



## Legal standing and consequences for creditors on privately made deeds of fiduciary guarantee based on guarantee law in Indonesia

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### Abstract

This study aimed to examine and analyze the legal standing and consequences for creditors on privately made deeds of fiduciary guarantee based on guarantee law in Indonesia. This study used normative legal research, then secondary data was from primary legal materials and other primary legal materials related to the study. The result of the study showed that privately made deeds of fiduciary guarantee deviated from the provisions in Article 5 paragraph (1) of the Fiduciary Guarantee Law, which affected the original creditor's standing from the preferred creditor to a concurrent creditor. As a result, the privately made deeds of fiduciary guarantee cannot be registered with the Fiduciary Registration Office and the loss of executive power made the creditor must file a lawsuit with the District Court with a breach of contract and/or execute by selling underhand. If the debtor defaults, the creditor cannot execute directly on the guarantee object. This can be concluded that privately made deeds of fiduciary guarantee changed the standing of the creditor from the preferred creditor to the concurrent creditor and the legal consequences cannot be registered and the executive power was lost. The suggestions are; for creditors, they must charge fiduciary guarantees made with an authentic deed, for debtors, they must understand and know the provisions in charging fiduciary guarantees, and for the Ministry of Law and Human Rights, they must provide socialization to creditors regarding the imposition of fiduciary guarantees.

**Keywords:** Fiduciary, Guarantee, Creditor

### 1. Introduction

Banking institutions have an important role in economic development. One of them is by distributing credit to the public. Etymologically, the term "credit" comes from Greek, it is "*credere*" which means trust<sup>[1]</sup>. According to Article 1 number 11 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law), credit is the provision of money or bills that can be likened to it, based on loan agreement between banks and other parties who require the borrower to repay the debt after a certain period with interest.

Before lending, a bank must be based on an agreement. According to Article 1313 of the Civil Code, agreement is an act in which one or more people commit themselves to one or more other people. The other most important thing apart from the agreement is a guarantee. Basically, the term guarantee comes from English which means "bear", therefore, guarantee can be interpreted as a borne<sup>[2]</sup>. Based on the types of guarantee, it can be divided into 2 (two) groups, namely general guarantees and specific guarantees. The birth of a general guarantee is based on Article 1131 of the Civil Code, whereas a specific guarantee is based on Article 1132 of the Civil Code which is confirmed by

Article 1133 and Article 1134 of the Civil Code<sup>[3]</sup>.

The Civil Code in Article 1131 states that all items belonging to the debtor, both movable and immovable, both existing and new one in the future, it will be borne by all individual engagements<sup>[4]</sup>. The provisions in the article explain that the creditor will get the right to repay debts of all borrowers' assets, both existing and new ones. The creditor's standing in the general guarantee is the same or balanced (concurrent creditor) in paying off debt. General guarantee is attached to the parties along with the birth of the agreed agreement.

Article 1132 of the Civil Code states that "the material makes a joint guarantee for all those who impose it on him; the sales income of the objects is divided according to balance, it is based on the size of the respective receivables, except if there are legitimate reasons for giving priority to the debtors." The provisions of Article 1132 of the Civil Code are then followed by Article 1133 of the Civil Code, it is the things to take precedence among people in debt are issued from privileges, liens, and mortgages. Priority rights arising from the agreement by the parties are divided into 2 (two) parts, namely individual rights guarantee and material rights guarantee. The material rights guarantee is arising through creditors requesting objects belonging to the debtor

<sup>1</sup> Thomas Suyatno, dkk, *Dasar-Dasar Perkreditan*, Edisi Ketiga, PT. Gramedia Pustaka Utama, Jakarta, 1994, hlm. 15.

<sup>2</sup> Riky Rustam, *Hukum Jaminan*, UII Press, Yogyakarta, 2017, hlm. 41.

<sup>3</sup> *Ibid*, hlm. 69

<sup>4</sup> Niken Prasetyawati dan Tony Hanoraga, *Jaminan Kebendaan dan Jaminan Perorangan sebagai Upaya Perlindungan Hukum Bagi Pemilik Piutang*, *Jurnal Sosial Humaniro*, Vol 8 No. 1, Juni 2015, hlm. 125.

to be used as a guarantee for the debt that is done through a pawn, fiduciary, borne and mortgage.

