



## Legal analysis of creditor protection in bankruptcy without fiduciary guarantee registration

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### ABSTRACT

*Fiduciary as a legal concept in Indonesia has undergone significant development, especially after the enactment of Law Number 42 of 1999 concerning Fiduciary Guarantees. With the expansion of the object of fiduciary guarantee, it now includes not only physical movable objects such as vehicles and equipment, but also intangible objects and immovable objects that cannot be encumbered with dependent rights. This shows that there is a legal adaptation that is responsive to the needs of transactions and economic development in the community. This research is a normative legal research using a legislative approach. Based on the results of the research, it can be concluded that a fiduciary guarantee deed that is not registered at the fiduciary registration office can result in a number of significant legal consequences. One of the main consequences is the loss of the power of execution of the guarantee, so that creditors cannot rely on the object of the guarantee as protection against their receivables.*

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### 1. Introduction

Historically, classical fiduciaries have existed since Roman times. In this case, there is what is referred to as *Fiduciary Crediture* in Rome, a legal structure in which the debtor's goods were handed over to creditors only to secure the debt (Masjchun, 1980). In Rome, there was also a so-called *Fiduciary Amico*, but it is only intended to hire a representative to safeguard his interests. Therefore, there is no surrender of debt or title guarantee as done in fiduciary binding (Fuady, 2000). After the Bierbrouwerij Arrest in the Netherlands (Netherlands), it was only in 1932 that it was known that Indonesia also followed the fiduciary practice in the Netherlands. With the decision of Hoogerechtshof (HGH) on August 18, 1932, in a case known as BPM Arrest. With this Decision marking the starting point of the development of Indonesian fiduciary (Patrik & Kashadi, 1997). Fiduciary is a term that has been known for a long time and is an official term in the world of positive law in Indonesia (Fuady, 2013). The majority of fiduciary objects (including supplies, trade, receivables, machinery, and motor vehicles) were movable goods

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before the enactment of Law No. 42 of 1999 concerning fiduciary guarantees. Fiduciary guarantees have been expanded to include immovable, lien-free, intangible personal property, and physical and intangible movable commodities since the law was enacted (Law No. 4 of 1996). The transfer of ownership of an object is based on trust, according to Article 1 of Law Number 42 of 1999 concerning fiduciary guarantees, as long as the original owner still has ownership of the object (Jono, 2013). Fiduciary guaranteed things are things that can be owned and have transferable ownership rights, including physical and intangible assets, whether registered or unregistered, movable or immovable, that cannot be encumbered by a mortgage. This explanation shows that the debtor still has collateral based on the faith. However, it is not uncommon for debtors to fail or partially meet their commitments when making credit arrangements. If the debtor is proven to have deliberately caused default, the sanction that will be given by the creditor is to be able to ask for compensation as a result of the non-implementation of the obligations that must be fulfilled by the debtor in accordance with the agreement, a risk transfer is held, a request for cancellation of the agreement and compensation. Loss can be interpreted as the reduction of one party's wealth caused by an act (doing or allowing) that violates the norm by the other party. An example of a case of the impact of non-compliance with creditors is in Case Number 178/Pdt.G/2023/PN Srg which occurred in Cilegon City which resulted in losses from all aspects, this started from the existence of a road construction project in the Cilegon area, where when the road construction process was completed, the funds that should have been paid according to the agreed date were late in returning and resulted in huge losses for the plaintiff in the case.

In order for the fiduciary system to function, creditors (financial institutions) must register with the fiduciary registration office. This gives them the legal authority to carry out the pledged goods. However, in practice, there are certain financial institutions that fail to register the collateral with the fiduciary registration office; Thus, the execution or auction can be ordered by the court through the bailiff.

Prospective customers of financial institutions are required to conduct a business feasibility study before they can be granted credit with fiduciary guarantees, because this type of credit is based on trust. In a fiduciary guarantee system, where the debtor remains in control of the collateral, a number of steps must be taken before the implementation of the purpose of the fiduciary guarantee. Today, factoring, leasing, and consumer financing are all services offered by various banks and other financial organizations. Although fiduciary guarantees for fiduciary objects are often part of the agreement process, paradoxically neither a notary deed nor a registration at the Fiduciary Registry Office is required to obtain a certificate. This kind of document is sometimes referred to as a fiduciary deed under hand (*Sanusi et al., 2019*). However, in order to obtain the legal protection provided by the UUJF, the original deed must be used to encumber an item with a fiduciary deed and included in the fiduciary register, as required by the fiduciary law. The UUJF's protection of creditors' rights depends on the fulfillment of these things.

