

Legal Protection Regarding Debtor Rights with Productive Credit Against Execution of Fiduciary Guarantees by Justice-Based Creditors

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Abstract

Fiduciary guarantee is one of the specific material guarantees that develops in practice. Since the promulgation of the provisions of Law No. 42 of 1999 concerning Fiduciary Guarantees, officially the fiduciary obtains certainty regarding the mastery of moving objects in the hands of the debtor. One certainty regulated by Law No. 42 of 1999 concerning Fiduciary Assurance is a matter of execution where creditors can choose the execution model that is considered to be the most beneficial for both parties. One of the rights of the creditor if he considers the debtor to be in breach of promise is to make a direct withdrawal to the debtor of the object of guarantee and if necessary requesting the assistance of the security apparatus is a breakthrough and convenience provided by the provisions of Article 30 of Law No. 42 of 1999 concerning Fiduciary Guarantees. This direct withdrawal will certainly be a problem if the object of collateral is used for productive purposes which results in the debtor not being able to run his business because he has lost the object of guarantee in a fiduciary agreement. This study aims to identify, understand and analyze the ratio legis of fiduciary guarantee execution as stipulated in article 30 of Law No. 42 of 1999 concerning justice-based Fiduciary Guarantees and the form of regulation of protection of the rights of debtors with productive credit towards the execution of fiduciary guarantees according to the provisions of article 30 of Law No. 42 of 1999 Of Justice-based Fiduciary Guarantees. This study is normative research by carrying out several approaches, namely the legislative approach, case approach, historical approach, and comparative approach. The results of this review reveal that the beginning of the purpose of the Act No. 42 of 1999 concerning Fiduciary Guarantees is in the context of fulfilling capital through an object as a guarantee object, but in its development credit is also intended for satisfying needs or non-productive, so that the treatment between productive credit and productive credit is necessary where productive loans should be provided (stay) or the opportunity to be able to pay off the debt, even though the distribution limit has ended or in other words the creditor does not directly use his right to execute the object of fiduciary collateral directly as stipulated in article 30 of Law No. 42 of 1999 concerning Fiduciary Guarantees without providing the opportunity for productive debtors to repay their debts.

Keywords: Fiduciary, Productive Credit, Execution.

DOI: 10.7176/JLPG/83-09

Publication date: March 31st 2019

Introduction

The guarantee law has a close relationship with the field of banking law. This link lies in the function of the bank itself as a collector and distributor of funds from the community, one of which is credit. Guarantee Law is a set of provisions that regulate or relate to collateral in the context of accounts payable (money loans) contained in various laws and regulations that currently apply.¹

With the enactment of Law No. 42 of 1999 concerning Fiduciary Guarantees (LN No.168, TLN No. 3889) hereinafter referred to as the Fiduciary Guarantee Law, it provides certainty of credit for a guaranteed movable object in the hands of the debtor or fiduciary giver. A law has legal certainty and includes 2 (two) things, namely the certainty of the formulation of norms and principles where the articles of the law as a whole and also the relation with other articles are not contradictory in the law.

Article 30 The Fiduciary Guarantee Act provides an ease of execution of objects of fiduciary collateral if the debtor is considered default refers to the agreement that has been jointly agreed so that this article also provides space for creditors to execute or take over the collateral object without having to undergo general procedures the court suit is due to the ease of execution.

Credit is not only known by the people of big cities but to villages is very popular, where the term comes from the Roman language, Credere which means trust.² Capital assistance in the form of credit must basically be an incentive for both parties. The party that receives credit can be used for the progress of its business, while

¹ M. Bahsan. *Hukum Jaminan dan Hukum Jaminan Kredit Perbankan Indonesia*, (Jakarta : RajaGarfindo Persada, 2010), pp.3

² Teguh Pudjo Mulyono, *Management Perkreditan bagi Bank Komersial*, Third Editons (Yogyakarta: Penerbit BPFE, 1993), pp. 9.

those who provide credit naturally should be proud to be able to help small industrial entrepreneurs and small people to achieve progress, the people's industry or more precisely handicrafts run by individuals have their own consideration in determining needs capital assistance, how and how long the capital must be returned.¹

Productive credit is credit that is used for productive purposes in the sense of increasing utility.² Productive credit is one of the three credit categories divided by its purpose, the other two loans are commercial loans, namely loans given to facilitate the customer's business in the field of trade and consumer loans, namely loans given to meet the needs of debtors who are consumptive. Productive loans are loans given to facilitate the production of debtors, or in other words loans taken by people who want to become entrepreneurs are used to buy goods such as one of them is motorized vehicles, but the condition of motorized vehicles after purchase is used for productive businesses that can make money back like rental cars, motorbikes and the like.

