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Fiduciary: Financing Guarantees and Ownership in the Business

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Abstract

The concept of fiduciary is the transfer of material rights of an object based on trust, which often causes multiple interpretations. Ownership and control of a fiduciary guarantee object in various cases, it is not uncommon for disputes between creditors and debtors to occur in a fiduciary guarantee agreement because the creditor assumes that with the existence of executory rights as fiduciary recipients, the object of fiduciary guarantee is legally owned by the creditor so that the creditor has the right to take and sell the fiduciary guarantee object when the debtor defaults. Unilaterally, the debtor who considers that the object of the fiduciary guarantee is owned because the object is registered in his name so that the debtor can use the object freely, such as handing over to a third party or selling the object of the fiduciary guarantee unilaterally. The author employs normative legal research techniques. According to the study's findings, the debtor owns the Fiduciary Guarantee Object following the Law, and the debtor controls the collateral object for financial gain. A law should be made clearly and firmly to avoid conflicts between its articles. In the business world, a fiduciary is a security for the parties when funding is implemented. With this rights transfer, the fiduciary will have the power to make decisions while prioritizing other creditors.

Keywords: ownership, objects, fiduciaries, financing

Introduction

In essence, human existence and the Law are inextricably linked. This is because when he was born, man had a social grouping with other people called society. According to Cicero, where there is society, there is Law (Aermadepa, 2017). So that human beings can create rules to regulate all human interactions. "Man can only live in a society where man is known as a zoon politicon or social being," a creature that prefers to live in groups, is a characteristic of

man (Isnaeni, 2016). The concepts of man and society work well together. Humans continue to maintain their existence by expanding and changing as members of society with a purpose. Human growth and development aim to achieve prosperity and lead affluent lives (Fathoni et al., 2016). Humans can lead affluent and successful lives by working hard to meet necessities.

The satisfaction of birth requires welfare and prosperity; to sustain it, it needs means or instruments in the form of things. Since objects are things someone owns, everything that is not an object is not considered an object. (Amudi & Sidabutar, 2015). According to the Law, objects (zaak) are everything that can be used as a target for property rights, which gives the term a reasonably broad definition.

As community members who utilize these items to further human flourishing, their property rights will be upheld following their intended use. (Kosasih, 2019). This is employed to further improve welfare for human survival in society so that it can continue sustainably from generation to generation. The growing amount of material operations balances the pursuit of welfare to grow the managed firm. Every properly managed endeavor will strengthen the capacity that fosters advancement to expand the number of human-owned items that are never static and are always dynamic.

Big money is required for one of the endeavors to advance the business. It is impossible to operate a business without the backing of significant funds. The company needs capital assistance from other parties because it cannot raise the necessary funds on its own; how can it get money with other people's aid by lending money. There is a guarantee of clear legal protection when lending money to financial institutions, which means that both parties are guaranteed legal certainty. This legal assurance of security makes it simpler for parties to borrow money when needed, making it safer for business continuity and more accessible to do so following the parties' preferences. It is necessary to commit to enhancing the populace's role in the economy so that it can become stable, developed, and independent. Currently, the populace's economy comprises tiny enterprises, which are fragile and less able to withstand and benefit from an open economy. Fiduciary assurance organizations should have more power, which is great for small firms.

Financial institutions and private persons may borrow money—a quick, simple, short, and valuable method of borrowing money from others. Significant hazards include excessive interest rates over normal bounds, lack of sufficient legal protection, and the fact that no security or considerable collateral is needed (Lumban Gaol, 2023). A financial institution's promise of legal certainty when you borrow money makes things easier for those needing money, keeping the business safer and in line with their wishes.

Non-bank and bank financial institutions are the two categories of financial institutions. Financial institutions serve as middlemen between individuals lacking money and those with extra cash. As a result, financial institutions' primary function in society is to act as financial intermediaries. Financial institutions that are not banks are more active in the capital and money markets (Pelupessy, 2023). They engage in financial activities like capital raising, lending, serving as middlemen to get financing, and raising funds. These endeavors are funded, directly or indirectly, primarily by creating valuable paper.

