

**ANALYSIS REGARDING THE TRANSFER OF FIDUCIARY GUARANTEES TO
THIRD PARTIES UNDER ARTICLE 35 AND 36 LAW NUMBER 42 OF 1999
CONCERNING FIDUCIARY GUARANTEES**

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ABSTRACT

Fiduciary guarantee is the transfer of title to an object based on a trust, provided that the title remains under the control of the owner of the object. In the practice of providing credit, there is a possibility of legal problems because the object of fiduciary guarantee remains in the hands of bank customers (debtors). This study analyzes the transfer of fiduciaries to third parties based on articles 35 and 36 of Law Number 42 of 1999 concerning Fiduciary Guarantee.

The research method used is the normative juridical method, which uses laws and judges' decisions as well as applicable legal methods and uses a qualitative approach by explaining existing data in words or statements.

Legal protection for creditors from the criminal act of transferring fiduciary collateral objects to third parties is provided by the Fiduciary Guarantee Act if the creditor (fiduciary beneficiary) obtains a fiduciary guarantee certificate, so that it has executory power over the fiduciary guarantee object. Some decisions of the Supreme Court Judges show that the Judge ruled that the criminal act of transferring the object of fiduciary guarantee was caused by forgery, alteration, omission or misleading giving of information, which if known to one person, the parties would not give rise to a Fiduciary Guarantee agreement as stipulated in Article 35 of the Fiduciary Guarantee Act and the transfer, mortgage, or rental of objects that are the object of Fiduciary Guarantee as referred to in Article 23 paragraph (2) which is carried out without consent.

Keywords: Criminal Act of Fiduciary Guarantee, Object of Fiduciary Guarantee, Fiduciary

A. INTRODUCTION

In the debt-receivable agreement, consumers (debtors) are required to provide adequate material security. Basically, there is no credit that does not contain collateral.¹ Tidak mungkin lembaga pembiayaan mau memberikan pinjaman dalam bentuk dana tanpa ada jaminan yang memadai dari pihak konsumen (debitur). 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 debt installments, the collateral object must be used as an alternative means of paying off the debt by selling it at auction to cover the consumer's (debtor's) payment obligations that are owed. So that the debt can be repaid easily when the debtor defaults, the creditor or financing institution must choose types of collateral that provide convenience and practicality, namely by placing the creditor as the holder of a special position and taking priority over other creditors.² In addition, the guarantee must have a value that is at least the same or even higher than the value of the obligations that must be fulfilled by the debtor.

The business world cannot be separated from the capital aspect. Capital is the main factor needed in developing a business. One of the financial institutions that provides capital assistance is a bank. As a financial institution, banks collect funds from the public and channel public funds in the form of credit. Credit is very important in obtaining capital. The credit sector is one of the largest sources of income for banks even though it contains risks. The credit agreement between the debtor and creditor is a reciprocal agreement based on trust. Therefore, before providing credit, the bank must assess the debtor's ability and capacity to be able to pay off his debt when it is due so that bad credit does not occur in the future.

Collateral is an important element in providing credit, one of which is material collateral. One of the material guarantees known in positive law is fiduciary guarantees. The existence of fiduciary guarantees was initially based on jurisprudence. Now fiduciary guarantees have been regulated in a separate law, namely Law Number 42 of 1999 concerning Fiduciary Guarantees³ (UUJF). Fiduciary comes from the word *fides* which means trust. Fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object.⁴

The definition of Fiduciary Guarantee is a mortgage 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 place. in the control of the Fiduciary Recipient. The giver, as a guarantee

¹J. Satrio (1), *Execution Parate as a Means of Overcoming Bad Credit*, Citra Aditya Bhakti, Bandung, 1993., hlm.5.

²*Ibid*, hlm.6.

³Tan Kamelo, *Fiduciary Guarantee Law: A Desired Need*, 1st Cet First Edition, Jakarta: PT.Alumni, 2006, hlm.2.

⁴Ignatius Ridwan Widyadharma, *Fiduciary Guarantee Law*, Cet.1, Semarang: Diponegoro University publishing body, 1999, hlm.9.

for the repayment of certain debts, gives the Fiduciary Recipient a preferred position compared to other creditors.⁵

Objects that are encumbered with fiduciary guarantees must be made with a notarial deed made in Indonesian, called a fiduciary guarantee deed, after which the deed is registered at the fiduciary registration office at the legal domicile of the fiduciary. Registration has legal consequences, namely a guarantee of obtaining property rights. This material right adheres to the principle of object or *droit de suite* where fiduciary guarantees will always be attached to the object of the fiduciary guarantee wherever the object is located and even if it is transferred to another person or third party. After that, the Fiduciary Registration Office will issue a Fiduciary Guarantee certificate which has the power of proof in the form of an authentic and executory deed as well as a court decision which has permanent legal force. This means that if the debtor breaks his promise and does not pay off his debt, the holder of the fiduciary guarantee certificate (creditor) can immediately execute the object that is the object of the fiduciary guarantee and the fiduciary giver is prohibited from doing so. re-executing fiduciary guarantees for objects that are registered as fiduciary guarantees.⁶

