

THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

Problematic of Fiduciary Guarantee in the Consumer Finance Agreement without a Notarial Deed

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Abstract:

Consumer finance as a form of providing funds of goods to the consumer, which is repaid periodically. This periodically payment raises considerable risk for financial institutions. One of these safeguards is to material guarantee (collateral) because creditors would be the preference creditors and also secure creditor. This research method is normative method. In this case is done library research to get secondary data. To complete data is done field research too, to get primary data. Implementation imposition of fiduciary is not made by notarial deed, so it can not be registered to Fiduciary Registration Office. The raising of fiduciary is when registered. Thus, there will be no fiduciary. As a result, the position of creditors just as concurrent creditors. Thus, do not have preferential rights to other creditors. If the debtor defaults, it cannot execute directly to the object fiduciary. In this case the only creditor can file a lawsuit to the court.

Keywords: *Collateral, Fiduciary, Guarantee, notarial deed, raising of fiduciary, registration*

1. Introduction

Guarantee law is one of the rapidly growing law in society life, especially with the emergence of various agreements no name underlying various legal relationships which form the basis for the fulfillment of human needs, among others, in the economy, especially the field of business. Talk about the collateral must always associated with the agreement, because the collateral always be *accessoir* (additional agreement) of the basic agreement, among other financing agreements undertaken by financial institutions as well as by the bank (Miranda Nasihin, 2012).

Financial institutions in Indonesia is basically divided into bank financial institutions, non-bank financial institutions and other financial institutions. The three types of financial institutions that have specific rules set out in the Act. In practice the financial institution can be said is no stranger known in the midst of the community is the bank. The Bank is one of the financial institutions which carry out their business activities by withdrawing funds directly from the public in the form of savings and channel them back to the people in the form of credit or financing, loans and other financial services (MunirFuady, 1995).

Bank financial institutions are still not sufficient to cope with various uses of funds in the people. Banks often considered to be less flexible and less adaptive to various development needs of the people. Addressing the weaknesses in bank financial institutions in order to channel the necessary funding needs of society, it appears the non-bank financial institutions which is a funding agency that is more flexible and moderate than banks in certain cases even higher level of risk. Institution is known as a financial institution that offers models of the new formulation in terms of the distribution of funds to the parties that is need it. Financing institutions include financial company, venture capital company and infrastructure finance companies. The presence of various financing institutions also carry a big profit in the economic development of society, especially lower economic community. This financing institutions emerged as a form of providing funds or capital goods to the public for the purchase of goods, which is repaid periodically.

In the finance company business activities include leasing, factoring, business of credit cards, and consumer finance are regulated by Presidential Decree Number 9 of 2009 on Financing Agency. Understanding financial institution can be found in Article 1 paragraph 1 Consumer finance or known as consumer finance, as one of the alternative financing system plays an active role in supporting the business community and very rapid growth in this mature .. Article 1 paragraph 7 In Presidential Decree Number 9 of 2009 states that consumer finance is on financing for the procurement of goods based on the needs of consumers with payment in installments ". Target markets consumer financing models are consumers. A term that is used as opposed to the word producer.

This periodically payment raises considerable risk for financial institutions. W.S. Weerasooria in his book entitled *The Banking Law and Financial System* suggests that any provision of loans is always risky. Therefore, it is necessary safeguards in return. Elements of safety is one of the basic principles of credit suitability and profit (profitability). Credit guarantee in practice is generally done with the use of collateral (Tan Kamelo, 2006)

It is very difficult to do business without the loan.

OK Brahan (2009) said "EconomischehuidigeOmsleven is nietmeerzonderdenkbaarkredietverlenting". For banking and financial institutions, any provision of loans to businesses and consumers are always risky. Therefore, it should be an element of guarantee of

return. Elements of guarantee is one of the basic principles in the loaning of credit in addition to the element of harmony (suitability) and profit (profitability). One of these safeguards is to material guarantee (collateral) because creditors would be the preference creditors and also secure creditor. Among the various collateral that is widely practiced in the society is a fiduciary guarantee.