As an intermediary entity that provides credit to clients, the bank always acts under the fundamental banking principles of trust and prudence. The following standards are applied while determining whether to grant debtors credit to uphold the idea of bank trust: 1) Character (the traits of potential debtors), 2) Capital (the capital that potential debtors have approved), 3) Ability (the capacity of potential debtors), 4) promises (the promises that potential debtors have offered or made available), and 5) Economic circumstances. Character, objectives, prospects, and compensation all have an impact as well. The precautionary principle is applied when distributing money to the general public through loans backed by guarantees or collateral.

It is the same as the lending and borrowing customs that Indonesians have long been accustomed to. In reality, lenders typically need debt collateral from borrowers. Collateral can take several forms: money or other items, or it might be a commitment to defer payment, in which case it becomes an individual guarantee. From an economic standpoint, voluntary trade is the best way to maximize resources for both parties and increase profits. Due to this arrangement, the parties are expected to act independently and without legal issues. In these situations, a contract exists to support the voluntary exchange of rights and obligations if the rights and obligations specified in the contract do not coincide, particularly in subsequent instances where the party who feels benefited initially benefits from the voluntary process.

The UUJF asserts that while the status of collateral goods remains in borrowers' hands, property rights are transferred, specifically from debtors to creditors. Then, someone commits items in order to borrow money, but they still want a guarantee that their owner's authority won't sever the object's property rights. The Law of fiduciary guarantees has this ratio as its logical conclusion. The collateralized item still belongs to the debtor. Still, in addition to the debtor's property rights, the creditor's property security rights are stacked or overlapped with those of the debtor, creating a conflict of interests between the debtor and creditors. According to the material guarantee agreement between the creditor and the debtor, the debtor only has limited power, in this case, as the owner of the object. UUJF invites many issues because it frequently pairs up articles that are discordant, imprecise, or that violate social standards. The lack of clarity regarding the debtor's position when in control of the subject of the fiduciary guarantee, as well as the debtor's legal position as either the owner or in control of the subject of the fiduciary guarantee, appears to be caused by the fact that the UUJF muffles a thousand languages but never offers an explanation or that there is a gap in the standards. The purpose of this research is to analyze the parties' legal position in terms of mastering the object of the fiduciary guarantee.

Literature Review

The construction of fiduciary guarantees based on trust has advantages because the object used as the debtor controls collateral to run his business (Latifa, 2018). Fiduciary assurances placed on property must be registered. The Fiduciary Registration Office is where registration is done. The actors must adhere to the established laws or regulations while putting into practice the guarantees they must also consider. Guarantee law, a clause that governs guarantees within the context of accounts receivable that can be broken down into numerous forms, is now in

effect.

The legal relationship in fiduciaries between a debtor (fiduciary) and a creditor (fiduciary beneficiary) is a legal relationship based on trust (Mahendra et al., 2018). After the debt has been settled, the fiduciary expects that the fiduciary will be willing to return the title to the items forfeited. On the other hand, the fiduciary has faith that the fiduciary won't abuse any power to misappropriate collateral.

Research Method

In this work, normative legal research is used. Normative legal research is defined as legal research that uses secondary data or library resources. This study is supported by primary legal materials like the relevant laws and regulations and secondary legal materials like law books with descriptive and analytical information connected to legal concerns. It is based on statutory, conceptual, and case approaches.

By reflecting on the numerous legal norms that need to be examined and the underlying premises of the idea that philosophy serves as a means of providing legal knowledge, the first philosophical approach will be utilized to provide a more comprehensive understanding of legal difficulties. The extensive and precise examination of Law in ontology, epistemology, and axiology is stated otherwise. Examining and studying laws and regulations about fiduciaries and banking, as well as other laws and regulations about legal protection for parties involved in fiduciary execution, is the second statutory approach, or statutory approach. In addition, the concept approach—also known as the concept approach—is employed to comprehend the abstract components found in the human mind. According to Ayn Rand, the idea is the mental fusion of two or more units divided by certain traits but brought together by definitions.