In the practice of providing credit by the Bank through fiduciary guarantee institutions to Bank customers, it does not rule out the possibility of legal problems arising because the object of the fiduciary guarantee remains in the hands of the Bank's customers (debtors). In the past, objects that could be objects of fiduciary collateral were only limited to tangible movable objects in the form of equipment, but in its development, objects that became fiduciary objects included wealth of intangible movable objects and immovable objects, for example motorized vehicles. in the form of cars, trucks, bicycles. motorbikes and other motorized vehicles, although the collateral given when applying for credit at the Bank is a motorized vehicle, in practice the collateral given by debtor customers to the Bank is only in the form of BPKB (Proof of Motor Vehicle Ownership) only. Credit with BPKB collateral has a very high risk, if the credit experiences congestion or there is a default, the Bank cannot immediately execute the collateral as credit repayment.

There were 594 reports of criminal cases related to fiduciary issues handled by Polda Metro Jaya during January-November 2022, but only half of them were processed by the police, because those who made the reports. does not have legal standing as a reporter. Of the 594 reports related to fiduciary guarantees, 506 cases were related to criminal acts of fraud and/or

⁵Indonesia, *Fiduciary Guarantee Law*, Law no. 42 of 1999, LN No.168 of 1999, TLN No.3889, Article 1 number (2).

⁶*Ibid*, vide Article 5 paragraph (1), Article 11 paragraph (1), Article 12 paragraph (1), Article 14 paragraph (1), Article 15 paragraph(2) and paragraph (3), and article 17 of the Fiduciary Guarantee Law, Law no. 42 of 1999.

embezzlement, and 88 other cases were related to fraud (third parties receiving/purchasing vehicles with credit status from debtors).⁷

With the Fiduciary Guarantee Law, it is hoped that debtors and creditors will understand their rights and obligations. Debtors must obey the law, meaning they cannot transfer their motorized vehicles as long as they have fiduciary guarantees. Meanwhile, creditors who use custody services also cannot execute motorized vehicles on the road if they do not have a fiduciary certificate and power of attorney from the financing service. The execution process can be carried out after the financing service provides the first to third summons/warning (SP) to the debtor.

The provisions governing criminal acts against fiduciary guarantees are contained in Law Number 42 of 1999 concerning Fiduciary Guarantees in Articles 35 to Article 36. There are 2 criminal acts regulated in this law, namely intentionally committing falsification and creating a fiduciary guarantee certificate. and transfer of fiduciary security objects without the written consent of the fiduciary recipient.⁸

a. Article 35 of Law Number 42 of 1999 concerning Fiduciary Guarantees regulates forgery and the creation of fiduciary certificates, which reads:

"Any person who deliberately falsifies, changes, omits or in any way provides misleading information, which if this is known to one of the parties does not give rise to a Fiduciary Guarantee agreement, shall be punished by 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,- (ten million rupiah) and a maximum of Rp. 100,000,000,- (one hundred million rupiah)."

b. Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees regulates the transfer of fiduciary collateral objects without the written consent of the fiduciary recipient, which reads:

"A Fiduciary Giver who transfers, pawns or rents out objects which are the object of Fiduciary collateral as intended in article 23 paragraph (2) without prior written approval from the Fiduciary Recipient, shall be punished with imprisonment for a maximum of 2 (two) years and a fine of up to a lot of Rp. 50,000,000,- (fifty million rupiah)."

The author wants to discuss the transfer of fiduciary collateral, especially the criminal act of transferring fiduciary collateral.

⁷<https://news.detik.com/berita/d-3735184/polda-metro-cepat-594-report-terkait-fidusia-sebuah-2022>, downloaded on date 10 January 2018, 12.00 pm o'clock.

⁸Salim HS., *Development of Guarantee Law in Indonesia*, PT. Raja Grafindo Persada, Jakarta, 2004, hlm. 91.

B. LITERATURE REVIEW

1. General Overview of the Agreement and Legal Terms of the Agreement

a. Understanding Agreement

According to Subekti, an agreement is an event where someone makes a promise to another person, or where two people promise each other to carry out something.⁹R. Seyawan, states that an agreement is a legal act in which one or more people bind themselves or mutually bind themselves to one or more people.¹⁰ Sri Soedewi Masjchoen Sofwan, believes that an agreement is a legal act in which one or more people bind themselves to another person or more.¹¹

b. Conditions for the Validity of the Agreement

For an agreement to be valid, the provisions stipulated in Article 1320 of the Civil Code must be fulfilled, which states four conditions, namely:

- 1) There is an agreement between both parties
- 2) Ability to carry out legal actions
- 3) There is a certain thing
- 4) There is a lawful cause.

The first two conditions are called subjective conditions because they concern the subject of the agreement, while the last two conditions are objective conditions because they relate to the object of the agreement.

