

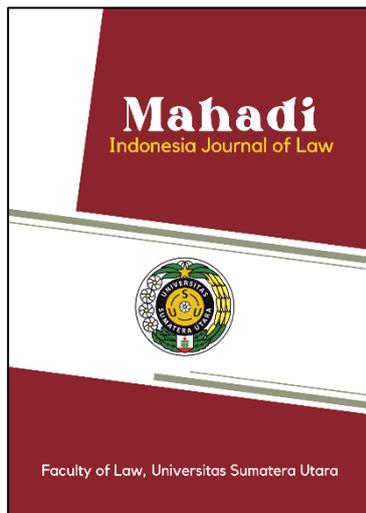


Legal Protection Of Finance Companies Through The Withdrawal Of Fiduciary Guarantee Objects in Multipurpose Financing Agreements

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Abstract:

A finance company is a form of business in the non-bank financial sector which is carried out in the form of providing funds or capital goods and in conducting financing requires the existence of a guarantee, namely the motorized vehicle itself as collateral. Finance companies as creditors require a guarantee from the debtor. The formulation of the problem in this study is how to withdraw fiduciary guarantee objects in multipurpose financing agreements for motorized vehicles at finance companies, how is the legal protection for finance companies in consumer financing business activities in multipurpose financing agreements for motorized vehicles. The method used in this thesis research is descriptive normative legal research. The approach method used is the case approach. The data sources used consist of secondary data and are supported by primary legal materials, secondary legal materials and tertiary legal materials. Writing research through regulations and legal materials related to this research. The results of the study explain that the withdrawal of fiduciary guarantee objects in multipurpose financing agreements for motorized vehicles at finance companies can be carried out *parate executie* to objects of fiduciary guarantees. Legal protection for finance companies in consumer financing business activities in multipurpose financing agreements for motorized vehicles is carried out preventively or repressively.

Keywords: : Legal Protection, Financing Company, Fiduciary

INTRODUCTION

A financing institution is a business entity that carries out financing activities in the form of providing funds or capital goods as referred to in laws and regulations concerning financing institutions.¹ Financing institutions are one of the non-bank financial institutions intended for the purpose of production or consumption of goods and services.² Financing institutions include finance companies, capital companies, venture, infrastructure financing company.³

Meanwhile, business activities in finance companies include:⁴

- a. Leasing is a financing activity in the form of providing capital goods either on a Lease with option rights (Finance Lease) or Lease without option rights (Operating Lease) for use by the Lessee for a certain period of time based on installment payments.

¹ See Article 1 point 9 of the Law of the Republic of Indonesia Number 21 of 2011 concerning the Financial Services Authority

² Sunaryo, Law of Financing Institutions, Sinar Graphic, Jakarta, 2017, p.95

³ See Article 2 of the Regulation of the President of the Republic of Indonesia Number 9 of 2009 concerning Financing Institutions

⁴ See Article 3 of the Regulation of the President of the Republic of Indonesia Number 9 of 2009 concerning Financing Institutions

- b. Factoring is a financing activity in the form of purchasing a company's short-term trade receivables and managing the receivables.
- c. Credit Card Business is a financing activity for the purchase of goods and/or services using a credit card.
- d. Consumer Finance is a financing activity for the procurement of goods based on consumer needs with payment in installments

Consumer financing is essentially the same as consumer credit that exists at the Bank. The only difference lies in the institution that finances it. Consumer financing is provided by a financing institution (financing company), while consumer credit is provided by a bank.⁵ Financing companies make financing agreements that regulate the provision of funds for the purchase of certain goods in providing financing facilities.⁶ The financing company applies various stages before providing financing facilities, this is done to provide confidence that the prospective debtor is a trustworthy person and is able to make periodic installments along with the specified interest.⁷ The element of safety is one of the basic principles both in granting credit and providing financing in addition to the elements of compatibility (suitability) and profitability.

This form of security in practice is carried out in the form of binding collateral.⁸ The collateral most favored by banks is material collateral. One type of material security recognized in positive law is Fiduciary Security. As a collateral institution for movable objects, fiduciary guarantees are widely used by the business community.⁹ In practice, consumer financing through finance companies often causes disputes between consumers who do not fulfill their achievements in entering into agreements with finance companies, so that finance companies withdraw fiduciary security objects from financing agreements.¹⁰ The withdrawal of the fiduciary security object by the finance company is a vertical consequence referring to the consequences that arise when the fiduciary security object is withdrawn or handed over to the finance company as the creditor who has the right to the fiduciary security object as a guarantee for the payment of consumer debt as the debtor.

According to Law Number 42 of 1999 concerning Fiduciary Guarantees, especially the provisions of Article 15 paragraph (2) and paragraph (3), finance companies as creditors (fiduciary recipients) can carry out executions independently (parate execution) without having to submit a request for execution to the court against debtors who are in default, this is based on consumers as debtors who are late in making payments. Then, against the debtor who is declared a breach of promise, the creditor will withdraw the object of the fiduciary guarantee from the hands of the debtor.

