



Legal Protection of Creditors of Fiduciary Guarantee Holders for the Transfer of Fiduciary Guarantee Objects by Debtors

Maya Redanti Wirastuti

Email: mayaredanti@student.ub.ac.id

Brawijaya University Malang, Indonesia

Amelia Sri Kusuma Dewi

Email: Amelia_dewi@ub.ac.id

Brawijaya University Malang, Indonesia

Djumikasih

Email: kimujd@ub.ac.id

Brawijaya University Malang, Indonesia

Abstract: The transfer of fiduciary collateral objects by debtors without creditor approval is increasingly common due to the weakening economic conditions of debtors. This study aims to examine the legal protection for creditors holding fiduciary collateral against the transfer of collateral objects by debtors. The research method used is socio-legal research. The study finds a misalignment between existing laws and these legal events, leading to sanctions and criminal threats for debtors in breach. Creditors have the right to file lawsuits in the District Court against debtors for actions detrimental to the creditors. The study concludes that legal protection for creditors in fiduciary collateral transfer cases by debtors needs enhancement, both through regulatory improvements and by increasing the capacity of law enforcement to handle such cases.

Keywords: *Fiduciary collateral; Transfer; Creditor; Legal protection; Breach of contract*



INTRODUCTION

Fiduciary guarantees play a vital role in the Indonesian financial system, providing security for creditors and facilitating access to credit for debtors. These guarantees involve a legal arrangement where the debtor retains the use of the collateral, while the creditor holds the ownership rights until the debt is fully repaid. This system supports the increasing demand for goods and services, enabling individuals and businesses to finance their needs through credit facilities offered by financial institutions. With the increasing role in bank or *non-bank* financing institutions, it shows that the level of people's needs in the form of goods and services continues to increase. This condition is a great opportunity to open a business for business actors providing financial service facilities (*leasing*) in the form of banks and non-banks to be able to attract profits from the increasing needs of the community in the form of consumption of goods and services.¹ Thus, people who will buy goods that will then be needed or desired, then do not need to provide large funds to buy them. Which then this can be overcome by using financial service facilities (*leasing*) using a credit system or installments.

In Indonesia, the high standard of living has led to an increased role for financial institutions, both banks and non-banks, in providing financing services. These institutions offer credit facilities that allow consumers to purchase goods and services without needing large upfront funds. Instead, they can pay in installments, using collateral objects as security for the loans. This system has become crucial as it addresses the growing needs of the community and supports economic activities by providing the necessary financial resources. Objects used as objects of fiduciary guarantees must adhere to the principles used in the law of guarantees, the law of binding, and financing institutions, as well as those related to the execution of guarantees, as well as related to the guarantee coverage provided by financial institutions (*finance*).

In research conducted on Indonesian society, not all business people or household needs can meet their needs in cash. So that the existence of financing institutions can help and facilitate business actors and community household needs to meet the needs that must be met. In this case, the credit guarantee provided by the debtor must be able to fulfill the function as an object of

¹ "Perkembangan Hukum Jaminan Di Indonesia / Dr. H. Salim HS., S.H., M.S. | OPAC Perpustakaan Nasional RI," accessed June 15, 2024, <https://opac.perpusnas.go.id/DetailOpac.aspx?id=374742>.



guarantee and must pay attention to the guidelines governing the law of guarantee.² Credit facilities provided by financial institutions involve lending money to individuals or businesses, with the debtor offering a fiduciary guarantee. This guarantee must comply with legal principles related to collateral, binding, institutions, execution, and coverage. The objects used as fiduciary guarantees must adhere to these principles to ensure the security and legality of the transaction. The credit agreement, which outlines the terms of the loan, must be legally binding and provide protection for both parties involved.

PT BPR Raga Surya Nuansa, a rural bank in Ponorogo Regency, exemplifies the role of financial institutions in providing credit facilities. As a business entity owned by the Muhammadiyah Association, this rural bank focuses on lending to Micro, Small, and Medium Enterprises (MSMEs). Unlike commercial banks, BPRs have a narrower scope of activities, primarily serving lower-middle-class communities in both rural and urban areas. However, they face risks, including the challenge of bad credit, which can impact their financial health.

In fact, almost all banks are not free from the risk of loss. The deterioration of the level of banking health conditions is caused by many diverse factors, especially in the problem of bad credit. So it should be noted that the level of health of a bank must be considered for the smooth operation and progress of the Company. Based on Law Number 10 of 1998 concerning Banking, it explains that banks can be divided into Commercial Banks and Rural Banks (BPR). Commercial Banks are business entities that are conventionally or based on sharia principles which in their activities provide services in payment traffic (*commercial bank / full service bank*). The legal framework for fiduciary guarantees in Indonesia requires that these agreements be made in writing and authenticated by a notary. This ensures legal certainty and provides protection for the parties involved. According to Article 5 paragraph (1) of the Fiduciary Guarantee Law, the encumbrance of objects with fiduciary guarantees must be notarized and include detailed information about the transaction. This legal requirement helps mitigate the risks associated with fiduciary guarantees, as the object of the guarantee remains in the debtor's possession.