This fiduciary guarantee gives a big advantage to the parties, because the object can still be located by the fiduciary guarantor hand, so that they can be used for everyday purposes. For creditors also can provide safety guarantees loans extended to debtors. For the fiduciary is then to be made by notarial deed and registered at the Registry Office of fiduciary. It is strictly regulated in Act Number 42 of 1999 on Fiduciary Guarantee. However, in practice often don't be made with the fiduciary notarial deed. It thus would be very risky for creditors, because the Deed of Fiduciary not made as specified in UUJF, it cannot be registered in Fiduciary Registration Office. Whereas the fiduciary is at the time of registration of fiduciary Fiduciary Registration Office. As a result, disputes often arise at a later date.

1.1. Problematic

1. Why is necessary fiduciary deed in the imposition of fiduciary guarantee on the financing agreement?
2. How Laws Due to the fiduciary Receiver of the fiduciary process is not made by notarial deed?

2. Discussion

2.1. Significance Deed of Fiduciary in the Imposition of Fiduciary in Consumer Finance Agreement

Business activity of Finance companies efforts which include leasing, factoring, credit cards business, and consumer finance are regulated by Presidential Decree Number. 9 of 2009 on Financing Agency. Understanding financial institution can be found in Article 1 paragraph 1 of Presidential Decree Number 9 of 2009, which states that the financial institution is a business entity financing activities in the form of providing funds or capital goods ".

Consumer finance as one of the alternative financing system is quite active in supporting business and development is quite fast on these days. The institutional is stipulated in Presidential Decree Number 9 Year 2009. Article 1 point 7 of the regulation explains the understanding of consumer financing is financing activities for the procurement of goods based on the needs of consumers with payment in periodically ".

Consumer finance is one of the models of financing committed by financial companies, in addition to activities such as leasing, factoring, credit cards. The market target of consumer finance model is consumers. A term that is used as opposed to the word producer. The amount of costs awarded every consumer is relatively small, given the goods which become the object of consumer finance is the purpose of consumer goods to be used by consumers for the purpose of his life. For example, goods such as household television, a refrigerator, a car, and so on. Thus, the risk of the consumer finance business is also spreading, since many consumers will engage with the provision of a relatively small cost. It's safer for the provider fee. It isn't like putting eggs in one basket.

When the public (consumers) need or want to have goods, while those concerned can be obtained by periodically payment through the supplier with consumer finance. There are three parties involved in a transaction of consumer finance, namely the finance company, the consumer and the supplier. Relationship Parties here bound by a contract, namely consumer finance agreement.

In consumer finance agreement after the price of goods paid in cash by the finance company to the supplier, then the next suppliers deliver goods to consumers. Furthermore, the consumer is obliged to pay the price of these goods by periodically to finance companies. This periodically payment is risky, non-payment of receivables by the debtor. The breakdown of payment arrears by the customer is often happened. If this problem is happened, then make a loss of finance company. In order to avoid the risk of such losses, it is generally finance companies always ask for collateral (M. Bahsan, .

Collateral is a translation from Dutch zekerheid or cautie. Collateral is everything that is given to creditors to induce the belief that the debtor will fulfill obligations can be valued with money arising from an engagement. M. Bahsan (2002) argued that the collateral is everything received by the creditor and the debtor submitted to collateral an accounts payable in society or ensure the safety of the creditor accounts. Thus in principle of collateral that is accessoir agreement because its main function is to ensure the fulfillment of achievements arising from an engagement. Thus the presence of collateral depends on the presence of the agreement anyway.

Article 1131 Civil Code (Civil Code) states that any material of a debtor, whether moving or not moving, both existing and new will be in later, a collateral for all personal engagement of the debtor.

