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Legal Protection for Creditors Regarding the Transfer of Fiduciary Objects to Third Parties Without the Creditor's Consent

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Abstract. *This study aims to describe and analyze the Legal Analysis of legal protection that can be given to creditors when the fiduciary collateral object is transferred to a third party without the creditor's consent and to describe and analyze the obstacles that arise in the context of legal protection for creditors when the fiduciary object is transferred to a third party without the creditor's consent. This study uses the method applied in this writing is carried out with normative legal research, namely by analyzing the problem through the approach of legal principles and referring to the legal norms contained in the laws and regulations. The results of this study, the Legal Analysis of legal protection can be given to creditors when the fiduciary collateral object is transferred to a third party without the creditor's consent, legal protection for creditors in the fiduciary agreement is very important to maintain the rights to the collateral object. In the Fiduciary Guarantee Law (UUJF), Article 24 stipulates that creditors have the right to protection if the fiduciary object is transferred without consent. The debtor's actions in transferring the fiduciary object without permission are considered a violation of the contract and can cause losses to the creditor. In addition, the Consumer Protection Law (UUPK) also provides protection rights for creditors against irresponsible debtor actions. Legal steps that can be taken include cancellation of the transfer, claims for compensation, and legal action to protect the creditor's rights, while obstacles that arise in the context of legal protection for creditors when fiduciary objects are transferred to third parties without the creditor's consent are challenges in enforcing creditor rights, loss of access to collateral objects, misuse by debtors, issues of proof in disputes, protection of third parties, inadequate or unclear regulations.*

Keywords: *Creditor; Fiduciary; Transfer.*

1. Introduction

Indonesia is a country based on law, as mandated in Article 1 Paragraph (3) of the 1945 Constitution, which guarantees that the law protects the interests of every individual regardless of social status (Equality Before the Law).[1] Law cannot be separated from human life, because since birth, humans will be involved in interactions with others, which form society.[2]. As expressed by Cicero in the phrase "ubi societas ibi ius," which means where there is society there is law. Therefore, law is created by humans to regulate every interaction between fellow humans. Basically, humans can only survive in society, where humans are recognized as zoon politicon or social beings.[3]. The term guarantee comes from the word "guarantee" which means responsibility, so that guarantee can be interpreted as a guarantee for all obligations of a person as stated in Article 1131 of the Civil Code "All objects of the debtor, both movable and immovable, both existing and new in the future, become a guarantee for all individual obligations or a guarantee for certain obligations of a person.

Meanwhile, in Article 1850 of the Civil Code regarding "A simple delay in payment permitted by the creditor to the debtor does not release the guarantor from his liability, but in such a case, the guarantor can force the debtor to pay his debt or release the guarantor from his liability". Collateral based on its form is divided into two groups, namely personal collateral and material collateral. In the banking world, material collateral is preferred by banks because it has the function of securing credit repayment if the borrower defaults on his promise.[4].

The collateral institutions that are widely applied in credit agreements are mortgages or collateral rights, pawns and fiduciary guarantees. Mortgage guarantee institutions are used if the collateral or collateral object is a fixed object (immovable object). If the collateral object is movable objects, it can be bound by a pawn or fiduciary guarantee. Fiduciary guarantee institutions as an accessory agreement of a credit debt agreement (agreement) are a development of pawn guarantee institutions. The principal difference between pawn guarantee institutions and fiduciary guarantee institutions lies in the aspect of control over the collateral object. In pawn institutions, the collateral object is handed over and controlled by the party receiving the pawn (creditor), while in a fiduciary guarantee agreement, the collateral object remains controlled by the party

