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Law enforcement against criminal acts Transfer of fiduciary guarantee objects Without permission of the fiduciary recipient

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ABSTRACT

The purpose of this writing is to find out how the law is enforced against the criminal act of Transferring Fiduciary Security Objects Without the Permission of the Fiduciary Recipient based on Law Number 42 of 1999 concerning Fiduciary Guarantees. By using qualitative research methods, it is concluded that this paper aims to determine the rights of fiduciary recipients regarding fiduciary collateral objects and law enforcement against perpetrators of criminal acts of transferring fiduciary collateral objects without the fiduciary recipient's permission based on Law Number 42 of 1999 concerning Fiduciary Guarantees. Fiduciary is the transfer of ownership rights to an object based on trust. However, in practice, problems are often encountered when transferring collateral without the approval of the fiduciary or creditor, causing the creditor to suffer losses. Transferring the object of a fiduciary guarantee is a criminal act regulated in the applicable legal basis, namely Article 23 paragraph (2) and Article 36 of Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees. The criminal sanctions given are a maximum imprisonment of 2 (two) years and a maximum fine of Rp. 50,000,000 (Fifty Million Rupiah).

Keywords: Law Enforcement; Guarantee; Fiduciary; Permit.

A. Introduction

Crimes against collateral objects are one of the business crimes that have 2 (two) aspects of criminal and civil law. Collateral is the most important component in providing credit in the modern era. Creditors, both banks and other financing institutions, can request certain assets belonging to the debtor as collateral to pay off debts if the debtor cannot pay their debts in the future. This condition is to obtain the position of the creditor as a provider of capital or money. On the other hand, the debtor has the advantage of having collateral: the creditor will find it easier to provide loans to debtors with collateral. Both are beneficial. However, from a criminal law perspective, this collateral has the potential to cause crime, namely crimes committed by the collateral provider (debtor) to the recipient of collateral (creditor) without the creditor's knowledge. This often happens in fiduciary guarantees.

Fiduciary guarantee is an important instrument in the financial system in Indonesia which provides protection to creditors and debtors in loan transactions.[1] Borrowing transactions between creditors and debtors occur to meet all needs both in the scope of business and daily life. The increasing number of needs and the increasing price of these needs cause debtors who in this case are borrowers to borrow capital from creditors who in this case can be banks or other financing institutions. The definition in Article 1 number 2 of Law Number 42 of 1996 concerning fiduciary guarantees states that fiduciary guarantees are guarantee rights for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Provider, as collateral to pay off debts caused by violations.

Fiduciary guarantees allow debtors to use collateral while still controlling and using it, while creditors have the right to execute collateral if the debtor fails to fulfill their obligations. For debtors, good collateral is collateral that will not interfere with their daily activities, while for creditors, good collateral is collateral that can provide a sense of security and legal certainty that their credit will be returned on time. Fiduciary Insurance is one of the well-known collateral companies in the Indonesian collateral legal system. With fiduciary, the transfer of ownership rights based on trust, debtors have authority over collateral property, even if they only borrow it temporarily or no longer own it.[2] However, in practice, debtors often transfer fiduciary collateral objects without first obtaining approval from the creditor or fiduciary recipient. This is because debtors have many opportunities to transfer fiduciary collateral objects,

[1] Winarno, J. (2013). Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia. Jurnal Independent, 1(1), 44.

[2] Jatmiko Winarno, "Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia", Jurnal Independen Fakultas Hukum, 2013, hlm.44

including movable and immovable objects. This is especially true for buildings, which cannot be burdened with mortgage rights according to Law Number 4 of 1996 concerning Mortgage Rights due to the debtor's control over the collateral object.

Transferring a fiduciary collateral object without the consent of the fiduciary recipient is a criminal act regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. The articles in this law emphasize that every transfer of collateral must be carried out with the written consent and permission of the creditor, in this case the fiduciary recipient. However, many practical cases show that violations of the provisions of the law still often occur. This raises questions regarding the effectiveness of law enforcement against such crimes in order to suppress the growth of criminal acts of transferring collateral objects without the permission of the fiduciary recipient.

