**LEGAL PROTECTION FOR CREDITORS RELATED TO THE EXISTENCE OF UNREGISTERED FIDUCIARY GUARANTEE DEEDS IN THE EVENT OF DEBTOR DEFAULTS (Study Case District Decision Number 108/Pdt.G/2021/PN.Mks)**

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| **Febe Hartanto**Universitas Jenderal Soedirman**Abstract**This research was conducted on the decision of the Makassar District Court civil case number 108/Pdt.G/2021/PN.Mks is concerned about a default lawsuit against a loan agreement that has been guaranteed with fiduciary guarantee and personal guarantee. In the decision, there was a problem where the fiduciary guarantee deed had not yet been registered. Therefore, even if the judges declares that the debtor is in default, the plaintiff or the creditor still cannot execute the fiduciary guarantee based on the fiduciary guarantee certificate. The purpose of this study is to analyze the consequences and the legal protection for the creditor related to the fiduciary guarantee deed that is not registered. This study uses a normative juridical research type, with the specifications of the research carried out in a prescriptive manner. The legal sources taken in this research came from secondary data which include primary and secondary legal materials with the data collection method through literature study. From this study, 2 (two) conclusions were obtained which the first one showed that the consequences of not registering the fiduciary guarantee deed is there is no fiduciary guarantee so that the agreement is just an ordinary loan agreement, therefore the position of the creditor is only as a concurrent creditor and there is no material character such as droit de suite and preferential rights attached to the fiduciary creditor. Apart from that, the creditor also does not have the right to executorial power based on the fiduciary guarantee certificate. Second, in terms of the debtor defaults, then the legal protection for the creditor if they feel aggrieved and want to claim or demand the debt back, they can only sue based on Article 1131 of the Civil Code. **Keywords:** Fiduciary Guarantee Deed; Legal Protection; Default |
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# **Pendahuluan**

A loan agreement is an agreement in which the first party (the lender or called the creditor) hands over a number of goods that have been used up to the other party (the borrower or called the debtor) with the provision that the borrower will return the same amount as the goods he has borrowed. The birth of a loan and borrowing agreement must fulfill the validity of the agreement in accordance with Article 1320 of the Civil Code and the delivery of the object of the agreement which is generally in the form of a sum of money. With this agreement, there is a legal relationship between the two parties so that an obligation arises. However, not all agreements go as agreed upon, causing a state of default. Default is a condition of non-fulfillment of an obligation as agreed due to the fault of the debtor. The occurrence of this default then encourages the party who is disadvantaged by the incident to file a lawsuit in the district court, such as in civil case number 108/Pdt.G/2021/PN.Mks.

Through decision number 108/Pdt.G/2021/PN.Mks, it is known that the Plaintiff, which is the Cooperative and Micro, Small and Medium Enterprises Revolving Fund Management Institution (LPDB KUMKM), sued the Defendant, namely the Muamalat Commerce Sharia Savings and Loan Cooperative and its three insurers, namely Muhammad Thamrin Arief, S.E., Drs. Andi Ahdam Surya, and Mutiawan Muharrim Handaling, each of whom consecutively served as chairman, secretary, and treasurer of the cooperative, on the basis of default. This case began with a loan/financing application submitted by the Defendants to the Plaintiff. After the Plaintiff conducted an initial analysis and the Defendants had met the requirements, which included being willing to provide fiduciary collateral for current receivables of at least 100% (one hundred percent) of the financing ceiling and the Management was willing to become a personal guarantor, then based on the Deed of Loan/Financing Agreement Number 126 dated May 25, 2011, Defendant I as a legal entity received a loan/financing from the Plaintiff with a ceiling of Rp5,000,000,000, - (five billion rupiah) with a term of 36 (thirty-six) months and a profit sharing ratio of 40%: 60% (forty percent to sixty percent) of gross income. However, based on the receivables card data and the testimony of the Plaintiff's witness, it was known that the Defendant did not make payments in accordance with the agreed installment value and schedule where the total outstanding of Defendant I reached Rp4,900,000,000 (four billion nine hundred million rupiah). For this reason, the Plaintiff then sent a warning letter/notice to the Defendants, but the Defendants still did not fulfill their obligations in repaying the loan/financing.