Fiduciary as a guarantee that regulates the relationship between the creditor and the debtor to bind each other and the debtor to pay the price in installments based on an agreement or agreement regarding the object, price, and method of

² "Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia / M. Bahsan | Perpustakaan Mahkamah Konstitusi," accessed June 15, 2024, <https://simpus.mkri.id/opac/detail-opac?id=7944>.



payment. The fiduciary guarantee agreement is an *accessoir agreement*, which is an additional agreement that follows the main agreement. This causes the fiduciary guarantee agreement to not be able to stand alone because it depends on the circumstances of the main agreement.³ With the enactment of an additional agreement in this fiduciary guarantee, if the main agreement ends, the additional agreement will also end or be deleted. This shows that there is no agreement in the fiduciary guarantee that does not have a principal guarantee. Despite the legal safeguards, violations by debtors are common, particularly the unauthorized transfer of fiduciary guarantee objects to third parties. This practice complicates the execution of guarantees and can lead to financial losses for the creditor. At PT BPR Raga Surya Nuansa, such violations have resulted in difficulties when debtors default on their agreements. The need for funds often drives debtors to transfer the collateral without notifying or obtaining approval from the creditor, highlighting a significant area of concern.

Agreements in fiduciary guarantees are made legally and in writing, then set out in an authentic deed made by a Notary. Notary is a public official authorized to make authentic deeds regarding actions, agreements and stipulations which are then set forth in a deed, which guarantees certainty regarding time in detail. The entirety of these interests is set forth as long as the making of the deed is by a general regulation and is not also assigned to another official.⁴ In terms of legal certainty, the fiduciary security deed must be in the form of a notarial deed. Because the existence of the fiduciary guarantee object is in the hands of the fiduciary, which causes a high risk that must be accepted by the fiduciary. This is regulated in Article 5 paragraph (1) of the Fiduciary Guarantee Law, which states that the encumbrance of objects with fiduciary guarantees is made by a notary using the Indonesian language. In addition, it must include details regarding the day, date, and hour. The making of a Fiduciary Deed by a notary has the purpose of protecting each interest that has permanent legal force with perfect proof.

The obligation to register fiduciary guarantees provides legal certainty to interested parties and the registration of fiduciary guarantees gives preference to the fiduciary recipient against other creditors. The registration of fiduciary guarantees is regulated in Article 11 of the Fiduciary Guarantee Law, namely:

³ Author Munir Fuady, "Jaminan Fidusia," Universitas Indonesia Library (Citra Aditya Bakti, 2003), <https://lib.ui.ac.id>.

⁴ Gede Wahyu Adipramartha Adam Jose Sihombing, "Kewajiban Notaris Membacakan Akta Autentik Bagi Penghadap Disabilitas Rungu," *Jurnal USM Law Review* 7, no. 1 (2024), <http://dx.doi.org/10.26623/julr.v7i1.8489>.



1. Objects encumbered with fiduciary security must be registered.
2. In the event that the object encumbered with fiduciary security is located outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) shall still apply.

Since the registration is done, by law, the property right passes from the debtor to the creditor and at the same time, the debtor has the right to borrow and use the collateral object until the debt covered by the collateral object is paid off. When the fiduciary security object is registered, the legal title passes from the creditor to the debtor over the security object until the debt owed by the debtor is paid in full. To address these violations, stricter enforcement of the Fiduciary Guarantee Law is necessary. Financial institutions must ensure that debtors understand the legal implications of unauthorized transfers and the consequences of defaulting on their loans. Enhanced monitoring and legal action against violations can help protect creditors and maintain the integrity of the fiduciary guarantee system.

However, in the facts in the field, namely at BPR Raga Surya Nuansa, there are still several debtors who make defaults in the form of transferring the object of fiduciary guarantee to third parties, making it difficult to execute. This results in losses to the BPR if the debtor actually defaults on the agreement agreed upon by each party. Based on the explanation of the background of the problem above, in the implementation of Law Number 42 of 1999 concerning Fiduciary Guarantees, there are still many discrepancies with the applicable regulations, both violations committed by the creditor (fiduciary recipient) and the debtor (fiduciary giver). In the research that will be discussed by the author, it will discuss violations from the debtor's side. One of the violations that is often committed by the debtor is the transfer of the fiduciary security object to another party without notification and approval from the creditor. One of the factors that causes one of them is because the debtor needs funds to evict him. So that in the event of default and bad credit, the creditor has difficulty executing the fiduciary security object.

THEORETICAL BASIS

In a legal writing, of course, using a sustainable legal theory to analyze the legal issues that have been discussed. So that in this legal writing, the theory that underlies this writing is Law Enforcement Theory.

1. Law Enforcement Theory

Law enforcement is an effort to realize certainty, usefulness and justice in law. Enforcement in the Big Indonesian Dictionary comes from the word

551



This work is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-nc-sa/4.0/).

"upright", which means standing, alert, straight up, firm, and unchanged. Law enforcement in Dutch is referred to as *rechtstoepassing* or *rechtshandhaving*.

