

# Legal Protection of Creditors and Debtors through Fiduciary Security Registration

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## ABSTRACT

The fiduciary guarantees an agreement is collateral for the settlement of certain money. This fiduciary guarantee becomes a preferent for the creditor when this fiduciary guarantee is registered at the Fiduciary registration office. Article 11 of the fiduciary law is determined that the goods are located in the territory of the Republic of Indonesia and outside the territory of the Republic of Indonesia, which is bound by a fiduciary guarantee to be registered and therefore to the object of guarantee has the same power as the ruling of the Court judgment.

**Keywords:** Fiduciary Guarantee, Legal Protection. Creditors, Debtors

## INTRODUCTION

A fiduciary is one of the assurance bodies, which means the submission of the property of the trust, given by one party to the other, the transfer of property as a guarantee only for a debt. With this guarantee, the assurance object remains in the debtor for the smooth running of the business. According to Pardede (2006), this fiduciary guarantee is governed by law number 42 the Year 1999 on the fiduciary guarantee. In article 1 number 2 of fiduciary law states: the fiduciary guarantee is the right of the moving object both tangible and intangible and does not move in particular the bassman which cannot be burdened as intended in law No. 4 of 1996 on the rights of liabilities that remain in possession of fiduciary as collateral for the settlement of

certain debts, which give precedence to fiduciary recipients against other creditors.

Based on the fiduciary, the objects of fiduciary guarantee consist of two, namely: 1. Moving objects, both tangible and intangible. 2. Objects that are not moving, especially buildings that do not have the right to be liable.

The procedure for the imposition of the fiduciary is regulated in the provisions of Article 4 to Article 10 of the Fiduciary Law which is an access or of the principal agreement which creates an obligation for the parties to fulfil an achievement. Fiduciary security is made and outlined in a notarial deed that has been standardized by the government. In Article 11 of the Fiduciary Law, it is determined that objects that are in the territory of the Republic of Indonesia and outside the territory of the Republic of Indonesia. Those bound by fiduciary guarantees must be registered at the fiduciary registration office which is within the scope of the duties of the Ministry of Law and Human Rights. Fiduciary security is a follow-up agreement contained in a fiduciary guarantee deed as collateral for the payment of certain money. This fiduciary guarantee is preferred for creditors if this fiduciary guarantee is registered at the Fiduciary Registration Office. This case is because the preferred position is guaranteed due to registration.

In the registration of the fiduciary security, there is a requirement to state the objects that are the object of the fiduciary

guarantee. This case is very important to do because these items can be sold to get fiduciary debt payments. The object of the guarantee needs to be understood because the fiduciary security right is a material right attached to the fiduciary object and will continue to follow the object in the hands of whomever the object is (*droit de suite*) as long as the fiduciary guarantee has not been abolished/written off.

In a guarantee agreement, usually between a creditor and a debtor certain promises are agreed upon, which are generally intended to provide a strong position for the creditor and later, after being registered, are also intended to bind third parties. Therefore, it can be interpreted here that registration includes, both the registration of objects and the bonds thereof, all promises contained in the fiduciary security deed (which in Article 13 paragraph (2) b, are recorded in the register book of the Fiduciary Registration Office) and bind the third party.

Interpreting that what must be listed are all objects and bonds, will be very profitable. Thus, the guarantee bond and fiduciary promises become registered and thus can become the property of the fiduciary recipient, while the legal protection provided by the fiduciary guarantee agreement is binding on a third party (Satrio, 2002).

The description above shows that the parties to the fiduciary guarantee agreement, both the fiduciary recipient and the fiduciary under the fiduciary security law are equally given legal protection, for the protection provided in the form of use rights over the collateral object, and defaults of the guarantor will not cause the object. The guarantee under the Fiduciary Guarantee Act is the granting of preference rights over the receivables. The *droit de suite* principle applies to collateral objects, for third parties the publicity principle in the fiduciary guarantee agreement will provide information on the objects being diffused. However, according to Article 11 of the Fiduciary Guarantee Law, it is explained

that with a notary deed fiduciary agreement is not sufficient, but must be registered, notary deed is an authentic deed and can be a tutorial deed, in a fiduciary agreement a notary deed without registration does not give preferred rights for fiduciary recipients.

