer. Not only they can get a loan, but they also retain possession of the collateral. However, if there is a default in consumer financing with a fiduciary guarantee by the debtor, it often creates legal consequences in practice. The focus of this paper is on legal consequences for parties who default on consumer financing with fiduciary guarantees. This type of normative research looks at legal provisions regarding creditor and debtor agreements on fiduciary guarantees. Thus, the conclusion was due to the law that there was a default in consumer financing with fiduciary guarantees that was able to collect bills. If repayment was not made, the creditor would sell collateral goods.*

***Keywords:*** *Consequences; Consumers; Fiduciary; Guarantees.*

## 1. INTRODUCTION

Fiduciary guarantees are conventional products that are applied to protect creditors in particular. When the debtor defaults, the creditor can ask for compensation from the debtor through the execution of a fiduciary guarantee. With fiduciary registration, the execution of collateral items can be carried out immediately without waiting for a court decision. Such conditions make it easy for financial institutions to withdraw compensation from loans provided to customers (Maksum, n.d.). The execution of the fiduciary guarantee is provided that the debtor notifies the financing institution that the fiduciary object will be executed (Handoko & Efendi, 2022).

Financing Institutions are business entities that carry out financing activities in the form of providing funds or capital goods. Article 1 Number 1 Decree of the President of the Republic of Indonesia Number 9 of 2009 concerning Financing Institutions The development of financial institutions or what is often known as consumer financing institutions is increasing since the fact that existing banks are deemed insufficient to deal with various funding needs for the community. Another cause is the limited range of credit distribution by banks and limited funds. Moreover, with the development of the era and the progress of the economy in our country recently, many private financing companies have sprung up that finance various kinds of community needs

because human needs, which are varied according to their dignity, are always increasing, while the ability to achieve something they want is always limited. This causes humans to need help to fulfill their desires and ideals. This causes humans to need help to fulfill their desires and ideals. According to Thomas Suyanto et al, in the case of humans trying "to increase their business or to increase the usability of an item, making humans need the help of others in the form of additional capital which in this case is often referred to as capital/financing"(Thomas Suyanto, 2007, p. 13). assistance in the form of additional capital is what is often referred to as consumer financing activities.

The presence of various financial institutions has contributed greatly to the economic development of the community, especially small communities. This financing institution appears as a form of providing funds or goods to the public for the purchase of goods whose payments are made in installments or periodically by consumers. The emergence of financing practices with a consumer financing system is caused by the following factors: first; it is difficult for most people to have access to bank credit which is always bound by collateral; second; the formal payment system through cooperatives has not developed as expected; third; formal funding sources such as Perum Pegadaian have many limitations or systems that are less flexible; and fourth; Informal financing systems such as loan-sharking practices are very stifling to society (Munir Fuady, 2002, p. 164). The presence of various financial institutions is beneficial for the community, as we know that not everyone in society has enough funds to fulfill their daily needs, therefore financial institutions are very helpful in running the economy of this country.

Consumer financing obtains financing capital carried out by financial companies in the form of providing financial assistance to purchase certain products. Funding assistance is defined as credit that is not giving money in cash to purchase an item, the customer will only receive the item (Munir Fuady, 2002, p. 205). Consumer finance companies help the public to buy consumer goods such as cars, motorcycles, heavy equipment, household appliances, electronics, and others. This company operates as an institution to meet consumer needs with the aim of making a profit. With so many financing businesses, the author only provides limitations on credit financing agreements for wood-cutting machines that are guaranteed to a leasing company which is part of the financing agreement for consumer financing. What is meant by consumer financing is a financing activity for the procurement of goods based on consumer needs with an installment or credit system, which aims to assist individuals or companies in meeting their needs and capital, particularly for the purchase of movable objects such as motorized vehicles, heavy equipment, electronics, and furniture. household. In consumer financing transactions there are three parties involved, namely: first; the consumer finance company (funding and financing providers or creditors); second; the Consumer (recipient of financing funds or debtor); and third; the supplier (seller or provider of goods)(Chidir, 1993, p. 166)

The relationship between the creditor and the debtor is a contractual relationship in this case a consumer financing contract. In this consumer financing system, the consumer finance company provides financing in the form of a loan to purchase an item, then the consumer will receive a funding facility for the purchase of certain goods and pay the debt periodically or in installments to the consumer financing company,

then the seller or supplier provides the desired goods. where the goods are paid in full by the Consumer Finance Company.

