

**Legal Protection Based On The Principle Of Proportion:
Maintaining A Balance Of Debtor And Creditor Rights In The
Execution Of Fiduciary Guarantees**

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ABSTRACT

Creditors cannot execute fiduciary guarantees independently; instead, they must file an execution request with the court until a legally binding decision is made. There is no agreement in this decision regarding the debtor's breach of contract and the debtor's willingness to surrender the fiduciary guarantee. The results of this study are as follows: there are no standards regarding the requirements that must be met in the execution auction application documents; many standards regarding execution titles equivalent to court decisions that have permanent legal force; no special category for execution auctions; fiduciary guarantees no longer pay special attention to the ease of execution; and agreement clauses mentioning the debtor's breach of promise and willingness to surrender have non-legal consequences, such as: a surge in execution applications in court; difficulty obtaining credit if the object of the fiduciary guarantee is executed; and the lengthy court execution process, which requires time and costs that can affect the trust in legal protection policies based on the principle of proportionality between the giver and receiver of the fiduciary guarantee.

Keywords: Fiduciary Guarantee, Legal Protection, Execution.

A. Introduction

Transportation, especially two-wheeled vehicles, is very close to people's daily lives and activities. However, some levels of society do not have the ability to buy it, so people use fiduciary and other types of collateral institutions. People make fiduciary agreements with creditors or finance companies as debtors. The agreement must create a bond between two parties, which includes rights and obligations. In other words, the bond is the basis of the agreement and provides features that distinguish one agreement from another. An agreement is a group of agreements formed by the agreement of two or more parties.

It is common for debtors not to pay their credit installments, which in turn

causes bad debts. In general, bad debts are caused by the inability of debtors to manage their finances. In fact, arrears are sometimes sought by pawning or selling fiduciary collateral underhand to other parties to fill the debt because the debtor and fiduciary collateral are no longer known, this is clearly detrimental to the finance company.

On the other hand, the process of withdrawing fiduciary collateral is considered unfair to the debtor. The fiduciary guarantee certificate has the same execution power as a court decision that has obtained permanent legal force, according to Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees. In addition, Article 15 paragraph (2) of the Fiduciary Law has constitutional issues because the creditor has the right to sell the goods that are the fiduciary guarantee at his own power in cases where the debtor fails to fulfill the promise. This is due to the fact that the creditor can request a fiduciary guarantee without a court execution process, making the position of the debtor who opposes it weaker.

Creditors who often ignore the rights of debtors can take arbitrary and inhumane actions as a result of the unilateral actions above. In addition, Article 15 paragraph (3), the phrase "breach of promise" does not explain the reason for the debtor to reject the agreement with the creditor. This means that the debtor does not have the right to defend himself and sell the goods at a reasonable price. In this case, PT. ASF, a finance company, forcibly took Suri Agung's Toyota Alphard V Model 2.4 A/T 2004 car on November 10, 2017. The company responsible sent a representative to take Suri Agung's vehicle as evidence of the violation. The debtor filed a letter of complaint against the actions of PT ASF's representatives after that. On April 24, 2018, the debtor took legal action by filing a lawsuit for unlawful acts with the South Jakarta High Court. With decision Number 345/PDT.G/2018/PN.Jkt.Sel, the South Jakarta District Court acknowledged that PT. ASF had committed an unlawful act. However, PT. ASF again forcibly towed the

applicant's vehicle, witnessed by the police on January 11, 2018.

The applicant filed an objection to the forced towing of his vehicle, but it was not responded to until several subsequent bad treatments. The applicant was dissatisfied with this and proposed a legal examination to the Constitutional Court (MK). The Decision of the Panel of Judges of the Constitutional Court Number 18/PUU-XVII/2019 concerning the Judicial Review of Law Number 42 of 1999 concerning Fiduciary Guarantees against the 1945 Constitution of the Republic of Indonesia (UUD 1945) was decided in early 2020, precisely on January 6, 2020. This decision was later known as the Constitutional Court Decision Number 18. This decision partially granted the Applicant's request and stated that several phrases and explanations in Article 15 paragraphs 2 and 3 of the Fiduciary Law were contrary to the 1945 Constitution if not interpreted in accordance with the interpretation of the Panel of Judges of the Constitutional Court stated in the relevant Decision. "Executorial power", "equal to a court decision that has permanent legal force" (with explanation) and "breach of promise" are phrases referred to in Article 15 paragraph (3) of the Fiduciary Law. The author wishes to discuss the potential impact of the implementation of the execution of fiduciary guarantee objects as well as the policy of legal protection based on the principle of proportionality for debtors and creditors of fiduciary guarantees in the future.

B. Research Methods

Legal research is a series of systematic mechanisms in conducting research.¹ In this case, legal research is conducted to find solutions and answers to a problem that has been determined in the legal issue that is used as the object of research. The research method used to answer the problem. This research is a type of normative legal research.² This study uses secondary data sources. Secondary data sources, This research data consists of secondary data. Secondary data is data obtained from

¹ Abdulkadir Muhammad. *Hukum dan Penelitian Hukum*. Cetakan I. (Bandung: Citra Aditya Bakti, 2004), hlm. 57.