In accordance with law enforcement in Indonesia, good law enforcement should refer to the principles of democracy, legitimacy, accountability, protection of human rights, freedom, transparency, power sharing and control in society. Law enforcement is an effort to *carry out* legal functions and norms in real terms in realizing Indonesia's role as a legal state. Law enforcement is a process that involves many things.⁵

According to Badra Nawawi Arief, law enforcement is an entire series of activities to organize a balance between the rights and obligations of all Indonesian citizens as well as accountability for the functions of law enforcement fairly, evenly, and in harmony with regulations and laws which are the embodiment of Pancasila and the 1945 Constitution.⁶

According to Satjipto Raharjo, law enforcement is essentially the enforcement of ideas or concepts about justice, truth, social benefits, and so on. According to Soerjono Soekanto, law enforcement is an activity of harmonizing the relationship of values that are spelled out in rules / views of values that are stable and manifest and attitudes of action as a series of final stage value elaboration to create, maintain and maintain peaceful living relationships. Here are some aspects that need to be considered in law enforcement according to Satjipto Raharjo⁷ :

- a) Law enforcement aimed at crime prevention requires protection for the community from anti-social acts that can harm and endanger society.
- b) Law enforcement that aims to improve or try to change behavior that was originally bad to be good, obedient to the law and useful to society.
- c) Law enforcement aims to prevent arbitrary actions, so protection is needed for the community against abuse of sanctions or reactions from law enforcement and from society in general.
- d) Law enforcement must be able to resolve conflicts, restore balance and bring back a sense of peace in society. So the need for protection for the

⁵ A. Absori, *Hukum Penyelesaian Sengketa Lingkungan Hidup; Sebuah Model Penyelesaian Sengketa Lingkungan Hidup Dengan Pendekatan Partisipatif* (Surakarta: Muhammadiyah University Press, 2009), <https://publikasiilmiah.ums.ac.id/xmlui/handle/11617/9399>.

⁶ Prof Dr Barda Nawawi Arief S.H, *Bunga Rampai Kebijakan Hukum Pidana* (Prenada Media, 2016).

⁷ Rahardjo Satjipto, "Ilmu Hukum," *Citra Aditya Bakti, Bandung*, 2000.



community against the balance or harmony of various interests and values that are disturbed as a result of crime.

According to Wayne La Favre in Soerjono Soekanto's book entitled *Factors Affecting Law Enforcement*, law enforcement is a process that is basically an application of discretion which involves making decisions that are not strictly regulated by legal rules, but have elements of personal judgment.⁸ Law enforcement is part of realizing the idea of justice so that legal objectives can become a reality.

Law is a driver and behavioral guide that must be obeyed by all Indonesian people. Law as a guide to human behavior and has a compelling nature to implement existing values, in accordance with applicable laws and regulations. Law enforcement is basically concerned with efforts to apply the law to legal events or deviations and violations of the laws that apply in society. Law enforcement deals with several aspects, including justice, expediency and legal certainty.⁹

Law enforcement is concretely the enactment of positive law in a real and proper manner. In essence, law enforcement is the embodiment of values and rules that contain legal norms and legal truths. In social reality, law enforcement is not only the duty of law enforcers, but also the duty of every individual. However, in relation to public law, it is the government that is responsible for law enforcement. In a narrow sense, law enforcement is defined as the efforts of certain law enforcement officials to guarantee and ensure that the law runs as it should. While in a broad sense, law enforcement includes the value of justice in which there are formal rules and values that apply widely in society. Law enforcement seen from the subject is an effort to guarantee and ensure that the rule of law can run as it should. Meanwhile, when viewed in terms of objects, law enforcement is only related to the enforcement of formal and written regulations.

The essence of this law enforcement theory is to harmonize the relationships and norms described in the rules that apply in Indonesia, in order to realize the value of law in the State of Indonesia which can ensure the harmony of the entire community. The use of legal remedies, is one of the efforts that can be used to overcome social problems. Law enforcement is an effort to realize ideas in justice, certainty and social benefit into reality. Thus, law enforcement is essentially a process of realizing ideas. Law enforcement is an effort to realize the

⁸ Soerjono Soekanto, "Penelitian Hukum Normatif: Suatu Tinjauan Singkat," 2007.

⁹ Sudikno Mertokusumo, "Mengenai Hukum Suatu Pengantar, Liberty," 2005.



ideas and concepts of law that society expects to become a reality, and in law enforcement is a process that involves many things.

The relationship between law enforcement theory and this writing is that there is a problem found in case handling, namely the transfer of rights to fiduciary guarantees made by debtors without the knowledge of creditors. The existence of legal theory can be recognized if the values and morals contained in the law can be implemented or not.¹⁰ The success of law enforcement will be a barometer in the legitimacy of law in the midst of social reality.

Law is created so that justice can be implemented in legal relationships. If there is a legal subject that does not comply with its obligations in carrying out legal obligations or has violated the legal rights of other subjects, the subject that does not comply with the obligations and violates the rights will be given responsibility and demands to restore or return the rights that have been violated. The legal subject in this case is a person, legal entity or government.

Law enforcement theory can run well if law enforcement agencies and officials have the capacity and quality that can support law enforcement efforts. The community really expects benefits in the implementation of law enforcement. Because people who get good treatment will realize a peaceful situation and achieve legal goals easily. Law enforcement must use the right line of thought with evidence to realize legal justice and legal content. Legal issues will become real when the legal instruments properly implement the rules that have been made. So that there is no abuse of the rules and laws that have been carried out systematically. Which means that it is still based on the norms that apply to society in order to realize legal certainty and legal justice.¹¹

2. Legal Protection Theory

In the Big Indonesian Dictionary (KBBI), protection comes from the word *lindung* which means to protect, prevent, defend and fortify. In general, protection means to protect, prevent, defend and fortify something from harmful things, which can be in the form of interests or objects. Based on this, legal protection can be defined as protection using legal institutions and legal means. Legal protection is to provide protection to human rights that are harmed by others, and is a protection given to the community so that the community can enjoy all the rights granted by law. Legal protection is also protection given to legal subjects in the form of preventive and repressive, written or unwritten. In

¹⁰ H Zainuddin Ali, *Sosiologi Hukum* (Sinar Grafika, 2023).