Based on the background of the problem above, the author is interested in conducting research on Legal Protection of Financing Companies Through Withdrawal of Fiduciary Guarantee Objects in Multipurpose Financing Agreements, then from this brief explanation, there are several interesting problems to be discussed in this study; How is the withdrawal of fiduciary guarantee objects in motor vehicle multipurpose financing agreements in finance companies? How is the legal protection of the finance company through the withdrawal of the

⁵ Sunaryo, *Op.Cit.*, p.96

⁶ See Article 1 point 2 of Presidential Regulation of the Republic of Indonesia Number 9 of 2009 concerning Financing Institutions "A finance company is a business entity specially established to carry out Leasing, Factoring, Consumer Financing, and/or Credit Card business"

⁷ Dahlan Siamat. Management of Financial Institutions, Faculty of Economics, University of Indonesia, Jakarta, 2011, p.21

⁸ Tan Kamello, Fiduciary Guarantee Law, A Coveted Need, Alumni, Bandung, 2022, p. 2

⁹ *Ibid.*, p. 23

¹⁰ Resty Femi Lombogia, "Development of Fiduciary Guarantee Institutions in Indonesia, *Lex Privatum*, Vol.I/No.4, October 2018, p.42

fiduisa guarantee object in a motorized vehicle multipurpose financing agreement?. The purpose of the study is to determine and analyze the withdrawal of fiduciary security objects in a multipurpose motor vehicle financing agreement between the debtor and the finance company and to determine and analyze the legal protection of the finance company in a multipurpose motor vehicle financing agreement.

METHODS

Type and Nature of Research

The type of research used in the preparation of this thesis uses normative legal research methods (juridical normative), namely "a study that places norms as the object of research, both legal norms in laws and regulations, legal norms originating from a law". The nature of the research is descriptive analytical. Research using descriptive analytics is "research that merely describes the state of objects or events without a purpose to draw general conclusions".¹¹

Research Data

The data in this study are secondary data, namely "data obtained or collected by people who conduct research from existing sources".¹² This data is obtained from:

a. Primary Legal Materials

Primary legal materials consist of legal principles and rules. The embodiment of these legal principles and rules is in the form of :

- 1) Law No. 42 Year 1999 on Fiduciary Guarantee
- 2) Law No. 21/2011 on the Financial Services Authority
- 3) Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2021 concerning Procedures for Registration, Amendment, and Abolition of Fiduciary Guarantees
- 4) Presidential Regulation No. 9/2009 t on Financing Institutions
- 5) Regulation of the Chief of the National Police of the Republic of Indonesia Number 8 of 2011 on Securing the Execution of Fiduciary Guarantees .
- 6) Regulation of the Financial Services Authority of the Republic of Indonesia No. 35/POJK.05/2018 concerning the Implementation of the Financing Company Business

b. Secondary legal materials consist of "law books (text books), law journals, legal papers or views of legal experts contained in the mass media, legal dictionaries and encyclopedias, the internet by mentioning the name of the site".¹³

c. Tertiary legal materials are "materials that provide instructions and explanations for primary legal materials and secondary legal materials such as general dictionaries, legal dictionaries, encyclopedias and so on".¹⁴

Techniques and Data Collection

The data collection technique used in this research was carried out by means of library research and supported by primary data as secondary data support. The data collection tools used to collect the data needed to support this research are document studies and interview guidelines. Document studies are used to obtain secondary data by reading, studying, researching, identifying and analyzing secondary data related to the object of research.¹⁵ The secondary data is obtained by studying books, research results and legislative documents related

¹¹ Soerjono Soekanto, Normative Legal Research. Jakarta : Raja Grafindo, 2011, p.4

¹² Bambang Sunggono, Legal Research Methodology, Raja Grafindo Persada, Jakarta, 2018, p.53

¹³ *Ibid.*, p.54.

¹⁴ Nomensen Sinamo, Legal Research Methods in Theory and Practice, Bumi Intitama Sejahtera, Jakarta, 2010, p.16

¹⁵ Nomensen Sinamo, *Op. Cit.*, p. 313

to financing agreements.