The construction of consumer financing is based on an agreement with the principle of freedom of contact as a legal principle for both parties, so the parties must be more careful in making agreements so as not to harm the parties or one of the parties in the future and must fulfill the principle of justice. Providing consumer financing also has a risk, while the risk is defaulted by consumers. Default is a situation where the consumer cannot fulfill his promise or the consumer is unable to pay installments which in bank terms is often referred to as bad credit. The causes of consumers not being able to fulfill their achievements can be caused by five things, namely the existence of an intentional element, namely the consumer deliberately not carrying out his obligations according to what was agreed, so that there is no element of willingness to pay financing debt (character) There is an element of accident, namely, the consumer wants to pay but are unable to because of circumstances or certain things (capacity), there is an accidental element, namely, consumers want to pay but are unable to because of insufficient capital (capital), consumers want to pay but consider the collateralized goods to be equivalent to what they get (collateral) there is an element to pay but economic conditions are not sufficient (condition of the economy)(Hutagalung, 1997, pp. 141–142)

Providing financing with a fiduciary charge makes it easy for consumers because, in addition to getting a loan, they also retain possession of the collateral. Although the provision of consumer financing has the opportunity for risk. The reason for the emergence of risk is usually due to default on the part of the debtor, changes in laws, monetary crises, natural disasters, and other causes which result in the debtor being unable to fulfill his obligations. The biggest risk in providing financing is non-payment of installments or default by the debtor (consumer) or in bank terms, bad credit occurs. To minimize risk, guarantees can be used as a certainty for repayment of financing debts in the future, because no matter how small the opportunities that may arise, the provision of financing will always be faced with the risk of failure (default).

The inability of consumers to carry out their achievements is caused by several things, namely; first; there is an element of intent, namely that the consumer deliberately does not carry out his obligations and does not have good faith with what has been agreed upon so that there is no willingness to pay the financing debt (Character); second; there is an unintentional element, namely willing to pay but unable to because of circumstances or certain things that cause consumers not to fulfill their achievements (Capacity); third; there is an element of incompetence, namely consumers are willing and want to pay but there is no availability of sufficient funds (Capital). Fourth; consumers are not willing to pay because they think the guaranteed goods are equivalent to what they get (Collateral). Based on the explanation above, the problem in this research is what are the legal consequences if the debtor defaults on consumer financing with a fiduciary guarantee.

## 2. RESEARCH METHODS

The type of this research is normative research, with a normative approach as the main approach which is supported by a sociological juridical approach, because the normative approach looks at the legal provisions concerning creditor and debtor agreements with fiduciaries. There are two types of data used in this study, there were

primary data and secondary data. To analyze the data, the researcher used a qualitative approach method which was a research method that produced the analytical descriptive data (Pratama, 2017)

## 3. RESULT AND DISCUSSION

### 3.1. The Legal Consequences if the Debtor Defaults on Consumer Financing with a Fiduciary Guarantee

Rabiyatul Syahriah explained that the agreement that gives rise to Fiduciary has the following characteristics: First, between the Fiduciary giver and the Fiduciary recipient there is an engagement relationship, which issues the right for the creditor to request delivery of collateral from the debtor; second, the engagement is an agreement to give something because the debtor delivers an item; third, the engagement in the context of granting Fiduciary is an accessory engagement, that is, an engagement that includes another engagement (principal engagement) in the form of a debt and credit agreement. Fourth, the Fiduciary Agreement is classified as an agreement with the condition that it is canceled, because if the debt is repaid, then the Fiduciary guarantee will be forfeited; fifth, a Fiduciary Agreement is classified as an agreement originating from an agreement, namely a Fiduciary agreement; sixth, the Fiduciary Agreement is an agreement that is not specifically mentioned in the Civil Code. Therefore, this agreement is classified as an anonymous agreement (Onbenoem De Overeenkomst); seventh, the Fiduciary Agreement remains subject to the provisions of the general part of the engagement contained in the Civil Code (Yasir, 2016)