¹¹ H. Ishaq, *Metode penelitian hukum dan penulisan skripsi, tesis serta disertasi* (Bandung: Alfabeta, 2017).



other words, legal protection is a description of the function of the law itself, which can provide justice, order, peace, benefit and certainty.

According to Soetiono, legal protection is an action or effort to protect people from arbitrary actions by the authorities that are not in accordance with the rule of law, in order to create order and peace so as to enable humans to enjoy their dignity as human beings. According to CST Kansil, legal protection is a variety of legal efforts provided by law enforcement officials to provide a sense of security, both in mind and physically from disturbances and various threats from any party.

Legal protection is all efforts to fulfill rights and provide assistance to provide security to witnesses and / or victims. Which legal protection can be realized in various forms, namely through the provision of compensation, services to legal assistance. Legal protection is protection given to legal subjects, in this case humans and legal entities and can take the form of preventive and repressive. Legal protection is a result of the success of legal norms in Indonesia, which provides justice, certainty, legal benefits that produce prosperity and peace in the Republic of Indonesia. Thus proving that the law is a reflection of the rules that apply in human life and are realized through real action.¹² Legal protection is defined as protection using legal means. Thus, in providing legal protection, several ways can be done including¹³ namely making regulations (*by giving regulation*), which aims to:

- a. Agree on rights and obligations;
- b. Guarantee the rights of the subjects of law

In this regard, the theory of legal protection aims to integrate and coordinate interests in society, because certain cross-interests can only be carried out by limiting interests on the other side. Therefore, legal protection is one of the media to enforce regulations and protect the injured party. So it can be concluded that *legal* protection is an effort that is enforced to maintain benefits in Indonesia. Law functions as a protection of human interests that must be carried out professionally. Legal certainty is a legal protection against arbitrary actions. Law can protect the rights and obligations of each individual in the implementation of social life. The essence of legal protection for this writing is the protection of the creditor as the party harmed by the debtor, that he gets protection during an *unfair* situation because the debtor transfers the object of the fiduciary

¹² Satjipto, "Ilmu Hukum."

¹³ Wahyu Wahyu Sasongko, *Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen* (Universitas Lampung, 2007), <http://repository.lppm.unila.ac.id/3847/>.



guarantee. In addition, there is another real legal protection, which is supported by the existence of law enforcement institutions such as courts, prosecutors, police and other institutions. According to Soedjono Dirdjosisworo, which states that law has several meanings in society, one of the most prominent is the existence of law enforcement institutions.

In line with this paper, fiduciary guarantees arise alongside an engagement that results in rights and obligations that must be fulfilled by each party. In other words, the birth of fiduciary guarantees between debtors and creditors creates a legal relationship that results in the emergence of rights and obligations. Which is then explained in Article 1339 of the Civil Code which states that a contract is not only binding for what is expressly stated in the contract, but also for something that must be obeyed, one of which is related to the fulfillment of the rights and obligations of the parties that have been agreed upon by each party. As one example, the fiduciary is prohibited from lending, renting, transferring or giving up control, use or change the use of the fiduciary security object. If the fiduciary is negligent of the obligations that must be performed, then the fiduciary must be prepared to bear all the risks that must be accepted.

Law can protect the rights and obligations of each individual in reality. With the creation of solid legal protection, the objectives of the law will be realized, which include order, security, tranquility, welfare, peace, and others. Legal protection is closely related to aspects of security and justice. According to Soedirman Kartohadiprodo, in essence the purpose of law itself is the achievement of justice. Thus, legal protection is one of the media to uphold various justice. In line with the legal issues raised by the author, namely the legal protection received by the creditor due to the transfer of the fiduciary guarantee object by the debtor. Thus it can be concluded that *legal protection* is an activity to protect and maintain society in order to achieve legal objectives. Which then that legal protection is constructed as a form of service and a protected subject.

RESEARCH METHODS

The type of research in the author's thesis research is *Socio Legal research*, namely legal research that serves to see the law in a real sense and see the operation of law in the community.¹⁴ In the author's thesis research, empirical legal research is used to examine and analyze various related issues. This research was conducted at the PT BPR Raga Surya Nuansa Office in Ponorogo Regency.

¹⁴ Irwansyah Irwansyah, "Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel," *Yogyakarta: Mirra Buana Media* 8 (2020).



This location was chosen because there is an activity at PT BPR Raga Surya Nuansa in Ponorogo Regency that provides credit with fiduciary guarantee, and there are several cases of transfer of fiduciary guarantee objects to third parties.

Some of the data sources used include primary data sources, namely primary data in the form of primary data is data that has been obtained directly from the first source or source of origin from the field or data obtained directly through interviews with source, and secondary data Secondary data is data obtained from books which are complementary data to primary data, namely data that the author obtains indirectly from respondents sourced from civil law books, business law, the Internet and others.

