



## Due to the Financing Company's Capital as a Fiducian Recipient of Fiducian Security Objectives

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### **Abstract**

The type of research used in this research is normative legal research. The transfer of ownership rights to the Fiduciary Collateral Objects is handed over in a *constitutum possessorium*, which means that the trustworthiness of the guaranteed property (the debtor's property) is transferred to the creditor, with physical control over the goods remaining with the debtor. Where it's agreed that the owner of the object will surrender his/her right over the object to the Fiduciary. But with a promise that the owner of the object may still use it and then hold onto the object for the Fiduciary. So the status, the person who was originally the owner, is now a borrower. In this incident, there was no real surrender, but only based on an agreement.

**Keywords:** *Fiducian; Security; Recipient*

### **Introduction**

For someone who needs funds from outside parties will apply for financing (Financing Debtor) to a Financing Company, either in the form of a bank financing institution or a non-bank financing institution. For both bank and non-bank financing institutions, when approving the financing proposed by the customer, they definitely want a guarantee or collateral. Collateral that is pledged as collateral to a Financing Company is usually immovable objects in the form of land and buildings that are certified as ownership rights or in the form of movable objects in the form of motorized vehicles or cars. For collateral that is guaranteed in the form of land or buildings, the Financing Company binds it with mortgage rights and movable objects are bound with Fiduciary Security. Sometimes the debtor who submits the Fiduciary Guarantee doesn't carry out what has been agreed with the creditor. The form of default or broken promise can be in the form of not paying debts to creditors, paying, but being late and so on. Of course, with this default, it causes losses to creditors, thus making creditors want to execute objects that have been diffused.

When looking at the object of the Fiduciary Guarantee, it can be said to be an object and within the scope of assets which includes: 1) movable objects that are tangible; 2) immovable objects; and 3) immovable objects, especially buildings that cannot be encumbered with mortgage rights. At the level of

the subject of the Fiduciary Guarantee are those who can bind themselves in the Fiduciary Guarantee agreement, which consists of the debtor as the fiduciary and Financing Company as the recipient of the fiduciary. (Nasution, 2019) For this reason, a company that is declared bankrupt is under general confiscation of all its assets whose management and settlement is carried out by the curator under the supervision of the Supervisory Judge as regulated in Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations ("UUK-PKPU"). This is necessary for legal protection, where as Article 36 paragraph (1) Bankruptcy and Postponement of Debt Payment Obligations explains that, the party entering into an agreement with the debtor can ask the Curator to provide certainty regarding the continuation of the implementation of the agreement within the period agreed upon by the Curator and the party.

### ***Research Method***

The type of research used in this research is normative legal research. (Halim, 2018)

### ***Discussion***

#### **Position of Fiduciary Collateral When the Fiduciary Receiving Company is Bankrupt**

In providing loans to Financing Debtors, the Financing Company enters into a Fiduciary Guarantee agreement. The Fiduciary Guarantee Agreement results in the emergence of a legal relationship between the parties. The Fiduciary Giver is obliged to hand over to the Fiduciary the object used as collateral for the debt on a fiduciary basis. Meanwhile, the Fiduciary Receiver has the right to guarantee the receivables that he has given to the Fiduciary, and the Fiduciary Receiver has the right to execute the object by making a sale through a public auction or under his hands, if it turns out that the Fiduciary Giver is declared in default. (Angraeni & Nasution, 2019)

Debtor is said to be in default can be determined by looking at the grace period, whether the agreement stipulates the grace period for the fulfillment of achievement or not. In the event that the grace period isn't specified, the Fiduciary Recipient needs to warn the debtor so that he or she can fulfill the achievement. Whereas in the event that a grace period has been determined, then according to the provisions of Article 1238 of the Civil Code (KUHP Perdata), by the elapsed time limit stipulated in the agreement, the debtor is considered negligent. Fiduciary recipients need to provide a written warning stating that the debtor is obliged to fulfill the achievement within the specified time, if during that time the debtor is declared to have been negligent or in default. (Murniati, 2020)

Efforts to be taken if there is default in the fiduciary financing agreement, collect and send a warning letter in stages 1, 2, and 3, if with the letter the debtor still doesn't make payments, the creditor will make collection efforts according to Law of the Republic of Indonesia Number 42 of 1999 regarding the Fiduciary Guarantee (Fiduciary Law), by exercising its right to execute objects by executing the title of execution, Sales through public tenders and taking the payment of accounts receivable from sales or by selling mechanisms under hand in order to obtain the highest price that benefits the parties. (Santoso, 2015)