According to Mariam Darus Badruzaman, In Article 1131 KUH Civil can be seen that every person is responsible for the debt. this responsibility in the form of providing good fortune moving objects or object is not moving (fixed object), if need be sold to pay off debts (*Schuldand Haftung* principles). This principle is very fair, in accordance with the principle of trust in the law of the engagement, which is any person who gives a debt to someone believes that the debtor will fulfill his achievements in the future. Everyone is also obliged to fulfill commitment a moral principle by the legislators upheld as legal norms.

In Article 1131 Civil Code, The general principles laid civil rights of a creditor against the debtors. So, all the wealth of the debtor becomes collateral for the debts debtors to creditors. General principles contained in Article 1131 Civil Code further described in Article 1132 Civil Code, which states that the material performance Article 1131 became joint collateral for creditors, and the results of the auction material balance divided among creditors according to the size of their individual accounts unless there are legitimate reasons to prioritize one of the accounts receivable other.

The provisions of Article 1132 Civil Code can be seen that in the case of a creditor has several creditors, then the position of the creditors is the same (principle of parity Creditorium). If wealth is not sufficient to pay off its debts, then creditors receive payment

based on the principle of balance / equality, ie each receive payments according to the size of the accounts receivable balance of each creditor. Thus embodied the general principle that the equality rights of creditors against the assets of the debtor.

General guarantees still provide less legal protection for the creditors, because in case there are several creditors, the position of each creditor alike, no one would take precedence in the settlement of receivables. Therefore, if the debtor defaults, and has several creditors, the assets of the debtor after the auction will be shared jointly to the creditors, and its distribution according to the size of the accounts receivable balance of each creditor.

It would require a special guarantee/Special Collateral. Act held deviations from the principle of balance, as mentioned above, that is if there is an agreement or if the law decide. Deviations principle of balance can be seen from the sentence in Article 1132 Civil Code"..... unless there are legitimate reasons to prioritize one of the accounts receivable that another". The legitimate reasons for a deviation from the general principles or the principle of balance are as defined in Article 1133 Civil Code, if there are receivables with privileged rights, pawning and mortgages. Receivables are callable must take precedence.

Receivables repayment should take precedence over other accounts receivable named preferred, whereas receivables repayment resolved according to the principle of equilibrium is called concurrent accounts. Creditors who have preferred the receivables called preferred creditors, while receivables concurrent creditors who have called concurrent creditors. Preferred creditors have a preference right / privilege, namely the right to precedence in the settlement of receivables compared to other creditors who do not have preferential rights.

Guarantees broadly divided into general guarantee and special guarantee. General guarantee under Article 1131 Civil Code, which covers the entire property owned by the debtor. Specific guarantees covering collateral and personal guarantees. Special guarantee is immaterial under Article 1132 Civil Code, which includes mortgage, pawning, security rights (Act No. 4 of 1996), fiduciary (Act No. 42 of 1999), and a special guarantee in the form of personal guarantee (*borgtocht*).

Fiduciary guarantee is one of the specific guarantees that the collateral. Fiduciary guarantee is already very old and well known and used in Roman law society. In Roman law this guarantee institution known as the fiduciary cum creditorecontractâ (that is, the promise of trust that is made with creditors). Fill promises made by the debtor to the creditor is that the debtor will transfer of ownership of an object to creditors as collateral for debts with creditors agreement that will transfer back the ownership of the debtor when the debt has been paid in full.

From the word cum creditore can be presumed that the handover is not intended to be truly the ownership transition, but only as a guarantee only, not to be owned creditors, and according to the agency, the creditor does not have full authority like that belongs to an owner. After the debtor to meet its obligations, then creditor shall submit back to the debtor ownership. The debtor acted with confidence, that after the debtors settle their obligations creditor will not break her promise to retain collateral objects (and consider themselves to be fully legitimate owner). Such a relationship is called fides or fiduciair relationship.