2. General Overview of Fiduciaries

a. Definition and History of Fiduciary

Fiduciary, according to its origin, comes from the word "fides" which means trust. In accordance with the meaning of this word, the (legal) relationship between the debtor (fiduciary giver) and the creditor (fiduciary recipient) is a legal relationship based on trust. The debtor believes that the debtor has the goods only as collateral. The debtor believes that the creditor will return the ownership of the goods that have been handed over, after the debt has been paid. On the other hand, debtors will not misuse collateral that is under their control.¹²

b. Definition of Objects as Objects of Fiduciary Collateral

The term object is a translation of the word zaak (Dutch). The definition of objects in the Civil Code can be found in the provisions of Article 499, which states that: "According to the law, objects are every item and every right, which can be the object of property rights".

⁹Subekti, *Principles of Civil Law*, PT. Intermas, Jakarta, 2001., hlm.36.

¹⁰R. Setiawan, *The Law of Engagements in General*, Bina Cipta, Bandung, 1987, hlm. 49.

¹¹Sri Sofwan Masjchoen, *Guarantee Law in Indonesia*, Liberty, Yogyakarta, 1982, hlm. 1.

¹²R.Subekti and R.Tjitrosudibio, *Civil Code (Burgerlijk Wetboek)* cet.41, Jakarta: PT.Balai Pustaka, hlm. 82.

c. Material Rights in Fiduciary Guarantees

According to Oey Hoey Tiong, fiduciary guarantees are often referred to as guarantees of property rights in trust, fiduciary is a form of guarantee for movable objects and immovable objects which cannot be charged with mortgages and mortgages. Fiduciary was initially regulated by practical needs and jurisprudence, then in 1999 Law Number 42 of 1999 was born which specifically regulates Fiduciary Guarantees. In the Fiduciary Guarantee that is handed over to the creditor, it is his property while the goods are still controlled by the debtor, which in the doctrine of handover like this is called *constitutum possessorium*.¹³

d. Imposition of Fiduciary Guarantees

Material encumbrances with Fiduciary Guarantees are made with Fiduciary Guarantees made with a notarial deed in Indonesian which is a Fiduciary Guarantee deed.¹⁴ In the fiduciary guarantee deed, apart from the day and date, the time (hour) of the deed is also stated.¹⁵ The Fiduciary Guarantee Deed must at least contain:

1. Identity of the Fiduciary Giver and Recipient; This identity includes full name, religion, place of residence or domicile and date of birth, gender, marital status and employment.
2. Data on the main agreements guaranteed by fiduciaries, namely regarding the types of agreements and debts guaranteed by fiduciaries.
3. Description of the object that is the object of the fiduciary guarantee.
4. A description of the object that is the object of the fiduciary guarantee, which is an object in stock (inventory) that is always changing and/or not fixed, such as stock of raw materials, finished goods, or a portfolio of securities, so the fiduciary guarantee deed includes a description of the type, brand, the quality of the object.
5. Guarantee value.
6. The value of the object that is the object of the fiduciary guarantee

e. Legal Basis for Fiduciaries

The basis for fiduciary law before the Fiduciary Guarantee Law was formed was the GHG arrest jurisprudence dated 18 August 1932 regarding the B.P.M case against Clygent.

The definition of fiduciary guarantee itself is the right to guarantee over movable objects, both tangible and intangible, and immovable objects, especially buildings which are not burdened with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain under the control of the fiduciary, as collateral for certain repayment, which gives priority position to recipients of other creditors' fiduciary guarantees.¹⁶

f. Object of Fiduciary Guarantee

¹³Oey Hoey Tiong, *Fiduciary as Guarantee for the Elements of an Agreement*, Ghalia Indonesia, Jakarta, 1985, hlm 21.

¹⁴Article 5 paragraph (1) Law Number 42 of 1999 concerning Fiduciary Guarantees

¹⁵Gunawan Widhaya and Ahmad Yani, *Fiduciary Guarantee*, Raja Grafindo Persada, Bandung, hlm 135.

¹⁶*Ibid*, hlm. 168.

Talking about fiduciary objects cannot be separated from article 504 of the Civil Code which divides objects into 2 (two) large groups, namely movable objects and immovable objects. The division in the guarantee law is explained into several guarantee institutions, namely:

- a. Pawn Guarantee Institution (article 1150-1161 BW) Mortgage institution (Article 314 paragraph (3), article 315, article 315 a, article 315 b, article 315 c, article 315 d, article 315 e, and
- b. article 316 of the Criminal Code)
- c. Mortgage Rights Institution (UU No. 4 of 1960)
- d. Fiduciary Guarantee Institution (UU No. 42 of 1999)

g. Fiduciary Registration

The process of registering a fiduciary guarantee deed is regulated in Articles 11 to 18 of Law Number 42 of 1999 concerning Fiduciary Guarantees, Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Procedures for Electronic Registration of Fiduciary Guarantees and Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making a Fiduciary Guarantee Deed.