² Jhonny Ibrahim, *Teori & Metode Penelitian Hukum Normatif*. (Malang: Bayumedia Publishing, 2008), hlm. 47

literature studies that are relevant to this study. Secondary data is "data sourced from literature studies (library research) related to publications, namely library data listed in official documents.

C. Analysis And Discussion

1. Potential Implications in the Implementation of Fiduciary Guarantee Object Execution

Constitutional Court Decision Number 18 implicitly shows that the provisions of Article 15 paragraph (3) of the Fiduciary Law are a continuation of the provisions of Article 15 paragraph (2) of the Fiduciary Law. Substantially, this is a legal consequence because of the existence of an "executory title" and "the equating of a fiduciary guarantee certificate with a court decision that has permanent legal force". However, there is a clear difference between the two articles. Article 15 regulates the execution of the executorial title in real terms in paragraphs (1) and (2), and parate execution (execution without a court decision) in paragraph (3). However, creditors cannot carry out the execution themselves if the debtor refuses to voluntarily hand over the fiduciary guarantee and does not admit to any breach of promise or default. This is because, according to Article 224 HIR, the execution of the executorial title must be carried out through the courts. Even before the Constitutional Court Decision Number 18, Article 15 paragraph (2) and (3) of the Fiduciary Law stated that the fiduciary certificate has an executorial title, which means that the decision can be executed without going through the execution procedure or method, as well as the execution referred to in Article 196 HIR or Article 208 RBg.

In other words, execution can be carried out without following the regulations stipulated. In terms of auction requirement documents, Article 11 paragraph (1) of the Minister of Finance Regulation Number 27/PMK.06/2016 concerning Auction Implementation Guidelines (hereinafter referred to as PMK Number 27/2016) stipulates that creditors who wish to sell goods through auction through the KPKNL must submit an auction application letter together with the auction requirement

documents to the Head of the KPKNL to obtain an auction schedule. One of the required documents, according to Article 5 paragraph (2) and Article 13 paragraph 4 of the Fiduciary Law, is the Fiduciary Guarantee Certificate issued by the Fiduciary Registration Office.

There is no document or copy of the court execution decision to execute the fiduciary guarantee when submitting a fiduciary guarantee execution auction, in accordance with several general document requirements submitted. This means that there is no standard that applies to additional documents, such as a court execution decision. Thus, the fiduciary guarantee auction procedure will be more difficult for creditors, including the KPKNL, and will hinder their business. This is mainly because it must go through the process of executing the fiduciary guarantee certificate by the court, which takes time and money. In this case, the fiduciary guarantee goods that can be executed through a public auction are considered to be included in the category of fiduciary guarantee execution auction, even though previously a court execution decision was required in accordance with Constitutional Court Decision Number 18. In fact, as a standard, including before Constitutional Court Decision Number 18 was issued, the Fiduciary Guarantee Execution Auction does not require an execution fiat from the head of the court. In other words, there are no clear rules about which type of execution auction is used to execute fiduciary guarantee goods; this does not matter whether it occurs in a court execution auction or in a fiduciary guarantee. The applicant acts as a court clerk in the court execution auction, while the applicant acts as a creditor in the fiduciary guarantee execution auction.

Although the execution parate cannot include the execution parate is still important for creditors because it will reduce the time and cost of execution. However, after the Constitutional Court Decision Number 18, when the court filed a creditor auction, the execution parate through a public auction must be included with the Fiduciary Guarantee Certificate execution decision. Likewise, the execution parate of a private sale stipulates the debtor's voluntary requirements; if the debtor acts in the

opposite way, it will hinder the creditor.

The researcher sees that the clause regarding the criteria for a defaulting debtor is only a repetition of the debtor's default clause, which should be in the fiduciary agreement because it is made and legalized by a notary, an authorized public official. However, in accordance with Article 1320 of the Civil Code, an agreement is still considered an agreement if it has met the valid requirements of the agreement. So that the agreement stated in the written agreement applies, the parties have the capacity. In addition, it contains the requirements of a certain matter and permissible reasons that do not violate statutory provisions (for example, a fiduciary agreement for a movable collateral object). In connection with the addition of a benchmark clause for debtors who are declared in default and do not voluntarily hand over the fiduciary collateral object, the Constitutional Court Decision Number 18 has raised doubts in its interpretation. Until now, there have been no technical or implementing instructions for this provision, and the Constitutional Court has not provided an example of a wording. Let's say there are regulations on execution procedures and certainty about when a debtor is declared in default, whether since the late installment stage or because the debtor has not paid off his loan. However, these elements are also the general concept of default, which means that the debtor will not pay the installment until it is due, and the financing company has usually carried out a warning process and visited the debtor's house.