Various factors often trigger the transfer of fiduciary collateral objects without permission, ranging from minimal legal understanding among debtors, pressing economic needs, to the existence of hidden intentions to misuse or even embezzle the collateral object. On the other hand, law enforcement for this violation often stumbles upon various obstacles. Obstacles such as the lack of in-depth socialization regarding the rights and obligations in fiduciary agreements, as well as complicated and slow legal processes, make this type of violation difficult to handle thoroughly and continues to grow in the midst of community life. However, this cannot be justified because in practice this action has violated the agreement that has been made and agreed upon by the creditor and debtor. In addition, there is a difference between creditors and debtors, where creditors are banks or other financing institutions that have receivables based on laws or agreements.

This study aims to analyze in depth the rights held by the fiduciary recipient over the object used as fiduciary collateral and regarding law enforcement against the criminal act of transferring the object of fiduciary collateral without the permission of the fiduciary recipient. This writing will discuss the rights held by the fiduciary recipient who in this case acts as a creditor against the object owned by the fiduciary giver who in this case acts as a debtor, where the object is used as fiduciary collateral. Of course, in this case the fiduciary collateral object is used as collateral or security to increase the trust of creditors in debtors to provide loans to debtors and ensure that debtors carry out and make payments according to the time they have agreed with the creditor. Thus, it is hoped that this study can provide constructive recommendations to increase the effectiveness of law enforcement and protection of creditor rights in fiduciary collateral transactions in Indonesia.

B. Research Methods

Legal research is a series of systematic mechanisms in conducting research.[3] 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.[4] This study uses secondary data sources. Secondary data sources, This research data consists of secondary data. Secondary data is data obtained from 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. Rights Held by Fiduciary Recipients to Fiduciary Guarantee Objects

Fiduciary is the transfer of ownership based on trust which is usually used as collateral in debt agreements. Occurs between debtors and creditors to transfer ownership of objects used as fiduciary collateral. This is used to guarantee and ensure that the debtor will carry out his obligations to the creditor regarding the repayment of the debt owned by the debtor. In this transaction, the fiduciary provider (debtor) still has the right to control the fiduciary object (for example, vehicles, machinery, or

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

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

inventory), while the fiduciary recipient (creditor) has legal ownership rights over the object until the debtor pays off his debt. As a creditor who has ownership rights over the collateral object, the fiduciary recipient has the right to execute the fiduciary collateral object if the debtor defaults or fails to fulfill his obligations. This execution right aims to protect the rights and interests of the fiduciary recipient in the repayment of his receivables. However, on the other hand, the fiduciary recipient is also bound by statutory regulations, especially in terms of the implementation of execution which must be carried out safely and in accordance with applicable legal procedures.

In addition to the right of execution, the fiduciary recipient also has the right to maintain the fiduciary object so that it remains in the debtor's possession during the agreement, but with the certainty that the object will become the property of the creditor if there is a default. This is done by supervising and controlling the condition and use of the fiduciary object so that it continues to have a value in accordance with what is guaranteed. For example, for motor vehicles that are used as fiduciary objects, the creditor has the right to ensure that the vehicle is not transferred or sold to another party during the guarantee. The fiduciary recipient also has the right of preference or the right to be prioritized over other creditors in terms of debt repayment. In the event of bankruptcy or liquidation, the fiduciary recipient has the right to receive the proceeds from the sale of the fiduciary object before other creditors, unless there are creditors with special rights that have been regulated in the regulations. This preferential right provides legal certainty and a strong position for the fiduciary recipient, thereby reducing the risk of financial loss that can occur due to the debtor's inability to pay his debt.