The Panel of Judges in decision number 108/Pdt.G/2021/PN.Mks was of the view that the Defendants had defaulted to the Plaintiff. However, in this case, there is a problem where the fiduciary guarantee provided by the Defendant has not been registered, so that it has not given rise to a Fiduciary Guarantee Deed. Therefore, it is necessary to analyze the legal consequences that may arise as a result of not registering the fiduciary guarantee with the fiduciary registration office and how legal protection can be obtained by the Plaintiff as a creditor in the event that the debtor defaults in the absence of a Fiduciary Guarantee Deed.

# Based on this background description, the author is interested in examining the legal consequences and legal protection for fiduciary creditors as described above by compiling legal writing in the form of the following article with the title “Legal Protection for Creditors related to the Unregistered Fiduciary Deed of Guarantee in the Event of Debtor Default (Study of Decision Number 108/Pdt.G/2021/PN.Mks)”.

# **Problems**

Based on the background that has been described, there are 2 (two) problem formulations, namely the first problem formulation is what legal consequences arise with the non-registration of the fiduciary guarantee deed in the event of a debtor default? Second, how is the legal protection for creditors related to the existence of an unregistered fiduciary security deed in the event of a debtor's default?

# **Research Method**

# This research uses normative juridical research type, with prescriptive research specifications. The source of legal materials taken for writing in this study comes from secondary data which includes primary legal materials and secondary legal materials with data collection methods through literature studies. The method of data presentation in this research is carried out descriptively narrative and normative qualitative data analysis method.

# **Discussion**

1. **Fiduciary Guarantee as Security for Debt Agreement**

Debt relations between debtors and creditors are often accompanied by collateral. The definition of collateral is not regulated in the Civil Code, but can be known from the opinions of scholars such as the opinion of R. Subekti who states that collateral is the fulfillment of obligations that can be valued in money and the collateral object can be transferred to another party. The guarantee can be movable or immovable objects or individual rights that can be transferred to other people. (Subekti, 1978) There is also an opinion from Hartono Hadisoeprapto which states that collateral is something given to the creditor to create confidence that the debtor will fulfill obligations that can be valued in money arising from an engagement. (Hadisoeprapto, 1984) In this case, the debtor or his insurer pledges a number of his assets for debt repayment according to the applicable statutory provisions if within the specified time there is a payment jam by the debtor. However, there are also guarantees arising from the law as stated in Article 1131 of the Civil Code which reads as follows:

“All property of the debtor, movable and immovable, whether existing or future, shall be liable for all his personal obligations.”

Then, followed by Article 1132 of the Civil Code which regulates:

“The goods become joint security for all creditors against whom the proceeds of the sale of the goods are divided according to the ratio of their respective receivables unless among the creditors there are legitimate reasons for precedence.”

In the context of debt, according to civil law, all debtor's property becomes collateral for his debt to creditors as stipulated in Article 1131 of the Civil Code. In general, there are two elements in the debtor, namely schuld and haftung because in principle, every debt is automatically borne by the debtor's wealth (Article 1131 of the Civil Code). Schuld is the debtor's obligation to perform and haftung is his juridical responsibility, regardless of who is obliged to fulfill the owed performance. (Satrio, 1999)

Followed by Article 1132 of the Civil Code, then the debt which is the obligation of the debtor to be paid to the creditor is secured by the property and if the creditor is more than one, then the property is divided according to the amount of their respective debts and with due regard to whether any creditor has priority in payment. In this equality of payment by the debtor, the principle of paritas creditorium applies, which determines that creditors have the same rights to all of the debtor's property, provided that if the debtor is unable to pay his debts, the debtor's assets will be fulfilled. In line with Article 1131 of the Civil Code above, this principle means that all of the debtor's assets, both movable and immovable goods owned by the debtor, whether they already exist or will exist, are tied to the settlement of the debtor's debt. However, this principle is then paired with the principle of pari passu prorata parte and the principle of structured creditor where in the principle of pari passu prorata parte, the assets that become joint collateral for the creditors must be distributed proportionally (pond-pond gewijs) between them, unless among the creditors, there are those whose payments must be prioritized according to law. Meanwhile, the principle of structured creditor is to classify various kinds of creditors, such as separatist, preferred, and concurrent creditors. (Simanjuntak, 2020)

This guarantee appears as a guarantee agreement that follows the main agreement so that the guarantee agreement is an accesoir agreement. J. Satrio argues that an accesoir agreement is an agreement whose birth/existence, transfer, and end/deletion depend on the main agreement (Satrio, 1996). This accesoir collateral agreement has legal consequences, such as birth / existence, movement, and termination / termination following the main agreement or in other words that the accesoir agreement cannot stand alone.