Data collection techniques, namely, interviews, document studies, involving population and samples, including first, President Director of PT BPR Raga Surya Nuansa, second, Manager of PT BPR Raga Surya Nuansa, third Customer / Debtor of PT BPR Raga Surya Nuansa who transferred the object of fiduciary guarantee without the consent of BPR Raga Surya Nuansa and fourth Notary who made the Fiduciary Deed of Guarantee at PT BPR Raga Surya Nuansa. All research results are analyzed using prescriptive analysis to answer the problem.

RESULT AND DISCUSSION

Description of PT BPR Raga Surya Nuansa

PT BPR Raga Surya Nuansa was established after the government policy, namely with the issuance of the October 27, 1988 Package. As well as the existence of Law Number 7 of 1992 concerning banking, it provides a clear general foundation as one type of bank other than commercial banks. PT BPR Raga Surya Nuansa is a People's Credit Bank in Ponorogo Regency which began operating on January 4, 1992, as in the Decree of the Minister of Finance of the Republic of Indonesia Number: Kep-542/KM.13/1991 concerning the granting of Business License of PT Bank Perkreditan Rakyat Raga Surya Nuansa in Ponorogo Regency. PT BPR Raga Surya Nuansa has its head office located at Jl. Jaksa Agung Suprpto Number 88, Mangkujayan, Ponorogo District, Ponorogo Regency.

In achieving the goals, targets, and the creation of a good BPR, of course BPR Raga Surya Nuansa has a strong foundation, establishment and principles. The motto of this BPR is "Maju Bersama Kami". This motto has a good meaning because this BPR has hopes for relations and customers to move forward together to achieve mutual success "Success for the Bank and Success for the Customer". "The creation of an Islamic BPR institution" is the vision of BPR Raga Surya



Nuansa, and "Overcoming Credit Practices that Strangle the Community" is the mission of BPR Raga Surya Nuansa. The motto adopted by BPR Raga Surya Nuansa is "Show Taman Ramah, always with a smile. Living the 10 employee behaviors of PT BPR Raga Surya Nuansa to give meaning to "Forward With Us". The following are the 10 employee behaviors mentioned in this BPR Motto, including: faith, cooperation, business sense, honest, exemplary, ethical, caring, open, professional and responsible. In the field of credit, BPR Raga Surya Nuansa serves business capital loans, namely: trade, industry, livestock and services. In addition, the benefits in the credit system at BPR Raga Surya Nuansa have easy terms, fast processing, friendly and low interest rates.

In order to achieve the desired target, BPR Raga Surya Nuansa has steps and tips to provide optimal service, and always improve its services. With optimal service, it has the aim of retaining customers, as well as attracting new customers as much as possible. Of course, in providing banking services, BPR Raga Surya Nuansa remains based on the principles of Islamic law in order to realize the vision and mission adopted by BPR Raga Surya Nuansa. Thus, the BPR has the hope that its customers can have a good impression of BPR Raga Surya Nuansa, then can introduce and promote BPR Raga Surya Nuansa so that it can attract new customers, and can compete with other banks. BPR Raga Surya Nuansa has a fixed procedure called SOP (*Standard Operational Procedure*) which is a guideline for all members & employees at BPR and aims to facilitate employees in working according to their *jobdesk*.

BPR Raga Surya Nuansa is one of the BPRs in Ponrogo Regency that takes part in the economic development of the community, especially in Ponorogo Regency. This BPR helps capital through loans with low interest rates, and is based on sharia principles, making it easier for its customers, with one of its goals being to help the development of MSMEs, especially in Ponorogo Regency.¹⁵ In accordance with internal regulations at BPR Raga Surya Nuansa, for loans above IDR 5,000,000 (five million rupiah) that use motor vehicles, the binding is carried out using fiduciary guarantees.

Implementation Of Legal Protection Against Bpr Raga Surya Nuansa Over The Change Of Fidusia Guarantee Objects By The Debitor

Fiduciary agreements are made in written form by an authorized official, namely Noratis. This aims to protect and facilitate the creditor to prove that there is a transfer of ownership rights from the debtor to the creditor. A fiduciary

¹⁵ Interview with Mr. Yustanto, Manager of BPR Raga Surya Nuansa Ponorogo Regency
558



guarantee can replace a security *cessie* over any receivables called *suiling* as a *fiduciare cessie* which is widely used in the practice of granting credit at banks in general. The object used as the object of fiduciary security is legally owned by the fiduciary or debtor at the time of its imposition, but it can also include objects that will be acquired later, including all assets that will be owned by the debtor later. Referring to Article 30 of the Fiduciary Guarantee Law, the debtor is obliged to hand over the object of fiduciary guarantee to the creditor. Based on Law Number 42 of 1999 concerning Fiduciary Guarantee Article 23 paragraph (2), it has been explained that the debtor is prohibited from transferring, mortgaging or leasing to other parties the object of fiduciary guarantee, except on the basis of written consent from the creditor. Thus, the debtor's actions in this matter are contrary to the applicable laws and regulations. Article 36 states that a fiduciary who transfers, mortgages, or leases an object of fiduciary guarantee as stipulated in Article 23 paragraph 2 without the written consent of the creditor, the fiduciary may be punished with imprisonment for a maximum of 2 years, with a maximum fine of Rp 50,000,000, - (fifty million rupiah). There are 2 (two) elements implied in Article 23 of the Law on Fiduciary Guarantee, including:

- 1) Objective element: transferring, mortgaging, leasing, the object of this fiduciary guarantee, without the written consent of the creditor.
- 2) Subjective elements: against the law and intentionally.