Result and Discussion

Article 1 point 2 of the Fiduciary Guarantee Act explicitly states that a fiduciary guarantee is collateral for property or material security (zakelijke zekerheid or security right in rem) that grants priority to the fiduciary beneficiary, provided that the fiduciary guarantor's bankruptcy does not take away the fiduciary beneficiary's precedence. Moreover, a fiduciary guarantee is defined as an executor (accessory) or follow-up agreement of a primary agreement under the terms of Article 4 of the Fiduciary Guarantee Law. Hence, when the obligation covered by the fiduciary guarantee is erased, the fiduciary guarantee becomes void due to the nature of this accessor.

According to the terms stated in Article 24 of the Fiduciary Guarantee Law, the fiduciary is the party who uses the security object, retains ownership of it, and is the one who benefits financially from its use. As a result, the fiduciary is accountable for all outcomes and assumes all risks associated with its use and condition. Furthermore, the "droit de suite" material principle is the foundation for fiduciary assurances, as specified in Article 20 of the Fiduciary

Guarantee Act. This rule is not applicable if the fiduciary's purpose is inventory items and the ownership rights are transferred per the guidelines outlined in Article 21 of the Fiduciary Guarantee Act and the protocol governing trading endeavors.

Since the fiduciary guarantee functions as a supplement to the principal agreement, its provisions are nullified if the principal agreement's debts and those guaranteed by the fiduciary are paid off. This regulation was made following Article 25 paragraph (3) of the Fiduciary Guarantee Act to enable the Fiduciary Registration Office to declare a fiduciary guarantee certificate no longer valid and to remove the recording of fiduciary guarantees from the Fiduciary Register Book.

It will be highly advantageous to interpret the fact that collateral bonds and items need to be recorded. Creditors and debtors typically agree to specific commitments in a guarantee agreement once fiduciary promises and guarantee bonds are registered. This directly binds third parties to give creditors a solid position. It seeks to obligate other parties. As a result, it is possible to see that registration comprises both the bond of guarantee and the object. As a result, all agreements found in the fiduciary guarantee deed—which is recorded in Article 13 paragraph (2) b of the Fiduciary Registration Office register book—are legitimate and enforceable against third parties.

The UUJF on Fiduciary promises governs the legal framework of fiduciary pledges to give interested parties protection and legal certainty. As stated in Article 2 of the UUJF, which specifies that this legislation applies to any arrangement that attempts to burden subjects with fiduciary guarantees, the regulations on fiduciary guarantees are incompatible with the UUJF. It is anticipated that interested parties will have more legal security and protection thanks to Article 2. This will constitute a comprehensive fiduciary obligation to sustain the enterprise. Legislators were not aware, though, that Article 2 went against UUJF Articles 38 and 37. According to Article 38 of the UUJF, all laws and rules about fiduciaries are in force until they are repealed, replaced, or renewed, provided they do not conflict with the provisions outlined in this legislation. According to Article 38 of the UUJF, the FEO (Fiduciaire Eigendoms Overdracht) that sought to succeed him was still legally recognized. FEO should be terminated and abolished because a substitute legal framework already exists. Because fiduciary standards based on FEO have been acknowledged by jurisprudence and have a solid legal foundation, fiduciaries continue to apply them in the field.

Article 1152 paragraph (2) of the Civil Code states that "While these goods as collateral objects are still needed by those who owe money, tangible movable objects given as collateral in the form of liens must move and are in the power of creditors (albeit stelling)." Un The UUJF introduces the concept of "constitutum possesorium (transfer of ownership of objects without surrender fidus)" for fiduciary assurance to satisfy the community's demand for guarantee institutions and to comply with Article 1152 paragraph 2 of the Civil Code. According to Latifah, one of the critical principles of the rule of Law in the democratic era is legal certainty. Some of these values are that the state ought to be at the forefront of enforcing the Law, that there should be an independent judiciary, and that everyone should have access to the full spectrum of the legal system, particularly those who have been harmed by "unjust arrangements"; and that the Law ought to be applied equitably and fairly.

Theoretically, the infusion of fiduciary guarantee law subsystems into substance, structure, and culture is part of the renovation of the National Fiduciary Guarantee Law System. To ensure that the Law is enforced successfully, the National Legal System that is to be constructed must be founded on values that align with the national viewpoint and beliefs of the Indonesian people. Law and its enforcement are closely tied to both politics and the economy. The processes in both areas impact the legal field.