The purpose of the security institution is to convince the creditor that the debtor has the ability to return or repay the debt given to him in accordance with the terms and agreements that have been mutually agreed upon. (Gie, 2005)

The need for collateral in a credit facility is solely oriented towards protecting the interests of creditors so that the funds they have given to the debtor can be returned according to the specified time period. In other words, the existence of collateral for granting credit is for the security and legal certainty of the owner of funds (creditor). (Gie, 2005)

The term guarantee itself comes from the word “jamin” which means responsibility so that the guarantee can be interpreted as a dependency. In this case, what is meant is a guarantee for all obligations of a person as specified in Article 1131 of the Civil Code as well as a guarantee for certain obligations of a person as regulated in Articles 1139-1149 of the Civil Code (privileged receivables), Articles 1150-1160 of the Civil Code (pawn), Articles 1162-1178 (mortgage), Articles 1820-1850 of the Civil Code (debt guarantee), and finally as determined by jurisprudence is fiduciary. (Tiong, 1983)

Basically, collateral can be divided into two types, namely:

1. Material Guarantee

Material security is a guarantee in the form of an absolute right to an object that has the characteristics of having a direct relationship to a particular object, can be defended against anyone, always follows the object and can be transferred. The legal system of property security includes pawn (pand), mortgage, mortgage, and fiduciary security. (Kamello, 2014)

1. Personal Guarantee

Personal guarantees are guarantees that give rise to a direct relationship to certain individuals, can only be maintained against certain debtors, against the debtor's property in general. Included in personal guarantees are:

1. The insurer (borg) is another person who can be charged;
2. Liability, which is similar to joint and several liability;
3. Warranty Agreement. (Sidik, 2001)

As a form of property security, fiduciary security, or Fiduciaire Eigendomsoverdracht as it is often called, is a form of security over movable objects in addition to pawn, which has been developed by jurisprudence. The definition of fiduciary guarantee is stated in Article 1 point 2 of Law Number 42 Year 1999 on Fiduciary Guarantee (UUJF) which reads:

“Fiduciary guarantee is a security right over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered by mortgage rights, which remain in the control of the fiduciary, as collateral for the repayment of certain debts, which gives priority to the fiduciary against other creditors.”

According to its origin, fiduciary comes from the word “fides” which means trust where the relationship between the fiduciary debtor and the fiduciary creditor is a legal relationship based on trust. The fiduciary grantor believes that the fiduciary creditor will return the property rights that have been handed over to him after the debtor has repaid his debt. The creditor also trusts that the fiduciary will not misuse the collateral in his/her control and will take care of it as a “good father of the house”. (Tiong, 1983) In fiduciary, unlike a pawn, what is handed over as collateral to the creditor is the property right, while the goods are still controlled by the debtor so that what occurs is a constitutum possessorium handover (Tiong, 1983). Therefore, the object pledged with fiduciary security in this case is still in the debtor's possession, while the creditor is only handed over its “ownership”.

1. **Obligation to Register Fiduciary Deed**

The encumbrance of objects with fiduciary guarantees is made by notarial deed in the Indonesian language and constitutes a fiduciary guarantee deed. Based on the provisions of Article 6 of Law No. 42/1999 on Fiduciary Guarantee (UUJF), the fiduciary guarantee deed must at least contain:

a. the identity of the fiduciary grantor and beneficiary;

b. data on the principal agreement guaranteed by the fiduciary;

c. description of the object of the fiduciary guarantee;

d. the value of the guarantee; and

e. the value of the object of fiduciary guarantee.

To provide legal certainty, Article 11 of the UUJF requires that objects encumbered with fiduciary guarantees be registered at the Fiduciary Registration Office located in Indonesia. This obligation applies even if the object encumbered with a fiduciary guarantee is located outside the territory of the Republic of Indonesia. The application for fiduciary guarantee registration is made by the fiduciary beneficiary, its attorney, or representative by attaching a fiduciary guarantee registration statement containing:

1. he identity of the fiduciary grantor and beneficiary;
2. data on the principal agreement guaranteed by the fiduciary;
3. description of the object of the fiduciary guarantee;
4. the value of the guarantee; and
5. the value of the object of fiduciary guarantee.. (Widjaja, 2001)

The fiduciary registration office will record the fiduciary guarantee in the fiduciary register book on the same date as the registration application is received. This date is then considered the moment of birth of the fiduciary guarantee. Thus, the registration of the fiduciary guarantee in the fiduciary register book is a constitutive act that gives birth to the fiduciary guarantee. (Widjaja, 2001)

The fiduciary guarantee certificate issued by the fiduciary registration office has the same executorial power as a court decision that has obtained permanent legal force (inkracht van gewijsde) because it contains the words “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA” in the certificate so that if the debtor is in default, this gives the fiduciary recipient the right to sell the object of the fiduciary guarantee under its own power (Article 15 UUJF).