Fiduciary guarantees that did not produce fiduciary guarantee certificates caused complex and risky legal consequences. Creditors could exercise their execution rights because they are considered unilateral and can lead to arbitrariness on the part of creditors. It could also be because considering that the financing of fiduciary object goods is usually not in full according to the value of the goods. Or, the debtor has carried out the obligations of part of the agreement made, so that it can be said that the rights of part of the debtor and part of the creditor stand on the item. (Debora R. N. N. Manurung, 2015)

After having a fiduciary guarantee agreement or certificate, creditors and debtors both receive legal protection as stipulated in the Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection, consumers were required to obtain legal protection in various types of agreements. Therefore, before the agreement is made, the consumer has received legal protection. In the provisions for the implementation of consumer protection in Indonesia, several parties regulate it, with the aim that the parties can have a smooth relationship. Where these parties were consumers, agencies and the government, and business actors (Dewa Bagus Komang Mahendra Krisna Putra et al., 2022)

Guarantees in consumer financing are divided into: first; the main guarantee; As a credit, the main guarantee was the trust from the creditor (finance company) to the debtor (consumer), that the consumer could be trusted and can fulfill his obligations. Second; principal guarantee; as collateral for consumer financing transactions are goods purchased with funds or financing from the said finance company. If the funds were given, for example, to buy a car, then the car in question would become the principal guarantee. Third; additional guarantee; Often, in consumer financing

practices, additional guarantees were requested, although they are not as stringent as bank guarantees for granting credit (Agustina & Aslamiyah, 2022).

After holding the agreement or certificate, it would result in legal consequences of achievement and default. Achievement was an obligation that must be fulfilled or carried out by the debtor in every engagement, both engagements originating from agreements and laws. In essence, the agreement was an agreement that requires honesty from the parties to fulfill their promises. If there was a situation where one of the parties agreeing did not do what had been agreed upon or did not carry out what was agreed on time, then in the law of this agreement it was called a default. To determine whether a debtor has defaulted, it must first be proven whether there was an element of good faith, or not on the part of the debtor. An agreement made legally is an agreement made not because of an oversight, not due to fraud or not because of an element of coercion, the debtor who defaults could be legally forced to fulfill all of his obligations, as what the law itself wanted because the law was arranged and forced. A very important consequence of not fulfilling the agreement was that the creditor can ask for compensation for the costs, losses, and interest he had suffered. For an obligation to compensate the debtor, the law determines that the debtor must first be declared negligent (*ingebrekestelling*).

This was done to ensure security in the provision of these financing facilities if the consumer defaults or did not carry out the agreed financing agreement. In addition to the reasons mentioned above, the Deed of Fiduciary Agreement was not directly registered about cost issues, because it would be very burdensome for finance companies. Default had very important consequences, so it must be determined in advance whether the debtor had defaulted and if this was denied, it must be proven before a judge. The determination of when a default occurs was often not agreed upon precisely when the debtor is required to perform the agreed performance. Regarding the time of occurrence of default, it was regulated in Article 1238 of the Civil Code which states that: "The debtor was negligent if he has been declared negligent by a warrant or similar deed, or for the sake of his engagement, if this determined that the debtor would be deemed negligent by passing of stopped time”

If the debtor defaulted, it would have legal consequences for the parties to the agreement. The provisions of Article 1267 of the Civil Code state that: "Parties against whom the agreement was not fulfilled can choose; force the other party to fulfill the agreement, if it could still be done, or demand cancellation of the agreement, with compensation for costs, losses and interest whether he, forced the other party to fulfill the agreement, or would he demand cancellation of the agreement, accompanied by compensation for losses and interest”.

Sometimes most of the occurrences of fiduciary guarantees were made by notarial deed but were not registered with the KPF, so the provisions in the Fiduciary Law cannot be applied because the agreement was not a fiduciary agreement, but an ordinary agreement, therefore the creditor's position in the agreement was as a concurrent creditor. The provisions of the Fiduciary Law cannot be enforced. Because the Fiduciary Law cannot be enforced, so that the debt can be fulfilled, what is used in Article 1131 of the Civil Code, according to Article 1131 of the Civil Code: "The property of the debtor, both movable and immovable, both existing and new there would be in the future, became a responsibility for all one's engagements ".