C. METODE

Methods are processes, principles and procedures for solving a problem, while research is a careful, diligent and thorough examination of a phenomenon to increase human knowledge. Thus, research methods can be interpreted as a process of principles and procedures for solving problems faced in conducting research. This type of research is normative, namely library research.¹⁷ Normative legal research or library research is research that examines document studies, namely using various secondary data such as statutory regulations, court decisions, legal theory, and can be the opinions of scholars. This normative type of research uses qualitative analysis, namely by explaining existing data with words or statements, not with numbers. The nature of this research is descriptive analytical, meaning that from this research it is hoped that a detailed and systematic picture of the problems to be studied will be obtained. The analysis is carried out based on the description, facts obtained and will be carried out carefully in how to answer the problem in concluding a solution as an answer to the problem.¹⁸ The normative juridical approach is an approach based on the main legal material by examining theories, concepts, legal principles and statutory regulations related to this research. This approach is also known as the bibliographic approach, namely by studying books, laws and regulations and other documents related to this research. Using a normative juridical approach because the target of this research is law or norms. The definition of rules includes legal principles, rules in the narrow sense (value), concrete legal regulations. Research that has normative legal objects in the form of

¹⁷Sutrisno Hadi, *Research Methodology*, ANDI, Yogyakarta, 2000, hlm. 4.

¹⁸Burhan Ashshofa, *Legal Research Methods*, Rineka Cipta, Jakarta, 2008. hlm. 27.

legal principles, legal systems, levels of vertical and horizontal synchronization.¹⁹ The analysis is carried out based on the description, facts obtained and will be carried out carefully in how to answer the problem in concluding a solution as an answer to the problem.²⁰

D. RESULTS AND DISCUSSION

1. Legal Protection for Creditors in Fiduciary Guarantees

Fiduciary guarantees relate to contract law and object law which is included in property law as regulated in the Civil Code (KUHPer), property law as regulated in Book II of the Civil Code, and contract law as regulated in Book III of the Civil Code.²¹ All agreements made legally apply as law to those who make them as regulated in Article 1338 of the Civil Code. The parties who make an agreement cannot cancel the agreement they have made unilaterally because the agreement meets the requirements for the validity of an agreement as regulated in Article 1320 of the Criminal Code, namely the binding party's agreement, the ability to make an agreement, a certain thing and a lawful cause. Agreements made by the parties must be made in good faith as regulated in Article 1338 paragraph (3) of the Civil Code. As with a fiduciary guarantee agreement, both Creditors (fiduciary recipients) and Debtors (fiduciary givers) are obliged to carry out the contents of the fiduciary guarantee agreement properly and correctly.

The term good faith is found in property law, where good faith is very necessary in a legal relationship and is the basis for legal certainty, both when entering into an agreement and when implementing an agreement, this is nothing but a subjective human mental attitude, but good faith can be measured objectively.²²

Legal protection for creditors (fiduciary recipients) is provided by UUJF if the fiduciary collateral has been registered at the Fiduciary Registration Office. A third party who has good intentions in accepting the transfer of a fiduciary security object receives legal protection based on Article 1997 paragraph (1) of the Civil Code, namely: "Every person who controls movable property which does not take the form of interest or receivables, which does not need to be paid on display, is deemed to be the full owner." However, so far the object of fiduciary collateral has not been or has not been registered at the Fiduciary Registration office.

Creditors receive priority legal protection in fiduciary guarantees, this is related to the nature of the transfer of fiduciary guarantees, namely the transfer of ownership rights in trust from the debtor to the creditor, even though legally the ownership rights are transferred to the creditor. objects that are the object of fiduciary collateral are under the control of the debtor. This makes it possible for debtors who have bad faith to transfer the object of fiduciary collateral to another party with the intention of seeking profit for themselves.

¹⁹Soejono Soekanto and Sri Mamudji, *Normative Legal Research a Brief Overview*, Raja Grafindo Persada, Jakarta, 1995, hlm. 7.

²⁰*Op. cit.*, hlm. 27.

²¹R.SubektidanR.Tjitrosudibio, *Code of Civil Law (Burgerlijk Wetboek)* cet.41, Jakarta:PT.BalaiPustaka, 2016.

²²Riduan Syahrani, *Ins and Outs and Principles of Civil Law*, Revised Edition, Bandung: PT.Alumni, 2010, halm. 40.

The debtor's control over the object of fiduciary security is related to bezit, as regulated in Article 529 of the Civil Code²³, there are bezit who have good intentions and there are also those who have bad intentions. Ownership in good faith occurs when the owner of ownership obtains the item by obtaining title without realizing there is a defect in it. Possession in bad faith occurs when the holder knows that the item he is holding does not belong to him. If the holder of the lawsuit is sued before a judge and is defeated in this case, then he is deemed to have acted in bad faith since the case was filed.²⁴ In Law no. 42 of 1999 concerning Fiduciary Guarantees Tan Kamello in his book: "Fiduciary Guarantee Law, A Desired Necessity"²⁵ wrote that the legislators did not explicitly mention the legal principles of fiduciary guarantees which are the basis for the formation of legal norms. Therefore, in accordance with the theory of fiduciary guarantee legal principles contained in the fiduciary guarantee law are as follows:

- 1) The principle of creditors receiving fiduciaries is that they are creditors who have priority over other creditors (Article 1 number 2 UUFJ).
- 2) The principle that fiduciary collateral remains in the object that is the object of fiduciary collateral in the hands of whoever holds the object. In legal science it is known as the principle of "droit de suite" or "zaaksgevolg" (Article 20 UUFJ). The principle that fiduciary guarantees are part of an agreement is commonly called the accessory principle (Article 4 UUFJ).
- 3) The principle of fiduciary guarantees can be placed on newly existing debts (Article 7 UUFJ).
- 4) The principle that fiduciary guarantees can be imposed on objects that will exist (Article 9 UUFJ).
- 5) The principle that fiduciary guarantees can be imposed on buildings/houses located on land owned by other people (General Explanation number 2 UUFJ).
- 6) The principle that fiduciary guarantees contain detailed descriptions of the subject and object of fiduciary guarantees. In legal science it is called the principle of specialization or explanation (Article 6 UUFJ).
- 7) The principle that the fiduciary guarantee provider must be a person who has legal authority over the object of the fiduciary guarantee.
- 8) The principle of fiduciary guarantees must be registered at the fiduciary registration office. In legal science it is called the principle of publication (Article 12 UUFJ).
- 9) The principle that objects which are the object of fiduciary collateral cannot be owned by creditors receiving fiduciary collateral even though it has been agreed (Article 1 paragraph (3) and Article 33 UUFJ). In legal science it is called the principle of accusation.
- 10) The principle of fiduciary guarantees gives preferential rights to creditors receiving

²³What is meant by possession is the position of controlling or enjoying an item that is in one's control personally or through the intermediary of another person, as if the item were one's own.

²⁴Vide Pasal 530, 531 dan 532 KUHP data.

²⁵Tan Kamello, *Op.cit*, hlm.159.

fiduciaries who first register at the fiduciary office compared to creditors who register later (Article 28 UUJF).

- 11) The principle that the fiduciary who retains control of the collateral must have good faith.
- 12) The principle of fiduciary guarantees is easy to implement (Article 15 UUJF).

Registration Office it is not easy for debtors providing fiduciaries who have bad intentions to simply transfer the object of fiduciary collateral. or redistribute it or sell it. to third parties who have good intentions.

Based on Law no. 42 of 1999 concerning Fiduciary Guarantees explains that Fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object, while Fiduciary Guarantee is a mortgage right. for 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 under Fiduciary control, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a preferred position compared to other creditors.

Law Number 41 of 1999 which regulates fiduciary matters is contained in Article 5 paragraph (1) The encumbrance of objects with Fiduciary Guarantee is made by notarial deed in Indonesian and is a Fiduciary Guarantee deed. Article 11 paragraph (1) Objects encumbered with Fiduciary Guarantee must be registered, and Article 15 paragraph (2) Fiduciary Guarantee Certificate as intended in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force.

Subject and Object of Fiduciary Guarantee

According to the Fiduciary Guarantee Law, a fiduciary is an individual or corporation that owns objects that are the object of Fiduciary Guarantee.²⁶ A fiduciary recipient is an individual or entity who has receivables whose payment is guaranteed by a Fiduciary Guarantee.²⁷

Prior to the enactment of the UUJF, the objects of fiduciary collateral were only movable objects consisting of inventory, merchandise, receivables, machine tools and motorized vehicles. Now the objects of fiduciary collateral include certain movable objects and certain fixed objects, which cannot be guaranteed through a mortgage or mortgage institution, but all of which is provided that the objects can be owned and transferred.²⁸

Transfer of Fiduciary Security

²⁶*Op.cit.*, Article 1 number 5 of the Fiduciary Guarantee Law, Law no. 42 of 1999.

²⁷*Ibid.*, Article 1 number 6.

²⁸J.Satrio (1), *Execution Parate as a Means of Overcoming Bad Credit*, Citra Aditya Bhakti, Bandung, 1993, hlm. 179.

The conditions for a legal transfer of rights in the legal construction of fiduciary guarantees must meet the following requirements:²⁹

- 1) There is a zakelijk agreement.
- 2) There is ownership rights upon transfer of rights.
- 3) There is authority to control the object from the person who handed over the object.
- 4) A certain method of delivery, namely by means of constitutum possessorium for tangible movable objects or by cessie for debts and receivables.

The transfer of rights to receivables guaranteed by a fiduciary guarantee has the legal effect of transferring by law all the rights and obligations of the fiduciary recipient to the new creditor.³⁰ The transfer of fiduciary collateral is registered by the new creditor at the fiduciary registration office.³¹ In connection with the act of transfer, basically a bill can be transferred to another person, as regulated in Article 613 of the Civil Code.³² The transfer of a bill can even be done without the debtor's consent. The transfer may be in addition to certain mandatory agreements. The transfer must be carried out in the form of a deed called a cessie deed, either in the form of a notarial deed or a private deed.

In other words, cessie is intended to transfer receivables from old creditors to new creditors. With the transfer of receivables, the fiduciary guarantee attached to the receivables is also immediately transferred to the new creditor. To protect the interests of new creditors, the transfer must be registered at the fiduciary registration office.

From the provisions of Article 19 UUFJ it can be concluded that there is no need for reports and requests for changes to the cooperation list between old creditors and debtors, but new creditors must be able to provide evidence that can convince the fiduciary registration officer. that the credit agreement or claim is secured by a fiduciary guarantee. indeed it has switched to a new creditor.