The rights of the fiduciary recipient also include the right to obtain legal protection if there is interference from a third party who tries to claim the fiduciary object. In this case, the fiduciary recipient has the right to file a lawsuit to defend the fiduciary object, on the basis that the legal ownership of the object is in the hands of the creditor until the debt is paid off. With this legal guarantee, the fiduciary recipient has the certainty that the ownership of the fiduciary guarantee cannot be disturbed by other parties as long as the debtor has not fulfilled his obligations. However, the fiduciary recipient must also ensure that the fiduciary guarantee object remains valuable by carrying out supervision and maintenance according to the agreement in the agreement. For example, in a vehicle fiduciary agreement, the fiduciary recipient has the right to monitor the condition of the vehicle so that it is maintained and does not experience a significant decrease in value. This right is important so that the fiduciary recipient continues to have a guarantee that is economically feasible and sufficient to cover the remaining debtor's debt if there is a default.

The rights of the fiduciary recipient to the fiduciary object are also of a follow-on nature, meaning that these rights remain attached to the fiduciary object even if the object is transferred by the debtor. In this case, if the debtor transfers the object without the creditor's consent, the fiduciary recipient has the right to continue executing the object in the hands of a third party, because legal ownership remains with the creditor. These follow-on rights aim to avoid creditor losses due to irresponsible actions of the debtor. Law Number 42 of 1999 concerning Fiduciary Guarantees in Indonesia regulates the rights of fiduciary recipients and the execution mechanism which is expected to guarantee justice for both parties. Overall, the rights of fiduciary recipients to the fiduciary guarantee object provide a strong position for creditors in ensuring the settlement of their receivables. With various rights regulated, ranging from execution rights, preference rights, to the right to retain fiduciary objects, creditors have adequate legal protection and an effective mechanism to deal with credit risk. This allows creditors to provide loans with fiduciary guarantees without worrying about losing rights to the objects used as collateral, thus supporting the sustainability of lending and borrowing activities in the financial and banking sectors.

2. **Law Enforcement Against the Transfer of Fiduciary Collateral Objects Without the Permission of the Fiduciary Recipient**

Property law as regulated in Book II of the Civil Code (KUHPerdata) and regarding fiduciary guarantees, Book III of the Civil Code All agreements made legally apply as laws for the parties who make them, in accordance with Article 1338 of the Civil Code. It is impossible for the parties who make the agreement to unilaterally cancel the agreement they make because the agreement has met the requirements for a valid agreement regulated in Article 1320 of the Civil Code, namely the agreement of the parties who bind themselves, the ability to make an agreement in certain situations, and a legitimate reason to do so. However, according to the fiduciary guarantee law, the fiduciary giver is an individual or company that owns the object that is the object of the guarantee. The fiduciary recipient is an individual or company that has receivables guaranteed by fiduciary guarantees. As long as the UUJF is in effect, the object of fiduciary guarantees can only be movable objects, such as merchandise, receivables, machine tools, inventory, and vehicles. Currently, fixed and movable objects that cannot be guaranteed by a mortgage or mortgage guarantee institution are considered as fiduciary guarantee objects, provided that the object can be owned and transferred.[5]

As stipulated in Article 1338 paragraph (3) of the Civil Code, agreements made by the parties must be made in good faith. Both the Creditor (fiduciary recipient) and the Debtor (fiduciary giver) are required to reasonably and appropriately follow the contents of the fiduciary guarantee agreement.

The law of property uses the term "good faith", which is very important in legal relations and serves as the basis for legal certainty both when making an agreement and implementing it. Good faith is not a subjective human mental attitude, but can be measured objectively. Creditors receive better legal protection because fiduciary guarantees are transfers, which means that the debtor gives ownership rights to the creditor even though legally the ownership rights are not given to the creditor.

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[5] J. Satrio, Hukum Jaminan, Hak Jaminan Kebendaan Fidusia, Cet.1, Bandung: PT. Citra Aditya Bakti, 2002, hal.179.

This allows unscrupulous debtors to provide fiduciary guarantees to other parties to seek profit.