Fiduciary guarantees that were made into fiduciary guarantee certificates had complex and risky legal consequences. Creditors could exercise their execution rights because they weree considered unilateral and can lead to arbitrariness on the part of creditors. It could also be because the financing of fiduciary object goods was usually not by the value of the goods, or the debtor had carried out some of his obligations from the agreed agreement so that it could be said that above the goods stand the rights of some belonging to the debtor and some belonging to the creditor. If the execution was not carried out through an official valuation agency or a public auction body, then the act could be categorized as an Unlawful Act (PMH) as stipulated in Article 1365 of the Civil Procedure Code and could be sued for compensation.

This situation could occur if the creditor in execution was forced and took the goods unilaterally, even though it was known that the goods partially or wholly belong to someone else. Although it was also known that some of these items belong to creditors who want to execute them but are not registered at the fiduciary office. Whereas the imposition of other articles could occur bearing in mind that executions were not an easy matter everywhere, for this reason, legal guarantees and support from the legal apparatus are needed. This was the urgency of balanced legal protection between creditors and debtors.

Even if the debtor transfers the fiduciary object under the hand to another party, he could not be charged with Law No. 42 of 1999 concerning Fiduciary Guarantees, because the fiduciary guarantee agreement made was not legal. The debtor who transfers the objects of fiduciary guarantees was reported on charges of embezzlement by Article 372 of the Criminal Code which emphasizes the following: "Anyone who deliberately and unlawfully owns goods which is wholly or partly owned by another person, but which was in his power not because of a crime was threatened for embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs.

But this could also be a blunder because they can report to each other. After all some of the goods belong to both parties, both the creditor and the debtor. To prevent legal confusion, a civil decision by the local District Court was needed to assign the portion of each owner of the goods to both parties. If this was done, there would be a legal process that is long, tiring, and costs a lot of money. As a result, the margin that the company wanted to achieve was not realized and may even make a loss, including loss of time and thought.

Financing institutions that did not register fiduciary guarantees lose themselves because they did not have legal executorial rights. Business problems that require speed and excellent customer service are always not in line with existing legal logic. Maybe because of a legal vacuum or laws that were not always as fast as the times. Imagine, fiduciary guarantees must be made in front of a notary while financing institutions carry out fiduciary agreements and transactions in the field in a relatively short time. Currently, many financial institutions carried out executions on goods objects that are burdened with fiduciary guarantees that are not registered. It could be called remedial, of coll or remove. So far, financing companies had felt that their actions were safe and smooth. According to the author, this occured because the bargaining power of customers was still weak against creditors as owners of funds, coupled with the low level of public legal knowledge. This weakness was exploited by

business players in the financial industry, especially the sector of financial institutions and banks that practiced fiduciary guarantees with private deed.

Whereas the principle of the agreement *pacta sun sunt servanda* which stated that the agreement made by the parties to the agreement will become law for both of them remained in effect and became the main principle in contract law. But agreements that provided underhand fiduciary guarantees could not be executed. The execution process must be carried out by filing a civil suit to the District Court through normal procedural law until a court decision is issued. This was a formal legal procedural choice to maintain justice and uphold the material law it contained. This process was almost certain to take a long time if the parties use all available legal remedies. The costs that must be spent are not small. Of course, this was a dilemmatic choice. The pretext of pursuing large margins must also consider the sense of justice of all parties. Communities that generally became customers must also be more critical and thorough in conducting transactions. Meanwhile, for the Government, the certainty of justice and law and order was the most important thing.

### 3.2. The Legal Remedies Withdrawal of Fiduciary Collateral Objects

Legal remedies in a fiduciary guarantee agreement, both the fiduciary recipient and the fiduciary giver according to the fiduciary guarantee law were both given legal protection, for the protection provided in the form of usufructuary rights over the collateral object, and the default of the guarantor would not cause the collateral object to change its ownership rights. The Fiduciary Guarantee Law provided preference rights over receivables and the *droit de suite* principle applies to collateral objects, for third parties the publicity principle in a fiduciary guarantee agreement will provide information on fiduciary objects. To guarantee the security of legal remedies for withdrawing fiduciary collateral objects, creditors were required to register a deed drawn up by a notary and then register with the Fiduciary Registration Office at the Office of the Ministry of Law and Human Rights, and after that, the creditor would receive a fiduciary guarantee certificate. Form of the deed under the hand and notarial deed (JP, 2019).