This surrender does not have any effect on the debtor until the surrender is notified to him or approved in writing or acknowledged. Delivery of debt securities in the person's name is carried out by giving them; "Delivery of a debt letter upon order is carried out by giving it simultaneously with the ratification of the letter."

Apart from the transfer of receivables, fiduciary collateral can also be transferred due to the transfer of the object of the fiduciary guarantee to another party, such as sale, and based on the principle of droit de suite, the collateral for the transferred object automatically follows the object. namely the object of collateral wherever the object is located.

When registering, you need to be careful about the items being pledged. If there is a change later, the transfer is related to the amount of collateral value. Apart from that, the era of globalization

²⁹Munir Fuady, *Fiduciary Guarantee*, Cet.1, Bandung: PT. Citra Aditya Bakti, 2000, hlm. 4.

³⁰*Ibid.*, Article 19 paragraph (1).

³¹Article 19 paragraph (2).

³²Article 613 of the Civil Code: "Delivery of receivables in the name of and other items without a body, is carried out by making an authentic or private deed which transfers the rights over the items to another person.

also has an impact on the scope of use of fiduciary guarantees and developments in the use of fiduciary objects for intangible movable goods can also more or less cause problems.³³

Legal Protection for Creditors If the Debtor Defaults

Legal protection for banks or financial institutions as creditors (fiduciary recipients) as a form of protection for the interests of banks or financial institutions if the debtor (customer) is in the form of a fiduciary guarantee deed as regulated in Article 6 UUJF which contains, among other things: the identity of the fiduciary giver and recipient, data the main agreement that is guaranteed by the fiduciary, a description of the object that is the object of the Fiduciary Guarantee, the value of the guarantee and the value of the object. which is the object of the Fiduciary Guarantee. Legal protection for the interests of banks or financial institutions as creditors is also regulated in Article 20 UUJF where the Fiduciary Guarantee remains on the object that is the object of the Fiduciary Guarantee in the hands of whoever the object is in, except for the transfer of assets. inventory items that are the object of Fiduciary Guarantee.³⁴

If the debtor providing the fiduciary defaults, the creditor receiving the fiduciary has the right to sell the object which is the object of the fiduciary guarantee under his own authority as regulated in Article 29 UUJF, namely by:

- a. Implementation of the executorial title as intended in Article 15 paragraph (2) by the Fiduciary Recipient;
- b. Selling objects that are the object of Fiduciary Guarantee under the authority of the Fiduciary Recipient himself through a public auction and collecting receivables from the sale;
- c. Private sales are carried out based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained which is profitable for both parties. Paragraph (2): The sale as referred to in paragraph (1) letter c is carried out after 1 (one) month has passed since being notified in writing by the Giver and Recipient of the Fiduciary to interested parties and announced no later than 2 (two) newspapers circulating in the area concerned.

Purchasers of objects that are the object of fiduciary guarantees which are inventory items, are free from claims even if the buyer is aware of the existence of fiduciary guarantees, provided that the buyer has paid the selling price of the object in full in accordance with applicable regulations. market price as regulated in Article 22 UUJF.

Fiduciary guarantees also have a material nature and apply the principle of *droit de suite*, except for the transfer of inventory items which are the object of fiduciary guarantees. As regulated in Article 23 paragraph (2) UUJF which states that the Fiduciary Giver is prohibited from transferring, pawning or renting to other parties objects that are the object of Fiduciary

³³ Mariam Darus Badruzaman, *Regulating Fiduciary Guarantees with Laws and Implementing Registration Systems*, Journal of Business Law, Vol. 9, 1999, hlm. 63.

³⁴ Vide Article 20 paragraph (1) Fiduciary Guarantee Law, Law no. 42 of 1999.

Guarantee which are not inventory items, except with prior written approval from the Fiduciary Recipient.³⁵

For all acts and omissions of the fiduciary giver, the fiduciary recipient is not subject to responsibility as regulated in Article 24 UUJF: "The Fiduciary Recipient is not responsible for the consequences of the Fiduciary Giver's actions or negligence, whether arising from contractual relationships or arising from unlawful acts in connection with with the use and transfer of objects that are the object of the Fiduciary Guarantee."

Legal protection for creditors regarding priority rights to receivables is regulated in Article 27 UUJF:

1. Fiduciary recipients have priority rights over other creditors.
2. The priority right as intended in paragraph (1) is the right of the Fiduciary Recipient to collect repayment of his receivables from the proceeds of the execution of the object that is the object of the Fiduciary Guarantee.
3. The Fiduciary Recipient's priority rights are not lost due to bankruptcy and/or liquidation of the Fiduciary Giver.

Criminal Provisions in the Fiduciary Guarantee Law

A fiduciary guarantee agreement is in the realm of civil law, but as a form of legal protection for parties who make a fiduciary guarantee agreement in good faith, because in a fiduciary guarantee agreement the collateral object is under the control of the debtor, so it is very possible for the transfer of the fiduciary guarantee object to another party. third, the UUJF regulates criminal provisions and fines. With the UUJF, in accordance with the legal principle of *Lex Specialis Derogat Legi Generalis*, the criminal law in the Criminal Code does not apply to criminal acts related to fiduciary, because Article 372³⁶ of the Criminal Code concerning embezzlement and Article 378³⁷ of the Criminal Code concerning fraud have been specifically regulated in Article 36 and Article 35 UUJF.