In the Fiduciary Guarantee agreement, the issue of legal authority needs to be clarified because it relates to the principle of handing over objects. Article 1 point 2 of the Fiduciary Law states that the ownership rights of the fiduciary security object which have been submitted by fiduciary to the Fiduciary, have implications for the position of the debtor who gives the fiduciary. In addition, the limitation of the authority of the debtor who has legally become the owner and at the same time controls the Fiduciary Collateral, but is not allowed to transfer the object of collateral as stipulated in Article 36 of the Fiduciary

Law, that the Fiduciary Giver transfers pawns, or rents the Objects that are the object of the Fiduciary Guarantee in Article 23 paragraph (2) which is carried out without the prior written consent of the Fiduciary Recipient, is punishable by imprisonment and a fine.(Anggraeny, 2018)

In the official explanation of Article 17 of the Fiduciary Law, it also states, re-fiduciary by the Fiduciary Giver, either a debtor or a third party guarantor, is not possible for objects that are the object of the Fiduciary Guarantee because the ownership rights to these objects have been transferred to the Fiduciary. As the statement contained in the fiduciary guarantee law Article 1 Number 1, it actually creates a contradictory interpretation in terms of ownership of Fiduciary Collateral if it's connected with Articles 1 Figures 5 and 6, Article 29, Article 30, Article 33 and Article 34 of the Fiduciary Law.(Purbandari, 2014)

Regarding the acquisition of property rights, Article 584 of the Civil Code states that "Property rights to an object cannot be obtained by other means but by ownership, because of attachment, because it expires, because of inheritance, either according to law or according to a will and because of appointment or delivery based on a civil incident to transfer property rights, it's carried out by a person who has the right to act freely against said object ". The conditions mentioned are that there is a civil incident to transfer property rights; and the delivery is made by the person who has the right to act freely with the object.

### **Due to the Bankruptcy of the Fiduciary Recipient of the Fiduciary Collateral**

Determination of bankruptcy requirements, that is, if the company as Bankrupt Debtor has at least two debts that are due and at least one of them is not paid, provided that it's sufficient to prove it with simple proof, it can become a double-edged knife. On the one hand, this provision can be used by competing partners to eliminate the company concerned from the market, because if it's declared bankrupt the company will definitely close or stop doing it's business activities.(Aprita & Adhitya, 2020) Therefore, the determination of the company as Bankrupt Debtor must be taken carefully so as not to have a major impact. The main handle in deciding whether a company is bankrupt or not is the objective of the bankruptcy regulation itself, namely to provide justice to all parties involved and ensure a healthy business climate.

Bankruptcy doesn't result in the Bankrupt Debtor losing his ability to carry out legal actions involving himself, except when the act involves the management and transfer of his existing assets. When it comes to assets that will be obtained, the Bankrupt Debtor can still take legal actions to receive these assets, but remains part of the bankruptcy estate.(Raimel, 2020)

For Financing Debtors who are in arrears, the Curator replaces the bankrupt Financing Company in collecting accounts receivable from the Fiduciary. If the Financing Debtor is current (not in arrears) then the agreement is continued as before. If the Financing Debtor is in a substandard or stuck position, a warning letter is drawn up and then the collection is carried out in accordance with the Fiduciary Law, Financial Services Authority Regulation No. 35/POJK.05/2018 concerning the Implementation of Business Financing Companies (POJK 35/2018) and with due observance of the Constitutional Court Decision No. 18/PUU-XVII/2019 concerning Review of Law Number 42 of 1999 concerning Fiduciary Guarantee (MK Decision No. 18/2019).

In the Constitutional Court Decision No. 18/2019, with respect to the phrase "executorial power" and "equal to a court decision that has obtained permanent power" in the Fiduciary Law Article 15 paragraph (2), the Constitutional Court interprets the Fiduciary Guarantee where there is no agreement on default (default) and the Debtor objected submitting the object of the Fiduciary Guarantee voluntarily, then all legal mechanisms and procedures in implementing the execution of the Fiduciary Guarantee

certificate must be carried out and have the same effect as the execution of a court decision that has permanent strength. (Nisa, 2019)

Regarding the phrase "default on promises" in Article 15 paragraph (3) of the Fiduciary Law, the Constitutional Court interprets that the default is not determined unilaterally by the creditor, but on the basis of an agreement between the creditor and the debtor on the basis of legal remedies that determine the breach of contract has occurred.

## **Conclusion**

The transfer of ownership rights to the Fiduciary Collateral Objects is handed over in a *constitutum possessorium*, which means that the trustworthiness of the guaranteed property (the debtor's property) is transferred to the creditor, with physical control over the goods remaining with the debtor. Where it's agreed that the owner of the object will surrender his/her right over the object to the Fiduciary. But with a promise that the owner of the object may still use it and then hold onto the object for the Fiduciary. So the status, the person who was originally the owner, is now a borrower. In this incident, there was no real surrender, but only based on an agreement.

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