Fiduciary institution is one of the famous institutions in Indonesia. Fiduciary means the transfer of property rights based on trust gives the standing or position to the debtor to continue and control the guarantee, even if it is only as a borrower to use for a while or no longer as the owner.<sup>[5]</sup>

The provision regarding fiduciary is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as Fiduciary Guarantee Law) and Government Regulation Number 21 of 2015 concerning the Procedure for Fiduciary Guarantee Registration and Costs for Making a Fiduciary Guarantee Deed (hereinafter referred to as Government regulations No. 21 of 2015). The granting of fiduciary guarantees is an accessor agreement of a basic agreement as stated in the explanation of Article 6 point b of Law No. 42 of 1999 and must be made with a notarial deed called the Fiduciary Guarantee deed.<sup>[6]</sup> According to Veenhoven, the object that can be used as a guarantee (fiduciary), namely all movable and immovable objects, which can be legally surrendered based on trust. Basically, the provisions in the Fiduciary Guarantee Law regulate the imposition of fiduciary guarantees made with a notarial deed which is then registered at the Fiduciary Registration Office within the Ministry of Law and Human Rights. The result of the registration is to get a fiduciary guarantee certificate that has direct executorial power if the debtor defaults.

The problem that arises in current practice is the proliferation of making the privately made deeds of fiduciary guarantee. The purpose of making the deed is to be able to reduce the burden of financing, speed and practicality for creditors in providing services. The provisions regarding privately made deed are regulated in Article 1868 of the Civil Code. The definition of a privately made deed is a deed made by the parties without the involvement of a legitimate official determined by law (Notary, Land Deed Official, and others). The privately made deed can be used as perfect evidence if the parties acknowledge the contents and signatures in the deed. However, on the contrary, if the debtor defaults on the privately made deed, it will hamper the creditor in carrying out the execution directly. Meanwhile, one of the objectives of making the Fiduciary Guarantee Law is to protect creditors. These problems will affect the legal standing and consequences for creditors in a guarantee.

Based on the above description, the author was interested in conducting a study entitled: Legal Standing and Consequences for Creditors on Privately Made Deeds of Fiduciary Guarantee Based on Guarantee Law in Indonesia. Based on this title, the author examined and analyzed one research problem, namely: What is the legal standing and consequences for creditors on privately made deeds of fiduciary guarantee based on guarantee law in Indonesia?

## 2. Research Methods

This study used normative law or also known as doctrinal

<sup>5</sup> Sri Ahyani, *Perlindungan Hukum Bagi Kreditur Melalui Perjanjian Jaminan Fidusia*, Jurnal Wawasan Hukum, Vol. 24 No. 01 Februari 2011, hlm. 308.

<sup>6</sup> Jatmiko Winarno, *Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia*, Jurnal Independent Fakultas Hukum, ISSN : 2338-7777, hlm. 44-45.

law research, the study conducted by examining library materials which were primary legal materials and also called library law research. Library research or document study is due to the fact that this research is mostly conducted on secondary data in the library.<sup>[7]</sup> This study used secondary data consisting of:

### a. Primary legal materials include

- 1) Civil Code;
- 2) Law Number 10 of 1998 concerning the Amendments to Law Number 7 of 1992 concerning Banking;
- 3) Law Number 42 of 1999 concerning the Fiduciary Guarantees;
- 4) Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning Position or Standing of Notary; and
- 5) Government Regulation Number 21 of 2015 concerning the Procedure for Fiduciary Guarantee Registration and Costs for Making a Fiduciary Guarantee Deed.

- b. Secondary legal materials consist of all legal publications which are not official documents.<sup>[8]</sup> The publications on law include textbooks, legal dictionaries, legal journals, and comments on court decisions.<sup>[9]</sup> The secondary legal materials used consist of textbooks, legal journals, relating to credit agreements, fiduciary guarantees, privately made deeds and other secondary legal materials related to the study.