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[1]Sri Endah Wahyuningsih. The Urgency of Reforming Indonesian Material Criminal Law Based on the Values of Belief in the Almighty God, Journal of Legal Reform, VO 1 No. 1 January -April 2014.
[2]Sri Endah Wahyuningsih, Wilsa, HR Mahmutarom, Implementation of Child Welfare in Indonesian Community Institutions, Journal of International Law, Volume 4, Edition 5, September, Unissula 2018.
[3]Sudikno Mertokusumo, Understanding the Law, Liberty, Yogyakarta, 2005, p. 3
[4]Oey Hoey Tiong, Fiduciary as a Guarantee of the Elements of an Agreement, Ghalia Indonesia, Jakarta, 2003, p. 15

providing the fiduciary (debtor)[5]. In credit agreements that are common in society, one of the objects of fiduciary is a movable object in the form of a vehicle, either a car or a motorbike, but the collateral as a guarantee of installment payments by the debtor is in the form of a document of ownership of the vehicle. In fiduciary guarantees, the transfer of ownership occurs when the fiduciary guarantee is registered at the fiduciary registration office because the transfer of the object of the agreement is carried out in a constitutum possessorium manner.

The obligation to register a fiduciary guarantee provides legal certainty to the interested parties and the registration of this fiduciary guarantee provides priority rights (preference) to the fiduciary recipient over other creditors. Registration of fiduciary guarantees is regulated in Article 11 of the Fiduciary Guarantee Law, namely; Objects burdened with fiduciary guarantees must be registered. In the event that the object burdened with fiduciary guarantees is outside the territory of the Republic of Indonesia, the obligation as referred to in paragraph (1) remains in effect. The legal consequence of an unregistered fiduciary agreement is that it does not create a material agreement for the fiduciary guarantee, so that the material character such as droit de suite and its preferential rights do not attach to the creditor providing the fiduciary guarantee. Since the enactment of Law Number 42 of 1999 concerning Fiduciary Guarantees, in its implementation there have still been violations of the law, both by the creditor (fiduciary recipient) and by the debtor (fiduciary provider). One of the violations often committed by debtors is the transfer of fiduciary collateral objects without notification to the creditor, making it difficult for the creditor to execute the fiduciary collateral when the debtor experiences bad credit. This action is usually carried out by debtors who have received financing from a finance company for the purchase of motor vehicles, where the debt has not been paid off but the vehicle has been transferred without the creditor's knowledge.

In a fiduciary agreement, the object that is used as the object of the fiduciary guarantee remains in the possession of the owner of the object (debtor) and is not controlled by the creditor, so in this case it is the transfer of ownership of the object without handing over the physical object. The creditor entrusts the debtor to continue to be able to use the collateral object according to its function.[6]. Article 23 paragraph (2) of the Fiduciary Guarantee Law, hereinafter referred to as the UUJF, states that: "Debtors are prohibited from transferring, pawning or renting to other parties objects that are the object of Fiduciary Guarantees that are not inventory items, except with prior written approval from the Fiduciary Recipient." From this provision, it is clear that the object of the fiduciary guarantee may not be transferred to another party without the approval of the fiduciary recipient.

[5]M.Bahsan, Indonesian Banking Credit Guarantee and Collateral Law, 1st Edition, Raja Grafindo Persada, Jakarta, 2007, p. 4
[6]Munir Fuady, Fiduciary Guarantee, 2nd ed., Citra Aditya Bakti, Bandung, 2002, p. 152

The consequences if the transfer, mortgage or lease is carried out without the consent of the fiduciary recipient, then it can be categorized that the debtor has committed an unlawful act and can be subject to criminal law as stipulated in Article 36 of the Fiduciary Guarantee Law which stipulates: "A debtor who transfers, mortgages or leases an object that is the object of a fiduciary guarantee as referred to in Article 23 paragraph (2) of the Notary Services Law which is carried out without prior written consent from the fiduciary recipient, shall be punished with imprisonment for a maximum of 2 (two) years and a maximum fine of Rp. 50,000,000,- (fifty million rupiah)". Based on the description above, the purpose of the research is to describe and analyze the Legal Analysis of legal protection that can be given to creditors when the object of the fiduciary guarantee is transferred to a third party without the consent of the creditor and to describe and analyze the obstacles that arise in the context of legal protection for creditors when the object of the fiduciary is transferred to a third party without the consent of the creditor.