Then if the debtor transfers the object of fiduciary guarantee to a third party without the consent of the creditor, there will be legal consequences arising which are referred to as default and criminal witnesses as stated in Article 36 of the Law on Fiduciary Guarantee.¹⁶ Based on interviews with several customers at BPR Raga Surya Nuansa, there are several obstacles in the debt settlement period of debtors or customers at BPR Raga Surya Nuansa, including:

- 1) Vehicle lost with the debtor
- 2) Vehicle sold to another party
- 3) Vehicle has an accident
- 4) Damaged vehicle

There are several reasons for the debtor to transfer the fiduciary security object without the consent of the creditor at BPR Raga Surya Nuansa, according to Mr. Yustanto, namely because of the inherent character of the debtor. The

¹⁶ Yulia Vera Momuat et al., "The Principle of Justice and Its Relevance to The Position of The Debtor in The Execution of Fiduciary Guarantees," *Journal of the Community Development in Asia*, September 20, 2023, <https://doi.org/10.32535/jcda.v6i3.2503>.



meaning of the debtor's character is the existence of bad character, as well as the existence of underhand transactions by the debtor with third parties carried out by the debtor because of continuing installments after the fiduciary security object is transferred to a third party.¹⁷ Based on this, in the case of the transfer of the fiduciary security object to a third party, it proves that many people think that the object used as a fiduciary security object is completely theirs. When viewed juridically, this thinking is a mistake. Because in fact, although the object of the fiduciary guarantee remains in the debtor's possession, the proof of vehicle ownership certificate is in the possession of the creditor, in this case BPR Raga Surya Nuansa. Thus, this is clearly and unequivocally not in accordance with the Law on Fiduciary Guarantee in article 36.

Based on research conducted by the author, banking activities at BPR Raga Surya Nuansa are not always in line with the law governing fiduciary guarantees. There are several cases at BPR Raga Surya Nuansa within the scope of fiduciary guarantees. One of them is regarding the transfer of the fiduciary guarantee object carried out by the debtor without the consent of BPR Raga Surya Nuansa as the creditor. One of the things that caused this transfer according to BPR Raga Surya Nuansa was because the debtor needed funds to pay the installments themselves every month. The legal consequences arising after the transfer of the fiduciary guarantee object to a third party without the consent of the creditor cannot be separated from the nature of the fiduciary guarantee as a property right regulated in the Fiduciary Guarantee Law itself. This underhand transfer made by the debtor is an act of default, because it has violated the things that have been stated in the fiduciary agreement agreed upon by the parties.¹⁸ Thus, the creditor, BPR Raga Surya Nuansa, has the right to demand that the debtor immediately replace the loss of the value of the fiduciary guarantee object, or be replaced with the equivalent of the remaining debt owed by the debtor.

The transfer of the fiduciary security object by the debtor does not eliminate the debtor's obligation to pay off his debt. Wherever the object of the fiduciary guarantee is located, the debtor must remain responsible for the repayment of the debt, because there is a transfer of the object of the fiduciary guarantee without the written consent of BPR Raga Surya Nuansa as the creditor. Whereas the transfer of the object of fiduciary guarantee must still refer to the legal system of guarantees and applicable legislation. This means that the creditor's authority is only the authority entitled to the ownership rights of the

¹⁷ Interview with Mr. Yustanto, Manager of BPR Raga Surya Nuansa Ponorogo Regency

¹⁸ Interview with Mr. Yustanto, Manager of BPR Raga Surya Nuansa Ponorogo Regency



object, because the real physical condition of the fiduciary guarantee object is with the original owner of the object. The transfer of the fiduciary security object by the debtor at BPR Raga Surya Nuansa is done underhand and illegally, which is done by: 1) For sale, 2) For Rent, 3) Missing

Based on the results of interviews with several customers who have problems with payments tied to a fiduciary agreement, the author concludes that there are many debtors who underestimate the things that are prohibited during the fiduciary agreement, including the transfer of fiduciary objects. Even though at the time of the execution of this credit agreement, the creditor has explained to the debtor about things that are allowed and prohibited, in accordance with the UUJF. Among them, the debtor is prohibited from re-fiduciating objects that have become objects of fiduciary guarantee that have been registered and have a Fiduciary Certificate. The debtor must remain responsible for transferring the object of fiduciary guarantee without the consent of the creditor. The responsibility that must be carried out by the debtor in default, can be held civilly or criminally liable. Because there are consequences that must be carried out by the debtor due to intentions committed by the debtor related to the fiduciary security object.

In this case, the debtor must still be responsible for repaying the debt, because the transfer of the object took place without the knowledge of the creditor. This will be different if the transfer of the fiduciary security object is carried out legally, or there are renewals of the binding credit agreement between the creditor and the debtor, then the one who continues the debt is the new debtor, who was originally a third party to this fiduciary agreement. According to BPR Raga Surya Nuansa, the consequences of the debtor's actions of transferring the object of fiduciary guarantee without the consent of BPR Raga Surya Nuansa are civil and criminal violations, as regulated in Article 35 and Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees. In this case, the losses suffered by BPR are very clear, as is the nominal amount stated in the fiduciary agreement along with the interest agreed upon by the debtor and creditor.