With the enactment of fiduciary, it can help creditors in the event of bankruptcy. This makes creditors aware of the importance of Fiduciary guarantees. In essence, bankruptcy includes all the debtor's assets at the time the bankruptcy declaration is made along with all assets obtained during the bankruptcy process. With the declaration of bankruptcy, the bankrupt debtor for the sake of the law will lose his rights to own and process his assets brought in bankruptcy, starting from the date of bankruptcy. Article 25 of the Law and PKPU emphasizes that "all bankrupt debtor agreements executed after being declared bankrupt cannot be paid from the bankruptcy assets unless these agreements bring benefits to the assets Therefore, lawsuits originating from the rights and obligations of the bankrupt debtor's assets must be filed against the curator." In the legal world, debtors who cannot complete their obligations to creditors can be declared bankrupt. The most important purpose of bankruptcy is to be able to distribute among creditors the debtor's wealth by the curator. so that there is no separate confiscation which is called separate execution with creditors and is replaced by holding a joint confiscation so that the

debtor's wealth can be divided equally among all creditors along with their respective rights, that is the purpose of this bankruptcy (Muhammad & SawitriNandari, 2018).

Bankrupt *fail-liat* (in Dutch), or *bankrupt* (in English). Dutch Indies-Bankrupt not included in the Criminal Code *Gang Wetboek van koopandle* and used in special regulations for *faillissements-verordering* since 1906. It was originally intended for traders, but now it can be applied to everyone. Like other regulations, bankruptcy cases are considered very important. In 1997, Indonesia faced an economic crisis that damaged almost all aspects of the country's economy. The crisis brought about a major change in Indonesia's bankruptcy regulations (Saliman, 2011). An event in which a debtor is unable to pay a debt to its creditors is called bankruptcy. This usually happens because the financial condition of the debtor company has deteriorated (Shubhan, 2008). One of the methods of resolving debt and receivables disputes is to go bankrupt. This organization does not aim to settle a creditor's debt; Instead, they work in the interests of some creditors. After the bankruptcy judgment is issued, other creditors can collectively file their debt bills. The court can determine a debtor's bankruptcy if he has a minimum of two creditors and at least one debt that is due and collectible (Supramono, 2013). When a bankruptcy declaration is made, the company's assets are put into bankruptcy assets, which is known as general foreclosure. According to Article 21 of the ICC Law, bankruptcy assets include all debtor assets at the time the bankruptcy judgment is announced, as well as all assets acquired by the debtor during bankruptcy (except for those explicitly removed from bankruptcy assets by the Bankruptcy Law) (Remy, 2009). Based on the description in the background, this study is interesting to study for the compiler and explain this problem in the form of a research entitled "Legal Analysis of Creditor Protection in Bankruptcy Without Fiduciary Guarantee Registration"

## **2. Method**

The method used in this study is normative juridical, which is a type of legal research that uses secondary data sources. This method involves the formation of a conceptual framework and the creation of provisions in laws and regulations that will be used as the basis for research. (Amiruddin & Asikin, 2018). Normative legal research, as explained by Peter Mahmud Marzuki, is a method of resolving legal disputes by identifying applicable laws, principles, and doctrines. The purpose of normative legal research is to provide a new framework for understanding and resolving actual legal problems (Marzuki, 2007).

It can be concluded that normative law research is a process to examine related legal norms, legal rules, legal principles, legal doctrines, legal theories, and other legal literature materials to find solutions to the legal events being studied.

In this study, the researcher focuses on the rule of law and its principles. Therefore, the researcher does not use empirical legal research methods. Researchers are more suitable to use normative legal research in this study because empirical legal research focuses on how the law is applied in society and the impact of the application of the law.

The methodology of this research is descriptive analysis, which seeks to identify the rule of law by relating it to the legal theories being investigated (Soemitro, 2015). The nature of this research is used to describe an event that is happening to reveal an event which is then analyzed based on legal theories and laws and regulations that are used and still in force.