As stipulated in Article 529 of the Civil Code, the debtor's authority over the object of fiduciary guarantees is related to possession; possession can occur with good or bad intentions. If someone owns goods with ownership rights without realizing it, it is called possession in good faith. If someone knows that the goods they own are not theirs, they have bad faith. If the owner is sued before a Judge, and he is defeated, the owner of the property from the time the case was filed, is considered to have behaved badly.

Therefore, law enforcement against the transfer of fiduciary collateral objects without the permission of the fiduciary recipient becomes an important issue in financing and borrowing practices. In the fiduciary guarantee system, the debtor still has collateral, but the fiduciary recipient as a creditor has the right to own it. Based on Law No. 42 of 1999 concerning Fiduciary Guarantees, the transfer of fiduciary collateral objects without the consent of the fiduciary recipient is considered a violation of the law that has the potential to harm creditors. This action can result in the loss of collateral that is the basis for the fiduciary binding, which then disrupts legal certainty and creditor security in the financing process. Violation of the rights of the fiduciary recipient is expressly regulated in Article 36 of Law No. 42 of 1999, which prohibits the transfer of fiduciary collateral objects without the consent of the fiduciary recipient, except in certain cases that have been agreed upon in the agreement. This article clarifies that fiduciary objects may not be transferred by the debtor unilaterally, unless the fiduciary recipient provides written consent. If the debtor continues to transfer fiduciary objects without permission, this action is considered a breach of contract or violation of the agreement which can lead to further legal action, including execution of the guarantee by the creditor.

Law enforcement against the transfer of fiduciary objects requires a firm and systematic approach. In practice, creditors often face obstacles in following up on these violations, especially if the fiduciary object has changed hands to a third party with good intentions. Creditors need to obtain assistance from law enforcement officers or through civil channels to demand ownership or return of the fiduciary object. This law enforcement requires good collaboration between creditors and related agencies so that the fiduciary object can be returned and the creditor's rights can be protected.

The law enforcement process often includes two main channels, namely civil and criminal channels. Through the civil channel, the fiduciary recipient can file a default lawsuit against the debtor who violates the fiduciary agreement by unilaterally transferring the collateral object. This lawsuit can be filed with the district court to request restoration of rights or compensation. Meanwhile, in the criminal realm, debtors who intentionally transfer fiduciary collateral objects without permission can be subject to criminal threats under Article 372 of the Criminal Code concerning embezzlement, because the debtor is considered to have misused the fiduciary object which is not fully his right.

In the implementation of criminal penalties, the act of transferring fiduciary objects without permission is often considered embezzlement because the object has been legally transferred to the creditor even though it is physically in the hands of the debtor. This action is detrimental to the fiduciary recipient, who is entitled to the collateral object as a form of protection against unpaid debts. However, the application of this embezzlement article requires sufficient evidence that the debtor intentionally intended to control or transfer the fiduciary object unlawfully.

Law enforcement against unauthorized transfer of fiduciary collateral objects also faces challenges if the object has been transferred to a third party who is unaware of the fiduciary status of the object. In some cases, third parties with good intentions will be difficult to prosecute, because they do not know that the object is a fiduciary collateral. In this situation, the fiduciary recipient can often only claim compensation from the original debtor, because the object is already in the hands of an innocent party who has good intentions when receiving the object. Law enforcement also relies heavily on strict supervision and control by creditors from the beginning of the agreement. Creditors need to ensure that the fiduciary agreement expressly includes provisions regarding the prohibition of unauthorized transfer of objects. Regular monitoring of the condition and use of fiduciary objects by debtors can help creditors detect early if there are indications of a transfer that violates the agreement. On the other hand, legal awareness from the debtor is also very necessary. Many debtors do not understand that unauthorized transfer of fiduciary objects is a serious violation of the law and can have legal consequences. Socialization regarding fiduciary collateral regulations, especially those related to the prohibition of unauthorized transfer of collateral objects, must be carried out to prevent violations in the future.

