

## Legal Protection for Debtors in Transactions Financing with Fiduciary Guarantee

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**Abstract.** *This study aims to analyze: 1) Legal protection for debtors in financing transactions with fiduciary guarantees. 2) Obstacles and solutions in legal protection for debtors in financing transactions with fiduciary guarantees. This type of research is included in the scope of empirical legal research. The approach method in this study is a sociological juridical approach. The types and sources of data in this study are primary and secondary data obtained through interviews and literature studies. The analysis in this study is prescriptive. The results of the study concluded: 1) Legal protection for debtors in financing transactions with fiduciary guarantees aims to provide a sense of security and legal certainty for debtors in carrying out their obligations. Based on applicable legal provisions, the rights of debtors are protected through a fiduciary agreement that regulates the rights and obligations of each party. In this agreement, BPR BKK Demak as the lender is required to comply with applicable legal provisions regarding fiduciary guarantees, including fiduciary registration procedures so that the guarantee is legally valid. In addition, if the debtor experiences default or failure to pay, the BPR must execute the fiduciary guarantee in a manner that is in accordance with the procedure and does not violate the rights of the debtor. 2) Obstacles and solutions in legal protection for debtors in financing transactions with fiduciary guarantees Obstacles in legal protection for debtors in financing transactions with fiduciary guarantees include the lack of understanding of debtors regarding their rights and obligations, minimal supervision of the fiduciary guarantee registration process, and guarantee execution practices that are often not in accordance with procedures. These obstacles can cause legal uncertainty and unfair treatment for debtors. Solutions to overcome this problem include increasing education for debtors about their rights, stricter supervision from the government or supervisory institutions in fiduciary registration, and implementing guarantee execution standards that are in accordance with legal provisions.*

**Keywords:** Debtors; Fiduciary; Legal; Protection.

## 1. Introduction

Someone in order to improve their economy, sometimes needs enough capital to start a business, so it is necessary to borrow credit to be able to start it. The meeting between the parties, requires an intermediary between the creditor (guarantor) and the debtor (borrower), so that in the end a debt agreement or credit agreement arises.<sup>1</sup>

Credit is a loan agreement between a bank as a creditor and another party as a debtor that requires the debtor to pay off his debt after a certain period of time with the provision of interest. The factor that plays an important role in granting credit is the credit agreement.<sup>2</sup> The form of collateral preferred by creditors is material collateral. Material collateral has material characteristics in the sense of providing pre-emptive rights over certain objects and has the characteristic of being attached to and accompanying the object in question (*droit de suite*). These material rights which provide guarantees can also be defended against anyone (they are absolute).<sup>3</sup> There are 4 types of collateral in Indonesia, namely pawn, mortgage, collateral and fiduciary. One of the credit guarantees commonly used by the public is fiduciary guarantee.

The regulation regarding the legal basis of fiduciary is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantee, with the explanation that fiduciary guarantee is a guarantee right for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights. The law relating to Fiduciary Guarantee is Article 15 of Law Number 4 of 1992 concerning housing and settlements, which stipulates that houses built on land owned by other parties can be burdened with Fiduciary Guarantee. In addition, Law Number 16 of 1985 concerning Flats regulates Ownership Rights for flat units that can be used as collateral for debt by being burdened with fiduciary if the land is land with use rights over state land.<sup>4</sup>

Regulations on securing fiduciary collateral objects in Article 6, Regulation of the Chief of Police (Perkap) Number 8 of 2011, namely there is a request from the applicant, have a fiduciary collateral deed, the fiduciary collateral is registered at the fiduciary registration office, have a fiduciary collateral certificate, the fiduciary collateral is located in the territory of the Republic of Indonesia. To request assistance from the Police, an application can be submitted to the local Police from the lowest level, namely the Sector Police to the highest in the area, namely the

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<sup>1</sup>Gunawan Wijaya and Ahmad Yani, 2000, Business Law Series: Fiduciary Guarantee, PT. Raja Grafindo Persada, Jakarta, p. 1.

<sup>2</sup>Maslihan and Sukarmi, 2018, Notary's Authority in Making Authentic Deeds Relating to Cooperation Contracts, Jurnal Akta, Volume 5 Number 2, p.15

<sup>3</sup>Riduan Syahrani, 2006, The Ins and Outs and Principles of Civil Law, PT. Alumni, Bandung, p. 142.