2. Legal Protection Policy Based on Proportional Principles for Providers and Recipients of Fiduciary Guarantees in the Future

Although the researcher disagrees with the affirmation of the above clause, the Constitutional Court Decision Number 18 remains a final and binding decision. Alternatively, the researcher argues that Because debtors sometimes want a faster process to obtain and use fiduciary goods, such as vehicles, fiduciary agreements are usually in the form of standard agreements and include clauses that discuss the level of the debtor's breach of promise, when the debtor is declared in breach of promise,

and whether the debtor voluntarily surrenders the fiduciary collateral object if the breach of promise occurs

If both parties read the fiduciary agreement thoroughly and in depth before signing it, both creditors and debtors will proportionally understand and commit to what is promised to them. It is possible that electronic recording will improve this procedure. Creditors can make mediation efforts, such as giving warnings or summonses to debtors with the help of advocates to prevent fiduciary collateral objects from being withdrawn using the services of third parties who are vulnerable to direct contact. This action is important because it is related to legality and provides assurance to law firms that they will resolve legal problems that occur in the body of the financing company or creditor. Advocates need jobs because they have to act professionally in legal procedures such as mediation and negotiation, which prioritize non-litigation procedures. During the implementation of the warning or summons, the advocate continues to make mediation efforts to arrange for both parties to reach an agreement that protects both parties, namely the creditor and the debtor. To ensure that the non-litigation process continues to run quickly and effectively, the role of advocates is very important strategically in helping to resolve cases, especially those related to fiduciary.

To maintain proportional law for creditors and debtors, underhand sales are the right action. However, it is very important for the debtor to be aware of and agree with the law to carry out this procedure. Furthermore, according to Article 29 paragraph 2 of the Fiduciary Law, underhand sales can only be carried out within 1 (one) month since the giver and/or recipient of the fiduciary in writing notifies in 2 (two) newspapers circulating in the relevant area.

Compared to auction houses, execution *parate* is usually carried out underhand. This is due to the fact that the sale of collateral for fiduciary collateral objects generates more profit than underhand sales assuming the debtor is in good faith. This method is generally faster and does not require auction fees. Currently,

after the Constitutional Court Decision Number 18, based on a thorough literature investigation, no method has been found that can be used to request the Court to execute fiduciary collateral objects. Legal uncertainty and differences in interpretation between the public and law enforcers arise because there are no technical instructions in the implementing regulations of the Constitutional Court Decision Number 18. Technically, there is also legal uncertainty about whether court execution is carried out through a lawsuit with a judge's statement acting as a decision (kondemnatoir) or through a petition with a judge's statement acting as a determination (declaratoir). Receiving public criticism

Retnowulan argues that in a lawsuit case, the dispute must be resolved and decided by the court. In addition, Retnowulan explained that when there is no dispute, the judge issues a decision known as a declaratoir decision, which means only determining or explaining. Meanwhile, Yahya Harahap explained that the application, also known as a voluntary lawsuit, is a civil matter submitted to the Head of the District Court in the form of an application signed by the applicant or his attorney. The court handles disputes or disagreements between two or more parties in a lawsuit through the process of rebuttal-refutation of replic and duplicate. In the law, the term "civil lawsuit" or "lawsuit only" is used.

According to the researcher who conducted the analysis, paragraphs (2) and (3) of Article 15 are interpreted as follows: "Every legal step used to implement the Fiduciary Guarantee Certificate must be carried out and implemented in the same manner as implementing a court decision that has permanent legal force." Therefore, normatively, the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of a court decision that has been made. This is because the term "decision" should come from a court process that contains a dispute between two or more parties acting as plaintiffs and defendants. This type of dispute is different from a lawsuit that ends with a judge's decision.

If the lawsuit process takes a long time, the creditor as the recipient of the

fiduciary can suffer losses. If they have to use the application process with a judge's decision to be more efficient, this will be contrary to the meaning of "a decision that has permanent legal force", which is defined in Constitutional Court Decision Number 18. In addition, the meaning of "a decision that has permanent legal force" requires that there is no longer.

D. Conclusion

Constitutional Court Decision Number 18/PUU-XVII/2019 (MK Decision Number 18) has legal and non-legal impacts. Legally, the following things happen: the rules on the title of execution are equivalent to a court decision that has permanent legal force; there are no regulations on the requirements that must be met in the execution auction application document; and the agreement clause stating that the debtor's promise and the debtor's willingness cause the execution auction to not be carried out. One of the consequences. Non-legally, court execution takes a lot of time and money, which can affect the good intentions of both debtors and prospective debtors; a surge in execution applications in court; difficulty in obtaining credit if the collateral object is of low value; stigma against finance companies because they cannot carry out execution without a court decision; and reduce the financial stability of finance companies. Based on the proportional principle, the following policies protect the giver and recipient of fiduciary guarantees in the future: read thoroughly and in detail the default agreement clause; use the services of an advocate to make non-litigation efforts; reach an agreement on an alternative execution through a private sale between the creditor and the debtor; and the debtor voluntarily surrenders the fiduciary guarantee object before the signature of both parties.

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