

**LEGAL ANALYSIS OF FIDUCIARY GUARANTEES IN FINANCE
COMPANIES**

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Citation Structure Recommendation :

Maulana, Ayang Fristia, Neneng Adelia, Sindi Saputri, Malita Ferliani. *Analysis Guarantee Law
On State Civil Apparatus Decree As A Basis Of Guarantee For Banking Credit Application.*

Rewang Rencang : Jurnal Hukum Lex Generalis. Vol.5. No.4 (2024).

ABSTRACT

In statutory regulations Fiduciary guarantees are regulated in Law Number 42 of 1999. In the Law, explained then the meaning of The transfer of ownership of an object is called fiduciary based of confidence in these provisions then from the object that is the basis of the basis of ownership rights, namely, The movement always be within the limits of ownership of the object. The fiduciary on collateral itself namely a security right over movable objects, whether tangible or intangible, and in buildings that cannot be loaded, they are included as immovable objects, right of dependency contained in statutory regulation Number 4 the 1996 explaining the Right of Dependency that remains in the control of the Fiduciary, as collateral for the repayment of certain debts, which gives the Fiduciary a priority position over other creditors. So if it is concluded that a fiduciary guarantee is a guarantee certificate that will be given to a capital provider institution (which will provide credit) to ensure the timeliness of the payment of credit installments that have been given to creditors with collateral that has been collateralized in the form of goods and has been used as a credit contract. In the implementation of the research, the aim is to find out the functions and regulations begins with a guarantee from a fiduciary in Indonesia and what applies analysis of these guarantees for budget company. This research uses normative juridical research methods targeted at applicable laws, books, journals and other research results. The researcher was carried away to carry out the writing related to fiduciary guarantees with the title: "LEGAL ANALYSIS OF FIDUCIARY GUARANTEES IN FINANCING COMPANIES".

A. INTRODUCTION

Is one of his businesses to improve and implement a prosperous and just in a society based on Pancasila and the Indonesia Constitution. For uphold and implementing sustainable development, for development figure, whether from ruler or public, or from legal entities and individuals, it all requires a large budget. In line along with the increase in development activities, there is Fiduciary guarantees have actually developed very quickly and with the rapid growth of practices in business activities in Indonesia and growing in the existing legal system between. In Indonesia. on its implementation this collateral, there the fiduciary guarantee certificate which contains a number of clauses such as: Identity/ Labels of recipients and fiduciaries; Data on principal agreements guaranteed by fiduciary; description object that will be principal of Fiduciary Guarantee; From value a secure; and view from the object of the on Guarantees from Fiduciaries.

For the credit agreement itself, it is made separately where in this credit agreement it is written in more detail and clearly regarding obligations and rights of each party who will carry out the credit contract. The development of fiduciary guarantees is based on jurisprudence. Fiduciary or in English Fiduciaire Eigendom Overdracht (FEO) is a guarantee property rights according to a believe, which is a form of guarantee for movable objects other than pawns, born out of jurisprudence. In Indonesia, the legal basis for this fiduciary guarantee is the Bataafsche Petroleum Maatschapij Arrest on January 25, 1929, and currently it It is already contained in the regulations Law Regulation Number 42 of 1999 concerning Guarantees on Fiduciaries.

From in national development section, it also an increase in the need for funding, which for the most part is is very necessary to fulfill these needs which can be obtained through credit activities regarding a loan. The source of law through jurisprudence then becomes a law and regulation, namely guarantee for fiduciaries are regulated in statutory regulations Number 42 of 1999. Causing in sources the jurisprudence laws and regulations to become an important part that should be understood as the background in this study. Laws and regulations or known as Jurisprudence are the source of applicable legal sources. Legal expert

Riduan Syahrani emphasized that jurisprudence is a decision of a judge (court) that can contain its own regulations, then followed and used as the basis for a decision by another judge in the same case.¹

After it comes into force Law regarding fiduciaries very clear inside the Guarantee Law Number in 42 of 1999, on application in fiduciary, which that is then called Fiduciaire Eigendom Overdracht (FEO), used the legal basis of jurisprudence, but after the enactment of Law No. 1999, the legal basis was laws and regulations. For the legal subject of fiduciary guarantees, the parties, both in the form of individuals and legal entities, with the other parties being financing companies in a legal relationship, agreement, or contract. That financing which is conducted business activity in form Leasing, Shifting Receivables, Credit Card Business, and/or other Consumer Financing. In other words, a finance company can only carry out four (4) activities, either one or can determine two activities, even more which are commonly referred to as Multifinance companies.²