Of course, legal efforts to withdraw fiduciary collateral objects through a power of attorney to withdraw collateral objects were valid legal grounds for creditors to carry out confiscations. This power of attorney contains a statement to be signed by the debtor himself to give power of attorney with the right to transfer ownership rights in a fiduciary manner with an approved fiduciary agreement number, hereinafter referred to as the attorney to take actions if the debtor experienced one of the events listed in the financing agreement consumers as follows: first; the debtor was considered negligent in paying one of the installments or installments thereof; second; the debtor died, or continued to be sick or permanently disabled, was unable to complete the obligations in this agreement, unless the recipient and or the successor of the rights/heirs with the approval of the creditor stated the ability to fulfill all the obligations of the debtor under this agreement. And third; the debtor was under guardianship or due to any reason that causes the debtor to be unprepared whatever it was and took it to a place that was considered good by the attorney.

If the fiduciary giver who controlled the fiduciary object to be withdrawn was not at home, the presence of an authorized official such as the police, village head, *RW* chief, or *RT* chief was required as a witness at the time of withdrawal. The existence of the

authorities was only incidental; besides that, it was also to guard against suspicions that the bailiff entered the yard and house by force. Those who sign the minutes of withdrawal were the recipient and giver of the guarantee and the authorities if they participated in the process of confiscating the object of the guarantee. If the collateral object to be withdrawn had been destroyed/damaged, insurance services are used. Insurance was one effort that can be done to obtain protection against the possibility of a loss. The type of insurance used was a total loss only. For the use of total-loss only insurance, the insurance coverage would be provided for loss/damage whose repair costs were estimated to be equal to or more than the price of the vehicle if it was repaired or the vehicle was lost stolen. For this type of insurance legal liability to third parties was not covered by the insurance. Regarding premium payments borne by the debtor as the fiduciary guarantee provider, this was confirmed in the fiduciary guarantee deed. If the fiduciary giver/debtor fails to ensure the object of the fiduciary guarantee, then all risks of damage, accidents, loss, and others were fully the responsibility and risk and burden of the fiduciary giver himself.

In general, if the collateral object was damaged/destroyed, the debtor tended to be in arrears. Because they did not want to spend double the funds, namely to finance machine repairs and pay installments. In addition, there was no demand from the creditor to compensate for the damage, but only the obligation to take care of the collateral object as well as possible. When a situation like this occurs, the debtor was deemed to have waived his rights and obligations. Therefore, immediately the object was withdrawn from the debtor. As stipulated in Article 30 of the Fiduciary Law, if the confiscated party was not present but the collateral object was there, then based on a power of attorney signed by the debtor himself, the withdrawal could still be carried out, but the police or local government officials were needed as witnesses that the confiscation was carried out for valid legal reasons. This situation would be written in the minutes of withdrawal. It was relatively effective and efficient in terms of time and cost because it could be done in a family manner without the use of lawyers and the documents that are prepared do not have to vary. The company had taken preventive action by attaching a Power of Attorney to withdraw motorized vehicles signed by the debtor himself, the Fiduciary Grant Agreement, and the Consumer Financing Agreement, all of which were binding evidence for both parties and contained details of withdrawal to public sale that had been signed by the debtor himself. If one looksed closely, the implementation of the auction carried out by the creditor was quite simple and not complicated.

The auction was carried out based on the conditions determined by the creditor himself. Creditors as sellers and auction participants were buyers who came out as auction winners declared as legitimate buyers. In the auction process, the party guiding the auction provided equal opportunities for participants to bid without impartiality (impartial judgment). The implementation of an auction which was quite simple, cheap, and fast in the sales process was considered quite helpful in the business world.

## 4. CONCLUSION

The legal consequences if the debtor defaults, that was, confiscation and sale of an item could be carried out if the family's efforts did not produce results. Billing, through letters in the form of billing letters and warning letters with stages 1,2,3. If with billing

letters and letters and warning letters the debtor would continue to default if payment was not made, then the creditor would sell the collateral.

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