2. Research methods

This study uses a normative legal method by analyzing problems through a legal principles approach. This approach also refers to legal norms contained in various laws and regulations, in order to gain a comprehensive understanding of the issues discussed.

3. Results and Discussion

3.1 Legal Analysis of Legal Protection Can Be Given to Creditors When Fiduciary Guarantee Objects Are Transferred to Third Parties Without the Consent of the Creditor

Fiduciary agreements are an important instrument in financing, especially because they provide guarantees for credit given to debtors.[7]. Legal protection for creditors becomes very important when the object of fiduciary guarantee is transferred to a third party without consent. In this context, Law Number 42 of 1999 concerning Fiduciary Guarantee (UUJF) becomes the main legal basis. Article 24 of UUJF stipulates that creditors have the right to legal protection if there is a transfer of fiduciary objects without consent. This protection aims to protect the rights of creditors as owners of property rights to the fiduciary object.

Article 23 of the UUJF stipulates that debtors are not permitted to transfer, rent, or assign fiduciary collateral objects without written consent from the creditor. If such actions are carried out without permission, the debtor is considered to have violated the fiduciary agreement. This article strengthens the legal position of creditors by providing a basis for taking legal steps to return fiduciary objects or obtain compensation for losses suffered. In addition, this regulation also provides preventive protection so that debtors do not act arbitrarily.

[7]Ahmad Fadli, Legal Aspects of Fiduciary Guarantees in Indonesia, Jakarta: Gramedia Pustaka Utama, 2017, p. 30

Transfer of fiduciary collateral objects without the creditor's consent is considered an act that is contrary to the principle of trust that is the basis of the fiduciary agreement. Article 1320 of the Civil Code (KUHPerdata) regulates the requirements for a valid agreement, one of which is an agreement between the parties. When the debtor transfers the fiduciary object without consent, the act violates the agreement that has been made in the fiduciary agreement, so that the creditor has a legal basis to demand the fulfillment of his rights.

Article 15 paragraph (3) of the UUJF provides executorial power to the fiduciary guarantee certificate, which is equivalent to a court decision. This allows creditors to execute the fiduciary guarantee object directly if the debtor violates the agreement, including in the case of transfer without consent. This executorial power is a concrete form of legal protection for creditors, so that their rights remain guaranteed even if the debtor acts irresponsibly. In addition to the UUJF, legal protection for creditors is also regulated in Law Number 8 of 1999 concerning Consumer Protection (UUPK). Article 4 of the UUPK provides the right to business actors, including creditors, to obtain legal protection from consumer actions that are detrimental. In this case, debtors who transfer fiduciary objects without permission can be considered irresponsible consumers, so that creditors have the right to claim compensation for the losses incurred.

Article 1365 of the Civil Code is also relevant in this context, which regulates unlawful acts. The debtor's action of transferring a fiduciary object without the creditor's consent can be categorized as an unlawful act, because it violates the creditor's rights as stipulated in the fiduciary agreement. Based on this article, the creditor can claim compensation for material and immaterial losses suffered due to the debtor's actions.

Legal steps that can be taken by creditors include canceling the transfer of fiduciary objects through the courts.[8]. Article 26 of the UUJF stipulates that creditors may request cancellation of the transfer if the transfer is carried out without consent. This cancellation aims to restore the legal position of the creditor as the party entitled to the fiduciary object, so that the losses suffered can be minimized. Creditors can also file a claim for compensation based on Article 1243 of the Civil Code, which regulates breach of contract. If the debtor is proven to have violated the fiduciary agreement by transferring the object without permission, then the creditor has the right to claim compensation for the losses suffered. This process is carried out through the courts to ensure that the creditor's rights are legally protected.

