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Legal Protection Against the Transfer of Fiducia Rights in the Takeover of Creditors

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ABSTRACT: Fiduciary security is a form of collateral over property or material security over movable objects, both tangible and intangible, which remain in the control of the fiduciary. This means that the pledged object is not physically handed over to the beneficiary, but the security right over it is recorded through a deed and registered at the fiduciary registration office. The construction of a fiduciary guarantee is the transfer of property rights in trust, over the debtor's property or movable goods to the creditor with physical control over the goods remaining with the debtor. Provided that if the debtor repays the debt in accordance with the stipulated time, the creditor is obliged to return the title to the property or goods to the debtor. In the repertoire of legal science, the transfer of property like this is called "*Constitutum Possessorium." With the aim of* knowing the legal protection of the transfer of fiduciary rights in law number 42 of 1999 concerning fiduciary guarantees and knowing the legal certainty in the takeover of creditors. This research method uses the foundation of the answer to the formulation of the problem is to use the main basis of the *approach* of legislation (*Statue Approach*) and *conceptual* approach (*conceptual approach*). The results of this study can be formulated that in the transfer of fiduciary rights in terms of the fiduciary law there is no mention of the fiduciary transfer process, while in the takeover of creditors it is mentioned in the limited liability company law that debts and shares in the form of assets all switch.

Keywords: Fiduciary, Creditor, Transfer of Rights.

INTRODUCTION

Fiduciary security is one of the most widely used forms of material security in financing practices in Indonesia, especially in motor vehicle loans and consumer financing transactions. Fiduciary allows the debtor to retain control of the object of collateral even though its ownership rights are legally transferred to the creditor as security for the debt. (B & Gunawan, 2022) This arrangement provides flexibility for the debtor, but on the other hand, it also creates potential conflicts and legal problems, especially related to the execution of the collateral object when a default occurs. The

legal framework governing fiduciary guarantees in Indonesia is contained in Law No. 42/1999 on Fiduciary Guarantees (Subekti, 1982). This law clarifies the legal position between the grantor and the fiduciary,

as well as providing a formal basis for the registration of fiduciary guarantees and their execution mechanisms. However, in practice, there are still many disputes related to the transfer, registration, and execution of fiduciary objects that are not in accordance with the principles of legal certainty and protection of the parties (Sipayung & Indriani, 2021). The main problems that often arise in fiduciary agreements are the transfer of rights to the fiduciary object without sufficient notice to third parties or without a valid record, as well as unilateral execution actions by creditors without going through a proportional and transparent process. (Dwiwijaya & Tedjosaputro, 2019)

The form of collateral that is most widely used as collateral in bank credit agreements is land rights, both with the status of Property Rights, Business Use Rights, Building Rights and Use Rights because in general they have a high value or price and continue to increase so that in this case it is appropriate if the debtor as a credit recipient and creditor as a provider of credit facilities and other related parties obtain protection through a strong security right institution and can provide legal certainty. (Soedewi, 2007)

Based on the provisions in Article 51 of Law Number 5 of 1960 concerning Basic Agrarian Principles, it is stated that a strong security right institution has been provided and can be imposed on land rights, namely Mortgage Rights as a substitute for hypotheek and creditverband institutions (Siswanto et al., 2023). For more than 30 years since the Basic Agrarian Law came into force, this institution of mortgage rights has not been able to function properly because there is no law that regulates it completely, and the provisions in the regulation are no longer in accordance with the National Land Law Principles and do not meet the economic needs in the field of credit. (Yudha Pandu, 2008)

An agreement is an event where one person promises to another or where two people promise each other to carry out a matter. (Subekti, 2005)From this event, a legal relationship arises between the two people called an obligation. An agreement between two or more people creates an obligation between those who make it. In its form, the agreement is in the form of a series of words containing promises or an ability between the two parties that are spoken in writing. In the economic world, it is known as a credit agreement, which is a consensual agreement between the debtor and the creditor (in this case the bank) that gives birth to a debt and credit relationship, where the debtor is obliged to repay the loan provided by the debtor, based on the terms and conditions agreed upon by the parties. (Sjahdeini, 1993) *Gap analysis* contains the gap between *das sollen* and *das sein*. Novelty of research results (*state of* the *art*) contains a description of previous research studies (*literature review*). As in the background of the problem mentioned above, this research aims to:

1. Knowing the Legal Protection of the Transfer of Fiduciary Rights in Law Number 42 of 1999 concerning Fiduciary Guarantees.
2. Knowing the legal certainty in the takeover of creditors based on Law Number 40 of 2007 concerning Limited Liability Companies.