The comprehensive arrangement of fiduciary guarantees in the Fiduciary Law provides a very exact meaning and benefits in efforts to develop national law, as well as a manifestation of the answer to legal reform, particularly in the business world to settle bank loans or loans using fiduciary guarantees. With the construction affirmation in the Fiduciary Law that objects that become fiduciary collateral remain under the control of the debtor or fiduciary security provider, so that the debtor is not hampered from doing business and using collateral, can create a healthy and dynamic business and trade climate so that economic actors and business actors can develop and progress without neglecting their obligations. By registering the fiduciary guarantee, the principle of publicity is fulfilled. It is a guarantee of certainty for other creditors regarding objects that have been subject to fiduciary security. Fiduciary security is born on the same date as the date when fiduciary security is recorded in the Fiduciary Register Book. Registration of fiduciary guarantees is not only carried out for the holding of fiduciary guarantees but also includes amendments, transfers, and cancellations of fiduciary guarantees. The registration of the fiduciary guarantee, in addition to providing legal certainty to interested parties, also provides the recipient of fiduciary with priority rights over other creditors. The procedure for registering fiduciary security begins with the drafting of a fiduciary security deed by a notary which then registers at the Fiduciary Registration Office.

It is an interesting matter to examine under the title Legal Protection of Creditors and Debtors through Fiduciary Security Registration with a normative juridical

approach to analyze various laws and regulations governing fiduciary agreements and fiduciary guarantees.

## **DISCUSSION**

The fiduciary is the transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains under the control of the owner of the object. Fiducia, according to its origin, comes from the word fides which means trust. Following the meaning of this word, the legal relationship between the debtor (fiduciary) and creditor (fiduciary recipient) is a legal relationship based on trust (Widjaja and Yani, 2000). According to Tan Kamello (2006), the fiduciary has two meanings, namely as a noun and an adjective. As a noun, the term fiduciary means someone who is entrusted with taking care of the interests of third parties in good faith, full of thoroughness, being careful, and straightforward. The person who is entrusted is burdened with the obligation to take action for the benefit of others. As an adjective, the term fiduciary denotes the meaning of matters related to trust.

Objects of fiduciary security are movable and immovable property, tangible or intangible, except for mortgages, marine mortgages, aircraft mortgages, and pawns. The Fiduciary Security Law is likened to the provision of a universal sweep, so all objects, unless designated as objects of mortgage, mortgage, and pawning rights, can be diffused (Widyono, 2006). The registration function for a debt guarantee including fiduciary security is very important for the community so that the Fiduciary Security Law is issued to meet legal needs that can further spur national development and to guarantee legal certainty and be able to provide legal protection for interested parties, especially Article 11 of the Law. -The Fiduciary Law which was passed on September 30, 1999, regulates it by requiring objects encumbered with fiduciary security to be registered with an authorized official, namely at the

fiduciary registration office in the General Legal Service Sector, Regional Office of the Ministry of Law and Human Rights in each provincial capital based on the address of the fiduciary / debtor.

The principle of publicity as stated in the elucidation of Article 11 of the Fiduciary Law must be carried out because the fiduciary commits fiduciary re-fiduciary (Article 17 of the Fiduciary Law) and a Fiduciary Recipient who meets the requirements will be given a certificate of fiduciary guarantee as proof of ownership of collateral rights over the fiduciary material. Such registration must be carried out, because by registering the fiduciary guarantee in the Fiduciary Register Book, the date of registration is the date of birth of the right to pre-emptive guarantee or preference right, meaning that if the creditor has a fiduciary guarantee certificate, he has the right to take precedence over the debtor's fiduciary guarantee.