Article 27 of the UUJF stipulates that creditors have the right to execute fiduciary objects if the debtor violates the agreement. This execution can be carried out through a public auction or direct sale to pay off the debtor's debt. In the context of the transfer of fiduciary objects without permission, creditors can use this

[8]Rahmat Hidayat, Legal Protection of Creditors in Fiduciary Guarantees, Yogyakarta: Pustaka Pelajar, 2018, p. 98

article to take back the objects that have been transferred, so that their rights as creditors remain guaranteed. Article 14 of the UUJF regulates the registration of fiduciary guarantees at the fiduciary registration office. This registration provides legal certainty for creditors over the fiduciary objects that are used as collateral. If an unauthorized transfer occurs, creditors can use this proof of registration to assert their rights to the fiduciary object and demand its return through legal channels.

In addition, Article 1338 of the Civil Code which regulates the principle of freedom of contract is also relevant. The fiduciary agreement that has been made between the creditor and the debtor has binding force as per the law. When the debtor violates the agreement by transferring the object without permission, then the action violates this principle, so the creditor has the right to demand fulfillment of the agreement or compensation. Article 29 of the UUJF stipulates that the creditor can ask for court assistance to take over the fiduciary object that has been transferred without permission. This process is carried out to ensure that the creditor's rights to the fiduciary object remain protected, while also providing a deterrent effect to debtors who act irresponsibly.

In practice, legal protection for creditors also involves the role of the police in law enforcement.[9]. Article 378 of the Criminal Code regulates fraud, which can be applied if the debtor intentionally transfers the fiduciary object to deceive the creditor. In this case, the creditor can report the debtor's actions to the authorities to ensure that the violation is prosecuted. Article 1131 of the Civil Code stipulates that all of the debtor's assets can be used as collateral for debt repayment. In the context of transferring fiduciary objects without permission, the creditor can demand debt repayment from other assets belonging to the debtor if the fiduciary object cannot be returned. This provides alternative protection for creditors to minimize losses.

Article 1156 of the Civil Code stipulates that the right to collateral, including fiduciary, provides a special position to creditors. This position allows creditors to prioritize their claims on fiduciary objects compared to other third parties. This protection is very important to ensure that creditors' rights remain guaranteed even though the fiduciary object has been transferred. Strengthening legal protection for creditors can also be done through additional agreements that regulate strict sanctions against unauthorized transfers. Article 1321 of the Civil Code stipulates that agreements made on the basis of fraud or cheating can be canceled. In this case, creditors can add special clauses to the fiduciary agreement to protect their rights more effectively.

In addition to the available legal mechanisms, mediation steps can also be taken to resolve disputes between creditors and debtors. Article 130 HIR stipulates that the court may encourage a peaceful settlement through mediation before the

[9]Siti Nurhayati, Fiduciary Guarantee in the Perspective of Indonesian Law, Bandung: Remaja Rosdakarya, 2015, p. 61

case is continued. In the context of unauthorized transfer of fiduciary objects, mediation can be an alternative to reach an agreement that benefits both parties. Legal protection for creditors is not only aimed at protecting property rights, but also at maintaining the stability of the financing system. Article 2 of the UUJF stipulates that fiduciary guarantees aim to provide legal certainty and protection for the parties. In this case, effective legal protection will encourage trust in the financing system, thereby providing broader benefits to the economy. Overall, legal protection for creditors in fiduciary agreements is very important to maintain the rights to collateral objects. The provisions in the UUJF, UUPK, KUHPerdata, and KUHP provide a strong legal basis for creditors to protect their rights. Through appropriate legal steps, creditors can ensure that their rights remain protected even if there is a violation by the debtor.