The legal foundations of fiduciary assurances, upon which the UUJF is founded, were not explicitly mentioned by the Law's framers when the organization was established and legislation was passed. The ideas listed below form the foundation of fiduciary guarantee law: Fiduciary beneficiary creditors are given preference over other creditors under the principle of preference. UUJF Articles 1 number, 2, and 27 contain the concept of trust, defined as the transfer of ownership rights of an object based on one's trust. A fiduciary guarantee is a follow-up agreement to the existence of a debt-receivable arrangement, according to the Acessoir concept. Publicity Principle: As Article 12 of the UUJF stipulated, fiduciary assurances must be filed with the Fiduciary Registration Office. Fiduciary assurance certificates with the phrase "For Justice Based on the One and Only God" (irah-irah) facilitate more straightforward execution.

Furthermore, there is a difference between the UUJF's Article 11 paragraph (1) and Article 12 paragraph (1). "Objects encumbered with fiduciary guarantees must be registered," according to Article 11 paragraph (1), and "Fiduciary Registration Office shall be the place of registration of fiduciary guarantees as referred to in Article 11 paragraph (1)," according to Article 12 paragraph (1). Considering the definition of the item specified in Article 1 Paragraph 4, things that can Next, a follow-up deed that serves as collateral to make a particular payment is called a fiduciary guarantee. Creditors will prefer a fiduciary guarantee if it is registered with the Fiduciary Registration Office. This is so that a preference guarantee can be provided through guarantee registration. Given those above, the Fiduciary Receiver files his Fiduciary Guarantee—not his property—with the Fiduciary Registration Office. Products covered by a fiduciary guarantee may be registered or unregistered, depending on what "objects" means, as defined in paragraph 4 of Article 1. A fiduciary guarantee has a treaty clause since it is an agreement. A fiduciary deed of guarantee may apply in this case and govern the object being secured. Therefore, this fiduciary guarantee deed must be registered to protect creditors' favored rights. The economic community views fiduciary guarantee institutions as more profitable than other guarantee institutions since fiduciaries or debtors still own and use the collateral items, making them decision-making idols.

The Constitutional Court Decision Number 2/PUU-XIX/2021 has a macro impact on the world of financing institutions. In practice, the ruling will undoubtedly be influenced by all financing institutions in Indonesia, considering the many financing institutions in Indonesia (Setiono, 2018). Indeed, the Constitutional Court's decision will affect the financial institution industry. Given the number of financing institutions in Indonesia, all existing financing institutions will definitely influence this decision. All types of financing institutions, which are very numerous, will be affected by the Constitutional Court's decision. Due to the significant number of financial institutions spread across Indonesia, legal security in the financial industry

is very important. This is because financial institutions generally function to spread justice to others.

The lessor may be forced to pass away if the lessee violates the lease terms through negligence, mainly if this negligence directly affects the leased item. Because there are resentful parties, regardless of whether the party agreement is permitted, legal protection measures are required to defend the lessor's rights and prevent loss risk or loss of the leased object. In the future, it will be necessary to consider the design of the relationship to ensure legal certainty between creditors and debtors because efforts to take the rights of financing institutions are getting more challenging due to the Constitutional Court Decision.

A new paradigm in the implementation of fiduciary assurances is provided by Constitutional Court Decision Number 2/PUU-XIX/2021 [9]. Following this decision, two new options exist for enforcing fiduciary guarantees: with and without court involvement. If there is no default provision in the debtor-creditor agreement and the debtor challenges the execution that "will" be carried out, the dispute will be resolved through the court. If the debtor and creditor agreement already contains a default provision, the debtor feels free to transfer it without going through the legal system.

This scenario may appear straightforward, but the creditor execution mechanism frequently deals with overdue debtors, making it difficult for creditors to know their rights confidently. The Constitutional Court's ruling Number 2/PUU-XIX/2021 is an example of state interference in contracts for business endeavors that fall under the purview of the private sector (Setianto, 2018). In previous practice, it appears that there is, in fact, an imbalance between the two parties. This imbalance is undoubtedly present for various reasons, such as the debtor's subordination to the creditors' needs or the creditors' superiority complex regarding unsatisfactory debtors.