<sup>4</sup>Ignatius Ridwan Widyadarma, 1996, Law on Mortgage Rights on Land and Objects Related to Land, Diponegoro University Publishing Agency, Semarang, p. 1

Regional Police (Polda), where the request for assistance in securing/accompaniment of the execution must be submitted in writing by his legal representative (advocate) or in person/principle of the recipient of the fiduciary collateral at the place where the execution will be carried out.<sup>5</sup>

The executive power of a fiduciary guarantee certificate that is the same as a court decision that has obtained legal force needs to be observed. The certificate is not condemnatory in nature, so it cannot be completely equated with a court decision that has obtained permanent legal force (non-executable), so the term "equivalent" to a court decision is often used. The holder of a fiduciary guarantee certificate is in the same position as someone who already holds a court decision that has permanent legal force.<sup>6</sup>

The control of the fiduciary creditor over the fiduciary object used as collateral is only in the form of legal control, meaning that as long as the agreement still holds a debt guarantee, the fiduciary debtor can still use it physically. The fiduciary creditor only has the authority to execute it if it turns out that the debtor is in default. The definition of default or breach of contract, according to Subekti, is if the debtor (debtor) does not do what he promised, then he is said to have committed a breach of contract, meaning that the debtor is negligent or negligent or breaks his promise, or violates the agreement, if he does or does something that he is not allowed to do. he did,"<sup>7</sup> whereas according to M. Yahya Harahap, what is meant by default is the implementation of obligations that are not on time or are not carried out properly. A debtor is said to be in a state of default if he has been negligent in carrying out the implementation of the agreement so that it is late from the specified time schedule or in carrying out the performance not properly or appropriately.<sup>8</sup>

So, to guarantee legal certainty and be able to provide legal protection for interested parties, the guarantee certainly needs to be made a Notarial Deed (a Deed made by a Notary) in the form of a Fiduciary Guarantee Deed, then registered at the Fiduciary Registration Office, then the fiduciary registration office issues and submits to the recipient of the fiduciary a fiduciary guarantee certificate.<sup>9</sup> This happens because the legal relationship between the debtor and the leasing company is based on an agreement, namely a consumer financing

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<sup>5</sup>Rahmat Hidayat and Soegianto, 2019, Settlement of Defaulting Debtors on Registered Fiduciary Collateral Objects, USM Law Review Journal, Volume 2, Number 2, p. 295

<sup>6</sup>Khifni Kafa Rufaida and Rian Sacıpto, 2019, "Legal Review of the Execution of Fiduciary Guarantee Objects Without a Legitimate Executorial Title", Journal of Legal Reflections, Volume 4, Number 1, p. 38

<sup>7</sup>Subekti, 1982, Guarantees for the Granting of Credit According to Indonesian Law, Alumni, Bandung, p. 1.

<sup>8</sup>M. Yahya Harahap, 1989, Scope of Execution Problems in the Civil Sector, Gramedia, Jakarta, p. 60.

<sup>9</sup>A. Rachmad Budiono and H. Suryadin Ahmad, 2000, Fiduciary According to Law Number 42 of 1999 concerning Fiduciary Guarantees, Ikip Malang, Malang, p. 24.

agreement. Legally, the legal consequences of default in an agreement are not that simple. Because the agreement is a bond in the field of civil law between two or more legal subjects, where one party has the right to something and the other party is obliged to do it.<sup>10</sup>

At BPR BKK Demak, as an institution serving the lower middle class segment, this problem is often faced by debtors who have limited legal understanding regarding their rights in fiduciary agreements. They often do not understand the consequences of fiduciary agreements, so they are vulnerable to being victims of arbitrary execution. Legal protection for debtors in fiduciary transactions is very important to provide a sense of security and legal certainty. Without adequate protection, debtors are in a vulnerable position to detrimental execution actions. Therefore, this study is important to understand the forms of legal protection for debtors at BPR BKK Demak, as well as the role of the institution in ensuring that the financing process with fiduciary guarantees is carried out in accordance with the principles of legal protection, both preventively and repressively.

## **2. Research Methods**

This type of research is included in empirical legal research. The approach method used in this study is a sociological legal approach. The types of data are primary and secondary data. Secondary data comes from primary, secondary and tertiary legal materials. Primary data is obtained through interviews and secondary data is obtained through literature studies. The analysis in this study is prescriptive.