3.2 Obstacles That Arise in the Context of Legal Protection for Creditors When Fiduciary Objects Are Transferred to Third Parties Without the Consent of the Creditor

Legal protection for creditors in fiduciary agreements is essential because the collateral object is an important asset to guarantee the debtor's debt repayment. However, the main obstacle arises when the fiduciary object is transferred to a third party without the creditor's consent. Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) stipulates that the object of fiduciary guarantee cannot be transferred without the creditor's consent. If this rule is violated, the creditor's position becomes weak because it is difficult to demand the fulfillment of their rights to the object that has been transferred. This situation creates a legal loophole that can be exploited by debtors to avoid their obligations.

The first obstacle is losing access to the fiduciary guarantee object.[10]. In practice, fiduciary objects that have been transferred to third parties are often difficult to trace, especially if the third party acts in bad faith. Article 23 of the Fiduciary Law states that debtors are responsible for maintaining and preserving fiduciary objects. However, without effective supervision or a firm law enforcement mechanism, this provision is often ignored. Creditors face great challenges in recovering the object or its equivalent as compensation. Another obstacle is misuse by irresponsible debtors. Article 36 of the Fiduciary Law prohibits the transfer of collateral objects without the creditor's consent, but it is not uncommon for debtors to intentionally transfer fiduciary objects in order to escape from their responsibility to pay debts. Creditors often have to file lawsuits to prove this violation, which takes time and money. This legal process is also often complicated by the lack of strong evidence, especially if documents or information related to the fiduciary object are not available.

[10]Sutikno, Widyatmo, Legal Protection for Creditors in Fiduciary Guarantees, Journal of Law and Development, Faculty of Law, University of Indonesia, Jakarta, Vol. 15, No. 3, September 2020, p. 225

The issue of proof in legal disputes is a significant obstacle to creditor protection.[11]. Creditors must show that the transfer of fiduciary objects was carried out without their consent, according to Article 33 of the Fiduciary Law. In many cases, evidence in the form of fiduciary agreement documents or other supporting evidence is often inadequate. This complicated proof process can prolong dispute resolution and reduce the creditor's chances of regaining their rights. Protection of third parties is also a challenge in enforcing creditors' rights. Article 17 paragraph (2) of the Fiduciary Law provides protection to third parties who receive fiduciary objects in good faith. However, if the third party does not know that the object is a fiduciary guarantee, the creditor will have difficulty reclaiming the object. This situation creates a conflict between creditor protection and protection of innocent third parties.

Inadequate or unclear regulations are often the root of the problem in creditor protection. The Fiduciary Law provides a legal basis for the management of fiduciary guarantees, but several articles, such as Article 30 and Article 33, do not specifically regulate the monitoring mechanism or sanctions for violations. This ambiguity creates room for interpretation that can be exploited by parties who want to avoid their responsibilities. The absence of an effective monitoring mechanism is also a significant obstacle. Article 20 of the Fiduciary Law states that a fiduciary guarantee certificate is proof of the creditor's ownership of the fiduciary object. However, there is no mechanism to ensure that the object remains in the debtor's possession. This situation allows the debtor to secretly transfer the object to a third party, thereby losing their rights.

Another obstacle is the weak law enforcement in cases of fiduciary violations. Although Article 35 of the Fiduciary Law states that violations of fiduciary agreements can be subject to criminal sanctions, the legal process is often slow and does not provide a deterrent effect. In addition, coordination between legal institutions, such as the police and the courts, is often not optimal, slowing down the case handling process. Creditors also face challenges in executing fiduciary objects that have been transferred. Article 29 of the Fiduciary Law stipulates that execution can be carried out if the debtor is in default. However, if the object has been transferred to a third party, the execution process becomes more complicated. Creditors must file additional lawsuits to repossess the object, which can be time-consuming and expensive.