METHOD

The research method contains research specifications, types of research, approach methods, data collection techniques, and data analysis methods used in the research. The method of approach used to underlie the answer to the formulation of the problem is to use the main basis of the *statutory* approach (*Statue Approach*) and *conceptual* approach (*conceptual approach*). *Statue Approach* is used because what will be used are various legal rules that become the focus and central theme of a study. *Conceptual Approach* is done when the researcher does not depart from the existing legal rules. This is done because there are no or no legal rules for the problem at hand. it allows to determine the exact meaning of words and use them in the thought process. (Julyano & Sulistyawan, 2019) Meanwhile, using the *conceptual approach* method departs from the views and doctrines in the legal science where researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issue at hand.

RESULT AND DISCUSSION

Legal Protection Against the Transfer of Fiduciary Rights in the Acquisition of Creditors that occurs, can be described that in the legal protection of Law Number 42 of 1999 is a law that regulates fiduciary guarantees (Ajwah et al., 2023). After the issuance of Law Number 42 of 1999 concerning fiduciary guarantees, the world of fiduciary guarantees has increasingly attracted the attention of financing business actors and the banking community. When the law was issued, it was expected to provide legal protection to the parties and provide legal certainty (Subekti, 2005).

Collateral is something that is given by the debtor to the creditor, both material and immaterial, in order to create trust and confidence in the creditor for the certainty of debt on time in accordance with the agreement that has been mutually agreed upon. Juridically, collateral is a means of protection for the creditor's security, namely the certainty of repayment of the debtor's debt or the performance of an achievement by the debtor or by the guarantor. (Subekti, 1982)A security agreement arises because of the existence of a principal agreement. (Soedewi, 2007) However, there are still obstacles and weaknesses in the implementation of Law Number 42 of 1999 concerning fiduciary guarantees. following:

Transfer of Fiduciary Rights contained in the Fiduciary Guarantee Law (UUJF) Article 19 paragraph 1 *"The transfer of rights to receivables guaranteed by fiduciary causes the transfer by law of all rights and obligations of the Fiduciary to the new creditor"*.

Acquisition of Creditors is contained in the Limited Liability Company Law Article 125 paragraph 3 *"Acquisition as referred to in paragraph (1) is the acquisition of shares which results in the transfer of control over the Company"*.

Winarno (2013) explains that the legal protection of creditors is still considered weak because there is no firmness in the execution of fiduciary guarantees when the debtor defaults. Muhtar (2013) To reinforce the legal protection of creditors in a fiduciary guarantee agreement, a guarantee execution institution must be established and socialization of fiduciary implementation.

Acquisition comes from the verb "acquire" which means to obtain, to take over. Acquisition in

business terminology is defined as the acquisition of ownership or control of the shares or assets of a company by another company and in this event both the acquiring and the acquired company continue to exist as separate legal entities. (Lukas Setia Atmaja, 2003) From the above definitions, it can be concluded that an acquisition occurs when a company acquires productive assets from another company and integrates these assets into its own assets (Sjahdeini, 1993).

Acquisitions can also occur when a company obtains control of the operations or productive facilities of another entity by owning a significant number of shares. In an acquisition, no company is dissolved, both companies involved in the acquisition are juridically still established and operate independently but there is a transfer of control by the acquirer (Rosaline et al., 2025). The acquisition phenomenon is actually a strategic decision in the business world. Rationalization in acquisition decisions is often referred to as an effort to spur the company to be healthier and more efficient to achieve synergy. According to Suad and Enny, this mutually beneficial condition will occur if synergies are obtained from the acquisition or merger event. Synergy means that the combined value of the two companies is greater than the sum of each value of the companies combined. Synergies can come from various reasons, such as management utilization, to operate more economies of scale, for faster growth, and utilization of tax savings. (Puad Husnan & Enny Pujiasturi, 2012) Law No. 40/2007 on Limited Liability Companies uses the terms merger, consolidation, and acquisition. Meanwhile, the Government Regulation on Banking uses the terms Merger, Consolidation, and Acquisition. The Capital Market and Financial Institutions Supervisory Agency Regulation Number IX.G.1 uses the term Merger or Consolidation of Public Companies or Issuers. Some other countries use the terms concentration and takeover.

Based on the definition of a takeover of a limited liability company as intended, several elements can be drawn that are inherent in the takeover, among others, namely, Acquisition is a legal act; The acquiring party is a person or legal entity; The method of acquisition is by acquiring shares; and the acquisition of shares can result in the transfer of control over the limited liability company. Acquisitions in Limited Liability Companies have a significant impact on the Company. There will be an increase in the amount of revenue, a reduction in costs, a decrease or exemption from taxation, and a reduction in working capital costs. In other words, acquisition is an option that has more prospects than other rescue patterns.