As a result of the losses suffered by BPR Raga Surya Nuansa, namely that it can still ask for back a number of losses, as well as ask for back a collateral object that is equivalent to the initial object that was used as collateral with the fiduciary guarantee. BPR Raga Surya Nuansa has several efforts to resolve the problem of transferring the object of fiduciary guarantee without his knowledge, including deliberations to reach consensus to settlement through the green table. In a



fiduciary agreement that binds the debtor and creditor, there are several provisions that contain things that are prohibited during the agreement. The agreement in the fiduciary guarantee is a formal agreement. Because it is in the form of an authentic deed and is made by a Notary as an official authorized to make it in the form of a Fiduciary Guarantee Deed. The fiduciary agreement, which has an *accessoir* nature, makes the fiduciary guarantee dependent on the main agreement, which when the main agreement is completed, the fiduciary guarantee as an ancillary or additional agreement is also completed. As explained in Article 4 of the Law on Fiduciary Guarantee, fiduciary is an ancillary agreement to a principal agreement that creates an obligation for the parties to provide mutual performance. Thus, a fiduciary agreement is not a stand-alone agreement, but it will always follow the main agreement in terms of existing debt and credit. Therefore, if the principal agreement followed by the fiduciary guarantee is invalid, completed, or invalidated, then the fiduciary agreement as an ancillary agreement will also be completed, invalidated, and void.¹⁹

BPR Raga Surya Nuansa stated that this is called preventive handling. Among them is the prohibition to transfer the object of fiduciary guarantee during the duration of the fiduciary agreement. The binding performance between the debtor and the creditor must still refer to the credit agreement that was signed at the beginning of the fiduciary agreement. Therefore, all forms of responsibility for credit repayment to the creditor should not be transferred underhand. If the debtor is not willing to fulfill his responsibilities based on previously agreed matters, BPR Raga Surya Nuansa has the right to make legal efforts in terms of collection, either partially or fully, based on the agreed fiduciary guarantee value.

One of the legal efforts that can be made by BPR Raga Surya Nuansa as a creditor is guided by Article 1131 of the Civil Code which reads "*all movable and immovable property owned by the debtor, both existing and future, then become collateral for the debtor's personal bond*". The meaning of this article is that it gives the creditor the opportunity to file a lawsuit over the assets owned by the debtor, when the debtor makes a default that can be tolerated again. This article also means that the creditor has the right to sue the assets owned by the debtor. According to Mr. Yustanto as a representative of BPR Raga Surya Nuansa who had the opportunity to interview with the interviewee, according to him, as a

¹⁹ Anis Mashdurohaturun, Gunarto Gunarto, and Adhi Budi Susilo, "The Transfer of Intellectual Property Rights as Object of Fiduciary Guarantee," *Jurnal Akta* 9, no. 3 (October 18, 2022): 378, <https://doi.org/10.30659/akta.v9i3.26756>.



creditor and has registered a fiduciary security object that has a Fiduciary Guarantee Certificate, the ownership of the certificate is proof that he is the owner of the fiduciary security object that has been pledged by the debtor, even though the object of the guarantee is in the control of the debtor, but the ownership rights & Vehicle Registration Certificate are in the control of the creditor, in this case the BRP Raga Surya Nuansa.

Fiduciary guarantee is a guarantee that has privilege or preference, which is strengthened by the making of a Fiduciary Deed made by a Notary, as well as being registered at the Fiduciary Registration Office and the existence of a Fiduciary Guarantee Certificate. So that if there is a debtor who defaults, including transferring the object of fiduciary guarantee without the knowledge of the creditor, the BPR as a fiduciary recipient has the right to execute the object of fiduciary guarantee whose power is in the context of repaying the debtor's debt. Execution is the next step of the civil procedural law process.

Based on the Fiduciary Guarantee Certificate owned by BPR Raga Surya Nuansa as the creditor, it has the right to obtain the return of the fiduciary guarantee object. This is then emphasized in Article 24 of the Law on Fiduciary Guarantee which states that "*the fiduciary recipient does not bear the obligation due to the actions or negligence of the debtor arising from unlawful acts in connection with the use and transfer of objects that are the object of fiduciary guarantee*". Based on the explanation in this article, it explains the legal protection given to creditors due to errors made by the debtor, namely the responsibility of the debtor to hand over the transferred fiduciary guarantee object, as well as fines and imprisonment for debtors who deliberately transfer the fiduciary guarantee object without the consent of the creditor. Steps taken by BPR Raga Surya Nuansa in overcoming debtors or customers who are negligent in debt payments, namely:

- 1) Conduct routine billing and coaching to customers who are late in making urang payments.
- 2) If it has passed the following month, but the debtor is still unable to make payments, the creditor issues an arrears warning letter. In the warning letter issued by the creditor, it is explained about the impact received by the debtor who did not make payments in the previous month's period, along with an explanation of the fines due to the debtor being late in making payments.
- 3) If the debtor misses 3x (three times) installments, the creditor gives a warning to immediately hand over the fiduciary security object to the



creditor, even though the ownership certificate regarding the object is already in the creditor's possession.

Based on several things written above, before the creditor warns and collects directly from the debtor, the creditor always provides counseling and warns the debtor to pay on time and not to do prohibited things as stated in the fiduciary agreement which is written authentically in the Fiduciary Guarantee Deed made by a Notary. However, in several cases at BPR Raga Surya Nuansa, there were several debtors who disappeared with the object of the fiduciary guarantee. This case is one of the complicated cases in the scope of debt and credit agreements with fiduciary guarantees. Debtors who are declared to have disappeared or absconded cannot be held legally responsible. Theoretically, this case can be handled by the investigating party, namely the local police by looking for the debtor's whereabouts in the Wanted Person List (DPO).

