TABELLIUS Journal of Law
ISSN 2988-6201
published by
Master of Notarial Law
Faculty of Law
Universitas Islam Sultan Agung
Semarang

Legal Protection for Creditors Over Execution of Fiduciary Guarantees Without Going Through The Court Process

Yustina Wardhani

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia, E-mail: yustina.std@unissula.ac.id

Abstract. *The birth of fiduciary is based on the Law, On March 24, 2019, a petition was submitted for judicial review of the Fiduciary Guarantee Law against the 1945 Constitution of the Republic of Indonesia to the Constitutional Court, until finally the Constitutional Court decided on the petition on January 6, 2020 at a plenary session open to the public. In its decision, it changed the meaning of Article 15 paragraph (2) and paragraph (3), with the existence of Constitutional Court Decision Number 18/PUU-XVII/2019, it is necessary to conduct a study regarding the implementation of the execution of fiduciary guarantee objects following the Constitutional Court's decision. This research is a descriptive legal normative type with data collection in the form of books, notes, and research reports from previous qualitative research, qualitative data analysis. Legal protection for creditors in the implementation of the execution of motor vehicle or car fiduciary guarantees, for creditors in a fiduciary guarantee agreement arises from the making of a notarial Deed of Fiduciary Guarantee, and continues to be emphasized by registration with the Fiduciary Registration Office in order to obtain a fiduciary guarantee certificate. By registering the fiduciary guarantee, the principle of publicity is fulfilled, this is a guarantee of legal certainty for creditors in the return of their receivables from the debtor. There is no binding legal protection for debtors who default on the object of the fiduciary guarantee. It's just that with the issuance of the decision of the Constitutional Court of the Republic of Indonesia No. 18 / PUU / XVII / 2019, Leasing companies will be more careful in taking parate execution actions. Before the interpretation of the implementation of the fiduciary guarantee execution was changed based on the Constitutional Court Decision No. 18 / PUU-XVII / 2019 and the Constitutional Court Decision No. 2/PUU-XIX/2021, creditors as fiduciary recipients have the right to execute fiduciary guarantees by carrying out the executorial title or executing the execution based on their own authority without requiring the debtor's agreement regarding when the event of default occurs and the debtor cannot refuse to hand over the object of the fiduciary guarantee to the debtor.*

Keywords: *Creditors; Fiduciary; Legal Protection.*

1. Introduction

The implementation of a fiduciary guarantee agreement where the lessee/renting party submits a financing application to the lessor or the renting party, then both parties agree to use the fiduciary guarantee against the lessee's property, then a notarial deed is made and then registered with the Fiduciary Registration Office. The creditor as the recipient of the Fiduciary will receive a fiduciary certificate, then a copy will be given to the lessee. Financing Institutions are business entities that carry out financing activities in the form of providing funds or capital goods without directly withdrawing funds from the public.[1] Financing Institutions include: Leasing, Venture Capital, Factoring, Credit Card business, Project Financing, and Consumer Financing.[2]

The practice that occurs in society, the emergence of a fiduciary guarantee agreement generally begins with a debt agreement between a creditor and a debtor, where the fiduciary guarantee agreement is intended as an anticipatory measure for the creditor if it turns out that the debtor cannot fulfill his obligation to pay off his debt as stated and agreed in the debt agreement. The existence of an obligation to hand over a right to movable property to another party proves that the agreement Fiduciary guarantee agreement is an agreement of a material nature (zakelijk).[3]

Consumer financing is classified as a Credit Sale because consumers do not receive cash, but only receive goods purchased on credit or installments,[4] so that the practice of this consumer financing institution is very popular with consumers based on the reasons that the application process or procedure for obtaining financing is very easy and there is no need for collateral other than the goods in question to be used as collateral.[5]

The term guarantee is translated from Dutch as zekerheid or cautie. Zekerheid or cautie generally covers the ways in which creditors guarantee that their bills will be met, in addition to the debtor's responsibility for their goods.[6] A guarantee is a liability given by a debtor and/or third party to a creditor because the creditor has an interest that the debtor must fulfill his/her obligations in a contract.[7] In

[1] Abdulkadir Muhammad and Rilda Murniati, 2000, Legal Aspects of Financial Institutions and Financing, Bandung: Citra Aditya Bakti, p. 5.
[2] Y. Sri Susilo, 2000, Banks and Other Financial Institutions, Jakarta: Salemba Empat, p. 137.
[3] Mariam Darus Badrulzaman, Civil Code Book III Contract Law and Its Explanation, (Bandung: Alumni, 1993), p. 92
[4] Munir Fuady. 1995, Law on Financing in Theory and Practice, Bandung: Citra Aditya Bakti, p. 206.
[5] Ade Arthesa and Edia Handiman, Op.Cit., Pg. 247.
[6] Salim HS, Development of Guarantee Law in Indonesia, (Jakarta: Raja Grafindo Persada, 2004), p. 21.
[7] HR. Daeng Naja, Credit Law and Bank Guarantee, (Bandung: Citra Aditya Bakti, 2005), p. 208

principle, not all guarantees can be guaranteed to banking institutions or non-bank financial institutions, but objects that can be guaranteed are objects that meet certain requirements.