Another obstacle is the debtor's lack of understanding of their obligations under the fiduciary agreement. Article 15 paragraph (1) of the Fiduciary Law states that a fiduciary certificate grants the creditor execution rights. However, many debtors are unaware of the legal consequences if they transfer collateral objects without permission. This situation shows the need for better education and socialization regarding fiduciary obligations. From the third party's perspective, ignorance of the status of fiduciary objects is a major obstacle. Article 11 of the Fiduciary Law

[11]Ibid., p. 227

stipulates that fiduciary registration must be carried out to provide legal certainty. However, if this information is not easily accessible to third parties, they may inadvertently receive fiduciary objects that have been transferred, thus creating the potential for legal disputes with creditors.

Legal protection for creditors also depends on the clarity of the fiduciary contract. Article 6 of the Fiduciary Law stipulates that a fiduciary agreement must be made in writing and registered. However, if the agreement does not contain a clear clause regarding the prohibition of transfer, creditors will have difficulty in claiming their rights if a violation occurs. This shows the importance of a carefully drafted agreement that contains all relevant provisions. Technical obstacles in the fiduciary administration system also affect creditor protection. Article 14 of the Fiduciary Law stipulates that registration is carried out at the fiduciary registration office. However, a slow registration process or one that is not well integrated with other systems, such as vehicle or property ownership databases, can hinder creditors' efforts to track fiduciary objects that have been transferred.[12].

Legal uncertainty also arises from different interpretations regarding good faith in third party protection. Article 18 of the Fiduciary Law provides protection for third parties who act in good faith, but there are no clear criteria for assessing such good faith. This ambiguity is often exploited by irresponsible parties to avoid lawsuits. Another obstacle is the lack of uniformity in court practices. Article 21 of the Fiduciary Law stipulates that creditors have privileges over fiduciary objects. However, in practice, several courts have given different decisions regarding creditor priority, especially if there are other parties who also claim rights to the same object. This lack of uniformity creates legal uncertainty for creditors.

From the debtor's side, the lack of strict sanctions against fiduciary violations is a major obstacle. Article 35 of the Fiduciary Law stipulates criminal sanctions for debtors who violate fiduciary agreements, but enforcement of these sanctions is often not optimal. Creditors must face a long legal process to obtain justice, while debtors can still use fiduciary objects during the process. Another obstacle is the absence of alternative mechanisms for resolving fiduciary disputes. Article 29 of the Fiduciary Law regulates the execution of collateral objects, but there are no provisions that specifically regulate mediation or arbitration as dispute resolution options. This leaves creditors with only the option of litigation, which requires high costs and a long time. The lack of integration between the fiduciary legal system and other laws is also an obstacle. Article 23 of the Fiduciary Law regulates the debtor's obligation to safeguard fiduciary objects, but there are no provisions that link this rule to other relevant criminal or civil laws. This lack of integration often complicates the law enforcement process.

The final obstacle is the lack of public awareness of the importance of fiduciary protection. Article 25 of the Fiduciary Law regulates supervision of the

[12]Dian Pratiwi, Implementation of Fiduciary Guarantee in Indonesia: Case Study of Creditors and Debtors, Surabaya: Airlangga University Press, 2020, p. 51

implementation of fiduciary, but in practice, this supervision is often ineffective due to lack of resources or support from the community. Creditors often have to rely on their own initiative to enforce their rights. To overcome this obstacle, it is necessary to revise and strengthen the Fiduciary Law, especially in terms of supervision, sanctions, and protection of creditors. Improving the mechanisms for registration, supervision, and law enforcement must also be a priority. Thus, legal protection for creditors can be improved, and the transfer of fiduciary objects without consent can be effectively prevented.

4. Conclusion

Legal protection for creditors for the transfer of fiduciary objects without consent is regulated in the Fiduciary Guarantee Law (UUJF) Article 24, which protects creditors' rights in the event of a breach of contract by the debtor. Legal actions include cancellation of the transfer, claims for compensation, and other legal remedies. Obstacles faced include challenges in enforcing rights, limited access to collateral, misuse by debtors, issues of proving disputes, third-party protection, and unclear regulations. The Consumer Protection Law (UUPK) also supports creditors in dealing with irresponsible debtor actions.

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