The fiduciary giver can transfer inventory items which are the object of the Fiduciary Guarantee in the manner and procedures commonly carried out in trading businesses, but this does not apply if the debtor or third party recipient of the fiduciary defaults (default) and if the fiduciary object of the guarantee is transferred to another person. if not, it must be replaced with an object equivalent to that by the fiduciary holder. However, if the fiduciary holder defaults, then the results of the transfer or claims that occur by law will become the object of the

³⁵*Ibid.*, Article 20 paragraph (2).

³⁶Article 372 of the Criminal Code: "Any person who intentionally and unlawfully owns something which wholly or partly belongs to another person, but which is in his or her control not because of a crime, is threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah."

³⁷Article 378 of the Criminal Code: "Whoever, with the intention of unlawfully benefiting himself or another person, by using a false name or false dignity, by deception or a series of lies, induces another person to hand over something to him, or to give debts or writing off receivables is punishable for fraud with a maximum prison sentence of four years."

replacement fiduciary guarantee and the object of the transferred fiduciary guarantee, as regulated in Article 21 UUFJ.³⁸

Violations of Article 23 paragraph (2) are subject to criminal sanctions as regulated in Article 36 UUFJ, namely that the Fiduciary Giver transfers, pawns or rents out objects that are the object of Fiduciary collateral as intended in Article 23 paragraph (2) without prior written approval. from the Fiduciary Recipient, shall be punished with a maximum imprisonment of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiah).

If a person intentionally falsifies, changes, omits or in any way provides misleading information, which if known by one of the parties does not give rise to a Fiduciary Guarantee agreement, then he or she will be punished with imprisonment for a minimum of 1 (one) year. and a maximum of 5 (five) years and a minimum fine of Rp. 10,000,000,- (ten million rupiah) and a maximum of Rp. 100,000,000,- (one hundred million rupiah).³⁹

2.Implementation of the Criminal Act of Transfer of Fiduciary Collateral by a Judge

The decision of the Supreme Court of the Republic of Indonesia regarding the criminal act of transferring the object of fiduciary collateral along with its juridical analysis is as follows:⁴⁰

1. MARI Decree No.6/Pid.B/2012/PN.Psr dated 12 March 2012.

Rules and Legal Basis:

H. Ahmad Budiyanto Bin Moch Romli carried out a sale and purchase transaction for a 2008 Honda CRV car in November 2010 worth Rp. 339,876,000 on credit in the form of a fiduciary financing agreement with PT. Astra Sedaya Finance with 36 installment payments. At the time of the first installment a fiduciary guarantee certificate is made. The fiduciary recipient is PT. Astra Sedaya Finance and the fiduciary giver are H. Ahmad Budiyanto Bin Moch Romli with the object of the fiduciary guarantee being a 2008 Honda CRV car. In November 2010 the fiduciary giver gave him a 2008 Honda CRV car because he had a debt of Rp. 75,000,000,- to H. Manaf Kadir as collateral for a debt without the permission of the fiduciary. On March 14 2011 there was a delay in payment, the installments had only been paid 6 times, therefore the fiduciary recipient provided SP-3 and SP. Finally, when I wanted to withdraw the fiduciary collateral, it turned out that it was no longer in the hands of the fiduciary holder. In its decision, the Panel of Judges stated: That the fiduciary giver is legally and convincingly guilty of committing the criminal act of pawning an object that is the object of fiduciary collateral without the prior written consent of the fiduciary recipient as regulated in Article 36 UUFJ and imposed a sentence of 5 months and a fine of Rp. 3,000. 000,- subsidiary 1 month in prison and detained.

³⁸Vide Article 21 paragraph (1) Fiduciary Guarantee Law, Law no. 42 of 1999.

³⁹*Ibid.*, Article 35.

⁴⁰<http://bangunan.mahkamahagung.go.id/>, downloaded on date 3 January 2018, 13.00 pm.

Juridical Analysis:

H. Ahmad Budiyo Bin Moch Romli's actions have fulfilled the formulation of Article 23 paragraph (1) and are subject to criminal sanctions as regulated in Article 36 UUJF, namely the Fiduciary Transferring, pawning or renting the object which is the object of collateral. Fiduciary guarantees as intended in Article 23 paragraph (2) which are carried out without prior written approval from the Fiduciary Recipient, are punishable by imprisonment for a maximum of 2 (two) years and a fine of a maximum of Rp. 50,000,000 (fifty million rupiah).