## **3. Results and Discussion**

### **3.1. Legal Protection for Debtors in Financing Transactions with Fiduciary Guarantees**

PT BPR BKK Demak (Perseroda) Kab Demak has a credit application procedure and a way to select or analyze prospective customers so that the credit can be given to prospective customers or creditors, where the criteria and analysis carried out are in accordance with the provisions and procedures recommended by the Financial Services Authority (Ojk, nd), so that it is expected to reduce credit risk and avoid unhealthy credit which results in bad credit being carried out by customers.<sup>11</sup>

One of the products widely used in PT BPR BKK Demak (Perseroda) Kab. Demak is financing with fiduciary guarantees. However, in practice, the implementation of financing with fiduciary guarantees often causes various legal problems that are detrimental to debtors. One of the main problems faced is the lack of clarity in the

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<sup>10</sup>Kelik Indro and Guruh Riona, 2020, Unilateral Execution by Leasing Companies Using Debt Collectors Against Fiduciary Collateral Objects, Jurnal Widya Pranata Hukum, Volume 2, Number 2, p. 5

<sup>11</sup>Ibid.

fiduciary guarantee execution procedure. Many debtors do not understand their rights and obligations in the fiduciary agreement, and do not know the correct procedure in the event of a default. This causes many debtors to feel pressured and do not have adequate legal protection when creditors execute the fiduciary guarantee object.

At PT BPR BKK Demak (Perseroda) Kab. Demak, the burden of objects with fiduciary guarantees is made with a notarial deed in Indonesian. The role of law in relation to public demands regarding the importance of the legal consequences of a deed, requires Notaries as public officials to always be able to follow legal developments in providing information to the public who need it and maintaining the deeds they make to always be able to provide clear legal certainty.<sup>12</sup> Notaries who have a working relationship with the bank related to the making of authentic deeds and registration of credit guarantees, then the notary is authorized to make deeds that can show that there is a legal act from the bank (creditor) with the customer (debtor) before the notary, so that the existence of a deed printed by a notary is very important for the parties to be able to protect their interests.<sup>13</sup>

The determination of a notarial deed in the imposition of fiduciary guarantee is intended to have legal force as evidence for the Debtor and Creditor. An authentic deed made by a Notary or before a Notary, is not only required by statutory regulations, but is also desired by the interested parties to ensure the rights and obligations of the parties for the sake of certainty, order and legal protection for the interested parties as well as for society as a whole.<sup>14</sup>

A deed made before a notary is called a notarial deed, or authentic, or authentic deed. The existence of a Notarial deed in a state of law, especially Indonesia, has a crucial function, the recognition of a Notarial deed as a deed that has perfect evidentiary power makes the position of a Notarial deed as the first and main evidence in civil evidentiary law, so that its existence also needs to be regulated in such a way that the evidentiary power of the notarial deed does not become a boomerang for the parties who make it.<sup>15</sup> In a bank credit agreement, the role of a Notary through the deed he/she makes provides legal certainty for the parties, namely the bank as the creditor and the customer as the debtor. This legal certainty guarantees the rights and obligations of each party in the credit agreement as stated in the authentic deed. This is because an authentic deed made by and before a Notary is a perfect means of proof. In a bank credit

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<sup>12</sup>Dimas Agung, Ahmad Khisni, Legal Consequences of Private Deeds Legalized by a Notary, Jurnal Akta, Vol. 4 No. 4 December 2017, p.728

<sup>13</sup>Heny Pratiwi, Legal Power of Covernote Through Bank Credit Granting with Collateral in the Event of Bad Credit, Journal of Notary Law, Volume 4 Number 3 December 2019, p.499

<sup>14</sup>Putri, AR, 2010, Legal Protection for Notaries (Indicators of Notary's Job Duties that Implicate Criminal Acts), Sofmedia, Medan, p.2

<sup>15</sup>Nawaaf Abdullah, Munsyarif Abdul Chalim, Position and Authority of Notaries in Making Authentic Deeds, Jurnal Akta, Volume 4 Number 4 December 2017, p.657

agreement, an authentic deed is evidence of a legal act in the form of granting bank credit to its customers.

In practice, the execution of Fiduciary Guarantee occurs due to a default by the debtor. The Fiduciary Guarantee Law also provides convenience in carrying out execution through an execution institution. The principle is that the sale of objects that are the object of Fiduciary Guarantee must be through a public auction, because in this way it is expected to obtain the highest price. However, it is estimated that it will not produce the highest price that benefits both the Fiduciary Giver and the Fiduciary Recipient, so it is possible to sell underhand as long as it is agreed upon by the Fiduciary Giver and the Fiduciary Recipient and the terms of the implementation period of the sale are met.<sup>16</sup>

Article 3 and Article 4 of the Regulation of the Minister of Finance Number 130 of 2012 emphasize that financing companies are prohibited from withdrawing fiduciary collateral objects if the fiduciary collateral registration office has not issued a fiduciary collateral certificate, financing companies must comply with the provisions and rules stipulated in the law regarding the withdrawal of fiduciary collateral objects and have been agreed upon by the parties in the consumer financing agreement.