Data Analysis

Data analysis is "a process of arranging, sorting, classifying, giving codes and categorizing them until then organizing them in a form of data management to find themes and working hypotheses that are raised to become substantive theories".¹⁶ To find a theory from the data, a qualitative method is used, namely "research that refers to legal norms contained in laws and court decisions as well as norms that live and develop in society".¹⁷

Data analysis activities in this research are carried out by "inventorying laws and regulations related to the issue that is the object of study".¹⁸ The collected data will be identified and then analyzed qualitatively in the form of discussion, between various secondary data related to various laws and regulations and legal materials that have been inventoried and at the final stage the law will be found concretely, so that conclusions are drawn using deductive thinking logic, namely "a way of thinking based on a basic statement to draw conclusions".¹⁹

ANALYSIS AND DISCUSSION

WITHDRAWAL OF FIDUCIARY GUARANTEE OBJECT IN A MOTOR VEHICLE MULTIPURPOSE FINANCING AGREEMENT AT A FINANCE COMPANY

According to the Big Indonesian Dictionary (KBBI), the word withdrawal is defined as the process, manner, action of withdrawing. An object is a sentence structure, usually a noun or person, that is the subject of a conversation. According to the KBBI, an object is a thing, etc., that is intended for research, attention, and so on.²⁰ Objects are nouns that complete transitive verbs in clauses. The withdrawal of the fiduciary security object by the finance company is a consequence that refers to the consequences that arise when the fiduciary security object is withdrawn or surrendered to the finance company as the creditor who has the right to the fiduciary security object as a guarantee for the payment of consumer debt as the debtor.

The withdrawal of this object can be interpreted as the same as the execution of the object guarantee. In accordance with the provisions of Article 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees, point (1), that Fiduciary is "the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object." One of the characteristics of fiduciary guarantees is the ease of implementing the withdrawal of the object of collateral if the fiduciary is in default. The fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force.²¹

The ease of withdrawal/execution of the fiduciary security object is based on the provisions of Article 15 of Law No. 42/1999 on Fiduciary Guarantee, which states that the fiduciary security certificate issued by the fiduciary registration office shall include the words "For the Sake of Justice Based on the Supreme Being". The certificate has the same power of execution as a court decision that has permanent legal force. The assertion of executorial power above means that the object of the fiduciary guarantee can be directly executed and does not need to go through the assistance of a court institution because the certificate is final and binds the parties to carry out the contents of the decision.²²

¹⁶ Lexy J Moleong, *Qualitative Research Methodology*. Bandung: Rosdakarya Youth, 2013 h. 103

¹⁷ Zainuddin Ali, *Op.Cit.*, p. 105

¹⁸ Bambang Sunggono, *Op.Cit.*, p.106

¹⁹ Zainuddin Ali, *Op.Cit.*, p.111

²⁰ Kamus Besar Bahasa Indonesia, downloaded via <https://kbbi.kemdikbud.go.id/>, diakses Jumat 19 Mei 2023, Pukul 15:00 WIB

²¹ See Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees

²² Supianto Rumawi, "Implications of the Constitutional Court's Decision No. 18/PUU-XVII/2019 on the Execution of Fiduciary Guarantees", *Diversions Journal of Law*, Vol 8 No.1, April 2022, p.79

According to D.Y Witanto, that the finance company as a creditor has several ways to collect debt repayment using collateral objects, if the creditor chooses to execute based on the executorial power in the Fiduciary Certificate, then several steps must be taken:²³

1. The Fiduciary Guarantee Holder submits an application to the President of the District Court.

Execution in the civil field is carried out upon application to the President of the District Court either in writing or orally by attaching the Fiduciary Certificate and Deed of Fiduciary Grant. Upon such application, the President of the District Court will examine whether the request for execution falls within its jurisdiction or not.²⁴

2. President of the Court Gives Reprimand (aanmaning)

The first stage of the execution process is that the President of the Court will summon the execution respondent to be reprimanded in order to fulfill what has been determined in the Deed of Granting Fiduciary Guarantee. This reprimand process is actually a preliminary action before further forced efforts are made if the execution respondent still does not want to carry out the contents of the agreement voluntarily.²⁵

3. Execution Seizure Laying

The execution seizure is carried out based on the order of the court chairman as a form of a series of executions if the period of reprimand given by the court chairman is not heeded by the fiduciary debtor. The confiscation order from the chairman of the court is given in the form of a stipulation and the bailiff can request assistance from the police to secure the confiscation process.²⁶

Once again, it must be emphasized that the process of executing a Fiduciary Guarantee Certificate based on the provisions of the irah irah in the Fiduciary Guarantee Certificate has specifically determined the object to be executed. The seizure process will be directly directed to the object of the guarantee, whether it is still controlled by the guarantor or in the hands of a third party, because the object of the Fiduciary Guarantee adheres to the principle of *droit de suite* so that whoever the object is in the hands of will not prevent the creditor from being able to execute the object.²⁷

The provision of Fiduciary Guarantee in a Consumer Financing Agreement has two aspects of specificity on the goods that become collateral, among others:

1. Goods that become collateral are actually goods purchased by money issued by the financing institution even though the financing is for the benefit of consumers or debtors, so the attachment between the debtor's debt and the object of collateral is very close.
2. The consumer (debtor) has handed over the property rights in a Fiduciary manner to the creditor (financing) to guarantee the debt arising from the financing agreement to the Creditor.