The generally accepted Fiduciary Guarantee Law will result in this law being applied to all collateral objects that use the fiduciary Guarantee Instrument object in its credit object agreement, so that the creditor's rights can be carried out immediately regardless of what the collateral object is used, as this is in the form of productive collateral objects that are used for productive activities to produce something or a tool to make something that is certainly in addition to being used to settle credit obligations also in order to increase the welfare of debtors so that in a broader correlation in improving the community economy movable goods in the productive sector or in other words productive loans should be more protected and not equated with consumer loans. This pattern of execution carried out on productive loans when equated with non-productive loans will be very risky. Laws and regulations that do not provide clear limits on the existence of productive and consumptive loans will certainly provide a dimension of inequality in the protection of debtors who use these loans to be productive in order to improve their welfare. Production objects used for productive activities are then immediately confiscated to be executed by creditors in the event of late payments with the same treatment as consumptive loans will be far from justice, this will certainly make the debtor unable to continue or support the productivity of his business activities.

Protection is carried out more to creditors while the debtor is not accommodated for protection, therefore a certainty is needed to be able to achieve justice, especially debtors with productive credit so that debtors with productive credit need a form of juridical protection. It's just that the protection of debtors with productive credit even though the credit has been given for role play points in economic improvement and public welfare also needs to be considered especially in the context of Article 30 of the Fiduciary Guarantee Act. Therefore, it is necessary to examine the ratio of fiduciary guarantee execution legislation as stipulated in Article 30 of Law No. 42 of 1999 concerning Fiduciary Security based on justice in fiduciary guarantees and then formulating forms of regulation of protection of the rights of debtors with productive credit towards the execution of fiduciary guarantees as stipulated in Article 30 of Law No. 42 of 1999 concerning justice-based Fiduciary Assurance in fiduciary guarantees.

Research Method

This type of research is normative legal research which is a study in the context of the field of law to be able to review the substance of positive law that exists textually which is not only about norms, but also principles even the values contained therein are related to execution Legal Fiduciary Assurance based on Article 30 of the Fiduciary Guarantee Law. The basis of normative research here is the vacuum of norms, where the regulation of legal protection of the rights of debtors with productive credit to the execution of fiduciary guarantees by justice-based creditors is non-existent (vacuum of norm) so that it can cause different interpretations. The research approaches used include legislation, case approaches, historical approaches and comparative approaches.

The type of legal material in this study consists of primary, secondary and tertiary legal materials. Material Primary law consists of legislation and court decisions in a hierarchical manner. Hierarchically, laws and regulations are specified starting from the 1945 Constitution, Government Laws / Regulations, Perpu, Government Regulations and other rules under the law related to the discussion of issues. Secondary Legal Materials are obtained from textbooks, scholarships, legal cases, journals, seminar results, workshop results, symposium results conducted by legal experts, the results of research reports both related to national and international scale discussion of the problem. Tertiary Legal Material is a legal material that contributes in the form of instructions and meaningful explanations of primary and secondary legal materials,³ like legal dictionaries and encyclopedias.

Collection of legal materials is carried out through the study of documents in the form of primary, secondary and tertiary legal materials through inventory, selection and systematization, to trace documents and literature in accordance with research problems. For the opinions of guarantee legal experts, traced by in-depth

¹ Gatot Supramono, *Perbankan dan Masalah Kredit, Suatu Tinjauan Yuridis*, (Jakarta: Penerbit Djambatan, 1997), pp. 131

² H. Rachmat Firdaus dan Maya Ariyanti, *Manajemen Perkreditan Bank Umum (Teori, Masalah, Kebijakan dan Aplikasinya Lengkap Dengan Analisis Kredit)*. (Bandung : Alfabeta, 2004), pp.27.