Based on the practice found in the field, the company that uses a third party (Debt Collector) does not carry out its duties properly so that unlawful acts (Violence, Extortion, Robbery) arise, therefore Law Number 42 of 1999 concerning Fiduciary Guarantees is not strong enough to be a legal basis for financing companies or consumers, so the Constitutional Court Decision Number 18 of 2019 was made to emphasize the correct execution so that there is no arbitrariness on the part of the financing company or the third party Debt Collector when a consumer/debtor is found to be in default. To strengthen legal protection for consumers, it can be obtained from Constitutional Court Regulation Number 130 of 2012 concerning Fiduciary Registration, this ministerial regulation clearly states what the obligations of the financing company are and what sanctions will be given if the financing company does not fulfill the provisions and rules that have been regulated and stipulated in the law.<sup>17</sup>

Consumer protection is any effort that ensures legal certainty to provide protection to consumers. Consumers are every person who uses goods and/or services available in society, whether for the benefit of themselves, their families, other people, or other living beings and not for trading.<sup>18</sup> In essence, there are two important legal instruments that form the basis of consumer protection policies in Indonesia, namely: First, the 1945 Constitution, as the source of all sources of law in Indonesia, mandates that national development aims to create a

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<sup>16</sup>Ibid, p. 2.

<sup>17</sup>Ibid., p. 3

<sup>18</sup>Article 1 paragraph (1) and (2) Law No.8/1999 concerning Consumer Protection

just and prosperous society. In this case, criminal liability by the lessor either before or after carrying out forced withdrawals is the responsibility of the company even though most forced withdrawals use third party media/intermediaries such as debt collectors.<sup>19</sup>

Legally, the lessor's debt collection method accompanied by threats, insults, terror, and confiscation of goods cannot be justified. This is contrary to Law Number 8 of 1999 concerning Consumer Protection. Lessors who intentionally or with other intentions carry out forced extortion of customers can be charged under Article 368 paragraph (1) of the Civil Code which states: "Anyone who with the intention of unlawfully benefiting themselves or another person, forces someone with violence or the threat of violence, to give something, all or part of which belongs to that person or another person; or to grant debt or write off receivables, is threatened, for extortion, with a maximum prison sentence of nine months."

The formulation of Article 368 paragraph (1) of the Civil Code as a formulation of the definition of extortion contains objective elements including acts of coercion, which are forced by someone, attempts to coerce with violence or threats of violence, and the aim, which is also the result of acts of coercion using attempts of violence or threats of violence, namely a person handing over an object, a person giving a loan, a person writing off a debt, and subjective elements including the intention to benefit oneself or another person and against the law.<sup>20</sup>

Referring to the Legal Protection Theory of Philipus M. Hadjon, legal protection for debtors in financing transactions with fiduciary guarantees includes preventive and repressive aspects. Both forms of protection ensure that debtors have adequate legal protection from the beginning of the agreement to the dispute resolution stage if a violation occurs. For BPR or other financial institutions that provide fiduciary financing, the application of the principles in Hadjon's theory is important to create a fair financing climate and protect debtors' rights comprehensively. Legal protection provides protection for human rights that are harmed by others and this protection is given to the community so that they can enjoy all the rights granted by law or in other words legal protection is various legal efforts that must be provided by law enforcement officers to provide a sense of security, both mentally and physically from disturbances and various threats from any party.

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<sup>19</sup>Ibid., p. 6

<sup>20</sup>Ibid., p.6

### 3.2. Obstacles and Solutions in Legal Protection for Debtors in Financing Transactions with Fiduciary Guarantees

Consumer financing agreements contain debt agreements in them. The provision of financing given to consumers as debtors becomes a debt worth the financing provided along with the interest agreed upon by the parties. Given the nature of the financing agreement containing a principal obligation in the form of debt, in general, financing services also require adequate collateral.<sup>21</sup>

The debtor is a party or person, a legal entity that has an obligation in the form of debt to another party (creditor) where the obligation has a time period in its implementation. The debtor's obligation is in the form of payment that must be carried out within a certain period of time in accordance with the agreement determined by the parties in the agreement, a legal relationship arises between two parties between the debtor and the creditor which is called an obligation. A legal relationship is a relationship that gives rise to legal consequences that are guaranteed by law and statutes. If one party does not fulfill the rights and obligations voluntarily, then one party can sue through the courts.<sup>22</sup>

According to Subekti in Djaja S. Meliala, default means not fulfilling obligations as stipulated in the agreement or contract. Failure to fulfill obligations in an agreement can be caused by the debtor's mistake, either intentionally or due to negligence and force majeure.<sup>23</sup> In financing transactions with fiduciary guarantees, there are several obstacles that are often faced regarding legal protection for debtors. These obstacles arise both in the agreement process, fiduciary registration, and during the execution of the guarantee in the event of a default. The following are some of the main obstacles and their solutions:

1. Lack of Legal Understanding by Debtors

- a. Constraint

Many debtors do not fully understand their rights and obligations under a fiduciary agreement. This ignorance makes debtors vulnerable to unilateral actions from creditors, especially in terms of collateral execution.