Based on the above legal materials, this study used qualitative analysis techniques. The interpretation technique in this study was in the form of grammatical interpretation, namely the provisions in the legislation were interpreted according to grammar or based on habits or daily language usage and the results of the analysis were deductively drawn conclusions, namely processing the data based on general facts and then specific draw conclusions.

## 3. Research Results and Discussion

Guarantee is a translation from Dutch, namely "*Zekerheid*" or "*Cautie*". "*Zekerheid*" or "*Cautie*" generally covers the ways the creditor guarantees the fulfillment of his bills, in addition to the debtor's general responsibility for his debts.

<sup>[10]</sup> M. Bahsan mentioned that guarantee is everything received by the creditor and submitted by the debtor to guarantee a debt receivable in the community.<sup>[11]</sup> The subjects in guarantee law include:

- a. Debtor is a party that is obliged to pay debts to creditors
- b. Creditor is a party entitled to receive payments from the debtor. The creditor is divided into 2 (two) types, namely:
  - 1) Concurrent creditor is a creditor who collectively

<sup>7</sup> Suratman & H.Philips Dillah, *Metode Penelitian Hukum*, Alfabeta, Bandung, 2013, hlm. 51.

<sup>8</sup> Meray Hendrik Mezak, *Jenis, Metode dan Pendekatan Dalam Penelitian Hukum*, Law Review. Fakultas Hukum Universitas Pelita Harapan, Vol. V, No.3. Murei 2006, hlm. 181.

<sup>9</sup> Ibid.

<sup>10</sup> Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, PT Raja Grafindo Persada, Jakarta, 2004, hlm. 21.

<sup>11</sup> Riky Rustam, *Hukum Jaminan,....Op.Cit.,* hlm. 42.

obtains debt repayments based on the size of the receivables. Therefore, they have the same position in paying off debt without taking precedence.

- 2) Preferred creditor is a creditor who has the right to take precedence in paying off debts. Therefore, it is because of the law and the nature of the receivables get repayment in advance from other creditors.

**This guarantee usually has a function, namely** <sup>[12]</sup>

- a. As a debtor/creditor if the debtor is unable to repay his debt/credit by selling/auctioning borne/ guarantee;
- b. As a result of the first function, it is one of the determinants of the amount of credit given (except in special cases, such as program credits, etc.);
- c. As a driver of debtor motivation.

The existence of a binding credit guarantee by the creditor will encourage the debtor to immediately pay off the credit in accordance with the agreement of the parties. The principles in the guarantee law, namely:

- a. The principle of publicity (*publicitet*). It means that the rights in the borne, mortgage and fiduciary right must be registered. The registration aims to let the third party know that the guarantee has been burdened with a guarantee. Mortgage rights are registered at the District/City Land Office in accordance with the location of the guarantee object. Fiduciary is registered with the Ministry of Law and Human Rights according to their regional office. Mortgages are registered at Syahbandar as an official and name register.
- b. Principle of specialty (*specialitet*). It means that the borne, mortgage and fiduciary rights can only be burdened on goods that have been registered under certain names.
- c. The principles cannot be divided. It means that the principle of debt sharing can not result in the sharing of borne, mortgage, and fiduciary rights even though some payments have been made.
- d. The principle of *inbesittstelling*. It means that guarantee in a pawn must be in the pawn receiver.
- e. Horizontal principle. It means that the buildings and land are not a single entity, this is seen in the use of use rights both on state land and land with ownership rights.

The guarantee is divided into 2 (two) types, namely, general guarantees and specific guarantees. The provisions regarding general guarantees are regulated in Article 1131 of the Civil Code, in which these guarantees are determined by law. Meanwhile, specific guarantees are regulated in Article 1132 of the Civil Code and affirmed in Article 1133 and Article 1134 of the Civil Code. The guarantee is born because of promised by the parties, both personal and material guarantees. Material guarantee is the material owned by the debtor to be used as guarantee, one of them is fiduciary.