The object of study of normative law research is to focus on the system of legal norms related to a legal event. By analyzing a legal event, as well as determining whether the legal event is correct or not and how the legal event should be. Therefore, a study begins by looking for an event that occurs and then provides an assessment of the legal event associated with applicable legal norms. Peter Mahmud Marzuki explained the approaches used in legal research as follows: (Marzuki, 2015): a) The legal method involves examining all laws and regulations relating to the legal issue under consideration; b) The conceptual approach is based on the

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perspectives and theories established in legal science; c) The case method involves studying cases related to topics that have resulted in binding court decisions.

This study uses a descriptive-analytical approach, which means that the research describes the event and then analyzes it based on secondary data from primary, secondary, and tertiary legal materials (Soekanto, 2006). Primary, secondary, and tertiary legal materials are the research subjects used in this study, which are carried out in two stages: literature research and field data collection (Nurmelinda, 2021). The data analysis method used in this study is a qualitative normative juridical analysis method.

After the researcher determines the issue to be discussed, then the researcher will search for relevant legal materials related to the problem that the researcher discusses. The search is by collecting law books, legal journals, legal dictionaries, and other literature related to the problems discussed by the researcher. Legal materials are collected by conducting searches and documentation studies, either through bookstores, libraries, internet media, and other media or institutions that are relevant to the problems discussed by the researcher.

There are 3 (three) methods of data collection techniques in normative law research, namely literature studies, documentation studies, and archival studies, which are as follows: 1) Literature Studies is a technique of examining written information about law from various widely published sources and is necessary in normative legal research. The procedures carried out in the data collection technique using the method of literature study are: a) Identify a source of legal materials through the library, b) Record the required legal materials by searching the table of contents on the legal materials used, c) Cite the necessary legal materials and mark each quote used, d) Analyze all legal materials that have been determined according to the problem in the research; 2) Documentation Study, is a method used to examine a legal material that is not publicly available; 3) Archival studies are the study of written information about events that occurred in the past (including legal events) that have historical value, are stored and maintained in a special place for reference. It can be in the form of; letters, records, maps, sketches, or specific documents.

### 3. Analysis and Results

The purpose of the UUJF (as mentioned in letter c) is to provide a more complete system than the existing one. According to his explanation, the Fiduciary Guarantee Law not only meets the needs but also provides legal certainty. Therefore, the principle of registration of fiduciary guarantees is taken by the Fiduciary Guarantee Law (Lestari et al., 2020). It is hoped that the registration will provide legal certainty to the giver and recipient or third parties. With registration, the third party is considered to know the characteristics of the object concerned and there is a guarantee of a relationship with these characteristics. If a third party neglects to view or control such registrations or listings, the third party cannot expect protection in good faith and must bear the loss (Hartono, 2007).

In Article 29 of the UUJF, the fiduciary guarantee implementation system stipulates that if the debtor or fiduciary guarantor breaches his promise, then the implementation of the object of the fiduciary guarantee can be carried out by: (Dewi & Handoko, 2022): a) The title of the executor has the same legal force as a court decision that has permanent legal force; b) If the object that is a fiduciary guarantee is sold through a public auction, the guarantor himself will also pay off his debt from the proceeds of the sale; c) If the sale at the counter is made by agreement between the fiduciary and the fiduciary, the highest price that benefits both parties will be obtained; d) The three fiduciary guarantee methods mentioned above are different.

Fiduciary is considered to be very helpful for debtor businesses, so it is very important in meeting the credit needs of the community. The debtor still has full control over the object of the guarantee, both for daily business and banking. Because banks do not need to provide special locations such as *pand* (Lombogia, 2013). The fiduciary agreement given to the creditor is only made after the creation of the credit agreement and the original deed and is not registered

with the Fiduciary Registration Office. Negotiations are also carried out by providing additional fees to the fiduciary when carrying out the fiduciary guarantee. One way to protect yourself from the law is to provide legal certainty. In reality, creditors are almost always harmed by debtors who violate the contract (Satrio, 2002).

As creditors and debtors, the fiduciary and the fiduciary have a legal relationship (Salim, 2004). The agreement would be contrary to Law Number 42 of 1999 concerning Fiduciary if it was made under the hand. Article 5 of the law states that the imposition of fiduciary collateral is carried out by a notary deed in Indonesian and is a fiduciary guarantee deed (Harahap, 2010). The encumbrance of an object (such as a car) as collateral is a legal defect if it is not made with a Notary Deed. In the context of a ruling, a legal defect in a financing agreement can be in the form of an agreement, policy, or procedure that violates the applicable law.