3. Auction Sales

The last stage of the whole series of execution process of the Fiduciary Guarantee object based on the Fiduciary Certificate is the public sale (auction). The object of collateral must be sold in public (auction) unless the parties agree to conduct an underhand sale of the object of collateral as stipulated in Article 29 paragraph (1) letter c of Law No. 42 of 1999.

The characteristic of a fiduciary guarantee is trust, that when an object is bound by a

²³ D.Y Witanto, *Fiduciary Guarantee Law in Consumer Financing Agreements*. Bandung: Mandar Maju, 2015., p.235

²⁴ *Ibid.*, p.237

²⁵ *Ibid.*, p.243

²⁶ *Ibid.*, p. 247

²⁷ *Ibid.*, p. 249

fiduciary guarantee the control of the object remains with the consumer as the debtor, in contrast to a pawn where the control of the goods is in the hands of the creditor. Then the distinctive feature of fiduciary guarantees is related to the method of execution of the object of guarantee, namely the finance company as the creditor can carry out the execution of the fiduciary guarantee object itself without going through the District Court if the consumer is in default, this is known as *parate executie*. For the fiduciary grantor, the default that is used as the basis for withdrawing the fiduciary object is the fiduciary recipient's unilateral submission.

Achievement or what in English is also called the term "performance" in contract law is intended as an implementation of the things written in a contract by the party who has bound himself to it, which implementation is in accordance with the "terms" and "conditions" as stated in the contract concerned.²⁸ Performance is an obligation that must be fulfilled in every engagement, while what is meant by engagement is to give something, to do something and not to do something.²⁹

The fiduciary grantor and beneficiary are bound by the agreement they agree to as stated in the deed of fiduciary grant as an additional agreement, which was previously carried out under the main agreement. The additional agreement in the form of a deed of fiduciary grant is registered at the fiduciary registration office and a fiduciary certificate is issued. On that basis, the fiduciary object can be sold under its own power by the fiduciary at any time, if the fiduciary defaults.

According to R. Subekti, a debtor's default can take four forms, namely:³⁰

- a. Not doing what he promised to do, meaning that the debtor does not fulfill the obligations he has agreed to fulfill in an agreement, or does not fulfill the obligations stipulated by law in the event that the obligation arises because of the law.
- b. Doing what was promised, but not as promised. Here the debtor carries out or fulfills the promised effort, but not as it should be according to the quality specified in the agreement.
- c. Doing what is promised, but late. Here the debtor fulfills the performance, but not on time as stipulated in the agreement.
- d. Doing something that according to the agreement he/she should not do.

Along with the development, the verdict contained in the Fiduciary Guarantee Certificate seems to trigger problems. The unilateral execution of the finance company as the creditor is considered a form of coercion against the consumer as the debtor. Finance companies take arbitrary actions, forcibly withdrawing vehicles as objects of fiduciary guarantees by using debt collector services which are considered to lead to criminal acts.³¹

The response to this problem is that the provisions in Article 15 of Law Number 42 of 1999 have been tested to the Constitutional Court, which gave birth to the Constitutional Court Decision Number 18/PUU-XVII/2019. In the content of the Constitutional Court's Decision on Article 15 paragraph (2) of the Fiduciary Guarantee Law insofar as the phrase executorial power and the phrase is the same as a court decision with permanent legal force is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted against fiduciary guarantees where there is no agreement on default and the debtor objects to voluntarily surrendering the object of fiduciary guarantee, then all mechanisms and legal procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of a court decision that has permanent legal force.³²

²⁸ Munir Fuady, *Op. Cit.*, h.87

²⁹ Abdulkadir Muhammad, *Law of Engagement*, Alumni, Bandung, 2012, p.31

³⁰ R. Subekti, *Op. Cit.*, h. 20

³¹ Syafrida and Hartati, "Execution of Fiduciary Guarantees After the Constitutional Court Decision Number 18/PUU/XVII/2019", *ADIL: Journal of Law* Vol. 11 No.1.2020. h 116

³² *Ibid.*, p.118

LEGAL PROTECTION OF FINANCE COMPANIES IN MOTOR VEHICLE MULTIPURPOSE FINANCING AGREEMENTS

Legal Protection of Financing Companies in Motor Vehicle Multipurpose Financing Agreements

R. Wirjono Prodjodikoro states that legal protection is a protective effort given to legal subjects, about what they can do to defend or protect the interests and rights of these legal subjects.³³ One way to protect the interests of finance companies as creditors is to provide definite provisions. Problems that often occur in financing agreements with fiduciary guarantees are juridical problems where when the fiduciary debtor does not carry out its obligations that should have been agreed upon.