If the debtor has debts everywhere and there are many fiduciary recipients, what takes precedence is the registration of the fiduciary security. If not registered, then they will not have the right to be prioritized, both in bankruptcy and in liquidation. The precedence shall be calculated from the date of registration of the object, which is the object of fiduciary security at the Fiduciary Registration Office (elucidation of Article 27 of the Fiduciary Law). Therefore, it is also necessary to record the date and time of registration in the registration in the Fiduciary Register Book, as stated in the explanation of Article 5 paragraph (1) of the Fiduciary Law. In Article 11 in conjunction with Article 13 in conjunction with Article 15 of the Fiduciary Law stipulates that objects (existing in the territory of the Republic of Indonesia or outside the Republic of Indonesia) which are burdened with fiduciary security must be registered at the Fiduciary Registration Office whose registration application is submitted by the Fiduciary Recipient with taking into account the requirements as stated in Article 13 and upon the granting of the application for

registration, the recipient of a fiduciary is given a Fiduciary Guarantee Certificate which uses the order of Justice Based on Almighty Godhead which date is the same as the date of receipt of the fiduciary registration of titles.

The recipient of this fiduciary can be a person or several people jointly (for example in the consortium of lending as mentioned in the explanation of Article 8); however, re-fiduciary guarantees are not permitted, meaning that the fiduciary may no longer guarantee the object of fiduciary collateral for other debt fiduciary guarantees ( Article 17 of the Fiduciary Law).For the first time in the history of Indonesian law, there is an obligation to register fiduciary with the competent authority. This obligation is based on Article 11 paragraph (1) of the Fiduciary Law, which reads: Objects that are burdened with fiduciary guarantees must be registered.

Etymologically, because what is registered is the object, the fiduciary security registration system does not use the theory of the registration system in general, namely the registration of deeds system (that what is registered is a legal act) or the registration of title system (what is registered is the right). However, if seen in Article 13 paragraph (2) of the Fiduciary Law, the registration system adopted is a registration of title system similar to the insurance rights registration system in the Mortgage Rights Law. The absence of registration obligations is felt in practice as a weakness and weakness for fiduciary legal institutions because, in addition to causing legal uncertainty, the obscurity of registration obligations causes fiduciary guarantees not to fulfil the element of publicity so that it is difficult to control, can lead to unhealthy things in practice such as fiduciary. Twice / repeat without the creditor's knowledge, there is a transfer of fiduciary goods without the knowledge of the original creditor. With the obligation to register fiduciary security, it is hoped that it can provide legal certainty and in the fiduciary guarantee it is a material

guarantee. With the registration of the positions of the parties, it will be more protected; it is hoped that business actors and the general public can find out whether an object has been subject to fiduciary security or not.

Fiduciary registration is carried out for the following matters: (1) Objects of fiduciary security that are in the country (Article 11 paragraph (1), Fiduciary Law). (2) Objects of fiduciary security that are outside the country (Article 11 paragraph (2), Fiduciary Security Law). (3) Regarding changes to the contents of the Fiduciary Guarantee Certificate (Article 16 paragraph (1), Fiduciary Law). This change does not need to be made with a notary deed, but it needs to be notified to the parties.

Fiduciary security must be registered, as stipulated in Article 11 of the Fiduciary Law. With this registration, the Fiduciary Law fulfils the principle of publicity which is one of the main principles of property guarantee law. This provision is made with the aim that the object that is used as the object of collateral is really the property of the debtor or the fiduciary so that if another party wants to claim the object, he can find out about it through the announcement. Registration of guarantee bonds that have been valid in Indonesian law is the registration of guarantee bonds for registered objects. What is meant by registration in the Fiduciary Security Law is not the registration of collateral but the registration of the guarantee bond. Fiduciary institutions are a symptom of the law that provides benefits for their users, especially to smooth credit repayments and do not weaken potential credit recipients.