Fiduciary is a transfer of property rights based on trust. Article 1 number 2 of the Fiduciary Guarantee Law explains that fiduciary guarantees are guarantee rights on movable objects both tangible and intangible and immovable objects especially buildings which cannot be encumbered as

mortgage rights as referred to in Law Number 4 of 1996 concerning the Permanent Mortgage Rights is in the authority of the fiduciary giver, as a guarantee for repayment of certain debts, which gives the fiduciary recipient the priority over other creditors. Subjects in the fiduciary guarantee are fiduciary recipients and fiduciary givers.

Generally, the process of loading fiduciary guarantees requires funds and time is not small. This makes the creditor make a guarantee in the form of a privately made deed. According to Article 5 paragraph (1) of the Fiduciary Guarantee Law, "the loading of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary deed." Notarial Deed is an authentic deed drawn up by or before a Notary according to the form and procedure stipulated in Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Notary Position (hereinafter referred to as Notary Position Law). Article 1870 of the Civil Code states that an authentic deed gives between the parties and their heirs or persons who have rights from them, perfect proof of what is contained therein. While the privately made deed does not have the strength of perfect proof, the truth will depend on the recognition of the parties or third parties <sup>[13]</sup>.

According to the author, the creditor who imposes a fiduciary guarantee with a privately made deed has deviated from Article 5 paragraph (1) of the Fiduciary Guarantee Law which requires that the imposition be made with a notarial deed. Although the use of a privately made deed is not prohibited normatively, only the deed cannot be registered for a fiduciary guarantee. Privately made deed based on the enactment of the principle of *pacta sunt servanda* is all agreements are made legally and act as a law for the parties who made them. Considering that fiduciary guarantee objects, in general, are movable objects that are not registered, it is only natural that an authentic deed form is considered the most guaranteed legal certainty regarding fiduciary guarantee objects <sup>[14]</sup>. The fiduciary deed guarantees at least have the following:

- a. The identity of the fiduciary giver and receiver
- b. Data of basic agreement guaranteed by fiduciary
- c. A description of the object which is the object of the fiduciary guarantee
- d. Guarantee value
- e. The value of the object which is the object of the fiduciary guarantee

These deviations affect the position of the creditor in a guarantee. Basically, the function of granting guarantees, especially for fiduciary guarantees, is to give rights to take precedence over other debtors. Furthermore, Article 27 of the Fiduciary Guarantee Law explains that the protection of preceded rights, namely:

- a. Fiduciary recipients have priority rights over other creditors
- b. The precedence right as referred to in Article 27 paragraph (1) is the right of the fiduciary recipient to

<sup>12</sup> Rochadi Santoso, Pengikatan Perjanjian dan Agunan Kredit, Prosiding SENTIA 2016 – Politeknik Negeri Malang, Volume 8 – ISSN : 2085-2347, hlm. 33.

<sup>13</sup> Habib Adjie, Sanksi Perdata dan Administratif terhadap Notaris sebagai Pejabat Publik, Refika Aditama, Bandung, 2009, hlm. 48.

<sup>14</sup> Reiza Natalia Kolang, Tinjauan Yuridis Terhadap Benda Jaminan yang Diikat dengan Fidusia, Lex Privatum Vol. VII/No. 3/Mar/2019, hlm. 79.

take repayment of his receivables on the results of the execution of the object which is the object of the fiduciary guarantee

- c. Priority rights from fiduciary recipients are not nullified due to bankruptcy and/or liquidation of fiduciary givers

It means that if the debtor defaults, the creditor as the fiduciary recipient has the right to execute the guarantee object and has the right to obtain debt repayment. The position of the creditor who originally had the right to take precedence, namely as a preferred creditor turned into a concurrent creditor. Concurrent creditors are creditors who collectively obtain debt repayments based on the size of the receivables.

**According to the author, based on the deviation cause legal consequences, namely:**

- a. Fiduciary guarantee registration is not possible at the Fiduciary Registration Office.