³<http://repositori.usu.ac.id/bitstream/handle/123456789/435/137011118.pdf?sequence=1&isAllowed=y>, accessed on 3 August 2011.

interviews. Legal materials obtained through library research research are analyzed critically by using theories and legal principles systematically and coherently to obtain answers to problems carried out in this study. The results of the analysis of the legal materials are expected to be able to answer the problem and provide an overview of the fiduciary guarantee law in the material guarantee system.

Results And Discussion

1. Execution of Fiduciary Guarantees according to Legal Provisions

If the debtor or fiduciary fails, the execution of objects that are objects of fiduciary guarantees can be carried out in several ways, namely:¹

1. Executorial title by fiduciary recipients, which means direct execution through the parate execution institution.
2. Sales of objects of fiduciary collateral on their own power through public auctions and taking repayments from the proceeds of sale.
3. Sales under the hand, meaning that the sale of objects to be executed must be based on the agreement of the giver and recipient of the fiduciary. In its implementation, it is carried out after a period of 1 (one) month from the written notice by the giver and / or fiduciary recipient to interested parties and announced at least in 2 (two) newspapers circulating in the area concerned.

The execution of a fiduciary guarantee, the fiduciary is obliged to submit objects that are objects of fiduciary guarantee. If the fiduciary does not submit at the time of execution, the fiduciary recipient has the right to take the object that is the object of the Fiduciary Guarantee and if necessary can request assistance from the authorities. In the event that the execution exceeds the guarantee value, the fiduciary is obliged to return the excess to the fiduciary giver, but if the result of the execution is insufficient for repayment of the debt, the debtor remains responsible for the debt that has not been paid.

The choice of procedural formal law in order to maintain justice and enforcement of the material law it contains. This process is almost certainly time consuming, if the parties use all available legal remedies. The costs that must be incurred are not small. Of course, this is a dilemma choice. The pretext of pursuing a large margin must also consider the sense of justice of all parties. People who generally become customers must also be more critical and careful in conducting transactions. While for the Government, certainty, justice and law order are important.²

The implementation of financing between creditors and debtors, sometimes defaults or broken promises. So, when the debtor breaks the promise, the creditor can execute objects that have been pledged through fiduciary guarantees. According to Subekti, what is meant by execution is the effort of the party won in the decision to get what is his right with the help of legal force, forcing the defeated party to carry out the decision.³

Debtors who break promises, then creditors can directly execute collateral guaranteed by fiduciary. Because in the fiduciary guarantee certificate contains the provisions of the words "FOR JUSTICE BASED ON THE ALMIGHTY GOD." With these words, it has the power of law as a court decision.

Every promise to carry out the execution of an object that is the object of a fiduciary guarantee in a manner that is contrary to the provisions above is null and void by law. Any promises that give authority to fiduciary recipients to possess objects that are objects of fiduciary collateral if the debtor is injured in the promise, null and void. In the event that the execution exceeds the guarantee value, the fiduciary recipient must return the excess to the fiduciary giver. If the results of the execution are insufficient for repayment of the debt, the debtor remains responsible for the debt that has not been paid.⁴

The execution by creditors through debt collector services sometimes creates new problems between creditors and debtors. This is due to the way the debt collector executes fiduciary goods by means of violence, intimidation and even by seizing fiduciary wares on the road, this is what causes opposition from the debtor.

For this reason, the police made a decision through the Indonesian National Police Chief Regulation Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees. The execution of fiduciary guarantees has the same binding legal force as the court ruling that has permanent legal force, so it requires security from the Indonesian National Police. The meaning of Execution Security is police action in order to provide security and protection for executors, applicants for executions, defendants of execution (executed) at the time of execution. The purpose of this regulation includes:⁵

1. Implementation of the execution of Fiduciary guarantees in a safe, orderly, smooth and accountable manner;

¹ Purwadi Patrik dan Kashadi, *Hukum Jaminan*, Revised Edition with UUHT, (Semarang: Faculty of Law Universitas Diponegoro, 2008), pp. 46.

² *Ibid*

³ R. Subekti, *Hukum Acara Perdata*, (Bandung: PT Bina Cipta, 1989), pp. 128

⁴ *Ibid*

⁵ <http://hamzaenurofiq.blogspot.com/2014/12/proses-pembebanan-dan-penghapusan.html> accessed on 3 August 2018.