The provisions of Article 11 of the Fiduciary Law stipulate that objects that are subject to fiduciary security must be registered; in fact, many objects that are subject to fiduciary security are not registered. This case occurs because there is a weakness in the article where there are no sanctions for not being registered, the period of registration of a fiduciary deed is also not determined. No provision says that if the

fiduciary bond is not registered, then the fiduciary guarantee bond is invalid. Fiduciary creditors/recipients who do not register their guarantee bonds can still base their rights on the agreement of the parties in the guarantee bond agreement, customary law, and jurisprudence.

The main breath of fiduciary security with the obligation to register at the Fiduciary Registration Office is a preferred giver to the fiduciary recipient of other creditors who are certain, absolute and complete because this fiduciary guarantee is known in civil law as giving the party the fiduciary the right to retain control over the object, which becomes the object of a fiduciary guarantee based on trust. This case is followed by a registration system to provide guarantees to the recipient of the fiduciary. Moreover, parties who have real and definite, concrete interests in the objects/goods (Ridwan, 1999).

The registration of the fiduciary security gives the fiduciary pre-emptive rights to the other creditors, and this right is given to the creditor who was previously granted the fiduciary guarantee deed which had registered it earlier. This case is done to prevent the same object from becoming the object of fiduciary security for other creditors. Registration of fiduciary security has a very important meaning, especially for collateral for unregistered movable objects, considering that it is not easy to prove who the owner is. Because of these movable objects, the provisions of Article 1977 KUHPP apply which stipulate that whoever controls movable objects is the owner. With the existence of registration, the material rights arising from the imposition of the fiduciary guarantee provide legal protection for creditors, which previously this fiduciary guarantee institution was less attractive to creditors. By registering fiduciary guarantees to provide better legal protection for interested parties. Protection of creditors or fiduciary recipients by providing a sense of security to ensure the return of the money, guaranteeing the payment of debtor's obligations at a predetermined time

agreed upon in advance between the creditor and the debtor.

According to Satrio, (2002), several principles adopted in the Fiduciary Guarantee Law are: (1) The principle of legal certainty; (2) The principle of publicity; (3) The principle of equal protection; (4) The principle of accommodating practical needs; (5) The principle of authentic writing; (6) The principle of granting a strong position to creditors.

One of the ways to protect the interests of creditors (fiduciary recipients) is to provide specific provisions for creditor rights. The complete arrangement of data that must be contained in the fiduciary guarantee deed (Article 6 of the Fiduciary Law), indirectly provides a strong grip on creditors as fiduciary recipients, particularly regarding which bills are guaranteed and the amount of collateral value, which determines how big the creditor's bill is preferred. Legal protection for creditors' interests in the Fiduciary Law can be seen in Article 20: Fiduciary security still follows the objects that are the object of fiduciary security in the hands of whomever the objects are in, except for the transfer of inventory objects that are the object of fiduciary security. This provision confirms that the fiduciary security has a material nature and applies to it the *droit de suite* principle, except for the transfer of inventory objects which are the object of the fiduciary guarantee.

Protection of creditors can also be seen in Article 23 paragraph (2): The fiduciary is prohibited from transferring, pawning, or renting to other parties objects which are objects of fiduciary security which are not inventory objects, except with prior written consent from the fiduciary recipient. Article 24: The fiduciary does not bear any liability for the consequences of the act or negligence of the fiduciary either arising from a contractual relationship or arising from illegal activity in connection with the use and transfer of objects that are the object of fiduciary security R. Soebekti

(1991) argues that violations of the transfer a criminal offence can punish the object of fiduciary security on a third party for committing the crime of embezzlement. That is because according to him, the debtor is no longer the owner.