### **3.1. Legal Protection for Creditors in Bankruptcy Without Fiduciary Guarantee Registration**

The creation of a fiduciary guarantee letter through a notary deed and registration at the civil registry office provides legal certainty to creditors. A fiduciary guarantee certificate, which contains an oath and promise, grants legal immunity to creditors and ensures that the debtor cannot default on the fiduciary deed (Ahyani, 2011). The position of creditors is heavily burdened by the dangers associated with the act of an unregistered fiduciary deed. Even in the event of bankruptcy, the legal protection provided to creditors who are fiduciary beneficiaries will not be restored, as the loan documents are considered to have no authority to execute. Legal hazards may arise from an unregistered fiduciary pawn, meaning it is made outside of a notary.

Assuming the debtor has fulfilled some of its obligations under the agreement, the creditor can execute at its own discretion to represent its rights. Any mention of collateral or goods in question will protect the interests of debtors and creditors. The creditor, in his capacity as a fiduciary, may suffer losses as a result of such actions, which are considered illegal. The parties in a credit arrangement that includes a fiduciary guarantee must have some sort of legal protection. There are two types of legal protection: (Anas, 2022): a) Legal protection in general: All assets belonging to the debtor, both tangible and immovable, present and future, are liable for certain commitments, according to Article 1131 of the Civil Code, which regulates their requirements. At that time, wealth became a guarantee for all agreements without any express representation or giving of money. Article 27 of the fiduciary law states that the creditor's rights will appear on the registered goods, so that if the creditor makes his own record, the status of the unregistered fiduciary guarantee does not take precedence over other creditors; b) The basic provisions of the agreement that include the debtor's commitment to defend the interests of the fiduciary creditor over the agreement it has signed, among other things, are special legal protections offered to creditors. This protection is contained in the debt recognition agreement. The ability of creditors to pursue debt repayment in the event of default, even after taking precautions such as exercising a power of attorney, is contrary to the requirements of the fiduciary law, which states that creditors can only act as creditors concurrently.

Thus, in the context of bankruptcy, legal protection for creditors who have unregistered fiduciary guarantees is a crucial issue. Although a fiduciary guarantee gives creditors the right to claim the debtor's assets, the non-registration of such a guarantee has the potential to put the creditor's rights in a weak position. This is due to the fact that without registration, fiduciary guarantees do not have enough legal force to defeat the rights of third parties, including other creditors who may have stronger guarantees. Therefore, it is important for creditors to register fiduciary guarantees in order to strengthen their legal position and protect their financial interests in a bankruptcy situation.

On the other hand, existing regulations need to pay more attention to the protection of creditors' rights, especially in the case of unregistered fiduciary guarantees. Clear and firm arrangements regarding the legal consequences of non-registration of fiduciary guarantees will provide legal certainty for all parties involved. Thus, efforts to maintain a balance between the

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interests of debtors and creditors must continue to be improved, so that strong legal protection can be realized and create trust in credit transactions in the community. In addition, education to creditors about the importance of registering fiduciary guarantees is also a strategic step to prevent greater losses in the future.

### **3.2. Legal consequences if the fiduciary guarantee deed is not registered at the fiduciary registration office**

In both Indonesia and the Netherlands, fiduciary law developed from habits driven by new legal innovations. It is not unexpected that fiduciries, including the need to register them, are not subject to any particular process or method, given that they are legal organizations rooted in the courts and there are no laws including rules governing them (Fuady, 2013). Given the many obstacles in its implementation, Indonesia finally passed a law that requires the registration of any imposition of fiduciary guarantees to the competent authorities with the passage of Law No. 42 of 1999 concerning fiduciary guarantees. In a legal sense, registration is an inseparable sequence from the implementation of the trust deed.

One of the legal foundations of contemporary material guarantees is the concept of publicity, and the UUJF has met this need by requiring the registration of fiduciary guarantees in accordance with Articles 11 and 12. Creditors and the general public will have a broader knowledge of, or access to, relevant information about, debt security if issued. In accordance with Article 24 of the fiduciary guarantee law, the fiduciary is responsible for all losses or losses that may occur as a result of the use or transfer of the object of guarantee, since he is the one who uses it and the party who benefits the most economically. of that.