2. The protection of safety and security of the recipient of the Fiduciary Guarantee, the Fiduciary Guarantee Provider, and / or the community from actions that could cause loss of property and / or life safety.

Object of securing fiduciary guarantees, including guarantee rights for:

1. A moving object that is tangible;
2. Moving objects that are intangible; and
3. Immovable objects, especially buildings that cannot be burdened with liability.

The object of securing fiduciary guarantees carried out on collateral objects that have been registered at the Office of Fiduciary Registration is within the scope of duty of the Ministry of Law and Human Rights. Safeguards against fiduciary objects can be carried out with conditions:¹

1. There is a request from the applicant
2. Having a fiduciary guarantee deed
3. A fiduciary guarantee is registered with the fiduciary registration office
4. Has a fiduciary guarantee certificate
5. Fiduciary guarantees are in the territory of Indonesia.

Execution is the realization of the obligations of the party defeated in the judge's decision, to fulfill the achievements stated in the judge's decision. In other words, the execution of a judge's decision that has legal force remains the final process of civil or criminal proceedings in court.

This execution is the effort of the party won in the decision to get what is rightfully with the help of legal force, forcing the defeated party to carry out the ruling. It was further stated that the notion of execution or execution of a decision implies that the defeated party does not want to carry out the decision voluntarily, so the decision must be forced on him with the help of legal force.

In an effort to take collateral objects from the hands of a third party that is not yet known to exist, the Fiduciary Holder before conducting a civil suit can verify in the field until a specified time limit. The Fiduciary Holder has the right to take the object of fiduciary collateral if the Fiduciary does not fulfill his obligations even though he has been given a warning letter in accordance with Article 30 of the Fiduciary Guarantee Law which states that "Fiduciary is obliged to submit objects that are objects of fiduciary collateral in the execution of Fiduciary guarantees."

2. Legis Ratio of Execution of Fiduciary Guarantees According to Provisions of Article 30 of Law on Fiduciary Assurance Based on Justice in Fiduciary Guarantees

H. L. Hart is one of the legal figures who is quite well known in the tradition of legal positivism, distinguishing 2 (two) types of law, namely the primary legal type and the secondary legal type. Primary rules here emphasize more on an obligation to do something or not do something. Secondary rules explain what is a society's obligation that is required by a rule, through the stages of this procedure there are indicators like what so that a regulation can be known. The concept put forward by Hart which states the rules is called the system of rules, which as we know for positivists what is called law is what is called the rules contained in the laws and regulations. Hart's opinion on principle emphasizing these rules was sharply criticized by Ronald Dworkin. The criticism carried out by Dworkin was primarily aimed at a failure that explained the principle by saying, "*principle differ from rules in that whilst the letter are applicable in an all-or-nothing manner, the former are guidelines, starting a reason that argues in one direction, but (does) not necessitate a particular decision*".²

This criticism of Dworkin provides a clue that legislation actually has a legislative ratio why the legislation can be made and based on it will be guided in an implementation order to be able to realize the desired goals of the law. If the ratio legis can be known in a law as desired or aspired, it will greatly help law enforcers in solving a legal provision, including in this case the bureaucrats.³

Legislation must play an idea or the purpose behind it is justice. The law in this case is not only political bargaining in a political constellation in a representative institution, but behind all that must reflect the values of justice. Therefore the legislation of the provisions of the law must be examined which is the basis for the formation of statutory regulations so that the regulation is truly based on a philosophical law which is the goal of the regulation.

Likewise the provisions contained in the Fiduciary Guarantee Law stipulated in Article 30 must have actual meaning that reflects the values of justice, not only for one party but all parties involved in the fiduciary guarantee process, so that the desired values of justice can brought near or if possible, can be glued together.

Economic movements that require capital will certainly move the economic wheel and will contribute to development, so that due to the smooth acquisition of funds from financial and financial institutions, the problem is legal certainty. A guarantee institution grows because the community's need for credit is guaranteed by objects

¹ <https://catatandebtcollector.wordpress.com/2013/01/09/dasar-hukum-pengamanan-eksekusi-jaminan-fidusia/>, accessed on 3 August 2018.