How about that Legal Analysis on Law Arrangements Guarantee for Fiduciaries in Indonesia? What is the Legal Correlation of a Finance Company in a Fiduciary Guarantee? Apart from that, credit guarantees also have a function related to the borrower's seriousness in fulfilling their what has been agreed must be in accordance with its Obligations so that it will be able to prevent disbursement of credit guarantees which may not be desired by the borrower because the value (price) of credit guarantees is generally higher when compared to the borrower's debt to the bank.³ The government employees is also an element of the have several important elements, namely the Guarantee for Fiduciary is an agreement on follow-up, as well as on the Fiduciary Guarantee gives rise to obligations for the parties. The perception of the concept of an agreement is very important to be discussed first before discussing other subsidiary agreements. An agreement or contract based on Ahmadi Miru can be interpreted as a state of law where one has promised another person or two people have promised each other to do or not to

¹ Djaja S. Meliala, *Development of Civil Law Concerning Objects and Engagement Law*, Nuansa Aulia, Bandung, 2008, p.58.

² Khotibul Umam, *Financing Institution Law, Rights and Obligations of Customers Using Financing Institution Services*, Pustaka Yustisia, Yogyakarta, 2010, p.4.

³ Ahmadi Miru, *Contract Law and Contract Drafting*, RajaGrafindo, Jakarta, 2014, p.4.

do something.⁴

Djaja S. Meliala said that engagement is an engagement with which two (2) or increase people do it to bind yourself something in the wealth base.⁵

What is meant by Guarantee to Fiduciary is a follow-up agreement to principal agreement which means if in principal agreement has been paid off, automatically the agreement will also be paid off, and likewise it has been mentioned previously that the encumberment agreement of the Fiduciary Guarantee is not always made using a notary deed, which means that it can also be done with a deed under hand such as in a financing agreement with a burden such as a Proof of Motor Vehicle Ownership (BPKB).

For Fiduciary Guarantees, it has been determined to scheduled as stipulated from chapter 11 on Law which contained in statutory regulations Number 42 of 1999 relates to Guarantee for Fiduciary, namely as follows: Items that are encumbered with a Fiduciary Guarantee scheduled. In the event then the object is said to be burdened by the fiduciary holder guarantee located outside regions Republic of Indonesia, such obligations intended paragraph one remains valid.

In the provisions of Article 11, it is explained that, every registration of Objects that will be encumbered with a Fiduciary Guarantee is carried out at the place of residence of the fiduciary, and its registration includes objects, both inside and outside the territory of the Republic of Indonesia to meet the principle of publicity, and at the same time is certainty of collateral to other creditors concerned objects which has been disturbed to the collateral guarantee.

The register process is of course related to the place of registration, which has been regulated the Article 12 statutory regulations statutory regulations Number 42 of 1999 concerning Guarantees for Fiduciaries, that: For first-time registration of collateral with Fiduciary established the Jakarta in the work area covering in all territories the Republic of Indonesia. Fiduciary to at the registration office as intended the verse two is within tasks from the scope Ministry in Justice. Provisions regarding Registration and establishment of Fiduciary offices in other

⁴ Djaja S. Meliala, *Op Cit.*, p.83.

⁵ Government Regulation Number 86 of 2000 concerning Procedures for Registration of Collateral for Fiduciaries and Costs for Making a Deed of Fiduciary Guarantee (General Explanation)

areas as well determination in their work area are regular by Presidential Decree. Registration for Fiduciary Guarantee as intended in Article 11 paragraph one is carried out at the Fiduciary Registration Office. Closely related to the registration Guarantee for Fiduciaries according to statutory regulations Number 42 of 1999, it is explained in Article 13 as follows: Registration request the Fiduciary Guarantee carried out by Fiduciary Holders, his attorney or with his representative must attach a statement of registration of Guarantee for Fiduciaries. The statement on registration as intended in paragraph (1) meaning: Identity recipient and giver to Fiduciary; Date and Fiduciary Guarantee number.

This type of writing is a type literature (Library Studies), data obtained from collecting data obtained from literature that is used as the main study material. This research was obtained from the availability of secondary legal materials, namely in the form of all publications on Guarantee Law, Treaty Law and Civil Law. The method is optional deed, name and place of residence of the notary make a Fiduciary Guarantee deed. Data on the principal agreement guaranteed by the fiduciary. Description of the Object that is the object of the fiduciary guarantee. Guarantee value.

B. ANALYSIS AND RESULTS

1. How about that Legal Analysis on Law Arrangements Guarantee for Fiduciaries in Indonesia

Guarantee for Fiduciaries it self namely the right to collateral for a movable object, whether tangible or intangible, as well as immovable objects in especially for buildings that cannot be burdened right of dependency as referred to in Law No. 4 of 1996 concerning the Right of Dependency that remains in position to fiduciary officials, as a guarantee for repayment of certain matters money, to can give fiduciary holders a preferential regarding his position as another creditor. That financing institution does not take risks to the object of the agreement, and through regulations of Law Number 42 of 1999 concerning Guarantees for Fiduciaries, it then gives legal force to the financing institution to always maintain the object through the fiduciary guarantee even though the object is in the control of the creditor. In Fiduciary Guarantees, it has developed and grown before

jurisprudence, which is based on the provisions of Pawn which is stated in Article 1152 paragraph two of the Criminal Code. Civil, which reads that the power over the mortgaged object should not be on the debtor's side. The consequence of this provision is that the debtor cannot take advantage of the pawned objects or goods.