The relationship between creditor and debtor must be based on the principle of proportionality, which must be actualized in future contracts (Suroto, 2016). There should never be a superior or unequal relationship between creditors and debtors. The dynamics, complexity, and issues citizens face are reflected in how contract law is growing and changing. This dynamic is felt particularly in light of the increasingly globalized commercial activities.

Further improvement is needed to provide legal protection by making contractual relationships in rigid default clauses (Wignjosoebroto, 2016). By using this paradigm, time-consuming court execution scenarios are avoided. The ruling of the Constitutional Court has created the possibility that creditors may still carry out direct execution or parade execution if a default clause has been agreed upon, allowing for as much execution as possible to take place outside of the court system. The Constitutional Court's ruling No.2/PUU-XIX/2021 strengthens the position of debtors' interests, but not creditors' (Syamsudin, 2017). Whatever the situation, the proportionality principle must nonetheless form the foundation of the fiduciary arrangement. The arrangement shouldn't cause any harm to anyone.

In terms of security rights by their material nature, there is an institution as a privilege over guarantee institutions (Prabowo, 2018). One of them is the institution of separate execution, which is the right of individual creditors to conduct sales on their authority or as if

their own, goods that the debtor has guaranteed to settle debts in public through generally accepted conditions, simple requirements because there is no involvement of the debtor and without the consent of a judge or executory title. With that concept in mind, it is evident that this execution parate offers creditors a highly secure haven.

Institutional separate execution aims to make it easy for creditors to pay off their collection rights (Wiwoho, 2014). The idea of a separate guarantee institution, whose nature provides convenience and whose position takes precedence for creditors to seek repayment of collecting rights, led to this situation. Therefore, it should be highlighted that the Law's author intended the presence of a particular guarantee institution to benefit creditors because, from the debtor's perspective, it indicates that the general guarantee institution has been adequately "accommodating."(Kamello, 2014). The convenience of particular guarantee institutions means that there is a very high expectation for the legislators so that the economy can run smoothly, especially in the aspect of business financing, where business can be carried out or can get rapid development with the existence of credit debt loans (Yuzrizal, 2015). Because there is security for creditors in the form of receivables that will be repaid in the future because the party providing the loan will not hesitate to give a loan for the debtor, and because creditors already own property rights that belong to debtors who provide unique guarantees, which creditors can sell if the debtor defaults.

The parties to the fiduciary guarantee will always face their issues and difficulties, but the Constitutional Court's ruling does offer a robust guarantee for the debtor's interests. However, the issue of creditors still exists. The design and rearrangement of legal regulations governing both positions will be examined in the following discussion, ensuring that both remain within the bounds of the proportionality principle and do not negatively impact one another.

The Constitutional Court Decision Number 2/PUU-XIX/2021, in terms of justice, provides justice for debtors because it provides legal protection from arbitrary actions of creditors that have often occurred in practice (Meilaputri et al., 2019). The decision makes room for extended fiduciary guarantee executions. The Constitutional Court's ruling has significantly altered the notion of separate execution in terms of the legal principle of fiduciary guarantee.

After the Constitutional Court decision, this principle's meaning changed. Initially, the principle existed to expedite creditors' billing rights. Still, after the decision, the fundamental ideas and mechanisms were updated, extending the means and period required to regain creditors' rights. This indicates that there has been a change in the principle, particularly about the execution parade, between before and after the Constitutional Court decision. The Constitutional Court Decision No.2/PUU-XIX/2021 does not follow the initial nature of the execution principle parade in the fiduciary guarantee. There are at least two new fiduciary guarantee execution scenarios resulting from the judgment, which introduces a novel notion in this area. That is done both with and without the help of the court. A trust-based legal relationship exists between a debtor (the fiduciary) and a creditor (the fiduciary beneficiary) in a fiduciary. After the debt has been settled, the fiduciary expects that the fiduciary will be willing to return the title to the items forfeited. On the other hand, the fiduciary has faith that

the fiduciary won't abuse any power to misappropriate collateral.