The definition given above makes it clear to us that fiduciary is distinguished from fiduciary guarantee, where fiduciary is a process of transferring rights. ownership and fiduciary guarantees are guarantees given in the form of fiduciary. The Fiduciary Guarantee Institution allows Fiduciaries to control the collateralized objects, to carry out business activities financed by loans using Fiduciary Guarantees. Initially, objects that were the object of fiduciary were limited to tangible movable property in the form of equipment. However, in its development, objects that were the object of fiduciary also included intangible movable property, as well as immovable property. The guarantee in fiduciary takes the form of "transfer of ownership rights through trust (fides)" or commonly referred to as Fiduciare Eigendom Overdracht. The trust factor in the transfer of ownership rights through "trust" is aimed at the trust given reciprocally by one party to another, that what "appears outwardly as a transfer of ownership", is actually (inwardly, internally) only as a "collateral" for a debt, the debtor's trust in the creditor that his ownership rights will return after his debts are paid off.[8]

In provision Article 1 number 1 UUF mentionedthat :"Fiducia is the transfer of ownership rights to an object based on trust with the provision that the object whose ownership rights are transferred the still in mastery owner object."From the "authentic" formulation of Fiduciary -- because the formulation was given by the legislator it can be concluded that "Fiduciary" is an act of transferring ownership rights to an object, ith the condition (stipulation) that object the still “mastered” by "OWNER OBJECT".Because in the last clause of the fiduciary formulation in the UUF above it says "... remains under the control of the owner of the object.", then it should be that what is meant by the "owner of the object" is "a person who transfers ownership of an object through fiduciary[9]

Article 1 number 2 of the UUF states: "Fiduciary guarantee is a guarantee right for movable objects, both tangible and intangible, and immovable objects, especially buildings, which cannot be burdened with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights (UUHT)

Fulfillment of the principle of specialization is a principle that requires the

[8] Subekti, Op.Cit., p. 66
[9] Kusuma. Legal Consequences of Fiduciary Guarantee Agreements on Collateralized Objects. https://pn-lembata.go.id/page/content/588/akibat-hukum-perjanjian-jaminan-fidusia-terhadap-benda-yang-asuransikan#:~:text=Dalam%20ketentuan%20Article%201%20angka,tetap%20dalam%20penguasa

inclusion of complete data in a fiduciary deed according to Law Number 42 of 1999 concerning Fiduciary Guarantees, Article 6, which states: "The fiduciary guarantee deed as referred to in Article 5 must at least include:

1. Identity of the party giving and receiving the fiduciary;
2. Data on the principal agreement guaranteed by fiduciary;
3. Description of the object that is the object of fiduciary guarantee;
4. Guarantee value; and
5. The value of the object that is the object of fiduciary guarantee.

"Furthermore, in addition to the principle of specialization, namely the principle of publicity, the principle of publicity is intended in Law Number 42 of 1999 concerning Fiduciary Guarantees in Article 11 which reads: "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."

Regarding the existence of guarantees in credit transactions between creditors and debtor, then a guarantee institution is needed. One of the institutions

The collateral that is often used is the fiduciary guarantee institution. Fiduciary guarantees have been used in Indonesia since the Dutch colonial era as a form of guarantee that was born from jurisprudence. This form of guarantee is widely used in lending transactions because the burden process is considered simple, easy and fast, although in some cases it is considered less certain of legal certainty. The position of the fiduciary recipient is as the owner of the fiduciary goods, but now it is accepted that the fiduciary recipient only has the position of a guarantee holder.

Article 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees provides limitations and understanding of fiduciary as the transfer of ownership rights of an object based on trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object (fiduciary giver). The fiduciary guarantee institution allows fiduciaries to control the object that is guaranteed, to carry out business activities financed by loans using fiduciary guarantees. In this case, what is transferred is only the legal ownership rights of the object or what is known as constitutum possessorium.

Initially, the objects that became fiduciary objects were limited to the belief of movable and tangible objects in the form of objects in inventory, merchandise, receivables, machine tools and motor vehicles. However, by realizing the growing needs of the business world and the need for legal certainty for creditors who

provide loans, then through this Fiduciary Guarantee Law the Indonesian Government tries to summarize all the needs of guarantees that are not covered and have been regulated in positive law in the Fiduciary Law.

The Constitutional Court (MK) has finally released a decision regarding the execution of fiduciary guarantees. In the decision, the Constitutional Court clarified that the execution of the seizure of credit goods from debtors can be carried out without going through the District Court process. The implementation of the execution of fiduciary guarantee certificates through the district court is actually only an alternative that can be done in the event that there is no agreement between the creditor and the debtor, either related to default or voluntary submission of the collateral object from the debtor to the creditor.

The Constitutional Court also explained that so far there has been a misunderstanding of the Constitutional Court's decision Number 18/PUU-XVII/2019 in relation to the executorial power of fiduciary guarantee certificates. In the decision, the Constitutional Court explained that so far the provision prohibiting independent execution without a trial basically provides a balance in the legal position between debtors and creditors and avoids the emergence of arbitrariness in the implementation of execution.[10] This happened in September 2019.