In addition to the above guarantee institutions, the Roman Law also recognized the existence of an institution entrusted with the fiduciary cum amicocontractâ name (that is, the promise of the trust created with a friend). Fiduciary institution is often used in the case of an owner objects have to travel out of town, and in this case the ownership of the object deposit to his friend with the promise that the friend will return the ownership of the object when the object owner has returned from his trip. Both fiduciary institutions, to avoid misunderstandings in Fiduciary Law affirmed that set forth therein is a fiduciary institution, so that the title of the law is "Fiduciary", while the short title pretty mentioned Act about Fiduciary.

The emergence of fiduciary institution as it was known in the form of fiduciareeigendomsoverdracht or FEO is with regard to the provisions of Article 1152 (2) Code Civil of pawning which requires that power over the pledged object may not be the pledgor (terms inbezitstelling). This poses difficulties for the pledgor because it can no longer use the pledged object to the interests of the pledgor.

Collateral is something that is given to the creditors to give rise to the belief, that the debtor will meet the obligations that can be valued in money, arising from an engagement. The guarantees provided in the consumer finance agreement is in principle similar to guarantee against ordinary bank credit agreement, especially consumer loans.

Against consumer finance agreement as collateral is principally goods purchased with funds or financing granted by the finance company. If the funds are given to buy a car, the car in question be guaranteed anyway. The collateral is usually made in the form of fiduciary transfer of ownership (Fiduciary).

In a fiduciary guarantee, usually all documents pertaining to the ownership of the goods in question will be held by the financing company as a fiduciary receiver, while the physical object is still there on the consumer.

Giving fiduciary done through a process called constitutumProssessorium (surrender ownership of objects without physically handing the object). The physical body remains in the hands of its owner or a debtor.

Article 1 point 1. 1 point 2 of Act No. 42 Year 1999 on Fiduciary (hereinafter abbreviated UUF) Fiduciary is a transfer of ownership of an object on the basis of trust with the provision that the object of the transferred ownership rights remain in the control of the owner of the object.

Under the provisions of Article 1 paragraph 2 of Law No. 42 Year 1999 on Fiduciary (hereinafter abbreviated UUF) stated that:

Fiduciary guarantee is security rights over movable goods both tangible and intangible and immovable particular building can not be encumbered encumbrance referred to in Law No. 4 of 1999 on Mortgage which remain in control of the Giver Fiduciary, as collateral for the repayment of the debt, which gives precedence to the Fiduciary Receiver position against other creditors.

Under these provisions, the elements of the fiduciary is an attempt to guarantee the entitlements of creditors with the aim of:

1. As collateral the transfer of ownership in the fiduciary concept is intended only as collateral / guarantee it.
2. For the purposes of granting the repayment of certain debt fiduciary debtor intended to meet its obligations in the repayment of certain debt.

3. Giving priority at the receiver position fiduciary In the fiduciary, fiduciary receiver position as creditors have preferred to other creditors in the debt repayment debtors.

One element that becomes the focus of attention in this paper is that the fiduciary, fiduciary receiver has preferred position / precedence to the other creditors of the repayment / obligations of the debtor (fiduciary guarantor).

These elements indicate that the recipient of fiduciary creditors will have a better position in front of the law in billing, as well as in case of the execution of fiduciary object, then the preferred position / precedence over other creditors in making repayment of its receivables on the results of the execution of fiduciary guarantee object.

Strong fiduciary guarantee also have characteristic namely:

- i. Fiduciary has accessoir agreement.

Fiduciary is accessoir means fiduciary is not a stand-alone right but the birth of the existence or abolishment of agreements principally depends. The definition of the basic agreement is an agreement that creates obligations for the parties to meet achievement. Accessoir agreement of fiduciary based on Article 4 UUF stipulates that fiduciary is a follow-up agreement and a principal agreement that creates obligations for the parties to meet achievement. While Article 25 UUF also confirmed that the Fiduciary void due to the abolition of the debt that is secured by a fiduciary.

- ii. b. Provide position of preferred to creditors of fiduciary receiver against other creditors (Article 27 UUF).