² Phil Harris. *An Introduction to law*. (Cambridge, 2007), didalam <http://rachmatan.blogspot.com/2011/06/asas-asas-hukum.html>

³ *Ibid*

that are still used daily to make a living or for the interests of the debtor's business. Seeing this condition from the expert's point of view Some experts argue that fiduciary guarantee institutions can be used to meet people's needs, even though they are regulated in legislation. However, Article 1152 of the Civil Code must be abolished because pawning is not possible if the object guaranteed is kept by the debtor. While other legal experts argue that fiduciary guarantee institutions cannot be accepted because they are contrary to the mortgage guarantee institution. Even though among experts themselves there are still cross opinions about fiduciary institutions in practice it turns out that these fiduciary institutions have often been used by the banking community.¹

The context of making a fiduciary guarantee bill that was given a response by various factions in the House of Representatives that the basis of this preparation is a legal certainty against fiduciary guarantees with the existence of a registration to protect those who carry out fiduciary guarantees, especially creditors as parties providing capital loans with fiduciary guarantees. With the existence of a fiduciary guarantee institution, it can be overcome by the problems of the pawnshop institution that places the collateral object in the hands of the debtor so that it does not provide an opportunity for the debtor to use the collateral object in the context of its business activities. Based on this, of course, it can be explored that the existence of objects in the hands of debtors on creditor trust is an effort so that goods are used for productive activities especially movable goods or fixed goods which are not regulated by dependent rights so that the collateral object is still used for productive activities.

The purpose of the draft Fiduciary Guarantee Act was made that the existence of this Fiduciary Law was intended in order to fill the legal vacuum in the form of legislation relating to the guarantee of movable and immovable objects to facilitate the business world to obtain capital. The initial objective of this law is to raise the capital sector where the debtors, namely fiduciary givers, can obtain business capital without the capital goods transferred to internal creditors as in the pawnshop.²

The draft law on fiduciary guarantees provides fiduciary collateral as collateral for a debt bond having a special appeal, because the owner / object, which is guaranteed not to submit the object to the lender (creditor), so that the goods can still be used to support their business. This is a positive element in fiduciary guarantees. This draft law was born, in general, the object of fiduciary collateral is a moving object consisting of objects in inventory (inventory), objects of trade, accounts receivable, machine tools and motorized vehicles. Therefore to meet the needs of a growing community in terms of obtaining business capital, the object of fiduciary guarantees is given a broad understanding of tangible and intangible movable objects, and immovable objects that cannot be burdened with dependent rights.

In the Special Committee report In the level IV discussion on decision making concerning the Draft Law on Fiduciary Guarantees and the registration of the government formulation, the Fiduciary Guarantee Bill and "Registration" were omitted to become the Fiduciary Guarantee Bill only where the execution process was in accordance with the draft formulation Law, that is, if the debtor or fiduciary agent is injured in the promise of an object being executed, it will be used as a fiduciary guarantee, but if the fiduciary does not hand over the object that is the object of fiduciary collateral at the time of execution, the fiduciary recipient has the right to take objects that are objects of fiduciary collateral and if necessary can request assistance from the authorities, then this provision becomes Article 30 of the Fiduciary Guarantee Act.

One characteristic of the Fiduciary Guarantee contained in the Fiduciary Guarantee Act is that it is easy and certain to carry out its execution, if the debtor (fiduciary) fails. Although in general the provisions regarding the execution have been regulated in the applicable civil procedural law but in the provisions of the Fiduciary Guarantee Act it is deemed necessary to specifically include the provisions of execution in the Fiduciary Guarantee Act.

Before the Fiduciary Law was issued, there was no clarity about how to execute objects of fiduciary guarantees. Because there are no provisions to regulate it, many interpret the execution of objects of fiduciary collateral by using ordinary claim procedures (through court with ordinary procedures) that are long, expensive and also tiring. Although since the enactment of Law No. 16 of 1985, there was a younger procedure with execution under the hands. Besides the heavy conditions, the execution of the object of fiduciary guarantee under the hand is of course only applicable to the fiduciary that applies to the apartment. Therefore in law practice fiduciary guarantee execution is rarely done.³

This provision is well aware of the formators of the Fiduciary Guarantee Law, which is why one of the breakthroughs made by this Act is to take the pattern of execution of dependent Rights developed by the dependent Rights Law No. 4 of 1996; regulate fiduciary execution in a variety of ways, so that the parties can choose the execution model they want which in this case is contained in article 29 of the Fiduciary Guarantee

¹ *Ibid.*

² The Government's Answer to the General Session of the Faction of the People's Consultative Council of the Republic of Indonesia Concerning the Draft Law of the Republic of Indonesia Concerning Fiduciary Guarantees and Registrars in the presence of the Plenary Session of the House.