Declaring Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) insofar as the phrase "executory power" and the phrase "same as a court decision with permanent legal force" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force insofar as it is not interpreted in relation to fiduciary guarantees.

where there is no agreement regarding breach of promise (default) and the debtor objects to voluntarily handing over the object that is the fiduciary guarantee, then all legal mechanisms and procedures in implementing the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same way as implementing the execution of a court decision that has permanent legal force;

Collateral does not provide the right to control or own the object that is the object, but rather the collateral is held in order to provide collateral rights for debt repayment. If later the debtor is found to be in default or unable to pay off his debt to the creditor, then the creditor cannot arbitrarily take the collateral object and make it his property. In the UUJF, the legislators do not explicitly state

[10] Tok! MK confirms multifinance can seize vehicles without court mechanism

the legal principles of fiduciary collateral which are the foundation of the formation of its legal norms, but in fact the legal principles of fiduciary collateral can be found in the articles of the UUJF. The legal principles of fiduciary collateral contained in the UUJF are:[11]

1. The principle of "droit de preference";

The fiduciary creditor is positioned as a creditor who is prioritized over other creditors. This principle can be found in Article 1 number 2 furthermore UUJF does not provide an understanding of what is meant by a creditor who is prioritized over other creditors. However, in another section, namely Article 27 UUJF, the understanding of the right that is prioritized over other creditors is explained. The right that is prioritized is the right of the fiduciary recipient to take payment of his debt from the results of the execution of the object that is the object of the fiduciary guarantee.

2. The principle of “droit de suite”

Fiduciary guarantees continue to follow the object that is the object of the fiduciary guarantee in the hands of anyone who holds the object. In legal science, this principle is called "droit de suite". The recognition of this principle in the UUJF shows that fiduciary guarantees are property rights (zakelikrecht) and not individual rights (persoonlijkrecht.) Thus, the right to fiduciary guarantees can be maintained against anyone and has the right to sue anyone who interferes with these rights.

Individual rights do not have the character of droit de suite. In the character of droit de suite there is a principle that older rights take precedence over younger rights. This means that if there are several property rights placed on an object, the strength of the rights is determined by the order of time. The recognition of the principle that fiduciary security rights follow the object in the hands of anyone who holds the object provides legal certainty for creditors holding fiduciary security to obtain debt repayment from the proceeds of the sale of the fiduciary security object if the debtor providing the fiduciary security defaults. Legal certainty over these rights is not only that the fiduciary security object is still in the hands of the debtor providing the fiduciary security even when the fiduciary security object is already in the hands of a third party.

The property rights of fiduciary guarantees are only born on the date the fiduciary guarantee is recorded in the fiduciary register. Therefore, the legal consequence is that the application of the droit de suite principle is only recognized from the date the fiduciary guarantee is recorded in the fiduciary register. The purpose of this affirmation is none other than that if the fiduciary

[11] Ibid, p. 9

guarantee is not recorded in the fiduciary register, it means that the fiduciary guarantee right is not a property right but has the character of an individual right. As a result, for third parties, the fiduciary guarantee right of the creditor holding the fiduciary guarantee is not respected. As a consequence, if there is a transfer of the fiduciary guarantee object, creditors holding fiduciary guarantees cannot be protected based on the principle of droit de suite. In other words, creditors holding fiduciary guarantees are positioned as concurrent creditors, not preferred creditors.

3. Accessory Principle.

Fiduciary guarantee is a secondary agreement commonly called the principle of accessority. This principle means that the existence of a fiduciary guarantee is determined by another agreement, namely the main agreement or principal agreement. The main agreement for a fiduciary guarantee is a debt-receivable agreement that gives birth to a debt that is guaranteed by a fiduciary guarantee. In the UUJF, this principle is expressly stated that a fiduciary guarantee is a secondary agreement of a principal agreement. In accordance with the nature of this assessor, it means that the elimination of a fiduciary guarantee is also determined by the elimination of debt or because of the settlement of the rights to the fiduciary guarantee by the creditor receiving the fiduciary guarantee.

4. Principle of Speciality or Specificity;

That the fiduciary guarantee contains a detailed description of the subject and object of the fiduciary guarantee. The subject of the fiduciary guarantee contains a detailed description of the subject of the fiduciary guarantee. The subject of the fiduciary guarantee in question is the identity of the parties, namely the giver and recipient of the fiduciary guarantee, while the object of the guarantee in question is the data of the principal agreement that is guaranteed by the fiduciary, a description of the object of the fiduciary guarantee, the value of the guarantee and the value of the object that is the object of the guarantee. In legal science it is called the principle of specialization or description.

5. Principles of Publication

Fiduciary guarantees must be registered with the Fiduciary Registration Office. In legal science, it is called the principle of publication. With the enactment of the registration of the fiduciary guarantee deed, it means that the fiduciary agreement was born and the momentum shows that the fiduciary guarantee agreement is a material agreement. The principle of publication also creates legal certainty from the fiduciary guarantee.

6. Principles of Claim

The object that is used as the object of fiduciary guarantee cannot be owned by

the creditor receiving the fiduciary guarantee even though it is agreed upon. Fiduciary Guarantee gives priority rights to the creditor receiving the fiduciary who first registers with the Fiduciary Office rather than creditors who register later.

7. Principle of Good Faith

The fiduciary must have good faith. The principle of Good Faith here has a subjective meaning as a continuation, not an objective meaning as compliance as in contract law. With this principle, it is expected that the fiduciary guarantee provider is obliged to maintain the collateral, not transfer, rent and mortgage it to other parties.