Based on Article 125 Paragraph (1) of the Company Law, an acquisition is carried out by way of acquisition of shares that have been issued and/or will be issued by the Company through the Board of Directors of the Company or directly in the form of a legal entity or natural person. The acquisition of shares referred to in Article 125 Paragraph (1) is an acquisition that results in the transfer of control over the Company later as included in Article 7 Number 11 of the Company Law.

The acquisition process only changes the status of the shareholders, namely switching from the shareholders of the acquired company to the shareholders of the acquirer. So the change that arises is not in the status of the company but in the shareholders of the acquirer and the acquired company continues to stand and carry out all the activities of the company independently. (Abdul Moin, 2004) Acquisition can be carried out by the company or directly from shareholders. The acquisition of shares is carried out for all or most of the shares which results in the transfer of control over the company. The Company Law requires the protection of employees, in addition to the

protection of other parties, in the event of a Merger, Acquisition and Consolidation.

The changes must be approved by the Ministry of Law and Human Rights. In addition to notification or application and approval of the Ministry of Law and Human Rights, the directors of the consolidation are also required to announce the results of the consolidation in 1 (one) or more daily newspapers within a period of 30 (thirty) days from the effective date of the consolidation. A company that will conduct a merger, consolidation, and Acquisition (takeover) does not need to obtain approval from the Minister of Law and Human Rights unless the Acquisition is approved which includes one or more of the changes mentioned above. In the event of a merger, consolidation and Acquisition with such an amendment to the approved acquisition, the merger, consolidation and Acquisition shall only take effect from the date of approval of the amendment to the Articles of Association by such Minister.

There are three basic procedures that are appropriate for a company to take over another company, firstly merger, the term Merger is often used to indicate the merger of two or more companies, and then just the name of one of the merged companies. Whereas, Consolidation indicates the merger of two or more companies, and the company of the merged company disappears, then a new name of the combined company appears. The second way is stock acquisition, which is to take over another company is to buy the company's shares, either purchased in cash, or replace them with other securities (stocks or bonds). The third is Asset Acquisition, where a company can acquire another company by buying the assets of that company. This method will prevent the company from having minority shareholders, which can happen in the event of a share acquisition. The acquisition of assets is done by transferring the ownership rights of the purchased assets.

A legal entity is a man-made legal subject based on applicable law. In order to act according to the law, a legal entity is managed by the management set out in its articles of association, as the authorized representative of the legal entity. This means that the actions of the management are the actions of the legal entity. The actions of the management are always on behalf of the legal entity, not on behalf of the management personally. All obligations arising from the actions of the management are the obligations of the legal entity, which are charged to the assets of the legal entity.

Conversely, all rights obtained from the actions of the management are the rights of legal entities that become the assets of legal entities. (Abdulkadir Muhammad, 2002) A legal entity company is a legal subject that is administered and managed by the management. Included in legal entity companies owned by the private sector, we can see, among others, Limited Liability Companies (PT) and Cooperative Business Entities. Meanwhile, those owned by the state are public companies (perum) and companies. Perseroan Terbatas (PT) is an alliance in the form of a legal entity used as a translation of Naamloooze Vennootschap (NV).

The term limited in PT is aimed at the responsibility of the persero or shareholders which is only limited to the nominal value of all shares owned. (R.T. Sutantya, 1991) Based on the provisions of Article 14 paragraph (3) of Law No. 42/1999 on Fiduciary Guarantee (UUJF), a new fiduciary guarantee is born on the same date as the date the fiduciary guarantee is recorded in the Fiduciary Register Book. Article 15 paragraph (1) of Law No. 42/1999 on Fiduciary Guarantee: "In the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1), the words "DEMI

KEADlLAN BERDASARKAN KETUHANAN YANG MAHA ESA" shall be included. Article 15 paragraph (2) of Law No. 42/1999 on Fiduciary Guarantee: "The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force."

The granting of collateral can specifically guarantee the repayment of the debtor's debt to the creditor. Creditors will have preferential rights in taking repayment of their debts. (Usman, 2008) The effective implementation of the provision of collateral is to provide legal certainty for the interests of creditors if it is carried out in accordance with the provisions of the applicable laws and regulations. (Ma'rifah, 2024)

Creditors are people who have receivables. In this case, people who have receivables can be people or legal entities, banks, financing institutions, pawnshops or other guarantor institutions. In this case, the rights and obligations of the creditor are to provide a loan to a debtor in the form of money or perhaps capital for a business from the debtor or other uses that will be used from the loan money (Hariss et al., 2023). In this case, the creditor has the obligation to help anyone who will make a loan. And in return the creditor has the right to hold the debtor's valuable goods or objects as collateral for the creditor to repay the debt. In the event that the lending institution is a pawn, the valuable object as collateral is gold. In the case of a fiduciary guarantee which is a special agreement made between the debtor and the creditor to promise the following things:

1. Material security, namely the existence of certain objects that are used as collateral.

2. Personal guarantees, namely the existence of a certain person who is able to pay or fulfill the debtor's performance if the debtor is in breach of promise. (Andreas Albertus, 2010)

In relation to the fiduciary relationship, it is clear that there is a close relationship between the parties, namely a relationship of trust based on good faith. The relationship of trust is now not solely based on the will of the two parties, but is based on binding legal rules. Material security is institutionalized in the form of Mortgage, Mortgage Rights, Fiduciary, Pawn, and Warehouse Receipt System Law. (Melani & Indiraharti, 1999)

Broadly speaking, guarantees regulated in the laws and regulations of the Republic of Indonesia have the following principles:

1. Security rights give precedence to creditors holding security rights against other creditors.

2. The security right is an assessoir right to the main agreement guaranteed by the agreement. The main agreement that is guaranteed is a debt agreement between the creditor and the debtor, meaning that if the main agreement ends, the security right agreement by law ends as well.

3. Security rights provide separatist rights for the creditor holding the security right. This means that the object encumbered with the security right is not a bankruptcy asset in the event that the debtor is declared bankrupt by the court.

4. The security right is a real right, meaning that the security right will always be attached to the object or always follow the object to whoever the object transfers ownership or droit de suite.

5. The creditor holding the security right has full authority to execute the security right. This means that the creditor holding the security right is authorized to sell itself, either based on a court order or based on the powers granted by law, the object encumbered with the security right and take the proceeds of the sale to pay off its debt to the debtor. (Wihandriati & Asri, 2021)

6. Because it is a property right, the security right applies to third parties, the principle of publicity applies to the security right. This means that the security right must be registered at the relevant security rights registration office.

According to Satjipto Rahardjo, "legal protection is to provide protection for human rights that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law". The transfer of rights is the transfer of one's property rights to another person by way of sale or exchange or in other ways justified by law. (Badrulzaman, 1989)

Based on the description above, the rights and obligations of the creditor are as a guarantee or lending institution to provide financial assistance to the debtor, where this is registered with the relevant property guarantee institution, and in this case the creditor has the right to receive collateral from a debtor, and if there is no repayment of debt by the debtor, the creditor has the right to execute the collateral by selling or declaring the debtor bankrupt because he is unable to pay the debt (Dwiwijaya, 2019).

In the theory of legal protection of the transfer of fiduciary rights, Article 19 of Law Number 42 of 1999 concerning Fiduciary Guarantees confirms that when the right to receivables is transferred to a new party, all rights and obligations owned by the fiduciary recipient will automatically transfer by law to the new creditor. (Kansil, 1989) To legally record this transfer, the new creditor must register it at the Fiduciary Registration Office in accordance with applicable legal provisions. (Hariss et al., 2023)

Legal Protection of Debtors based on Law Number 8 Year 1999 on Consumer Protection and Protection of Determination of the Limit Value of Mortgage Collateral Auctions Consumers are one of the actors of economic activities in a country. Based on the provisions of Article 1 point 1 of the Consumer Protection Law, Consumer Protection is all efforts that ensure legal certainty to provide protection to consumers. Article 2 states that consumer protection is based on benefits, justice, balance, consumer security and safety, and legal certainty. (Sumual, 2024)

The theory of legal certainty was introduced by Gustav Radbruch in his book entitled "*einführung in die rechtswissenschaften*". Radbruch wrote that in law there are 3 (three) basic values, namely: (1) Justice (*Gerechtigkeit*); (2) Benefit (*Zweckmassigkeit*); and (3) Legal Certainty (*Rechtssicherheit*). Legal certainty according to Van Apeldoorn is everything that is based on the rule of law that is permanent. (Apeldoorn, 1993) "The existence of the principle of legal certainty is a form of protection for justices (justice seekers) against arbitrary actions, which means that a person will and can obtain something that is expected in certain circumstances." (Julyano & Sulistyawan, 2019)

CONCLUSION

Based on the results of the analysis that has been stated, it is concluded that the fiduciary that

occurs in fact has an influence on each other. The enactment of a rule of law may be followed by legal certainty and/or legal uncertainty, because in fact there are several laws that have been tested due to the non-inclusion of the principle of legal certainty in them and law enforcers do not carry out the law as it should be so that legal subjects do not get legal certainty as protection of their rights. Legal Protection Against the Transfer of Fiduciary Rights in the Acquisition of Creditors that occurs, can be described that in the legal protection of Law Number 42 of 1999 is a law that regulates fiduciary guarantees (Jadidah, 2022). After the issuance of Law Number 42 of 1999 concerning fiduciary guarantees, the world of fiduciary guarantees has increasingly attracted the attention of financing business actors and the banking sector. When the law was issued, it was expected to provide legal protection to the parties and provide legal certainty.

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