Then in the statutory regulations Article 4 Number 42 the 1999 it is said that the Guarantee for Fiduciary is an agreement regarding follow-up of on the main agreement can provides an obligation for all parties to be able to do so provide the Achievement. This provision is explained that, what is meant by "Achievement" is that this provision is to provide something, which can be valued in money. The provisions of Article.

Have several important elements, namely the Guarantee to Fiduciary is an agreement regarding follow-up, as well as from the Fiduciary Guarantee which gives rise to obligations for the parties. The perception of the concept of an agreement is very important to be discussed first before discussing other subsidiary agreements. An agreement or contract based on Ahmadi Miru can be interpreted as a state of law where one has promised another person or two people have promised each other to do or not to do something.

Djaja S. Meliala said that an agreement is an agreement in two (2) where in more people as binding oneself in carrying it out something in the environment of wealth law.⁶ A fiduciary guarantee is an agreement regarding the follow-up of a principal agreement which means that if the principal agreement has been paid off, automatically the agreement will also be paid off, and likewise it has been mentioned previously that the encumberment agreement of the Fiduciary Guarantee is not always made using a notary deed, which means that it can also be done with a deed under hand such as in a financing agreement with a burden such as a Proof of Motor Vehicle Ownership (BPKB).

For Fiduciary Guarantees, it has been determined to registered as stipulated contained in Article 11 of Law Regulation Regulation Number 42 of 1999 concerning Guarantees for Fiduciaries, namely as follows: Items that are encumbered with a Fiduciary Guarantee must be registered. On that matter object encumbered by fiduciary guarantees are outside the territory of the Unitary State

⁶ Djaja S. Meliala, *Op.Cit.*, p.83.

of the Republic of Indonesia, the obligation as intended in paragraph (1) remains valid. In the provisions of Article 11, it is explained that, every registration of Objects that will be encumbered with a Fiduciary Guarantee is carried out at the place of residence of the fiduciary, and its registration includes objects, both inside and outside the territory of the Republic of Indonesia to meet the principle of publicity, and at the same time is on the certainty of collateral against other creditors in question objects that have been encumbered to the Fiduciary Guarantee.

The registration process is of course related to the place of registration, which has been regulated in Article 12 regulations of Law Number 42 of 1999 concerning Guarantees for Fiduciaries, that: For the first time, Fiduciary Registration takes place in Jakarta and works area covering to all territories of the Republic of Indonesia. Fiduciary Registration Office as intended the paragraph two is within tasks and scope of Ministry Justice. Must regarding Establishment offices on Fiduciary Registration also for other regions as well determination of to their work area are regulated by Presidential Decree. for a Fiduciary Security Registration in accordance with Article 11 paragraph one which carried out at the Fiduciary Registration Office.

Closely related to in registration of Guarantee for Fiduciaries according to Law Number 42 of 1999, it is explained in Article 13 as follows: Application for registration the Fiduciary Guarantee is made by the Fiduciary, his attorney or representative by attaching a statement of registration of the Fiduciary Guarantee. The a registration statement as intended to in paragraph (1) contains: Identity of the Giver and Fiduciary; Date, number of the Fiduciary Guarantee deed, name and place of residence of the notary make a deed of a Fiduciary Guarantee. Agreement data on the principal is guaranteed on the elegance. Description on Object that is the object of the fiduciary guarantee. Guarantee value what is the Legal Correlation in a Finance Company in a Fiduciary Guarantee?

For the legal correlation between a finance company and the consumer as its customer, it is the legal correlation of the agreement or contract law, which has similarities in principles and with the bank credit agreement, which includes all main guarantees, principal guarantees, additional guarantees.

2. What is the Legal Correlation of a Finance Company in a Fiduciary Guarantee

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Regarding the main collateral, such as financing in the form of credit, the most important guarantee is that there is trust from the consumer finance company (creditor) to its consumer (debtor), that the consumer can be trusted and is able to pay regularly or gradually arrived it is paid off on the financing that he has received, the consumer finance company that applies the applicable general principles in credit, namely holding the 5C principle of credit, namely it could be Collateral, then Capacity, then Character, as well as Capital and Economic Conditions.

From the main guarantee in the form of a trust and principal guarantee, in addition to that there is an additional guarantee, which in practice, the financing company asks consumers for an additional guarantee for consumer financing transactions. In general, on collateral against additional for consumer financing transactions such as this are in the recognition debt (letter of agreement)), or the power of attorney to sell goods, as well the assignment of proceed (cessie) from insurance.