8. The principle of Fiduciary Guarantee is easy to execute

The ease of implementing the execution of fiduciary guarantees is carried out by including the words: "For the Sake of Justice Based on the Almighty God" on the fiduciary guarantee certificate. With this executory title, it gives rise to the legal consequence that the fiduciary guarantee has the same legal force as a court decision that has obtained permanent legal force.

The birth of fiduciary is based on the Law. On March 24, 2019, a request for a judicial review of the Fiduciary Guarantee Law against the 1945 Constitution of the Republic of Indonesia was submitted to the Constitutional Court, until finally the Constitutional Court decided on the request on January 6, 2020 at an open plenary session. for the public. In its decision, it provides a change in meaning to the text of Article 15 paragraph (2) and paragraph (3), with the existence of the Constitutional Court decision Number 18/PUU-XVII/2019, it is necessary to conduct a study related to the implementation of the execution of fiduciary guarantee objects after the Constitutional Court's decision.

2. Research Methods

In this study, the author uses a descriptive type of research, namely legal research that is intended to describe as detailed as possible about a situation subjectively. So that it is able to solve the problem to be studied.

3. Results and Discussion

3.1. Legal Protection for Creditors Who Have Executed Fiduciary Guarantees Without Going Through the Courts

Legal protection for every citizen of the Republic of Indonesia has been guaranteed by the Constitution of the Republic of Indonesia. Legal protection is always related to the role and function of law as a regulator and protector of the interests of society. In addition, legal protection is also closely related to the

fulfillment of a person's right to receive legal protection and have the right to a sense of security. This is stated in Article 28 letter G of the 1945 Constitution of the Republic of Indonesia, the second amendment, which means that every citizen has the right to protection from the State for himself, his family, honor and dignity and property that he owns under his authority and everyone also has the right to have the right to a sense of security and protection from threats to do or act that is not in accordance with human rights.

In carrying out the execution of the fiduciary guarantee object, the creditor can apply for security from the police so that the execution can proceed in an orderly manner if necessary. Security from the police has been regulated in Article 2 of the Regulation of the Chief of the Republic of Indonesia National Police Number 8 of 2011 concerning Security of the Execution of Fiduciary Guarantees which states that the implementation of the execution of fiduciary guarantees must be carried out safely, orderly, smoothly, and can be accounted for and the safety and security of the security of the recipient of fiduciary guarantees, the provider of fiduciary guarantees, and/or the community from acts that may result in loss of property and/or safety of life.

In reality, creditors often do not ask for security assistance from the Indonesian National Police but instead directly order debt collectors to execute fiduciary guarantees. Debt collectors who work to execute fiduciary guarantee objects often take arbitrary actions so that the process of executing fiduciary guarantees is not carried out smoothly. Then there is an element of coercion in the process of handing over fiduciary guarantee objects which makes the debtor very disadvantaged both morally and materially. Legal protection aims to provide protection to legal subjects through applicable laws and regulations accompanied by real sanctions. Legal protection can be divided into two, namely:

1. Preventive Legal Protection is legal protection provided by the government in terms of preventing violations before they occur. Preventive legal protection is reflected in a law that provides limitations or guidelines in carrying out an act.

2. Repressive Legal Protection is final protection in the form of sanctions such as fines, imprisonment, and additional penalties given if a dispute has occurred or a violation has been committed.

Fiduciary is a guarantee institution that is often practiced in the banking world as a credit guarantee. This is in accordance with the provisions of Article 1 paragraph (2) of the Fiduciary Law, which states that fiduciary guarantees are guarantee rights for movable objects, both tangible and intangible, and immovable objects, especially buildings, which cannot be burdened with mortgage rights as referred to in Law No. 4 of 1996 concerning Mortgage Rights which remain in the control of the fiduciary provider, as collateral for repayment.

certain debts that give the fiduciary recipient a priority position over other creditors.

The stages and mechanisms for imposing fiduciary guarantees in practice are as follows:

1. The bank accepts collateral in the form of vehicle BPKB, letters/invoices/machine lists and lists of bills (based on contracts, SPK, and other similar things that can give rise to receivables that can be billed).

2. The notary makes a deed of Fiduciary Guarantee for the collateralized goods based on the Credit Agreement deed made between the debtor and the Bank.

3. Regarding the fiduciary guarantee deed, the Notary registers it at the Fiduciary Registration Office for the issuance of a fiduciary guarantee certificate for the bank as a preference creditor.

Execution as a legal action carried out by the Court against the losing party in a case is a rule and procedure for continuing the case examination process. Therefore, execution is nothing more than a continuous action from the entire civil procedural law process. Execution is an inseparable part of the implementation of the rules of procedure contained in the HIR or Rbg as the legal basis for implementing the execution. Anyone who wants to know the guidelines for the execution rules must refer to the statutory regulations in the HIR or Rbg. Fiduciary Guarantee Execution can be carried out if the Fiduciary Provider (debtor) is in a state of default. According to the doctrine, the definition of default is "an event or condition where the debtor does not fulfill his obligation to perform his obligations properly and the debtor has an element of fault for it. Default committed by a debtor is in the form of:

1. Not doing what he promised to do;

2. Carrying out what he promised, but not as promised;

3. Did what he promised but was too late;

4. Doing something that according to the agreement you are not allowed to do.

One of the characteristics of a strong fiduciary guarantee is that it is easy and certain in its execution, if the debtor defaults. Although in general the provisions regarding execution have been regulated in the applicable civil procedure law, it is deemed necessary to specifically include provisions regarding execution in the Fiduciary Guarantee Law, namely those regulating the institution of parate execution. Legally, the sale of fiduciary guarantee objects underhand is to obtain the highest cost and benefit both parties.