³ Munir Fuadi. *Jaminan Fidusia*. (Bandung : Citra Aditya Bhakti, 2000), pp. 57.

Act.¹

The ease in carrying out the execution is based on the provisions of Article 30 of the Fiduciary Guarantee Law in the case of the execution of fiduciary collateral the fiduciary is obliged to surrender the fiduciary object, wherein the fiduciary does not hand over the object as a fiduciary guarantee fiduciary guarantee and if necessary request assistance from the authorities. The ease of carrying out execution is certainly a very good breakthrough in order to protect the object of fiduciary collateral that is in the hands of debtors, this also relates to fiduciary collateral objects which are movable and movable movable objects so that they are very vulnerable to abused.

This convenience must certainly provide space for other parties who in this case are debtors to be able to provide an explanation or in other words the opportunity to pay off the debt guaranteed by the object of fiduciary collateral. Although the execution of direct fiduciary collateral execution is also possible in some practices in other countries, for example, the provisions of fiduciary execution in the United States allow the creditor to take on the object of fiduciary collateral himself, as long as avoiding breaking the peace. The goods may be sold in public or sold under the hands, provided they are carried out in good faith and in a commercially reasonable manner.²

The existence of this opportunity is due to the nature and purpose of the credit provided by the Fiduciary Law for capital and business, where fiduciary objects can be used for production activities or produce productively as explained by the government and views of the factions in the process of making Fiduciary Guarantee Act.

The condition in which the debtor cannot pay his obligations in a timely manner is of course influenced by various factors, but even so it still creates rights to the creditor or in this case the fiduciary recipient to carry out direct execution of the object of guarantee. This execution will have a significant impact on debtors who can no longer carry out their business in the context of carrying out their business activities to carry out production activities because the object of collateral has been executed by creditors who are granted the right by law.

The differentiation of the use of productive and consumptive credit is so important to do because as explained above that in the beginning the Fiduciary Guarantee Law was in order to obtain capital by pledging its production goods to be able to pay off debt installments or in other words used for productive credit, but in its development credit by using fiduciary guarantees not only capital for businesses but also for non-productive activities or only having a satisfying object of needs, this shift is certainly not a problem as long as the provisions contained in the provisions of the Fiduciary Guarantee Act and its supporting rules remain held.

This direct execution with non-productive credit will certainly not have a significant impact on the economic process and of course the obstruction or non-payment of the credit in question and not handing over fiduciary goods shows a bad faith in the mastery of fiduciary collateral objects. However, the condition where the object of collateral is productive credit must certainly be treated more leniently with direct execution is the last thing if the efforts taken are not carried out.

Moreover, basically the execution carried out on the basis of the debtor's refusal of questions from the Armed Forces of the Republic of Indonesia in the minutes of the formation of the Fiduciary Guarantee Bill that was answered by the government, the government stated that "of course because this certificate has sectorial means this implementation should still include results execution through the chief justice. So back again like other dependent rights deeds and mortgages, dependent rights and others, but it is expected to see article 27 in fact they immediately obey, the agreed upon and if they continue to refuse the only way they must submit an execution through the court, because of the nature of the fiduciary certificate this clearly has the strength as well as its execution as a court decision that has permanent legal force. This position means that even if the actions taken under Article 30 of the Law on fiduciary guarantees are the rights of the creditor and the obligations of the debtor, if there is a rebuttal and refusal from the debtor, the settlement must be submitted through the head of the local court.

3. Aspects of Justice for Creditors in the Framework of Protection for Productive Debtors

A feature that is very beneficial for creditors receiving fiduciary guarantees is that the fiduciary guarantee certificate contains words commonly called "For the sake of Justice Based on the One Godhead" (Article 15 sub 1), which are interpreted as containing executorial titles (Article 15 sub 2) and that means, that the fiduciary guarantee certificate has the same strength as a court decision that has obtained permanent legal force.³

Fiduciary guarantees that are not made a fiduciary guarantee certificate create legal consequences that are complex and risky. Creditors can carry out their execution rights because they are considered unilateral and can lead to arbitrariness from creditors. It could also be because considering that financing for goods of fiduciary

¹ *Ibid.*, pp. 142.