- b. Solution

Financing institutions, such as BPR, need to provide clear education and information to debtors regarding their rights and procedures in fiduciary agreements. Socialization through written materials or

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<sup>21</sup>First Pretty, Op.cit., p.1

<sup>22</sup>Ibid., p. 6

<sup>23</sup>Djaja S. Meliala, 2012, Civil Law from the Perspective of BW, Nuansa Aulia, Bandung, p.175.

consultations before signing the agreement will greatly help debtors understand their risks and rights.

2. Fiduciary Registration Process Not Implemented Properly

a. Constraint

Registration of fiduciary guarantees at the Fiduciary Registration Office is often neglected, so that the rights of creditors and debtors are not legally protected. As a result, debtors become vulnerable to arbitrary execution, because the agreement is not officially recorded.

b. Solution

The government or supervisory agency needs to tighten the rules so that financial institutions are required to register fiduciary agreements. In addition, digitizing fiduciary registration can also speed up the registration process, making it easier for debtors and creditors to monitor.

3. Non-Transparent Guarantee Execution

a. Constraint

Creditors can execute directly if the debtor defaults, but often the procedure is not transparent and is carried out without adequate notification to the debtor. This makes the debtor feel cornered and his rights as the owner of the collateral are violated.

b. Solution

Stricter regulations need to be implemented to ensure that execution can only be carried out after formal notification and a reasonable time limit for the debtor. In addition, mediation or alternative dispute resolution can be a solution for debtors and creditors to resolve problems peacefully before execution is carried out.

4. Lack of Supervision of Fiduciary Financing Practices

a. Constraint

Supervision of fiduciary financing practices in the field is still limited. As a result, there is a mismatch between the procedures that should be and the execution practices in the field.

b. Solution

The government needs to strengthen supervision of the implementation of fiduciary, both by financial supervisory institutions

and related agencies. Tighter supervision will encourage financial institutions to carry out procedures correctly.

The legal system is a legal entity consisting of three elements, namely legal structure, legal substance and legal culture. The function of the legal system is first as part of the social control system that regulates human behavior. Second, as a means to resolve disputes (dispute settlement). Third, the legal system has a function as a social engineering function. Fourth, law as social maintenance, namely a function that emphasizes the role of law in maintaining the "status quo" which does not want change.<sup>24</sup>

The theory of legal systems helps to see the effectiveness of the legal protection system from the institutional (structure), regulatory (substance), and legal awareness of society and institutions (culture) aspects. Legal protection for debtors can be guaranteed if these three components run in harmony and effectively, where the legal structure functions optimally, the legal substance is adequate, and the legal culture supports awareness of debtor rights.

#### **4. Conclusion**

Legal protection for debtors in financing transactions with fiduciary guarantees aims to provide a sense of security and legal certainty for debtors in carrying out their obligations. Based on applicable legal provisions, debtor rights are protected through a fiduciary agreement that regulates the rights and obligations of each party. In this agreement, BPR BKK Demak as the lender is required to comply with applicable legal provisions regarding fiduciary guarantees, including fiduciary registration procedures so that the guarantee is legally valid. In addition, if the debtor experiences default or failure to pay, the BPR must execute the fiduciary guarantee in a manner that is in accordance with the procedure and does not violate the debtor's rights. This protection is regulated to prevent arbitrary actions in the collection or execution process so that the debtor's rights remain guaranteed in accordance with the principles of justice and legal certainty. Obstacles and solutions in legal protection for debtors in financing transactions with fiduciary guarantees include the debtor's lack of understanding of their rights and obligations, minimal supervision of the fiduciary guarantee registration process, and the practice of executing guarantees that are often not in accordance with procedures. These obstacles can cause legal uncertainty and unfair treatment for debtors. Solutions to overcome this problem include increasing education for debtors about their rights, stricter supervision from the government or supervisory institutions in fiduciary registration, and implementing collateral execution standards in accordance with legal provisions. With the implementation of these solutions, it is hoped that legal protection for debtors will

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<sup>24</sup>Teguh Prasyo, 2013, Philosophy, Theory, and Legal Science, PT. Raja Grafindo Persada, Jakarta, p.312

be more guaranteed, creating fair and balanced financing transactions between debtors and creditors.

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