3.2. Execution of fiduciary guarantees without going through a court process

Fiduciary guarantee execution is the seizure and sale of objects that are the objects of fiduciary guarantee. The cause of this fiduciary guarantee execution is because the debtor or fiduciary giver is in breach of promise or does not fulfill his performance is on time to the fiduciary recipient, even though the giver Fiduciary has been given a warning. In Article 29 of Law Number 42 of 1999, it is regulated that there are 3 (three) ways to execute fiduciary collateral, namely:

If the debtor or Fiduciary Provider defaults, execution of the object of the Fiduciary Guarantee can be carried out in the following manner:

1. Implementation of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient; In the Fiduciary Guarantee certificate issued by the Fiduciary Registration Office, the words "For the Sake of Justice Based on the Almighty God" are included. This fiduciary guarantee certificate has the same executorial power as a court decision that has obtained permanent legal force. What is meant by executorial power is that it can be implemented directly without going through a court and is final and binding on the parties to implement the decision. Thus, the implementation of the execution title (basis for execution rights) by the fiduciary recipient contains 2 (two) main requirements, namely:

a. Debtor or Fiduciary Provider defaults on promise

b. There is a Fiduciary Guarantee certificate that states "For the Sake of Justice Based on the Almighty God". Furthermore, although it is not expressly determined how to implement this execution title (by auction or underhand), considering its nature as an execution and considering that underhand sales have been given requirements based on the agreement of the fiduciary giver and recipient, the implementation of this execution title must be by auction.

2. The sale of objects that are the object of Fiduciary Guarantee under the authority of the Fiduciary Recipient himself through public auction and taking settlement of his receivables from the proceeds of the sale; If the debtor defaults, the fiduciary recipient has the right to sell the object of the fiduciary guarantee under his own authority. Sales in this manner are known as institutions

Parate Execution and must be sold through public auction, thus Parate Execution is more or less the authority given (by law or court decision) to one party to enforce the contents of the agreement by themselves when the other party is in default. However, because this power must be proven by a fiduciary guarantee certification, in practice the execution of one's own power (Parate Execution) contains the same requirements as the execution on the basis of the execution right (execution title) as stated in point 1 (one) above.

3. Underhand sales are made based on agreement

The Giver and Receiver of Fiduciary if in this way the highest price can be obtained that benefits the parties. Execution of fiduciary guarantees by means of underhand sales is a development of the execution system that was previously also adopted in the execution of Mortgage Rights on Land (Law No. 4 of 1966). As in the mortgage law, in this fiduciary law, underhand sales of fiduciary objects also contain several requirements that are relatively difficult to implement. There are 3 (three) requirements to be able to carry out underhand sales, namely:

a. Agreement between the giver and recipient of fiduciary, This condition is expected to focus on the issue of price and costs that benefit both parties.

b. After a period of 1 (one) month has passed since written notification by the giver and/or recipient of the fiduciary to the interested parties.

c. Announced in at least 2 (two) newspapers circulating in the relevant area. Given the severity of the requirements above, it is highly likely (as with the Land Rights Mortgage Rights so far) that underhand sales will not be popular.

It is estimated that if this method is taken it will only be limited to large-scale credit. It is very likely that the current method will be more preferred by the parties compared to the new method in the Fiduciary Law. In the old way, the debtor or collateral owner with the debtor's consent will redeem or pay off the burden (binding value) of the goods that are the object of the fiduciary, perhaps the redemption money comes from the prospective buyer after that or at the same time the owner makes a sale and purchase with the buyer underhand (signed by the owner of the goods). However, by looking at the motive or reason for this underhand sale method is to obtain the highest price and then carry out the sale and purchase voluntarily, then auction sales through the Auction House can also be used on this occasion. (2) The implementation of the sale as referred to in paragraph (1) letter c is carried out after 1 (one) month has passed since being notified in writing by the Fiduciary Giver and Recipient to the interested parties and announced in at least 2 (two) newspapers circulating in the relevant area.

To carry out execution on the object of Fiduciary Guarantee, the Fiduciary Provider is obliged to hand over the object that is the object of Fiduciary Guarantee.