Default gives rise to juridical facts so that the legal consequences for the creditor receiving the fiduciary guarantee, namely giving birth to the right to execute or withdraw the object of the fiduciary guarantee. Juridically, the creditor carries out execution when the debtor defaults, this is valid, this is related to matters agreed upon by the parties at the beginning of the agreement and has been described in the substance of the agreement which must be implemented and is binding on the parties as law.³⁴ Based on the above opinion, the legal protection of creditors in motor vehicle multipurpose agreements is divided into:

Preventive Legal Protection

Preventive legal protection is "protection provided by the government with the aim of preventing violations before they occur".³⁵ This is contained in legislation with the intention of preventing a violation and providing signs or limits in performing an obligation. This legal protection has its own provisions and characteristics in its application. In this preventive legal protection, legal subjects have the opportunity to submit objections and opinions before the government gives a final decision. Because its nature emphasizes prevention, the government tends to have freedom of action so that they are more careful in applying it. There is no specific regulation that further regulates the legal protection in Indonesia.

The form of legal protection provided by legislation against finance companies is:

Article

15 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees states, "If the debtor is in default, the Fiduciary Receiver has the right to sell the object of the Fiduciary Guarantee under its own power". Therefore, the object of fiduciary guarantee is mandatory for the finance company as the recipient of the fiduciary guarantee object to be registered.³⁶

In conducting a fiduciary agreement, it is carried out through the stages of encumbering fiduciary guarantees, namely a series of legal actions from the making of the main agreement, namely a consumer financing agreement, making a fiduciary guarantee deed until registration at the Fiduciary Registration Office by obtaining a Fiduciary Jamian Certificate. By registering the object of fiduciary guarantee, it proves the attachment of preferent rights for the finance company.

As in the fiduciary guarantee registration procedure, where the requirements for registering a fiduciary guarantee with the Fiduciary Registration Office as stipulated in Article 13 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees which reads:

The registration statement as referred to in paragraph (1) contains:

1. The identity of the Fiduciary Giver and Beneficiary.

³³ R Wirjono Prodjodikoro, *Asas-Asas Hukum Perjanjian*, Bandung, 2016, h. 20

³⁴ Made Bagas Ari Kusuma D, Komang Febrinayanti Dantes, Ni Ketut Sari Adnyani, "Perlindungan Hukum Bagi Debitor Yang Melakukan Wanprestasi Terhadap Objek Jaminan Fidusia Ditinjau Dari Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia", *Jurnal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum* Volume 3 No 3 Tahun 2020, h. 275

³⁵ Phillipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, 2015, h.29

³⁶ Lihat Pasal 11 Undang Undang Nomor 42 Tahun 1999 tentang *Jaminan Fidusia*

2. Date, number of the Fiduciary Deed, name and domicile of the Notary who made the Fiduciary Deed.
3. Data on the underlying fiduciary agreement.
4. Description of the Object of Fiduciary Guarantee.
5. Guarantee value.
6. Value of the Object of Fiduciary Guarantee.

From these requirements, it can be seen that the registered Fiduciary Guarantee has an attachment describing the object of the Fiduciary Guarantee as stipulated in Article 13 paragraph (1) letter d of the Fiduciary Law, so it is clear which object is being pledged.

The reason why the Fiduciary Law requires the fiduciary security deed to be in a special form, namely in the form of a notarial deed, is:³⁷

1. A notarial deed is an authentic deed so that it has perfect evidentiary power about what is contained in it between the parties and their heirs or successors.³⁸
2. The object of fiduciary security is generally an unregistered movable object, so it is only natural that an authentic deed is used to ensure legal certainty about the object of fiduciary security.
3. Article 6 of Law No. 42/1999 on Fiduciary Guarantee regulates the content of the fiduciary guarantee deed so that it must be made in accordance with the provisions in Article 6.
4. The Fiduciary Law prohibits re-fiduciaries.

The same protection can also be seen in Article 23 paragraph (2): “a fiduciary is prohibited from transferring, mortgaging, or leasing to another party an object of fiduciary guarantee that is not an inventory object, except with the prior written consent of the Fiduciary Beneficiary”.

Repressive Legal Protection

Repressive legal protection is "final protection in the form of sanctions such as fines, imprisonment, and additional penalties given when a dispute has occurred or an offense has been committed".³⁹ In this repressive law, legal subjects do not have the opportunity to file objections because they are handled directly by administrative courts and general courts.

Sanctions for the above provisions are criminal as referred to in Article 36 of the Fiduciary Guarantee Law: “Any person who intentionally falsifies, alters, omits or in any way provides misleading information, which if it is known by one of the parties does not give birth to a fiduciary guarantee agreement, shall be punished with 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.- (one million rupiah) and a maximum of Rp. 100,000,000.- (one hundred million rupiah)”.

For all acts and omissions of the consumer as a fiduciary, the fiduciary beneficiary based on the negligence is not responsible, as referred to in Article 24 of the Fiduciary Guarantee Law: “The fiduciary beneficiary shall not bear any liability for the consequences of the acts or omissions of the fiduciary, whether arising from contractual relations or arising from unlawful acts in connection with the use and transfer of objects that are the object of fiduciary guarantees”.