² *Ibid.*, pp. 141.

³ J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, (Bandung: Citra Aditya Bakti, 2002), pp. 255.

objects is usually not full in accordance with the value of goods. Or, the debtor has carried out a partial obligation of the agreement made, so that it can be said that above the item stands a partial right belonging to the debtor and partially owned by the creditor. Especially if the execution is not through an official price appraisal body or a public auction agency. These actions can be categorized as Unlawful Acts (PMH) as stipulated in Article 1365 of the Civil Code and can be sued for compensation.¹

A court decision is said to have obtained legal force that remains if the decision is no longer available. Thus, the person holding a fiduciary guarantee certificate is the same as a person who has won a case in court and for that decision, there are no ordinary legal remedies available, while the usual legal remedies are resistance, appeals and cassation. Because the contents of the principal agreement guaranteed by the fiduciary contain the obligation to provide a certain achievement, the fiduciary guarantee certificate is the same as the decision containing such an order and hence is condemnatory. By holding an executive title, then steps can be taken.²

In the Fiduciary Guarantee Act it is deemed necessary to specifically regulate the execution of Fiduciary Guarantees through the parate execution institution. If the debtor is injured in the promise according to Article 15 paragraph (3), the Fiduciary Recipient has the right to sell the object that is the object of the Fiduciary Guarantee of his own power. Then according to Article 19 paragraph (1) b, the sale of objects that are objects of Fiduciary Assurance itself is carried out through public auctions as well as taking repayment of accounts receivable from the sale of the object concerned.³

Parate Execution is execution that does not require an executive title, and therefore does not require court mediation, does not require bailiff cooperation and does not require confiscation. In an event like this it is said, that the creditor carries out the sale of his own power (*eigenmachtig verkoop*). The granting of such a large parate of execution authority can only be understood if we know the purpose of giving such great authority in the past. The execution of guarantees through the Court has been recognized for a long time and can cost a lot. If creditors hold special guarantees, they are not provided with a quick and cheap means to take payment of their bills, it is feared that official banks and financial institutions will be reluctant to give small loans to their debtors, because it is feared, that the cost of making repayment, will not be balanced with the amount of the bill.⁴ If the situation is left like that, it is feared that weak or small members of the community who need small / small loans are forced to flee to moneylenders, who are usually given bad nicknames, namely loan sharks. To avoid such a situation, then in the Civil Code (KUHP), creditors are legally given the opportunity to promise the parate of execution.⁵ Regarding legal protection, the creditor gets absolute legal certainty when the fiduciary guarantee is registered.

4. Legal Protection for Productive Debtors Against Execution of Fiduciary Guarantees by Justice-Based Creditors

The position of the debt guarantee holder as a separatist creditor is partly due to the waiting period which is also called the obligation to suspend the stay, which is an obligation for the creditor, the separatist creditor. During a certain time in the bankruptcy process may not execute its own guarantee of debt even though the debt is due. The waiting period in the Bankruptcy Act is 90 (nine) days in a bankruptcy case, and during the period of postponement of debt financing obligations, which does not exceed 270 days in postponing the payment obligation.⁶

It is necessary to suspend the execution of this debt guarantee in the bankruptcy process or the process of obligation to pay debt so that the bankruptcy process and postponement of debt repayment obligations can run well and do not harm the stakeholders of the company concerned, but of course the waiting period is deferred bankruptcy process or the process of delaying the obligation to pay debt, in essence it is the execution of the right of the collateral of the debt collaterals. Although there is an element of this justification, it will bring an unfortunate consequence to the separatist creditor. The justification of the waiting period for separatist creditors must be in accordance with the principles of justice, besides not being able to sacrifice other legal objectives, because justice is the main focus of the legal system. Therefore, justice in this case with regard to the waiting period to be able to execute the debt guarantee itself must be an important factor for the justification of the waiting period. The stay of the suspension of execution, the separatist nature of the creditor and the right of preference of the apprentice of the mortgage rights actually applies to the holders of other property rights including fiduciary.⁷

¹ Grace P. Nugroho, *Eksekusi Terhadap Benda Obyek Perjanjian Fidusia dengan Akta Di Bawah Tangan*, diakses dari <http://www.hukumonline.com/berita/baca/hol17783/eksekusi-terhadap-benda-objek-perjanjian-fidusia-dengan-akta-di-bawah-tangan>, 10 Oktober 2007, accessed on April 27, 2014.