According to Soepratignja, this opinion did not solve the problem completely because the transfer did not erase the civil aspect. Following the principle of *Nemo plus*, the debtor is not authorized to give up *eigendom* (full) rights over goods that are the object of fiduciary. He only has empty *eigendom* rights over these items. Therefore he can only hand over his empty *eigendom* rights to others. However, if he also surrenders the *eigendom* (full) rights to the said goods to a third party, then because this delivery is about movable property not on behalf of, the third party in good faith must be protected. Creditors must run the risk of being untrustworthy. Regarding this, if the debtor does not fulfil his obligations to maintain fiduciary goods properly or if he abuses the trust that has been given by the creditor to him, then he is obliged to replace it with goods of the same type and value or pay compensation to the creditor, for reducing or eliminating them-creditors receivable guarantee (Fuadi, 2000).

Sanctions for the above provisions are criminal as referred to in Article 36 of the Fiduciary Guarantee Law: Any person who deliberately falsifies, changes, removes or in any way provides misleading information, which if it is found out by one of the parties does not give birth to a fiduciary guarantee agreement. , shall be sentenced to imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp. 10,000,000.- (ten million rupiah) and a maximum of Rp. 100,000,000.- (one hundred million rupiah). For all actions and negligence of the fiduciary, the fiduciary recipient is not responsible because of the negligence as referred to in Article 24 of the Fiduciary Law. The recipient of the fiduciary does not

bear any liability for the consequences of the act or negligence of the fiduciary either arising from a contractual relationship or arising from illegal acts in connection with the use and transfer of objects that are the object of fiduciary security.

The purpose of the fiduciary guarantee agreement in terms of legal protection for creditors is to give privileges or precedence for them to pay off debtors' debts to them (*schuld* and *haftung* principles). A debtor who has paid off a creditor's debt to a higher level creditor based on the precedence/preference, the creditor is automatically deemed to replace his position immediately and also all the privileges of the higher level creditor (Fuadi, 2000). Furthermore, the legal protection of the right to take precedence can be seen in the provisions of Article 27 of the Fiduciary Law:(1) A fiduciary has precedence over other creditors.(2) The priority right as referred to in paragraph (1) is the right of the fiduciary to collect the payment of his / her debt on the result of the execution of objects that are the object of fiduciary security.(3) The rights that take precedence and the recipient of fiduciary are not cancelled due to bankruptcy and or liquidation of the fiduciary.

The creditors of the fiduciary holders are preferred creditors. Like Mariam Darus Badruzaman (1994), fiduciary owners have preference rights. If the provider of the fiduciary guarantee goes bankrupt, then the fiduciary property will not be included in the bankruptcy budget. The owner of the fiduciary security has the right to sell fiduciary goods to settle the debt. Sri Soedewi Masjchoen Sofwan (1997), The fiduciary agreement is *zakelijk*; therefore, it will give birth to legal consequences such as mortgage and pledge property rights in the case of bankruptcy. Oey Hoey Tiong (1999), a fiduciary recipient, like other recipients of material guarantees, has two main rights, namely other rights and property rights. R Subekti (1991) states that the position of a fiduciary is as a material right, which is a right that

gives direct power over an object and applies to everyone, especially giving preference to a creditor over other creditors. Hamzah A. and Senjun Manulang (1997), fiduciary holders, including creditors with strong positions and holders of inherent separatist rights.

Overall, several things that can indicate the existence of legal protection for creditors (fiduciary recipients) according to the Fiduciary Law include; 1. There is a fiduciary guarantee registration agency, which is none other than to guarantee the interests of the party receiving fiduciary; 2. There is a prohibition against the grantor of fiduciary duty to refusing the object of fiduciary security (Article 17); 3. There is a provision that the fiduciary is not allowed to transfer, mortgage, or lease (Article 23 sub 2); 4. There is a provision that the issuer of the Fiducia is obliged to surrender the collateral object if the creditor wishes to execute the object of the fiduciary guarantee; 5. The existence of criminal provisions in the Fiduciary Law.