The purpose of a financing agreement with fiduciary security in terms of legal protection for the finance company as a creditor is to provide special rights or rights of precedence for him to pay off debts, debtors to him (schuld and haftung principles).⁴⁰ Further legal protection of

³⁷ Tan Kamello, *Op.Cit.*, h. 131

³⁸ See Article 1870 of the Indonesian Civil Code "An authentic deed provides between the parties and their heirs or people who have rights from them a perfect proof of what is contained therein."

³⁹ Phillipus M. Hadjon, *Op.Cit.*, h.73

⁴⁰ The Schuld and Haftung principles relate to the debtor's obligation to excel and guarantee the fulfillment of these achievements with all of his assets.

the right to prioritize receivables can be seen in the provisions of Law No. 42 of 1999 concerning Fiduciary Guarantees:⁴¹

1. The Fiduciary has precedence over other creditors.

The right of precedence as referred to in Article 27 paragraph (1) is the right of the fiduciary beneficiary to take repayment of his debt from the proceeds of the execution of the object of the fiduciary guarantee.

2. The fiduciary's rights of precedence and beneficiary are not extinguished by the bankruptcy and/or liquidation of the fiduciary.

Overall, several things that can indicate the existence of legal protection for finance companies as creditors (Fiduciary Recipients) according to Law No. 42 of 1999 concerning Fiduciary Guarantees in 1999 include the following:

1. The existence of a fiduciary guarantee registration institution, which is none other than to guarantee the interests of the party receiving the fiduciary.

2. There is a prohibition for the fiduciary to re-fiduciate the object of fiduciary guarantee (Article 17).

3. There is a provision that the Fiduciary is not allowed to transfer, mortgage or lease (Article 23(2)).

4. There is a provision that the fiduciary is obliged to surrender the object of collateral, if the creditor wants to execute the object of fiduciary guarantee (Article 30).

5. There are criminal provisions in the Fiduciary Guarantee Law (Article 35).⁴²

Legal Protection for Debtors on the Withdrawal of Fiduciary Guarantee Objects

Default gives rise to juridical facts so that the legal consequences for the creditor receiving the fiduciary guarantee, namely giving birth to the right to execute the collateral. Juridically, the finance company carries out the execution when the debtor defaults, this is related to the matters agreed upon by the parties at the beginning of the agreement and have been described in the substance of the agreement which must be implemented and binding for the parties as law.⁴³

It is necessary to pay attention to the provisions that must be obeyed in the execution of the fiduciary guarantee object, namely:⁴⁴

1. Any promise to execute the object of fiduciary guarantee in a manner contrary to the provisions referred to in Article 29 and Article 31 of the Fiduciary Guarantee Law is null and void.

2. Any promise that authorizes the fiduciary beneficiary to take possession of the object of the fiduciary guarantee if the debtor is in default is null and void.

3. In the event that the proceeds of execution exceed the value of the guarantor, the fiduciary is obliged to return the excess to the fiduciary grantor while if the proceeds of execution are insufficient for debt repayment the debtor remains responsible for the unpaid debt.

Default is then one of the reasons pushing the creditor company to withdraw the object of fiduciary guarantee from the consumer as the debtor, which becomes a problem if the creditor applies a method that causes arbitrary actions in the withdrawal process. This action usually occurs by hiring the services of a debt collector who is an employee who works in a collection company that has a working relationship with the creditor. The term debt collector in Indonesia in practice has received a distorted view and is considered to reflect collection criteria that prioritize arbitrary actions.⁴⁵

⁴¹ See Article 27 paragraph (1) of Law no. 42 of 1999 concerning Fiduciary Guarantees

⁴² Munir Fuady, *Op. Cit.*, h.78

⁴³ Made Bagas Asri Kusuma, *Op. Cit.*, h.275

⁴⁴ *Ibid.*, p.276

⁴⁵ *Ibid.*, p.276

Based on the above, legal protection for debtors for the withdrawal of fiduciary objects is needed. Legal protection is one of the actions or a system of rules in which there are norms and sanctions aimed at controlling human behavior, maintaining order and justice, and preventing chaos.

Preventive legal protection

Preventive legal protection for debtors (consumers) is contained in Law Number 8 of 1999 concerning Consumer Protection, which regulates the rights and obligations of consumers and business actors, in addition to regulating the limits of the actions of consumers and business actors to prevent losses for one of the parties. In the case of fiduciary guarantee objects, preventive protection for debtors is regulated in the Fiduciary Guarantee Law and Regulation of the Minister of Finance of the Republic of Indonesia Number 130 / PMK.010 / 2012 as well as the Constitutional Court Decision Number 18 / PUU-XII / 2019 and also the Constitutional Court Decision Number 2 / PUU-XIX / 2021 in providing restrictions on performing obligations in order to prevent disputes related to the protracted execution of fiduciary guarantees due to the unconstitutional provisions of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999.