The right of precedence in question is the right of fiduciary receiver to take over the repayment of its receivables result of the execution objects that become the object of a fiduciary. Which take precedence over the rights of recipients of fiduciary does not remove because of the bankruptcy or liquidation of fiduciary giver. The provisions in this case relates to the provision that the fiduciary is the right material for collateral on debt repayment.

If on the same object becomes the object of more than 1 (one) fiduciary agreement, the rights that precedence is given to those who first enrolled in Fiduciary Registration Office.

- iii. c. Always follow the guarantee object in the hands of anyone objects that are (*droit de suite*) (Article 20 UUF).

The fiduciary guarantee still follow fiduciary guarantee object that becomes in the hands of whoever the object is, except the transfer of inventory goods that become the object of a fiduciary guarantee. This provision recognizes the principle of *droit de suite* that has been a part of laws and regulations of Indonesia in relation to the absolute rights over the material (in rem) Fiduciary Principles

2.2. Fiduciary Guarantee Deed As Momentum Early Stage of Fiduciary Guarantee

In Article 5 of Act Number 42 of 1999 on Fiduciary Guarantee that:

- a. Imposition of objects with fiduciary created by notarial deed in Indonesian and is a fiduciary guarantee.

- b. Against the fiduciary deed referred to in paragraph (1) the amount charged shall be further regulated by Government Regulation.

We make Notarial deed which is one manifestation of an authentic deed will have the strength of evidence is perfect, meaning it can be used as evidence in court without having to ask other evidences again. So the notary deed made as contemplated by Article 1868 of the Civil Code which states that: "authentic deed is a deed which is (made) in the form prescribed by the Act, made by or in the presence of public officials to the ruling, in a place Where the deed made."

Registration Request made by the fiduciary receiver, power or his representative at the seat of fiduciary giver to attach Fiduciary registration statement, which includes:

- a. The identity of the fiduciary guarantor and fiduciary receiver;
- b. Date, number Fiduciary deed, the name and domicile of the notary who made the Fiduciary Warranty Deed;
- c. Data principal agreement which is guaranteed;
- d. Description of the fiduciary object;
- e. The value of the guarantee; and
- f. Value fiduciary objects.

Fiduciary registration process can also be done online. Through the Director General of AHU Circular dated 5 March 2013, the number AHU-06.OT.03.01 in 2013 regarding Enforcement Administration System in Electronic Registration Fiduciary (Online System). Fiduciary Registration Office (KPF) will record the Fiduciary on the same date as the date of filing the application for registration.

2.3. Legal Effect of Fiduciary Guarantee that is not Created by Notary Deed

Occurrence momentum of fiduciary guarantee must fulfill two (2) phases, namely:

1. Stage imposition of fiduciary guarantee
2. Stage Fiduciary Guarantee registration

In the previous description has stated that the imposition of fiduciary done fiduciary deed with a notary and in the Indonesian language. Furthermore fiduciary must be registered to Fiduciary Registration Office.

Fiduciary registration application referred to equipped with:

- a. a copy of the notarial deed of liberation Fiduciary;
- b. power of attorney or letter of delegation of authority to register Fiduciary;
- c. proof of payment of the registration Fiduciary fee

Application for registration of Fiduciary, request repairs Fiduciary certificate, Fiduciary application for a certificate changes, and notice of deletion certificates submitted by the Fiduciary Receiver, power of attorney or his deputy to the Minister. The application shall be submitted through the registration system fiduciary electronically.

Application for registration of Fiduciary includes: a. the identity of the Fiduciary Guarantor and Fiduciary Receiver; b. date, number of Fiduciary deed, the name and domicile of the notary who made the Fiduciary Warranty deed; c. Data of principal agreement which guaranteed the fiduciary; d. description of the Fiduciary object; e. the value of the guarantee; and f. the value of objects that become the object of Fiduciary. Application for registration of Fiduciary referred to in Article 3 filed within 30 (thirty) days from the date of manufacture Fiduciary deed.