² J. Satrio, *Op.Cit.*, pp. 256

³ Frieda Husni Hasbullah, *Hukum Kebendaan Perdata Hak-Hak Yang Memberi Jaminan Jilid II*, (Jakarta: Ind-Hill-Co, 2005), pp. 79

⁴ <http://repositori.usu.ac.id/bitstream/handle/123456789/435/137011118.pdf?sequence=1&isAllowed=y>

⁵ J. Satrio, *Op.Cit.*, hlm. 261

⁶ Munir Fuadi, *Hukum Jaminan Hutang.op.cit.*, pp. 53.

⁷ *Ibid.*, pp. 54-57.

One of the principles that applies to the postponement of execution is that there is no general guiding principle for delaying execution. There is no reason to delay a decisive execution. Therefore, it can be explained that the reasons for delaying execution of each case cannot be equated in other cases because there is no decisive standard of execution delays in each case. Arrangements for clear reasons that determine the postponement of execution do not exist because they are casuistic.¹

Yahya Harahap about delaying the execution stated that there was another principle that received attention. The principle is that execution delays are exceptional. This means that the execution of execution is an exception to the general principle of the law of execution. Delays in execution are called nature and are exceptional actions, because the action of delaying execution is a general rule of execution.²

Therefore, the stay is an opportunity given by the law to the debtor to carry out his performance. Based on this, in other words the debtor is given the opportunity to stay so that the object used as a fiduciary guarantee can still be used for productive purposes. Because the Fiduciary Law does not mention the existence of a special waiting period regarding productive credit, to protect debtors so that creditors do not automatically execute according to Article 30 of the Fiduciary Guarantee Act and do not provide an opportunity for debtors to seek funds for fulfilling his achievements.

Conclusions And Suggestions

1. Conclusions

One of the distinctive features of the Fiduciary Guarantee contained in the Fiduciary Guarantee Act is that it is easy and certain to carry out its execution, if the debtor (fiduciary) fails, especially the provisions of article 30 of the Fiduciary Guarantee Act. The ease of carrying out the execution is certainly a very good breakthrough in order to protect the object of fiduciary collateral that is in the hands of the debtor, this is also because the fiduciary object is a moving object that is easy to move and move so it is very vulnerable to use. This convenience, of course, must provide space to other parties, in this case, debtors to be given the opportunity to pay off their debts guaranteed by fiduciary guarantee objects. The existence of this opportunity will provide justice to debtors with productive credit due to the nature and purpose of credit provided by the Fiduciary Law for capital and business, where objects of fiduciary collateral can be used for production activities or produce things productively as government explanations and views factions in the process of making the Fiduciary Guarantee Act.

The form of protection for the rights of debtors with productive credit is that the debtor is given the opportunity for a waiting period so that the objects used as collateral for the fiduciary can still be used for productive purposes. Because the Fiduciary Guarantee Law does not mention the existence of a waiting period especially with regard to productive credit, to protect debtors so that creditors do not automatically execute according to Article 30 of the Fiduciary Guarantee Act and provide an opportunity for debtors to seek funds to fulfill their achievements, duration the waiting period under the bankruptcy law before the revision of the Fiduciary Guarantee Act is 90 days and does not exceed 270 days in delaying the payment of the debt.

2. Suggestions

The Fiduciary Guarantee Law must be preventive so that the rights of debtors must be protected from the outset since the fiduciary guarantee agreed upon a balance of treatment of debtor's rights so that fiduciary guarantees can be made on a balance of protection not only creditors but also debtors with productive credit. in the sense that there must be a clear line against the treatment of debtors who are productive and consumptive especially concerning Article 30 of the Fiduciary Guarantee Act.

Legislation itself as stated in the principle of justice in Law No. 12 of 2012 concerning the Establishment of Legislation, where the provisions of the Fiduciary Guarantee Law certainly must provide justice not only for creditors but for debtors, especially debtors with productive credit without violating the principles of the agreement and the provisions outlined by legislation.

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