

## **Legal Protection for Lenders on the Transfer of Fiduciary Objects to Third Parties**

**Silvana Yasin Hamzah<sup>1</sup>, Hijrah Lahaling<sup>2</sup>, Sumiyati B<sup>3</sup>**

Universitas Ichsan Gorontalo

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### **Abstract**

*This study aims to determine how Legal Protection for Lenders for the Transfer of Fiduciary Objects in the Form of Four-Wheeled Vehicles to Third Parties Without the Lender's Consent. This study uses an Empirical legal research method using a legal research method where empirical facts are taken from human behavior, both verbal behaviors obtained from interviews and real behavior carried out through direct observation. Empirical research is also used to observe the results of human behavior in the form of physical remains or archives. The results of the study show; legal protection is an effort to provide protection to legal subjects, regarding actions that can be taken to maintain or protect the interests and rights of the legal subjects. Indonesia recognizes four material guarantee institutions, namely Pawn, Mortgage, Fiduciary, and Mortgage. One of the recognized guarantee institutions is fiduciary guarantee. Based on Law No. 42 of 1999 concerning Fiduciary Guarantees, it is explained that Fiduciary is the transfer of ownership rights of an object based on trust, where the object whose ownership rights are transferred remains in the control of the owner of the object.*

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### **Corresponding Author:**

Silvana Yasin Hamzah

Universitas Ichsan Gorontalo

Email: [silvana.hamzah90@gmail.com](mailto:silvana.hamzah90@gmail.com)

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## **1. INTRODUCTION**

In the current era of globalization, society is developing very quickly. Boundaries or distances in the world no longer have any effect on technology Internet. In terms of economics, it is also experiencing very rapid development and demands speed of mobility for the people involved in it.

The increasing need of society for the role of financial institutions in activity business and trade have simultaneously triggered the birth of non-bank financial institutions that provide financing facilities (services) for the community through system installment payments (credit). This shows that the level of people's needs for consumption of goods and services continues to increase. This condition is certainly a promising opportunity for business actors to be able to attract profits by opening up business opportunities in the field of financing and financial service facilities.

With the existence of consumer finance, people do not need to provide too large funds to realize their desire to buy the goods they need, just by providing 10 to 20% of the price of the goods as a down payment (DP), people can take home the goods they want.

Based on Presidential Decree Number 9 of 2009 concerning Financing Institutions, it is stated that consumer financing institutions are activities carried out in the form of

providing funds for consumers to purchase goods (consumptive) where payments are made in installments.

Every financing provided to consumers must be preceded by an agreement. Article 1338 of the Civil Code states: "All contracts (agreements) that are legally made are valid as law for those who make them." This is called a general guarantee ".

It is stated that all agreements that are made legally, are valid as law for those who make them. What is meant in this article is an agreement that is made legally, meaning that it does not conflict with the law, and is binding on both parties. This agreement in a financing institution is called a debt and receivables agreement or credit agreement. In debt and receivable agreements, consumers (debtors) are required to provide adequate material collateral.

In principle, there is no credit that does not contain collateral. It is impossible for financial institutions to provide loans in the form of funds without adequate collateral from the consumer (debtor). This is a generally accepted principle in providing credit, both by banking financial institutions and non-bank financial institutions. This is because every grant of credit will always contain a risk if in the future there is a payment problem from the consumer (debtor). To guarantee that if one day the debtor is unable to pay the installments the debt, then the object of collateral must be able to be used as an alternative means of paying off debt by selling it at auction to cover the consumer's (debtor's) payment obligations that are owed. So that debt If the debtor defaults, the creditor or financing institution must choose the type of collateral that provides convenience and practicality, namely by placing the creditor as the holder of a special position and taking priority over its creditors.