2. MARI Decree No.124/Pid/2015/PT.BDG dated 25 May 2015.

Rules and Legal Basis:

Edi Herdiana Bin Sambas (fiduciary holder) on January 29 2013 purchased a used vehicle, a 2005 metallic yellow Toyota Avanza in the name of Gunawan at the Warung Wetan Ciamis showroom for Rp. 120,000,000,- with a shortfall of Rp. 80,000,000,- paid on credit through PT. Magna Finance Ciamis / PT. MFC (fiduciary recipient) is paid in 11 monthly installments amounting to Rp. 7,869,000,- per month with consumer financing and a fiduciary guarantee agreement made on February 4 2013. After 3 installments in June 2013 Edi Herdiana no longer paid the installments so Yana Sektiana from the head collector of PT.MFC wanted to take the car as collateral fiduciary. It turned out that the BPKB and the car belonged to and were in the name of Elan Jakalalana which Edi Herdiana had borrowed through Nia Kurnianingsih to use as collateral for PT. In its decision the Panel of Judges stated:

That Edi Herdiana Bin Sambas was proven wrong and was found guilty of committing a criminal act by deliberately providing misleading information which, if known by one of the parties, would not give rise to a fiduciary agreement in accordance with Article 35 of Law no. 42 of 1999 concerning fiduciary guarantees with the threat of a prison sentence of 1 year and a fine of Rp. 10,000,000,- with the provision that if the fine is not paid it will be replaced by imprisonment for 1 month.

Juridical Analysis:

Edi Herdiana Bin Sambas' actions clearly fulfill the formulation of Article 35 UUJF which states that every person intentionally falsifies, changes, omits or in any way provides misleading information, which if known by one of the parties does not cause harm. Fiduciary Guarantee agreement, punishable by crime. 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,- (ten million rupiah) and a maximum of Rp. 100,000,000,- (one hundred million rupiah).

3. MARI Decree No.10/Pid.Sus/2016/PN.Yyk dated 13 April 2016.

Rules and Legal Basis:

Dwi Andar Witati (fiduciary holder) on May 11 2011 purchased 1 unit of Avansa car in 2008 in his name with the aim of helping Muhamad Nur Faiq's business by leasing financing to PT.Austindo Nusantara Jaya Finace (ANJF) (fiduciary recipient) which is now called PT . Mitra Pinasthika Mustika (MPM), priced at Rp. 135,000,000,- with a down payment of Rp. 20,250,000,- and a shortfall of Rp. 114,750,000,- financed by PT.MPM in installments of Rp. 3,348,000,- paid in installments over a total of 48 months by Muhamad Nur Faiq. Letter of imposition of fiduciary guarantee on May 11 2011 at notary Frederika L.P, SH, MKN. Even though there was a sale and purchase between Dwi Andar Witati and Muhamad Nur Faiq, the sale and purchase was only fictitious, because the Avansa car was still in the control of Muhamad Nur Faiq and then the car was handed over to Muhamad Nur Faiq's family in Tuban for rental without PT MPM's permission. and Muhamad Nur Faiq did not pay the 37th to 48th installments because he did not have the money. The leasing party once asked for 80 million rupiah but Muhamad Nur Faiq was only able to pay 40 million rupiah so there was no agreement. In its decision, the Panel of Judges stated: That Dwi Andar Witati (fiduciary holder) has been legally and convincingly proven guilty of committing a criminal act by intentionally falsifying, changing, omitting, or in any way providing misleading information which, if known by one of the parties, will not give rise to a guarantee agreement. fiduciary as in the first alternative charge violates Article 35 of Law Number 42 of 1999 concerning fiduciary guarantees with the threat of a prison sentence of 3 months and a fine of Rp. 1,000,000,- and if the fine is not paid it will be replaced by imprisonment for 1 month.

Juridical Analysis:

Dwi Andar Witati's actions fulfill the formulation of Article 35 UUJF which states that any person who deliberately falsifies, changes, omits or in any way provides misleading information, which if known by one of the parties does not give rise to a Fiduciary Guarantee. consent, is punishable by a maximum prison sentence. Minimum 1 (one) year and maximum 5 (five) years and a minimum fine of Rp. 10,000,000,- (ten million rupiah) and a maximum of Rp. 100,000,000,- (one hundred million rupiah).

The Birth of Constitutional Court Decision No. 18/2019 which provides a new interpretation of several phrases and explanations in the Fiduciary Law certainly has more or less implications for the auction business process which is the authority of DJKN c.q. KPKNL. These implications can take the form of adjustments at a practical or normative level. So, DJKN needs to re-examine all the implications that have and may occur on the auction business process by making improvements to the laws and regulations in order to create a better *ius constituendum* in the field of auctions.

E. CONCLUSION

Legal protection for creditors from criminal acts of transferring fiduciary collateral to third parties is provided by the Fiduciary Guarantee Law if the creditor (fiduciary recipient) obtains a fiduciary guarantee certificate by registering a fiduciary guarantee deed made with an

original note at the fiduciary registration office, so that it has the power executory towards the object of fiduciary guarantee.

From several decisions of the Supreme Court Judges, it can be seen that the Judges decided that the criminal act of transferring the object of fiduciary collateral was caused by falsification, alteration, omission or provision of misleading information, which if this was known by one person. The parties will not enter into a Fiduciary Guarantee agreement as regulated in Article 35 of the Fiduciary Guarantee Law and the transfer, pawning or rental of objects which are the object of Fiduciary Guarantee as intended in Article 23 paragraph (2) which are carried out without approval,

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