This protection in the Fiduciary Guarantee Law is expressly contained in the consideration point "c" of Constitutional Court Decision Number 2/PUU-XIX/2021, which reads "that in order to fulfill legal needs that can further spur national development and to ensure legal certainty and be able to provide legal protection for interested parties, it is necessary to establish complete provisions regarding Fiduciary Guarantees and the guarantee needs to be registered at the Fiduciary Registration Office". This point of consideration is emphasized in Article 11 (1) of the Fiduciary Guarantee Law "Objects encumbered with Fiduciary Guarantees must be registered".

Furthermore, the confirmation of the fiduciary guarantee registration obligation in the Fiduciary Guarantee Law above is regulated more clearly in the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 which is stated in Article 2 "stating that finance companies must register fiduciary guarantees at the Fiduciary Registration Office no later than 30 (thirty) calendar days from the date of consumer financing".

Furthermore, Article 3 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 states that finance companies are prohibited from withdrawing fiduciary security objects in the form of motor vehicles if the Fiduciary Registration Office has not issued a fiduciary security certificate and submitted it to the finance company. The withdrawal of fiduciary security objects in the form of motor vehicles by finance companies must fulfill the provisions and requirements as stipulated in the law regarding fiduciary guarantees and agreed upon by the parties to the motor vehicle consumer financing agreement.

Article 4 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 states that finance companies that violate the provisions regarding the obligation to register fiduciary guarantees will be subject to sanctions in the form of warnings, suspension of business activities or revocation of business licenses.

Article 3 paragraph (1) of the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 states that the warning sanction is given in writing at most 3 (three) times with a validity period of 60 calendar days each. In the event that before the expiration of the warning period, the finance company has registered the fiduciary guarantee, the warning shall be revoked by the Minister of Finance. If the third warning period has expired and the finance company does not register the fiduciary guarantee, the Minister of Finance shall suspend the business activities.

In general, the rights of consumers have been regulated in Law No.8 of 1999 concerning consumer protection. Article 4 of the Consumer Protection Act is a staple in the enforcement

of consumer protection where a number of consumer rights are guaranteed and protected by law, :

1. The right to comfort, safety and security in consuming goods/services
2. The right to choose goods/services and get the goods and/or services in accordance with the exchange rate and conditions and guarantees promised.
3. The right to correct, clear and honest information regarding the condition and guarantee of goods and/or services.
4. The right to have their opinions and complaints about the goods and / or services used heard.
5. The right to obtain advocacy, protection and efforts to resolve consumer protection disputes properly.
6. The right to receive guidance and consumer education
7. The right to be treated or served correctly and honestly and non-discriminatory.
8. The right to compensation, compensation, and/or replacement, if the goods and/or services received are not in accordance with the agreement or not as they should be.
9. Rights stipulated in other statutory provisions.

The consumer protection stipulated in the Consumer Protection Law and other provisions of laws and regulations is not consumer protection with the principle that consumers are always right, but rather equitable consumer protection by taking into account the interests of consumers and business actors.

Default, is one of the reasons that then encourages the finance company as the creditor to withdraw the object of fiduciary guarantee from the debtor for further execution either by public auction or sale under hand and take repayment of the debt from the proceeds of the sale. If the execution of the fiduciary security object occurs, the debtor needs to ensure several things first, such as:⁴⁶

1. The process of executing the fiduciary security object is in accordance with the procedures stipulated in the financing agreement, including the stage of giving a warning letter to the debtor;
2. The officer who executes the fiduciary security object is an employee of the finance company or an outsourced employee of the finance company who has a letter of assignment to execute the fiduciary security object;
3. The officer who executes the fiduciary security object carries the fiduciary security certificate.
4. The process of selling goods resulting from the execution of the object of fiduciary guarantee must be carried out in accordance with the provisions of laws and regulations concerning fiduciary guarantees.

The matter referred to above is in accordance with Article 50 paragraph (1) of the Financial Services Authority Regulation No. 35/POJK.05/2018 concerning the Implementation of Financing Companies, namely the execution of collateral by a finance company must meet the provisions, the debtor is proven to be in default, the debtor has been given a warning letter and the Financing Company has a fiduciary guarantee certificate.

Article 50 paragraph (4) explains that the Financing Company must explain to the debtor information regarding: outstanding principal owed, interest owed, fines owed, costs related to collateral execution and the mechanism for selling collateral in the event that the debtor does not complete its obligations.

The existence of Constitutional Court Decision Number 18 / PUUXII / 2019 and Constitutional Court Decision Number 2 / PUU-XIX / 2021 has provided legal certainty for

⁴⁶ *Ibid.*,p.275

debtors (fiduciaries) regarding the execution of fiduciary guarantees that the determination of a breach of promise (default) is not only determined unilaterally by the creditor as has been the case so far, but on the basis of an agreement or on the basis of legal remedies that determine the occurrence of a breach of promise, as evidenced by an agreement document between the finance company and the debtor regarding the occurrence of a default or a court decision stating that a default has occurred.