The term guarantee comes from the word "guarantee" which means responsibility, so that a guarantee can be interpreted as a guarantee for all obligations of a person as stated in Article 1131 of the Civil Code "All property of the debtor, both movable and immovable, whether existing or new that will exist in the future, is a guarantee for all individual obligations or responsibility for certain obligations of a person. Meanwhile, Article 1850 of the Civil Code states "A simple postponement of payment permitted by the creditor to the debtor does not free the guarantor from his or her responsibility, but in such a case, the guarantor can force the debtor to pay the debt or free the guarantor from his or her responsibility." Guarantees based on their form are divided into two groups, namely personal guarantees and material guarantees. In the banking world, material collateral is preferred by banks because it has the function of securing credit repayment if the borrower breaks their promise.

The material security institutions that are widely applied in credit agreements are mortgages or mortgage rights, pledges and fiduciary guarantees. Mortgage guarantee institutions are used if the object of collateral or collateral is a fixed object (immovable object). If the collateral objects are movable objects, they can be tied with a pledge or fiduciary guarantee. The fiduciary guarantee institution as an accessory agreement to the credit debt agreement (agreement) is a development of the pawn guarantee institution. The principal difference between pawn guarantee institutions and fiduciary guarantee institutions lies in the aspect of control over the collateral object. In a pawnshop, the collateral object is handed over and controlled by the party receiving the pledge (creditor), whereas in a fiduciary agreement, the collateral object remains controlled by the fiduciary (debtor).

In 1999 Law Number 42 of 1999 concerning Fiduciary Guarantees was issued, hereinafter referred to as the Fiduciary Guarantee Law, in article 1 number 2 it is stated that; "Fiduciary Guarantee is a security right over movable objects, both tangible and

intangible, and immovable objects specifically buildings that cannot be encumbered with Mortgage Rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Debtor, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a preferred position over other creditors.

Article 23 paragraph (2) of the Fiduciary Guarantee Law, hereinafter referred to as UUJF, states that: Debtors are prohibited from transferring, pawning or renting to other parties objects that are the object of Fiduciary Guarantee which are not inventory items, except with prior written approval from the Fiduciary Recipient.

The consequences if the transfer, mortgage or lease is carried out without the consent of the fiduciary recipient, then the debtor can be categorized as having committed an unlawful act and may be subject to criminal law as stipulated in Article 36 of the Fiduciary Guarantee Law which determines: "A debtor who transfers, pawns or leases objects that are the object of fiduciary collateral as intended in Article 23 paragraph (2) of the Notary Services Law which is carried out without prior written approval from the fiduciary recipient, convicted with a maximum imprisonment of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiah)."

In practice, the picture above is not the case, because it is not uncommon for fiduciary providers to often transfer the object of fiduciary collateral to another party without the written consent of the fiduciary recipient. One of the finance companies in Gorontalo City that provides financing for four-wheeled vehicles or cars is PT KB Multi Finance / Kredit Plus.

## 2. RESEARCH METHOD

This type of research is empirical legal research using legal research methods where empirical facts are taken from human behavior, both verbal behavior obtained from interviews and real behavior carried out through direct observation. Empirical research is also used to observe the results of human behavior in the form of physical remains and archives.

## 3. RESEARCH RESULTS AND DISCUSSION

### **Legal Protection for Lenders on the Transfer of Fiduciary Objects to Third Parties**

Legal protection consists of two parts, namely protection and law. Protection refers to actions or things that aim to protect. Meanwhile, law is a set of norms that functions to protect the interests of all parties involved. According to Wirjono Prodjodikoro in his writing, legal protection is an effort given to protect legal subjects, regarding things that can be done to defend or protect the interests and rights of the legal subjects themselves.

Abdul Hariss, Nur Fauzia, and Gladys Amanda. Legal Protection for Recipients in the Situation of Giving Unregistered Fiduciary Security Objects Without the Recipient's Consent. Based on this, the author wishes to raise issues that still need to be answered by focusing on the ambiguity of norms in Article 23 Paragraph (1) of the Fiduciary Guarantee Law (UUJF), especially regarding unlawful actions carried out by Parties Debtor Fiduciary Guarantee. This research is entitled "Legal Protection for Givers in the Case of Recipients of Unregistered Fiduciary Security Objects Without the Giver's Consent.