1. Legal steps taken if the Debtor defaults

In the implementation of a debt agreement with a motor vehicle as a fiduciary collateral with the debtor, there will be problems with the second party (debtor) if the debtor is late in paying installments. However, efforts are still being made

to do what can be done if there is a delay in paying installments before the collateral is withdrawn, these efforts include:

a. Persuasive Efforts

Every time there is an irregular installment, the pawnshop will make control efforts. Every time they face a problem with problematic credit, the pawnshop will look for the source of the problem, for example: because their business is sluggish, they deliberately do not want to pay, they are truly unable to pay, their customers have died, collateral is badly damaged/lost. If the irregular installment is due to damage/loss of collateral, then the customer is asked to replace it with a new collateral and is still reminded to complete their credit until it is paid off. If the irregular credit is due to the customer being sick or even dying, then this situation does not cancel the obligation of the person concerned to continue paying off their debts. The husband/wife or heirs are still asked to complete their debts or if they are unable to carry out the credit, they will be asked to submit the credit collateral to be sold by the pawnshop. Meanwhile, for customers who do not want to pay installments or are unable to pay installments, the credit settlement will be processed through the collateral sale mechanism/execution of collateral.

b. Somasi (Warning)

Before carrying out the confiscation, for customers who have been in arrears with installments for 3 (three) consecutive months or are in arrears until the due date, the Branch Manager must first provide a warning letter to the customer 3 (three) times, namely:

1) Warning letter I, 7 (seven) days after the final installment due date or after 3 (three) consecutive times the customer has not made an installment.

2) Warning Letter II, 7 (seven) days after warning letter I. 50 SE. No: 11/US.2.00/2005 Concerning Operational Guidelines for Fiduciary System Installment Credit.

3) Warning Letter III, 7 (seven) days after warning letter II.

c. Process of Implementing Withdrawal / Confiscation of Goods

The purpose of withdrawing collateral is to withdraw the credit that has been distributed to the customer along with the capital rent and fines that are the company's rights. Withdrawal of collateral must still be carried out even though the insurance claim has been received, because there is still a pawnshop right of 20% that must still be received. After being sent Warning Letter III and having met the requirements to submit an insurance claim, then together with the submission of the insurance claim, the process of

confiscation/confiscation/execution of the collateral and sale will be carried out in accordance with Article 29 of Law. No. 42/1999 (Fiduciary Guarantee Law) for loans registered with the Fiduciary Office. Meanwhile, for credit in a certain amount that is not registered with the Fiduciary Office, confiscation is carried out because the customer has given the pawnshop authority to sell the collateral if the customer does not fulfill his promise to pay his obligations as stated in the debt agreement. The collection of collateral is carried out by the KREASI credit organizing branch 7 (seven) days after the Third Warning Letter is sent, or 28 (twenty eight) days after the due date of the 3rd installment that is in arrears/last installment. No later than 30 (thirty) days after

Warning Letter III is sent to the customer, the collateral must be in the branch company that organizes the credit. The confiscation process is carried out as follows:

1) Branch Managers and service managers will come directly to the customer's address;

2) If the collateral is still there, even though the customer, for example, has died, then the collateral will be forcibly taken by persuasion by reminding that according to the agreed credit agreement, the customer/customer's heirs are required to hand over the collateral to be sold by the pawnshop to pay the following debts, fines and other costs;

3) In the execution process, it will be explained that the credit processing for a certain amount as stipulated in the Circular Letter has been legally bound by fiduciary law so that the pawnshop has the right to withdraw/seize collateral and carry out execution without going through a court decision. Meanwhile, for credit below a certain amount as stipulated in the Circular Letter, the customer has also agreed that if there is a breach of promise as stipulated in the agreement, then to pay off the credit, the customer has authorized the pawnshop to sell the credit collateral in accordance with the agreement and authorized the pawnshop to carry out the sale. So this collateral withdrawal effort has a strong legal basis.

4) If the customer resists/refuses to provide collateral, the pawnshop will remind them that the agreement that has been made together is the highest "law" for the parties who made it. And the pawnshop will only take the remaining principal loan that has not been returned, capital rent with a lump sum repayment rate, fines and collateral withdrawal fees;

5) If the customer uses the assistance of a legal institution or reports to the police, the pawnshop will try as much as possible to provide a strong argument that the withdrawal of collateral is in accordance with the contents of the agreement made by both parties. Then it is explained that the pawnshop runs a

business with government regulation No. 103 of 2000 and other valid regulations;

6) If with the above explanation the withdrawal of collateral still fails, then the branch officers are permitted to request assistance from law enforcement officers at the company's expense which will be calculated from the proceeds from the sale of collateral which has been successfully confiscated;

Based on research that the author has conducted in Batam City, according to the Branch Manager, the process of carrying out the confiscation / confiscation / execution of collateral and sales are carried out in accordance with Article 29 of Law No. 42/1999 (Fiduciary Guarantee Law) for loans registered with the Fiduciary Office. Meanwhile, for credit in a certain amount that is not registered with the Fiduciary Office, confiscation is carried out because the customer has given the pawnshop the authority to sell the collateral if the customer does not fulfill his promise to pay his obligations as stated in the debt agreement. According to them, the value of collateral that is usually not registered with the Fiduciary Registration Office is IDR 10,000,000.00 (ten million rupiah) down. Considering that the value is small and the installments are not long.53 This means that in Perum Pegadaian if the debtor or Fiduciary Provider defaults, Article 29 paragraph (1) letter c will be applied with the exception of the implementation of sales without announcement through a newspaper.