The legal correlation occurs between that consumer to finance companies and consumers, who can place them as creditors and debtors, respectively, with regard to the fulfillment of an agreement or contract. The implementation of an agreement or contract is an achievement, which is something that must be fulfilled in accordance with the content that has been mutually agreed upon in the agreement. Then Ahmadi Miru said that the obligation to fulfill what was promised is called "achievement", while if one party or even both parties do not carry out their obligations in accordance with the agreement that they have made, that is called default.⁷

The legal correlation the distance between the finance company and

⁷ Ahmadi Miru, *Op Cit.*, p.68.

consumers as its customers the law of the agreement, can cause certain legal consequences and if one of the parties is unable to implement or does not fulfill what has been agreed upon together in an agreement. The legal consequence or legal consequence is the occurrence of against default that can be committed by one of the parties who unable to carry out what has been agreed upon.

The occurrence of default can cause one of the parties to suffer losses, and such losses in the business world, are only suppressed in such a way as not to cause a loss to business development, in which case the finance company suffers losses because its customers commit a default. Basically, the default can be in the form of fulfilling achievements, or the achievements performed are not perfect, or because they are late in fulfilling achievements, or because they do what is prohibited by the agreement to be done.

Then the customer as a debtor who has obtained a motor vehicle loan, for example a car from a financing company, based on an agreement that has been agreed upon upon, has in obligation to pay a certain amount of funds/money in installments as determined as determined. This obligation is a burden on the customer, by Because every specified time must be able to fulfill its achievements, namely by paying the agreed installments. It can often happen, the customer is late in paying the the installments are appropriate schedule or period that has been will or agreed, or the customer pays at a certain time but the amount is not enough, even the customer himself is in arrears of the agreed installment and the payment is an obligation that must be fulfilled.

The object of the consumer financing agreement, such as the procurement of a car or motorcycle in the correlation of financing law, is a guarantee that can be withdrawn at any time by the financing company if the debtor neglects its payment arrears. The longer and larger the arrears, the greater the chance of being forcibly withdrawn by the finance company as it is often revealed that cars or motorcycles are confiscated by a certain group of people as debt collectors.

In practice, the finance company has not issued and/or taken care of the process of making a letter from the Proof of Motor Vehicle Ownership (BPKB), when it is in the period of installment payment.

And if in time, the installment has not been paid off as well, then the control

towards the object of collateral in the fiduciary has completely shifted to the customer or debtor concerned. For finance companies that are part of the Finance Institution in carrying out their business activities, it is also determined and regulated by the Financial Services Authority based on Law No. 21 of 2011. Regulation and supervision to the Authority on Financial Services, determined in Law No. 21 of 2011 and Article 55 paragraph (1), that since December 31, 2012, the duties, authority and function for regulation and supervision of activities regarding financial services in the fields of Capital Markets, Insurance and Pension Funds, Financial Institutions, and Other Financial Services Institutions sectors has moved from the Minister of Finance and Capital Markets Supervisory Agency and at financial institutions of at the Financial Services Authority.⁸

C. Conclusion

Fiduciary guarantees with the main object being movable objects develop and grow in legal rules that exist in Indonesia and depart from in provisions of Pawn in Criminal Code. Civil, which has determined the object of the pawn must move in the control of the creditor. The legal consequences of this provision cause business actors (entrepreneurs) in the relay sector, the restaurant sector, or transportation companies such as goods cars or passengers, it will be difficult because the object must be transferred to creditors. Through jurisprudence dated August 18, 1932, the judge's decision allowed the object of the pawn to remain towards debtors, and in its development the jurisprudence became Law Regulation Regulation Number 42 of 1999 on Guarantees for Fiduciaries. The definition of a finance company is a company whose business activities only consist of: for Leasing, Receivables, Credit Card Business, and Consumer Finance, which is a company that implements a Fiduciary Guarantee system in its legal relationship with its customers or debtors, and is established in the form of a financing agreement (financing contract). As a legal relationship of agreement, the rights and obligations of the parties to the agreement are very important to be realized in order to achieve common legal interests, legal

⁸ Pasal 55 ayat (1) Undang-Undang Nomor 21 Tahun 2011 tentang Otoritas Jasa Keuangan.

protection, and in turn in the end in realizing legal awareness in society.

The Fiduciary Guarantee Law which is regulated in Law No. 42 of 1999 and its implementation with financing companies, needs to be reviewed on the legal basis of finance companies which is only regulated by Presidential Regulation No. 9 of 2009, so that it can be upgraded/raised into law. It is necessary to create a balanced legal correlation between finance companies and debtors or customers, so that they do not contain burdensome clauses and harm their customers.

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