Legal Protection for Fiduciary Providers (Creditors) in Fiduciary Guarantee Practices. Legal protection consists of two words, namely protection and law. Protection refers to the action or process of protecting, while law is a set of rules aimed at safeguarding the interests of all parties. According to Wirjono Prodjodikoro in his book, legal protection is an effort to provide protection to legal subjects, regarding actions that can be taken to defend or protect the interests and rights of those legal subjects. Indonesia recognizes four material

security institutions, namely Pawn, Mortgage, Fiduciary and Mortgage. One of the guarantee institutions that has been recognized is fiduciary guarantees.

Based on Law no. 42 of 1999 concerning Fiduciary Guarantees, it is explained that Fiduciary is the transfer of ownership rights to an object based on trust, where the object whose ownership rights are transferred remains in the control of the owner of the object. Fiduciary Guarantee is a security right for movable objects, both tangible and intangible, as well as immovable objects, especially buildings which cannot be encumbered with mortgage rights in accordance with Law Number 4 of 1996 concerning Mortgage Rights, and remain in the control of the Fiduciary Grantor as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a more preferential position compared to other creditors.

This fiduciary guarantee is different from other material guarantees, a fiduciary institution is the only institution where the debtor controls movable collateral and money from the credit agreement. Fiduciary guarantees are carried out by: *established owner*, namely objects whose ownership has been handed over to the creditor but which are still physically controlled by the fiduciary for the benefit of the fiduciary recipient. So this means that the transfer of ownership rights on the basis of trust gives the fiduciary the position to continue to control the collateral, even if only as a borrower for temporary use or no longer as owner.

What is meant by material rights here is the right to an object that can be used owned and redirected. Fiduciary Guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the fiduciary giver, as collateral for the repayment of certain debts, which gives the fiduciary recipient a preferred position over other creditors.

Provisions regarding fiduciary guarantees are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees, more specific provisions governing the transfer of fiduciary guarantees are regulated in the third part of the law. The transfer of the object of fiduciary collateral does not necessarily transfer the obligation of the debtor to the creditor, in the provisions of Article 20 of Law Number 42 of 1999 it is stated that "fiduciary collateral remains with the object that is the object of fiduciary collateral in the hands of whoever the object is in, except for the transfer of inventory objects that are the object of fiduciary collateral".

In principle, the provider of fiduciary collateral does not have the authority to transfer objects or the results of objects that are the object of fiduciary collateral, because there has been a transfer of ownership rights in trust to the objects or proceeds of objects that are the object of fiduciary collateral from the debtor (fiduciary giver) to the creditor (fiduciary recipient), so that the debtor (fiduciary giver) has the position of borrower or substitute borrower for the object that is the object of fiduciary collateral whose ownership rights have been transferred in trust from him to the creditor (fiduciary recipient).

The provisions contained in article 23 paragraph 1 of the Fiduciary Law are provisions that depend on agreement, where the fiduciary is allowed to transfer goods or proceeds from goods that are fiduciary collateral, including withdrawing or negotiating debts. Arrangements regarding the transfer of goods or proceeds from goods which are fiduciary collateral must be remembered that usually the objects of fiduciary collateral are various types of movable goods. In a fiduciary guarantee, the debtor or fiduciary giver can still use, manage, or use the goods that are the fiduciary collateral, even though the ownership rights to the goods have been entrusted as collateral to the creditor or fiduciary recipient.

However, the goods whose ownership rights are transferred are still controlled by the owner of the goods, namely the fiduciary.

The protection that is also given to creditors who receive fiduciaries whose fiduciary collateral objects are stock of merchandise is regulated in the Fiduciary Law. One of the provisions is the requirement to register the fiduciary guarantee by including the value of the goods or objects that are the object of the fiduciary guarantee. This protection ensures that if the goods or objects used as fiduciary collateral do not exist or do not match those stated in the file, the creditor who receives the fiduciary can ask the party who provided the fiduciary to fulfill its responsibilities in the amount of the value that has been guaranteed.