The most important thing about credit guarantee rights for creditors is to provide convenience and authority to sell the collateral given and to execute by the intention and function of the credit guarantee, strictly without going through a parate execution program and without a request for a decision from the court and can be directly implemented by creditors. Because in a fiduciary guarantee basically there has been a transfer of property rights. Protection for debtors can be affirmed that the fiduciary or the debtor retains ownership rights over the object that is burdened with fiduciary security in the real sense when the debt is paid off, and the creditor does not acquire real ownership rights, such as sale and purchase. Legal protection for debtors can be seen in several articles in the Fiduciary Law, as follows:

**Article 29:**

(1) If the debtor or provider of fiduciary breaches, the execution of the object, which is the object of fiduciary security can be

carried out by a). Implementation of the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient; b). sale of objects which are the object of fiduciary security on the authority of the fiduciary himself through a public auction and collect the receivables from the sale proceeds; c). Underhand sales are made based on an agreement between the giver and recipient of fiduciaries if in this way the highest price that is favourable to the parties can be obtained.

(2) The sale as referred to in paragraph (1) letter c shall be made after 1 (one) month has passed since being notified in writing by the fiduciary giver and / or recipient of the fiduciary to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned. Article 32 Fiduciary Law: Any promise to carry out the execution of objects which are the object of fiduciary security in a manner contrary to the provisions referred to in Article 29 and Article 31 is null and void by law.

Several provisions in the Fiduciary Guarantee Act which can indicate that this law also provides legal protection for debtors as fiduciary are: (1). There is an affirmation (Article 4) which states that the fiduciary agreement is an *accessoir*, this can indirectly protect the rights of the fiduciary (the debtor) over the collateral object because by abolishing the repayment of the principal agreement, the fiduciary guarantee agreement automatically becomes deleted (Article 25). This case means that ownership rights to fiduciary collateral automatically return to the debtor (fiduciary recipient) to retain control over the pledged object to carry out business activities financed from loans obtained using the fiduciary guarantee. (2). The imposition of fiduciary through a notarial deed is also a manifestation of the legislators' attention to the interests of debtors (fiduciary); through advice and reading of the deed of granting fiduciary before signing is one way to avoid giving guarantees recklessly; (3). The existence of provisions regarding the execution of collateral (Article 29) is an

important protection of the rights of the fiduciary because with these provisions it becomes clear that so far it is necessary to protect his interests as creditors only; (4). The existence of the provisions of Article 29 sub 1 c and Article 31 of the Fiduciary Law increases the opportunity to get a good price for collateral, which is of course very beneficial to the fiduciary. With a fiduciary guarantee, the need for credit secured by movable objects without releasing the goods that are used as collateral, so that the debtor can still use the guaranteed goods.

In the elucidation of the Fiduciary Guarantee Law, in addition to accommodating the needs of existing practices, it also wants to provide legal certainty to interested parties by carrying out future fiduciary security registration obligations if not registered will receive legal sanctions following applicable legal provisions. In line with the principle of providing legal certainty, the Fiduciary Security Law adopts the fiduciary guarantee registration principle. The registration is expected to provide legal certainty to both the fiduciary and the recipient.

## CONCLUSION

The imposition of fiduciary security must be made with a Notary Deed in Indonesian. The imposition of this fiduciary guarantee must be registered at the Fiduciary Registration Office. The obligation is in terms of binding fiduciary guarantees and fiduciary registration so that the object of the guarantee is binding and has the same executorial power as a court decision. Article 11 paragraph (1) of the Fiduciary Law can be effective if there is awareness from business actors about the importance of registration of fiduciary guarantees where legal protection will arise from registration and the absence of strict sanctions by imposing fines if not registered. The obligation to register fiduciary guarantees in terms of legal certainty will be achieved if the Fiduciary Law is first perfected by including strict sanctions in the form of criminal fines

against objects bearing fiduciary security that is not registered and the registration period after the fiduciary deed is drawn up to obtain legal certainty where it is obtained only through fiduciary security registration at the Fiduciary Registration Office.

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#### Regulation

- Kitab Undang-Undang Hukum Perdata
- Undang-undang Nomor 4 Tahun 1996 tentang Hak Tanggungan
- Undang-Undang Nomor 10 Tahun 1998 tentang Perbankan
- Undang-undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia

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