Researchers found a scientific legal article that interpreted and stated that the implication of the verdict is that an application for execution cannot be filed, but must go through a lawsuit to obtain a permanent legal decision (Pratama and Pandamdari 2020). In the scientific legal article, it seems that the executive power on the fiduciary guarantee certificate has been removed in its entirety, even though if examined more deeply, the ruling in the Constitutional Court Decision No. 18/PUU-XVII/2019 in relation to Article 15 Paragraph (2) of Law No. 42/1999 is an affirmation of the Constitutional Court regarding the legal procedure for implementing the executive title in the fiduciary guarantee certificate which should be carried out in accordance with the provisions of Article 196 HIR or Article 207 RBG and Article 197 HIR or 208 RBG. As explained in the first discussion in this article, in reality the implementation of the execution of fiduciary guarantees with the executorial title on the fiduciary guarantee certificate as referred to in Article 29 Paragraph (1) letter a in conjunction with Article 15 Paragraph (2) of Law No. 42/1999 by creditors should use the mechanism and procedures for implementing execution like the execution of a court decision that has permanent legal force as referred to in Article 196 HIR or 207 RBG and Article 197 HIR or 208 RBG. Unfortunately, this is not fully implemented by creditors in executing the object of the fiduciary guarantee, so that the execution is carried out without the consent of the debtor, tends to be with coercion, and without a determination issued by the

head of the local district court (Dinata 2020).

That the argument put forward by the researcher is in line with the legal considerations of the Constitutional Court as stated in point [3.16] and point [3.17] of the Constitutional Court Decision No. 2/PUU-XIX/2021. Second, in connection with the change in the meaning of Article 15 Paragraph (3) of Law No. 42/1999, the provisions of Article 15 Paragraph (3) of Law No. 42/1999 can be interpreted that creditors cannot unilaterally sell objects that are the object of fiduciary collateral based on their own authority if there is no agreement between the creditor and the debtor or on the basis of legal remedies that determine that a breach of promise has occurred. Meanwhile, if the debtor has acknowledged that there has been a breach of promise and voluntarily surrenders the object of the fiduciary collateral, the creditor as the recipient of the fiduciary can sell the object that is the object of the fiduciary collateral in accordance with the principle of parate executie to settle his receivables. In the legal considerations of the Constitutional Court Decision No. 18/PUU-XVII/2019 point [3.16] paragraph 3, the Constitutional Court questioned the time when the "breach of promise" was deemed to have occurred and who had the right to determine it and stated that this did not exist. clarity in Law No. 42/1999. Thus, the Constitutional Court considers that there will be legal uncertainty regarding the actual time when the debtor as the fiduciary provider has committed a breach of promise which has consequences in the form of absolute authority from the creditor as the fiduciary recipient to sell the object that is the object of the fiduciary guarantee. Responding to the ruling of the Constitutional Court Decision No. 18/PUU-XVII/2019 regarding changes in the legal interpretation of Article 15 Paragraph (3) of Law No. 42/1999, the ruling is considered to eliminate the main nature of fiduciary guarantees, namely the ease of executing the object of fiduciary guarantees, in the event of disagreement or debate regarding the occurrence of a breach of promise (Joni Alizon 2020). This is then further explained in the explanation of Article 15 Paragraph (3) of Law No. 42/1999 which states that one of the characteristics of fiduciary guarantees is the ease of executing fiduciary guarantees in the event that the fiduciary provider breaches a promise. Decision No. 18/PUU-XVII/2019 is considered a setback and does not support the government's program which is promoting the Ease of Doing Business (EoDB) which is related to the execution of guarantees, thus creating uncertainty for creditors as fiduciary recipients in relation to the emergence of new problems in the form of determining the state of default, even though this may have been expressly regulated in the financing agreement (or credit/debt agreement) which is the main agreement, which in practice has a standard clause (template) that is rarely rejected by debtors (Riskawati and Brawijaya 2021). Researchers confirm that Law No. 42/1999 does not clearly indicate the time (when) the default occurs, however, the explanation of Article 21 Paragraph (3) of Law No. 42/1999 explains that default is an act of not fulfilling performance,

either based on the main agreement, fiduciary guarantee agreement or other guarantee agreements. In addition, the understanding and application of the event of default can be seen from Civil Code, Supreme Court decisions, and field practices. M. Yahya Harahap, an Indonesian civil law expert, stated that breach of promise or default is the implementation of an agreement that is not on time or is not carried out properly or is not implemented in its entirety (Harahap 1986). Simply put, breach of promise is a consequence in the event that one of the parties in an agreement does not fulfill what is his obligation based on the agreement, whether the agreement is based on an agreement or law (Niru Anita Sinaga and others 2015).

Based on the understanding above, basically the event of breach of promise has been regulated and implemented in various agreements, one of which is a loan agreement with its derivative, namely a fiduciary agreement. Therefore,