1. **Execution of Fiduciary Security Object in the Event of Debtor Default**

In general, the rights and obligations arising from the engagement are fulfilled by the debtor and creditor, but in practice, there are parties who do not comply with what is their obligation as agreed. On the debtor himself lies the obligation to fulfill the performance and if he does not carry out his obligations not due to force majeure, then the debtor is considered to have broken his promise or default. (Setiawan, 1977). The word default comes from the Dutch language which means bad performance (Setiawan, 2016).

1. J. Satrio provides an understanding of default where default is referred to as a situation where the debtor does not fulfill his promise or does not fulfill as it should and all of which can be blamed on him (Setiawan, 2016). From this understanding, it can be seen that the elements of default consist of the debtor's non-performance and the debtor's fault.

In decision number 108/Pdt.G/2021/PN.Mks, the panel of judges stated that the debtor had been proven to have defaulted. As a result, if the case is like in the decision, namely that there is a fiduciary guarantee, then if a fiduciary guarantee certificate has been born, refer to Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF):

1. In the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1), the words “DEMI KEADILY BASED ON THE KINGDOM OF THE Almighty God” shall be included;
2. The Fiduciary Guarantee Certificate as referred to in paragraph (1) shall have the same executorial power as a court decision that has obtained permanent legal force;
3. If the debtor is in default, the Fiduciary Beneficiary shall have the right to sell the object of the Fiduciary Guarantee under its own authority..

Against the above article, the Constitutional Court through Constitutional Court Decision No. 18/PUU-XVII/2019 essentially states that upon ownership of a fiduciary security certificate, the fiduciary receiver (creditor) has the right to execute the fiduciary security object if:

1. default or breach of promise is not determined unilaterally, but based on an agreement between the creditor and the debtor; or
2. certain legal measures have been taken that determine the occurrence of default or breach of promise.

However, if the creditor and debtor do not reach an agreement regarding the occurrence of default and the debtor objects to surrendering the object of fiduciary guarantee voluntarily, the fiduciary receiver (creditor) cannot carry out the execution itself, but instead submits a request for execution to the district court.

If the applicant for execution has submitted an application to the President of the Court of First Instance, the President of the Court will summon the losing party (respondent) for an admonition (aanmaning) to carry out the contents of the decision within 8 (eight) days in accordance with Article 196 HIR/207 Rbg. If the execution respondent still does not want to execute the decision, the Chief Justice issues a decision containing an order to the clerk / bailiff / substitute bailiff to carry out seizure of execution against the property if no bail was previously placed in accordance with the provisions of Article 197 HIR/208 Rbg (Permatasari, 2021).

In addition to the executorial title, Article 29 of the Fiduciary Guarantee Law (UUJF) stipulates that if the debtor is in default, the execution of the fiduciary guarantee object can be carried out in the following ways:

1. Execution of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Beneficiary;
2. Sale of the object of fiduciary guarantee under the authority of the Fiduciary itself through a public auction and taking repayment of the debt from the proceeds of the sale;
3. Sale under the hands based on the agreement of the Fiduciary and the Fiduciary if the highest price favorable to the parties can be obtained by such means.
4. **Legal Effects and Legal Protection to Fiduciary Creditor in the Absence of Fiduciary Guarantee Certificate**

In a debt and credit agreement with fiduciary guarantee, legal protection is needed for the parties, especially for the creditor considering that the collateral object is controlled by the debtor. Legal protection in general is regulated in Article 1131 of the Civil Code which explains that since a person binds himself to an agreement, all assets, both existing and future, become the responsibility of the debtor or the debtor for all his obligations, while in Article 1132 it is stated that the debtor's assets become collateral for his creditors, the proceeds of the sale are divided according to their respective balances, unless there is a right of precedence. Nevertheless, Law No. 42/1999 on Fiduciary Guarantee specifically regulates in Article 11 that objects encumbered by fiduciary guarantees must be registered, then a fiduciary guarantee certificate is made which includes the phrase “For the Sake of Justice based on God Almighty” so that the fiduciary guarantee certificate has the same executorial power as a court decision with permanent legal force.