Repressive Legal Protection

Repressive legal protection is a form of legal protection given to the debtor if the withdrawal of the fiduciary guarantee object carried out by the creditor arbitrarily is not in accordance with the Fiduciary Guarantee Law or the decision of the Constitutional Court. Legal remedies that can be taken in the event of forced withdrawal of the fiduciary security object can be categorized in criminal and civil forms. Criminally, the debtor can make a report to the police based on Article 368 of the Criminal Code on Extortion and Threats. Meanwhile, in the civil context, the legal steps are divided into litigation and non-litigation. In litigation, the debtor can take legal steps in the form of filing a lawsuit in court and in non-litigation, the debtor can make an out-of-court settlement through mediation, negotiation and arbitration.

The debtor can file a lawsuit to the court due to the withdrawal of the fiduciary object that is not in accordance with the laws and regulations, then the debtor can file a lawsuit for tort / compensation based on Article 1365 of the Civil Code which states “Every unlawful act that brings harm to another person, obliges the person who through his fault causes the loss, to compensate for the loss”.

A lawsuit against the law (PMH) from the debtor as the holder of the fiduciary guarantee object is a repressive action to obtain juridical legal protection. If the debtor feels aggrieved by the forced withdrawal of the fiduciary security object that is not in accordance with the provisions of the Fiduciary Guarantee Law and the Constitutional Court Decision, then this PMH lawsuit can be submitted to the local District Court. Where the debtor must be able to prove the elements that exist in the illegal act, starting from the existence of an illegal act, the existence of an error committed by the creditor, the existence of a causal relationship between the loss and the act, and also the loss suffered by the debtor due to the forced withdrawal of the fiduciary security object.

Actions taken by the creditor for the arbitrary withdrawal of the fiduciary guarantee object must be clearly proven and accompanied by relevant evidence of both unlawful acts and losses suffered by the plaintiff so that the judge can decide fairly based on relevant evidence. Constitutional Court Decision Number 18/PUU-XII/2019 confirms that the right for creditors to carry out direct execution without going through the court as stipulated in Article 15 paragraph (2) of the Fiduciary Guarantee Law can only be implemented as long as there is consent from the debtor. If there is no consent and the debtor objects to the execution, then all executions must be carried out and apply the same as a court decision with permanent legal force. This means that the execution of the fiduciary guarantee when there is no agreement must be carried out through the court like the execution of a decision with permanent legal force as stipulated in the HIR/Rbg.

Execution by title executorial requires a fiat from the President of the Court, but selling based on parate execution is a sale based on the creditor's own rights that have been agreed so that it does not require Court permission. The Constitutional Court then confirmed it in a further decision, namely Decision No.2/PUU-XIX/2021, where execution through the court is an alternative in the absence of the debtor's agreement regarding default and execution of collateral. The procedure for execution through the court is basically carried out by an order

from the President of the District Court, which is then carried out by the bailiff, in accordance with the provisions in the HIR and Rbg.⁴⁷

CONCLUSIONS

Withdrawal of the fiduciary security object in a motor vehicle multipurpose financing agreement can be carried out by *parate executie* against the fiduciary security object either carried out by the financing company itself with the condition that there is a fiduciary security certificate. The matter as referred to is contained in Article 15 paragraph (2), Article 15 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees where the executorial power of the fiduciary guarantee certificate is the same as the power of a court decision that has obtained permanent legal force. This means that if the consumer as the debtor does not perform as agreed, the finance company as the fiduciary recipient who has registered the fiduciary guarantee and has a fiduciary guarantee certificate is given the right to determine the implementation of the repayment of its debt with the object of fiduciary guarantee either by *parate executie*, through public auction or sale under the hands carried out based on the agreement of the grantor and recipient of the fiduciary in accordance with the provisions of Article 29 paragraph (1) and Explanation of Article 30 of Law No. 42 of 1999 concerning Fiduciary Guarantees.

The form of legal protection against finance companies in motor vehicle multipurpose financing agreements is regulated in the financing agreement where the contents of the financing agreement are in accordance with Article 34 of the Financial Services Authority Regulation No. 35/POJK.05/2018 and the provisions of Law No. 42 of 1999 concerning Fiduciary Guarantees where the object of fiduciary guarantee is required to be registered. When the fiduciary security object is recorded and registered, the property rights of the fiduciary holder are active, thus giving rise to the consequence that everyone will be deemed to have known that the fiduciary security object is transferred to the finance company as the creditor. This is done through the stages of encumbering fiduciary guarantees, namely a series of legal actions from the making of the main agreement, namely the financing agreement, making a fiduciary guarantee deed until registration at the Fiduciary Registration Office by obtaining a Fiduciary Jamian Certificate. The result of the registration is expected to provide legal protection to the giver and receiver of fiduciary.

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