The researcher assessed that requiring a breach of promise based on an agreement between the creditor and the debtor is wrong. In addition, the researcher also highlighted the alternative requirements for determining a breach of promise in relation to Article 15 Paragraph (3) of Law No. 42/1999, namely "determination of breach of promise based on legal remedies". Based on the wording of the ruling and legal considerations in the Constitutional Court Decision No. 18/PUU-XVII/2019, it is not further explained regarding the form of legal remedies in question, whether in the form of a lawsuit or an application. If the legal remedy in the ruling is a breach of promise lawsuit, then the Constitutional Court Decision No. 18/PUU-XVII/2019 has set aside the main purpose of the existence of parate executie in the fiduciary guarantee institution, namely so that creditors do not need to file a lawsuit with the aim of executing the fiduciary guarantee object (Budi 2021). Third, regarding the considerations of the Constitutional Court in the Constitutional Court Decision No. 18/PUU-XVII/2019 point [3.16] paragraph 1 and paragraph 2 which states that Article 15 Paragraph (3) of Law No. 42/1999 as a continuation of the provisions of Article 15 Paragraph (2) of Law No. 42/1999 which is a legal consequence due to the phrase "executory title" and "equated with a court decision that has permanent legal force". The legal considerations given by the Constitutional Court are inappropriate because Article 15 Paragraph (2) of Law No. 42/1999 regulates the executorial title, while Article 15 Paragraph (3) of Law No. 42/1999 relates to execution by creditors as fiduciary recipients based on their own authority without going through a court decision (parate executie) (Sepalia 2020). Although in the end if the debtor is proven to have breach of promise, then the creditor can still execute the fiduciary guarantee object. After the reading of the Constitutional Court Decision No. 18/PUU-XVII/2019, the researcher is concerned about the loss of appeal for creditors to provide loan and/or financing facilities to debtors using fiduciary guarantees. It should be noted that one of the added values of binding guarantees using a fiduciary guarantee institution is the ease of

executing the fiduciary guarantee object in the event that the debtor defaults. Given that the object of fiduciary guarantees is generally an object with a collateral value that is not too high and a depreciating selling value, creditors should not be made difficult to prove the debtor's breach of promise in the event that the debtor does not agree to the existence of a breach of promise (Jati 2021).

Implementation of Fiduciary Guarantee Execution Post Constitutional Court Decision No. 2/PUU-XIX/2021 In Constitutional Court Decision No. 2/PUU-XIX/2021, the Constitutional Court rejected the petition in the provision and in the main petition from the applicant. In the ruling in question, Points [3.14.3] and [3.14.4] in Constitutional Court Decision No. 2/PUU-XIX/2021 emphasize that the implementation of the execution of the fiduciary guarantee certificate through the district court institution is an alternative in the event that there is no agreement between the debtor and creditor, either related to breach of promise or voluntary transfer of the fiduciary guarantee object from the debtor to the creditor. Furthermore, the Constitutional Court reiterated that the existence of a request for execution to the district court aims to avoid creditor arbitrariness in implementing the execution of the fiduciary guarantee and to provide a balance in the legal position between creditors and debtors. Based on legal considerations and the ruling of the Constitutional Court in Constitutional Court Decision No. 2/PUU-XIX/2021, the Constitutional Court emphasized that the implementation of the change in legal meaning in the Constitutional Court Decision No. 18/PUU-XVII/2019 regarding the implementation of the execution of the guarantee certificate Fiduciary through the District Court is not mandatory or is only an alternative, in the event that there is an agreement regarding breach of promise and voluntary transfer of the fiduciary guarantee object from the debtor to the creditor (Kosasih 2022).

4. Conclusion

Based on the research results and discussion, the following conclusions can be drawn: 1. Legal protection for creditors in the implementation of the execution of motor vehicle or car fiduciary guarantees, for creditors in a fiduciary guarantee agreement arises from the making of a notarial Deed of Fiduciary Guarantee, and continues to be emphasized by registration with the Fiduciary Registration Office in order to obtain a fiduciary guarantee certificate. By registering the fiduciary guarantee, the principle of publicity is fulfilled, this is a guarantee of legal certainty for creditors in the return of their receivables from debtors. There is no binding legal protection for debtors who default on the object of the fiduciary guarantee. It's just that with the issuance of the decision of the Constitutional Court of the Republic of Indonesia No. 18 / PUU / XVII / 2019, Leasing companies will be more careful in taking parate execution actions. 2. Before the interpretation of the implementation of the fiduciary guarantee

execution was changed based on the Constitutional Court Decision No. 18/PUU-XVII/2019 and the Constitutional Court Decision No. 2/PUU-XIX/2021, the creditor as the recipient of the fiduciary has the right to execute the fiduciary guarantee by carrying out the executorial title or executing the execution based on his own authority without requiring the debtor's agreement regarding when the event of default occurs and the debtor cannot refuse to hand over the object of the fiduciary guarantee to the debtor. While after The reading of the two Constitutional Court decisions means that creditors cannot immediately exercise their exclusive rights in carrying out the sale of fiduciary collateral objects in the event that there is no agreement regarding the time of default and the debtor is not willing to hand over the fiduciary collateral object under his control to the creditor in connection with the change in the meaning of Article 15 Paragraph (3) of Law No. 42/1999. In addition, in connection with the implementation of the executorial title on the fiduciary collateral certificate, this is a form of confirmation by the Constitutional Court that the implementation of the executorial title must be in accordance with the mechanisms and procedures as if implementing a court decision that has been in kracht van gewijsde, namely by submitting an execution application to the head of the local district court. The researcher assesses that the two Constitutional Court decisions are wrong because they deviate from the circumstances of default in Article 1238 of the Civil Code and Article 1243 of the Civil Code and are not in accordance with the purpose of binding fiduciary collateral as collateral in a financing agreement (credit agreement and/or debt agreement).

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