Referring to the Fiduciary Guarantee Law, in article 15 paragraph 2, fiduciary guarantees have executorial power. Executorial power is a special power in fiduciary guarantees, which can be carried out if there is a debtor who is declared in default, then the BPR Raga Surya Nuansa as the creditor can execute the object used as the object of fiduciary guarantee directly, because the executorial power in this fiduciary guarantee is equivalent to a court decision that has obtained permanent legal force.

In principle, solving the problem of transferring the fiduciary security object carried out by the debtor without the consent of BPR Raga Surya Nuansa is the same as solving the problem of default. Because the transfer of the fiduciary object is carried out by the debtor without the knowledge of the creditor, which is regulated in the Law on Fiduciary Guarantees and this is a matter that is prohibited and written in the Fiduciary Guarantee Deed made by a Notary. If so, then BPR Raga Surya Nuansa has the right to execute the object of collateral, if the object of collateral can be found, and the debtor is really declared unable to make payments on debts owed to creditors.

CONCLUSION

Legal protection obtained by BPR Raga Surya Nuansa is divided into two, namely preventive legal protection and repressive legal protection. In terms of preventive legal protection, where BPR has registered the Fiduciary Guarantee with the Fiduciary Registration Office, and has obtained a Fiduciary Guarantee Certificate, so that the Creditor gets legal protection based on the Fiduciary Guarantee Law. BPR Raga Surya Nuansa has included a clause stating that the debtor is not allowed to lease the Collateral object to another party without the



knowledge of the creditor. BPR Raga Surya Nuansa as a creditor who has been harmed, so that the debtor is obliged to compensate for the losses suffered by the creditor and the debtor is obliged to submit the object of fiduciary guarantee to the creditor so that the BPR can carry out the execution process. Unlawful acts are regulated in Article 1365 of the Civil Code where the debtor is responsible for compensating losses in the form of restoring the original state as a result of his actions that harm others. Meanwhile, the juridical responsibility for the transfer is imprisoned for a maximum of 2 (two) years and a maximum fine of Rp 50,000,000, - (fifty million rupiah) by the debtor.

BIBLIOGRAPHY

- Absori, A. *Hukum Penyelesaian Sengketa Lingkungan Hidup; Sebuah Model Penyelesaian Sengketa Lingkungan Hidup Dengan Pendekatan Partisipatif*. Surakarta: Muhammadiyah University Press, 2009. <https://publikasiilmiah.ums.ac.id/xmlui/handle/11617/9399>.
- Adam Jose Sihombing, Gede Wahyu Adipramartha. "Kewajiban Notaris Membacakan Akta Autentik Bagi Penghadap Disabilitas Rungu." *Jurnal USM Law Review* 7, no. 1 (2024). <http://dx.doi.org/10.26623/julr.v7i1.8489>.
- Ali, H Zainuddin. *Sosiologi Hukum*. Sinar Grafika, 2023.
- H. Ishaq. *Metode penelitian hukum dan penulisan skripsi, tesis serta disertasi*. Bandung: Alfabeta, 2017.
- "Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia / M. Bahsan | Perpustakaan Mahkamah Konstitusi." Accessed June 15, 2024. <https://simpus.mkri.id/opac/detail-opac?id=7944>.
- Irwansyah, Irwansyah. "Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel." Yogyakarta: Mirra Buana Media 8 (2020).
- Mashdurohatun, Anis, Gunarto Gunarto, and Adhi Budi Susilo. "The Transfer of Intellectual Property Rights as Object of Fiduciary Guarantee." *Jurnal Akta* 9, no. 3 (October 18, 2022): 378. <https://doi.org/10.30659/akta.v9i3.26756>.
- Mertokusumo, Sudikno. "Mengenal Hukum Suatu Pengantar, Liberty," 2005.
- Momuat, Yulia Vera, Ronny A. Maramis, Wulanmas A. P. G. Frederik, and Merry E. Kalalo. "The Principle of Justice and Its Relevance to The Position of The Debtor in The Execution of Fiduciary Guarantees." *Journal of the Community Development in Asia*, September 20, 2023. <https://doi.org/10.32535/jcda.v6i3.2503>.
- Munir Fuady, Author. "Jaminan Fidusia." Universitas Indonesia Library. Citra Aditya Bakti, 2003. <https://lib.ui.ac.id>.



- "Perkembangan Hukum Jaminan Di Indonesia / Dr. H. Salim HS., S.H., M.S. | OPAC Perpustakaan Nasional RI." Accessed June 15, 2024. <https://opac.perpusnas.go.id/DetailOpac.aspx?id=374742>.
- Satjipto, Rahardjo. "Ilmu Hukum." Citra Aditya Bakti, Bandung, 2000.
- Prof Dr Barda Nawawi Arief. Bunga Rampai Kebijakan Hukum Pidana. Prenada Media, 2016.
- Soekanto, Soerjono. "Penelitian Hukum Normatif: Suatu Tinjauan Singkat," 2007.
- Wahyu Sasongko, Wahyu. Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen. Universitas Lampung, 2007. <http://repository.lppm.unila.ac.id/3847/>.