The UUJF states that there is a transfer of property rights, namely from debtors (fiduciaries) to creditors (fiduciary recipients), even though the position of collateral objects remains in the hands of debtors (Kafa, 2019). Then, someone commits items in order to borrow money, but they still want a guarantee that their owner's authority won't sever the object's property rights. The Law of fiduciary guarantees has this ratio as its logical conclusion. The collateralized item and the guaranteed property rights remain with the debtor; however, the guaranteed property rights are stacked or overlapped with the property security rights of the creditors, creating a conflict of rights between the debtor and creditors. In this situation, as the object's owner, the debtor has limited authority as agreed in the material guarantee agreement made by the creditor and debtor.

The debtor's position in controlling the fiduciary security object following the Fiduciary Guarantee Law is well known. According to this Law, as long as the object is used as a security, the debtor is acknowledged to retain ownership of the property rights in question. Creditors only have material security rights, not ownership rights over the collateral. It is against the Law to make a guarantee arrangement in which it is stipulated that, in the event of a debtor's default, the collateral will immediately become the creditor's property. This is crucial to give debtors, typically in a weaker position, legal protection when making claims against creditors. As a result, the ruler included Articles 1154 and 1178 of the Civil Code in the mortgage to give weak parties, namely, debtors, under pressure to borrow money external legal protection. Both articles restrain creditors' relatively strong influence over debtors' will.

The actual transfer of "ownership," as defined by "levering" in Section 584 BW, is not the transfer goal in a fiduciary guarantee. The goods are not being transferred within the parameters of the sale and purchase agreement; instead, the parties intend to utilize them as collateral. Rather than genuinely transferring ownership, transferring ownership rights to the fiduciary security object is intended to guarantee the object for the debt he has received.

After they are transferred, fiduciary collateral objects become the property of fiduciary beneficiary creditors, according to the Law. They possess objects, which gives them authority, but they lack fiduciary guarantees for those objects. Stated differently, when fiduciary assurances are imposed, the goal of assigning ownership rights to fiduciary security objects is to offer rights that rightfully belong to the thing's owner. Since the fiduciary beneficiary creditors allegedly own the goods, they are entitled to sell the goods used as fiduciary collateral.

New ownership rights emerge with the declaration of default of the fiduciary debtor. The title to the fiduciary security object is transferred to approve the fiduciary beneficiary's creditors. The fiduciary beneficiary then has the option to sell the fiduciary guarantee's item. Due to this transfer of ownership rights, debtors who are fiduciary beneficiaries shouldn't be the owners of property that serves as fiduciary collateral.

In contrast to ancient Rome, the current meaning of fiduciary functions as a guarantee rather than a transfer of ownership. Law No. 42/1999, Article 33, explains this. These clauses may prohibit the fiduciary beneficiary from holding the asset that functions as the fiduciary's guarantee if the debtor defaults or fails to do so. Legally speaking, no vow may give such

authority. Consequently, there is no overall transfer of ownership; on the other hand, there is a growth in the right of security over the fiduciary promise. Placing fiduciary guarantees does not confer full rights on the fiduciary beneficiary since creditors lack control over and authorization to use the property. Even if the fiduciary debtor did nothing, the fiduciary beneficiary creditor is limited to selling the fiduciary security object as if he were the owner.

Conclusion

The Constitutional Court's Decision Number 2/PUU-XIX/2021 upholds the principles of justice by protecting borrowers against the arbitrary actions of creditors, which have frequently occurred in actual practice. The decision makes room for extended fiduciary guarantee executions. The Constitutional Court's ruling has significantly altered the notion of separate execution in terms of the legal principle of fiduciary guarantee. After the Constitutional Court decision, the principle's meaning changed. Initially, the principle existed to expedite creditors' billing rights. Still, after the decision, the fundamental ideas and mechanisms were updated so that the means and period to regain creditors' rights were lengthened. This means that the Constitutional Court Decision No.2/PUU-XIX/2021 is not following the initial nature of the principle of execution parade in the fiduciary guarantee/or there has been a change in principle, especially regarding execution parade between before and after the Constitutional Court decision. Due to this judgment, at least two new scenarios exist for implementing fiduciary assurances, which introduces a new notion in this area. That is done both with and without the help of the court. If there is no default provision in the debtor-creditor agreement and the debtor challenges the execution that "will" be carried out, the dispute will be resolved through the court. If the debtor and creditor agreement already contains a default provision, the debtor feels free to transfer it without going through the legal system.

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