If the debtor defaults, based on the fiduciary guarantee certificate, the creditor has the right to carry out execution based on the executorial title, the creditor also has the right to sell the object of fiduciary guarantee through a public auction and repay the receivables from the proceeds of the sale or sale under the hand based on an agreement between the parties.

In the Fiduciary Guarantee Law, to create protection for creditors, fiduciary guarantees must first be registered as stipulated in Article 11 of the Fiduciary Guarantee Law where this registration is a fulfillment of the principle of publicity. The encumbrance of a fiduciary guarantee that is only by notarial deed without registration will not give birth to a preferential right to the creditor of the fiduciary recipient.

In practice in the business world, financing institutions after the deed of encumbrance of fiduciary guarantee is made by notarial deed, are not followed up with the registration procedure. This is due to the idea that the imposition of fiduciary security with a notarial deed is safe enough for the creditor. It also saves on registration costs. Another underlying point is that so far, the imposition of fiduciary guarantees has not been problematic in practice, but as a guide, the fiduciary guarantee deed is prepared by the creditor for the possibility of being registered if a problem occurs in the future, for example, the debtor defaults. (Muhtar, 2013)

By not registering the fiduciary guarantee deed, based on Article 11 of the Fiduciary Guarantee Law, the fiduciary guarantee has not yet been born, so all binding legal consequences after the birth of the fiduciary guarantee still do not exist. Therefore, the creditor's position is still as a concurrent creditor. In general, concurrent creditors are creditors who do not hold any material security rights, in contrast to preferred creditors who are creditors who have special rights to take precedence over other creditors based on the nature of their debts. In addition, in relation to fiduciary guarantees, the principle of droit de suite applies where droit de suite is one of the characteristics of property, namely a right that continues to follow the owner of the object or a right that follows the object in anyone's hands (het recht volgt de eigendom van de zaak) which applies in relation to absolute rights to property (in rem) as stated in Article 20 of the Fiduciary Guarantee Law which states that the fiduciary guarantee continues to follow the object of the fiduciary guarantee in anyone's hands, except for the transfer of inventory objects that are the object of the fiduciary guarantee. Therefore, with the absence of a fiduciary guarantee, the droit de suite character of the property is not attached to the creditor.

Based on the above, there is no fiduciary security certificate, which has an executorial power that is able to give the creditor the power to execute the fiduciary security object. The absence of a fiduciary guarantee certificate automatically nullifies the creditor's right to carry out execution based on the executorial title so that as in the case of decision number 108/Pdt.G/2021/PN.Mks which states that the debtor has been proven to be in default, even though the creditor has been given the right to an object with a fiduciary guarantee, but because it is not registered so that it does not give birth to a fiduciary guarantee juridically, the creditor cannot execute the fiduciary guarantee object.

Although the creditor cannot execute the object of the debtor's fiduciary guarantee as repayment of his debt, the creditor still has a legal protection to be able to reclaim his rights, namely based on Article 1131 of the Civil Code. Based on Article 1131 of the Civil Code, all of the debtor's assets, both existing and future, become the debtor's liabilities to pay off his debts to the creditor. The provision in this article is a general security provision in which it is a security arising from the law; the form and content of which are determined by law so that even in the absence of a specifically agreed guarantee, the creditor can still hold security for its principal engagement with the debtor. However, in this context, the creditor is only a concurrent creditor against all of the debtor's assets as per Article 1132 of the Civil Code.

# **Conclution**

# 1. The legal consequence of not registering a fiduciary guarantee with the fiduciary registration office is that it does not give birth to a fiduciary guarantee certificate so that there is no material security agreement in the form of a fiduciary guarantee. Therefore, property characteristics such as droit de suite and preference rights are not attached to the fiduciary creditor. In addition, the unregistered fiduciary deed of guarantee has no executorial power.

# 2. In the event that the debtor defaults, while the object of the fiduciary guarantee is not registered, then no fiduciary guarantee is born so that the agreement is only an ordinary debt and credit agreement, so the creditor's position is only as a concurrent creditor. The legal protection for the creditor is that if the creditor feels aggrieved and wants to claim his debt back, he can only sue based on Article 1131 of the Civil Code.

# **Comments**

# There needs to be a briefing/explanation to the fiduciary creditor by the notary as the maker of the fiduciary security deed regarding the importance of fiduciary security registration.

# There is a need for legal awareness regarding the execution of fiduciary security objects so that the weaknesses in Law Number 42 of 1999 concerning Fiduciary Guarantees can be minimized in fiduciary agreements.

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