This situation is very likely to occur because as is known the stock of merchandise is not always available as recorded because as merchandise, it is possible that the goods have been traded in accordance with its designation. So, by including the value of the collateral, it will really provide protection for the interests of the creditor, because even if the items listed in the attachment or details about the objects used as fiduciary collateral objects do not match those specified, the creditor can still execute the collateral for the value of the items guaranteed. Or in other words, changes that occur to object fiduciary collateral, in this case the stock of merchandise does not need to be registered every time there is an increase or decrease, because the creditor will refer to the collateral value of the object being pledged as collateral. Under these circumstances, the interests of creditors will naturally be better protected.

*Fiduciary Property Transfer* or the transfer of property rights on the basis of trust arises on the basis of community needs. People need loans or credit secured by movable objects, but the movable objects which are guaranteed are still controlled by the debtor because they are needed daily to continue their business or daily work needs. The practice of granting credit as collateral for movable objects that are still under the control of the debtor (not handed over to the creditor). is based on jurisprudence because there is no law that regulates it.

Providing legal protection to fiduciary recipients related to the fact that there are no longer any fiduciary collateral objects in the debtor's control, becomes increasingly important to pay attention to considering several things:

1) Associated with legal functions

Law works by looking at a person's actions or the relationships between people in society. For erection purposes, it is legal to do work in various functions.

Theo Huijbers stated that the function of law is to maintain public interests in society, guarantee human rights, and realize justice in living together.

Suhardjo also emphasized that law as a rule has the following functions:

- 1) Laws that guarantee legal certainty.
- 2) Laws that guarantee social justice.
- 3) The law has a protective or protective function

The function of law as guardian or protection implies that the law functions to protect or protect humans in society, nation and state, both their souls and bodies as well as their personal rights, namely their human rights, material rights and individual rights.

Thus, law as a rule functions to protect or protect and guarantee the rights that humans have in society, including their material rights. Fiduciary as a material right that provides collateral is protected by law, and this right can be defended against anyone.

2) Associated with the concept of rights and material rights.

Among the types of rights there is something called material rights. Some of the material rights have the nature of providing a guarantee. There are also material rights that provide guarantees (commercial security law) regulated in mortgages, mortgages, Law no. 42 of 1996 concerning Mortgage Rights, and Law no. 42 of 1999 concerning Fiduciary Guarantees. With these material rights, the position of the creditor (recipient of collateral) is guaranteed repayment of its receivables.

Usually in legal practice, when parties enter into an agreement, so that the creditor gets extra legal protection, it is always created with an additional agreement in the form of a material guarantee agreement which gives rise to material rights, so that the creditor's position becomes stronger.

Fiduciary is a material right that provides collateral, gives direct power over the collateral, and this right is protected by law and can be defended by anyone. With such a construction, the finance company as the holder/recipient of fiduciary collateral rights is protected by the legal system or its power over fiduciary collateral objects.

Apart from that, in accordance with the characteristics of material rights, fiduciaries as material security institutions have preferential rights (priority rights). This preferential right is owned by the finance company as a fiduciary recipient in repayment of its receivables taken from fiduciary collateral if the debtor defaults.

To overcome difficulties and to adapt developments and community needs and to avoid the provisions of Article 1152 of the Civil Code (which requires collateral to be withdrawn by the authority of the owner), jurisprudence allows the existence of Fiduciary institutions. The collateral that is transferred or handed over using a Fiduciary institution is the right to the object (ownership right) as collateral based on trust, while the object itself remains in the control of the debtor/owner of the item so that it can still be used for the benefit of continuing the business of the debtor/owner of the item.

## 1. CONCLUSION

Legal protection is an effort to provide protection to legal subjects, regarding actions that can be taken to defend or protect the interests and rights of these legal subjects. Indonesia recognizes four material security institutions, namely Pawn, Mortgage, Fiduciary and Mortgage. One of the guarantee institutions that has been recognized is fiduciary guarantees. Based on Law no. 42 of 1999 concerning Fiduciary Guarantees, it is explained that Fiduciary is the transfer of ownership rights to an object based on trust, where the object whose ownership rights are transferred remains in the control of the owner of the object.

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