The provisions in the Fiduciary Guarantee Law, apart from imposing a notarial deed, then it is required to register with the Fiduciary Registration Office. The procedures for registering fiduciary guarantees are regulated in Government Regulation Number 21 of 2015 concerning the Procedure for Fiduciary Guarantee Registration and Costs for Making a Fiduciary Guarantee Deed. According to Article 3 PP No. 21 of 2015, the application for registration of fiduciary guarantees includes:

- 1) The identity of the fiduciary giver and receiver
- 2) Date, number of fiduciary guarantee deed, name, and place of the notary who made the fiduciary guarantee deed
- 3) Data of principal agreement guaranteed by fiduciary
- 4) The description of the object which is the object of the fiduciary guarantee
- 5) Guarantee value
- 6) The value of the object which is the object of the fiduciary guarantee

The purpose of registering fiduciary guarantees is to give preferential rights to accounts receivable, the application of the principle of *droit de suite*, namely material rights guaranteed by fiduciaries, still following objects that are the object of guarantee in the hands of whoever the objects are, and fulfilling the principle of publicity (*publicitet*), creditors will obtain a fiduciary guarantee certificate as proof that the creditor is a fiduciary guarantee holder so that it is binding on third parties. The fiduciary guarantee certificate uses the words " For Justice Based On Almighty God".

**b. Loss of executive power**

In the imposition of fiduciary guarantees carried out by notarial deed, then it is registered and a fiduciary guarantee certificate is issued. The certificate has an executive power equivalent to a court decision that has obtained permanent legal force. This is confirmed in Article 15 paragraph (1) of the Fiduciary Guarantee Law that the fiduciary guarantee certificate as referred to in Article 14 paragraph (1) includes the words " FOR JUSTICE BASED ON ALMIGHTY GOD". The executorial title in the fiduciary guarantee certificate gives the creditor or fiduciary recipient the right to execute the object which is the object of fiduciary guarantee when the debtor or fiduciary fails to promise,

either through a public auction or underhand sale based on the parties in order to repay the debt. <sup>[15]</sup> Therefore, by not fulfilling the obligation to charge guarantee objects with a notarial deed it results in not obtaining protection for the creditor due to the loss of the executive power of the deed.

The loss of the executive power makes the creditor must file a lawsuit to the District Court with a default lawsuit until it is decided and has permanent legal force. In addition, creditors can execute indirectly, by selling underhanded. The juridical ratio of selling the objects of privately made deed is to obtain the highest cost and benefit both parties. <sup>[16]</sup> However, the underhand sale is not in accordance with these provisions, because the execution is only done unilaterally carried out by the creditor to be able to get the debt back. Therefore, it is clear that one-sided execution does not protect the debtor.

**4. Closing**

**4.1. Conclusion**

This study can be concluded that the privately made deeds of fiduciary guarantee deviated from the provisions in Article 5 paragraph (1) of the Fiduciary Guarantee Law which requires the imposition of fiduciary guarantee with a notarial deed. These deviations have affected the position of creditors, which are originally from preferred creditors to concurrent creditors. In addition to the change in the creditor position, it also fails to register privately made deeds of fiduciary guarantee and the loss of executive power. If the debtor defaults, the creditor cannot directly execute the guarantee object.

**4.2. Suggestion**

- a. For creditors, it is better to make a fiduciary guarantee made with an authentic deed, to be able to protect the creditor if the debtor defaults.
- b. For debtors, it is better before approving the imposition of fiduciary guarantee must understand and know the provisions in the imposition of fiduciary guarantee and if necessary consultations with experts in their field.
- c. For the Ministry of Law and Human Rights, it is better to provide socialization to creditors to be able to impose fiduciary guarantees made in authentic deeds.

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<sup>15</sup> Muhammad Moerdiono Muhtar, Perlindungan Hukum Kreditur pada Perjanjian Jaminan Fidusia dalam Praktek, Jurnal Lex Privatum Volume 1 Nomor 2, April-Juni 2013, hlm. 14.

<sup>16</sup> Finka Saradia, Eksekusi Objek Jaminan Fidusa melalui Penjualan Dibawah Tangan sebagai Penyelesaian Kredit Macet, Jatiswara Jurnal Ilmu Hukum, Vol. 32 No. 3, November 2017, hlm. 420.

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