In the practice of charging credit with fiduciary guarantees, creditors often do not register the fiduciary guarantee deed to the fiduciary registration office. This is due to several factors, one of which is the registration process which is carried out manually, which is considered difficult and inefficient. In fact, the Fiduciary Registration Office (KPF) itself has difficulty meeting the standards regulated in the Fiduciary Guarantee Law (UUJF). Article 14 of the UUJF states that KPF must issue and submit a Fiduciary Certificate to the Fiduciary on the same date as the date of receipt of the registration application. However, the reality is that the issuance of these certificates often takes anywhere from a few weeks to months, which makes it difficult for creditors to guarantee their priority rights.

To overcome this, a number of new regulations have been issued, including Regulation of the Minister of Law and Human Rights Number 8 of 2013 concerning the Delegation of Electronic Signing of Fiduciary Guarantee Certificates, Regulation of the Minister of Law and Human Rights Number 9 of 2013 concerning the Implementation of Electronic Registration of Fiduciary Guarantees, and Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Procedures for Electronic Registration of Fiduciary Guarantees. Coupled with the Circular Letter of the Director General of AHU No. AHU-06. OT.03.01 of 2013 which regulates the operationalization of the electronic fiduciary registration system (online). With the implementation of the online fiduciary registration system, fiduciary registration that was previously done manually can now be done faster, in just a matter of minutes. The system also closes the practice of manual fiduciary registration which previously often hampered the process (Suryaningsih, 2020).

Thus, the age of online registration for fiduciary purposes begins, replacing the previous manual approach. This change was made for the sake of simplification and accuracy. In fact, however, the public's understanding of legal certainty is still very low, and government initiatives still fail to inspire them to take action to protect their interests. The fiduciary guarantee deed, which binds the object of the debt guarantee to the local KPF in the creditor's area, is often not registered by many business actors, including the fiduciary (bank or financing institution) for this matter. The failure to record the deed of binding collateral is caused by many factors, such as: a) The debtor or fiduciary has been a loyal client of the financial institution for some time and has a solid payment history; b) This prospective debtor has a

relatively low debt limit value; c) The fiduciary registration procedure is considered unnecessary by financial institutions because they do not want to charge significant administrative fees to prospective consumers or customers; d) This fiduciary levy is presented only as an additional guarantee of the credit arrangement, the main guarantee of which has been guaranteed.

Because fiduciary guarantees are legally protected, their registration benefits the community as a whole. Alternatively, the public will not benefit from the legal protections provided if fiduciary promises are not recorded. It is possible to compare unregistered fiduciary agreements with fraudulent agreements, as they cannot be executed directly according to their order. If the debtor does not pay, the next step is to initiate the execution by bringing the civil case to the District Court and following the usual legal procedures until a decision is made. Furthermore, based on Article 27 paragraph 1 of the UUJF, creditors, including banks and financial institutions, are not entitled to preferential treatment in terms of loan repayment. This is because a fiduciary guarantee is considered invalid if it is not registered, regardless of whether the creditor is bankrupt or not.

#### **4. Conclusion**

A fiduciary guarantee deed that is not registered with the fiduciary registry office can result in a number of significant legal consequences. One of the main consequences is the loss of the executory power of the guarantee, so that creditors cannot rely on the object of the guarantee as protection against their receivables. In this case, creditors experience difficulties in exercising their rights if the debtor does not fulfill its obligations, considering that the legal provisions that govern the registration of fiduciary guarantees aim to provide legal certainty and protection for the parties, especially for creditors. Then, non-compliance in the registration process can also result in the creditor's position becoming more vulnerable compared to other creditors who have registered their guarantees. In the context of bankruptcy, creditors who do not register a fiduciary guarantee deed risk losing their rights in the settlement of the debtor's debt, which can have a negative impact on the recovery of receivables. Therefore, compliance with these registration provisions is not only a procedural form that must be complied with, but also a strategic step to protect the legal and economic interests of creditors in transactions involving fiduciary. Of course, the existence of fiduciary guarantees will be very helpful for the implementation of citizens' rights and obligations because there are strict and binding rules. Based on the conclusions of the results of this study, it is quite comprehensive to be applied by stakeholders because it benefits both parties and does not harm one of the parties

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