Basically, according to the provisions of Article 14 paragraph (3) of Act number 42 of 1999 on Fiduciary ("UUJF"), a fiduciary rise on the same date as the date of fiduciary guarantee on record in the Register of Fiduciary and the receiver will obtain a certificate of fiduciary there is said that "By Justice Based on God." With certified fiduciary then the receiver of fiduciary necessarily have the right to immediate execution (*parateexecutie*), as occurs in the lending and borrowing in the banking sector. The certificate legal force equal to a court decision that already have binding legal force.

In addition, for the imposition of fiduciary guarantee, Article 5, paragraph (1) mandates the imposition UUJF Objects with Fiduciary made by notarial deed in Indonesian and a Fiduciary deed. Against Objects Fiduciary Agreement with Deed, today, most financial institutions (finance) and banks (commercial banks and credit) organized financing for consumers (consumer finance), lease (leasing), factoring (factoring). They generally use ordinances agreement to include their fiduciary fiduciary objects for the object, but ironically not made in a notarial deed and not registered in Fiduciary Registration Office to obtain a certificate. Such deed can be called fiduciary deed that is not made by notary.

in accordance with the provisions of UUJF, to obtain legal protection as set out in UUJF, loading objects with fiduciary deed must be made with an authentic deed and recorded in the Register of Fiduciary. If these provisions are not met, the rights of creditors do not receive legal protection as mentioned in UUJF.

When debtor is default, and the fiduciary has not been registered, in essence, to the fiduciary guarantee can not be executed immediately. Process execution must be done by filing a civil lawsuit to the District Court through the normal legal process to show that the decline in court rulings. In addition, as a creditor bank becomes nopreferred right (see Article 27, paragraph [1] UUJF) against the other creditors in the repayment of the loan because the guarantee fiduciary considered invalid if not registered.

In practice creditor often do direct execution of fiduciary collateral. Given the financing of goods fiduciary objects are usually not full accordance with the value of the goods. Alternatively, the debtor has the obligation to implement some of the agreements made, so that it can be said that the above goods there are right owned creditors of the debtor. If the execution of the fiduciary object goods are not made through official price assessment agency or entity of the public tender, these actions can be categorized as an act of Unlawful (PMH) as set forth in Article 1365 of the Civil Code ("Civil Code") and can be sued compensation. In the conception of criminal law, the object execution fiduciary guarantee un-notary deed (without the court decision) entered in the criminal act of Article 368 of the Criminal Code if the receiver did coercion and the threat of expropriation. Grace writes that "This situation can occur if the creditor in the execution of coercing and take the goods unilaterally, but unknown in these goods partly or wholly owned by others. Although well known that most of the goods are owned by creditors who want to execute, but is not registered in a fiduciary office.

When the debtor transfer fiduciary objects that is conducted unnotary deed of the other party cannot be charged with UUJF, because fiduciary agreement is illegal. Indeed, it may be a debtor who divert fiduciary object embezzlement reportedly on charges under Article 372 of the Criminal Code by creditors. Both the creditor and the debtor can each report since most of the items belong to both creditors and debtors. It takes a civil verdict by the local district court for the seat portion of each owner of the goods to both sides. "

3. Conclusion

1. The fiduciary guarantee deed in the imposition of fiduciary guarantee on the financing agreement are indispensable as the initial momentum fiduciary. The process of fiduciary there are two stages, namely the imposition of fiduciary and fiduciary guarantee registration. The imposition of fiduciary stage is done by notarial deed, as authentic evidence and as a condition for registration of fiduciary

2. If the imposition of fiduciary is not made by notarial deed which can not be registered to Fiduciary Registration Office. Yet when the birth of fiduciary is when registered. Thus there will be no fiduciary. As a result, the position of creditors just as concurrent creditors. Thus do not have preferential rights to other creditors. If the debtor defaults, it can not execute directly to the object fiduciary. In this case the only creditor can file a lawsuit to the court.

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