Effective law enforcement against these violations requires the involvement of authorities, including the courts, police, and supervisory institutions that oversee financing activities. Support from these institutions can make it easier for creditors to carry out the execution process or claim against fiduciary objects that have been illegally transferred. Synergy between these institutions is very important to create strict law enforcement and protect creditors' rights. Strict action against violations of the transfer of fiduciary objects is expected to provide a deterrent effect for debtors who intend to violate the fiduciary agreement. This deterrent effect is important to maintain the integrity of the fiduciary system and creditors' trust in the security of collateral. If the fiduciary guarantee system is not enforced properly, creditors will be reluctant to provide financing, especially for small and medium businesses that need capital with fiduciary guarantees. Overall, law enforcement against the transfer of fiduciary objects without the permission of the fiduciary recipient is an important part of maintaining legal certainty and protection for creditors. A clear process and support from various authorities can help creditors defend their rights to collateral objects. Enforcing these fiduciary rules is also expected to increase trust in financing transactions that use fiduciary guarantees in Indonesia.

An example of a case of law enforcement against the transfer of fiduciary objects without the permission of the fiduciary recipient is in November 2010, Ahmad Budiyanto Bin Moch Romli sold a 2008 Honda CRV car. The financing agreement with fiduciary collateral worth Rp. 339,876,000, - with 36 installment payments with PT. Astra Sedaya Finance. The fiduciary guarantee certificate was made at the time of the first installment. PT. Astra Sedaya Finance acted as the fiduciary provider and H. Ahmad Budiyanto Bin Moch Romli acted as the fiduciary provider. The fiduciary object was a 2008 Honda CRV car. Without the permission of the fiduciary recipient, in November 2010, the fiduciary provider gave a 2008 Honda CRV car to H. Manaf Kadir as collateral for a debt of Rp. 75,000,000, -. The fiduciary recipient issued SP-3 and the last SP because there was a delay in payment on March 14, 2011, when the installment had only been paid six times. At the time the fiduciary collateral object was withdrawn, it turned out that it was not in the hands of the fiduciary provider. Thus, I found that the actions of H. Ahmad Budiyanto Bin Moch Romli met the requirements of Article 23 paragraph (1) and would be subject to criminal sanctions. Article 36 of the UUJF stipulates that a Fiduciary Provider who transfers, pawns, or rents an object that is a Fiduciary collateral in the manner mentioned above without prior written consent from the Fiduciary Recipient, according to Article 23 Paragraph 2, will be subject to a maximum prison sentence of one year.

D. Conclussion

Fiduciary is a type of transfer of ownership that relies on trust, which is usually used as collateral in debt agreements. This is used to guarantee and ensure that the debtor will carry out his obligations to the creditor regarding the repayment of the debt owned by the debtor. The fiduciary recipient (debtor) still has legal ownership rights to the collateral object, while the fiduciary recipient (creditor) has legal ownership rights to the collateral object until the debtor pays off his debt. This aims to protect the rights and interests of the fiduciary recipient in the repayment of his receivables. However, the fiduciary recipient is also bound by the provisions of the law, especially in the implementation of execution which must be carried out safely and in accordance with the law. The fiduciary recipient's rights also have execution rights, preference rights, and the right to be prioritized over other creditors in terms of debt repayment. This is of a following nature, meaning that these rights are attached to the fiduciary object even though the object is transferred by the debtor. This aims to avoid creditor losses due to irresponsible actions of the debtor. The debtor's control over fiduciary collateral assets related to property can be carried out with good or bad intentions. If someone has property rights without realizing it, it is called possession in good faith. If someone knows that the property he holds is not his property, it can cause a problem of bad faith. In the financing and lending industry, the implementation of laws that prevent the transfer of fiduciary collateral assets without the permission of the fiduciary recipient is an important issue. Legal enforcement against fiduciary collateral objects must be transferred clearly and systematically because this is considered a violation of the law that has the potential to harm creditors.

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