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Unilateral Withdrawal of the Fiduciary Security Object Without Any Default by the Debtor (Case Study of Decision No.36/Pdt.G.S/2023/PN Pdg)

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Abstract: The development of Indonesia's financing sector has led to legal issues concerning fiduciary security, particularly the unilateral withdrawal of fiduciary collateral by creditors without any default by the debtor, as seen in Decision Number 36/Pdt.G.S/2023/PN Pdg. This research aims to analyze the legal protection for debtors and the liability of creditors when withdrawing fiduciary objects unilaterally in the absence of debtor default. The study employs a normative-juridical method with legislative and case-based approaches. Data was collected through literature review and analyzed qualitatively. The findings indicate that legal protection for debtors remains suboptimal due to the imbalance of power between creditors and debtors under Article 15(2) and (3) of Law No. 42/1999 on Fiduciary Security before the Constitutional Court's ruling. However, Constitutional Court Decision No. 18/PUU-XVII/2019 strengthened the debtor's position by affirming that default and fiduciary execution must follow judicial procedures. Meanwhile, a creditor's unilateral withdrawal of fiduciary collateral constitutes an unlawful act under Article 1365 of the Indonesian Civil Code, obliging the creditor to return the fiduciary object and compensate the debtor for material and immaterial losses. In conclusion, a legal balance between creditors and debtors is necessary to ensure fairness and legal certainty in the execution of fiduciary security.

Keyword: Fiduciary Security, Parate Executie, Legal Protection, Liability.

INTRODUCTION

Indonesia's current economic growth is becoming increasingly rapid, competitive, and integrated, accompanied by more complex challenges and a more advanced financial system. As a result, adjustments in the economic sector including banking and financing institutions are necessary. This has driven growth in the financing sector. Financing activities have become one of the key sectors in economic growth. On the other hand, the growing consumerist tendencies among Indonesians have significantly influenced the flourishing activities in the financing sector. The public's demand for certain goods, such as cars, has become a key reason for the

emergence of financing institutions as third parties that assist people (debtors) in purchasing specific goods from sellers (creditors) through credit or installment payment methods. This helps ease the financial burden on individuals when acquiring the goods they need.

This financing institution uses a form of collateral known as fiduciary security. Fiduciary security has been utilized in Indonesia since the period of Dutch colonization, originating as a form of guarantee shaped by judicial decisions. This type of collateral is commonly selected for loan due to its relatively straightforward, convenient, and quick establishment, though it is sometimes viewed as lacking sufficient legal certainty in certain respects. The consequence of imposing fiduciary security is that the debtor, as the nominal owner of the goods, acts as the fiduciary grantor to the creditor, who is referred to as the fiduciary recipient.

Fiduciary Security is regulated under Law Number 42 of 1999 on Fiduciary Security (hereinafter referred to as the Fiduciary Security Law). According to Article 1(2) of the Fiduciary Security Law, fiduciary security is defined as a security right over movable objects, whether tangible or intangible, as well as certain immovable objects particularly buildings that cannot be encumbered with a mortgage under Law Number 4 of 1996 on Mortgage Rights Over Land and Related Objects. The collateral remains under the possession of the fiduciary grantor and serves as security for the repayment of a specific debt, granting the fiduciary recipient a preferred position over other creditors.

In practice, problems often arise in the imposition of fiduciary security, causing debtors to face significant challenges—one of which is evident in Court Decision No. 36/Pdt.G.S/2023/PN Pdg, where debtors frequently find themselves in the most disadvantaged position.

Regarding this situation, the debtor (referred to as the plaintiff) was a debtor to a financial services company (leasing) through the financing company PT. Maybank Indonesia Finance (PT. Maybank Indonesia Finance Padang Branch), purchasing a vehicle from the creditor (referred to as the defendant): specifically, 1 (one) unit of a Toyota Raize-1000T G CVT One Tone, on credit—subsequently designated as the fiduciary security object.

The plaintiff was obligated to pay installments for the purchase of the fiduciary security object over 72 (seventy-two) months. Throughout the installment period, the plaintiff consistently paid the installments without causing any credit default. However, shortly after the 25th (twenty-fifth) installment, a dispute arose between the plaintiff and the defendant, where the defendant unilaterally judged that the plaintiff had defaulted and breached the agreement. As a result, the defendant unilaterally withdrew the fiduciary security object as a form of debt repayment, without the consent or knowledge of the plaintiff. This clearly contradicts applicable legal provisions and has caused both material and immaterial losses for the plaintiff.

The court's verdict indicates that the debtor did not default. According to Article 1238 of the Indonesian Civil Code (KUHPerdara), default (*wanprestasi*) occurs when: "The debtor is in default if a formal notice or a similar deed has declared them in default, or by the nature of the obligation itself if it stipulates that the debtor shall be deemed in default upon the lapse of a specified period." In this ruling, the debtor was not negligent in fulfilling their obligations because they consistently made installment payments without any default or indication of payment cessation. Therefore, the creditor had no legal basis to declare the debtor in default. Additionally, since property rights still partially belong to the debtor, the creditor does not have the right to unilaterally seize the fiduciary collateral object without following proper court procedures.

Article 15(2) of the Fiduciary Security Law grants the creditor/fiduciary recipient the right to execute the fiduciary collateral through *parate executie* (self-help execution). This is contentious because the *parate executie* clause in fiduciary certificates is interpreted as "execution by one's own authority." This provision effectively allows financing institutions, as

creditors, to act unilaterally—as if they possessed the judicial authority to enforce collateral like a court.

Consequently, financing companies can arbitrarily declare that the debtor (customer) has defaulted (*wanprestasi*). Such a legal framework provides creditors with excessive power, enabling potential abuse by subjectively interpreting a debtor's default to justify seizing fiduciary collateral without court proceedings. This creates an imbalance, undermining debtor protections and legal certainty.

In light of these issues, this study will examine the legal provisions that have led to problematic implementation practices, causing public distress and harming debtors in fiduciary security. These provisions have created significant discriminatory impacts by granting creditors excessive discretionary power to unilaterally determine debtor default (*wanprestasi*) and execute fiduciary collateral without due process. Such unilateral executions themselves constitute resulting damages.

Therefore, this research aims to analyze legal protections for debtors and creditor liability in cases of unilateral fiduciary collateral seizure. The study is formally titled: “Unilateral Withdrawal of the Fiduciary Security Object Without Any Default by the Debtor (Case Study of Decision No.36/Pdt.G.S/2023/PN PdG)”.

METHOD

This research utilizes a normative-juridical legal research method, which involves examining library materials and secondary data as the foundation for investigation through systematic review of relevant literature and regulations pertaining to the research problem. The research adopts a dual methodological approach combining statutory analysis (examining applicable laws and regulations) and case study analysis (evaluating relevant court decisions that have obtained permanent legal force).

Data collection is conducted through comprehensive legal literature review, drawing from law journals, legal textbooks, and the researcher's own legal writings. The research data undergoes qualitative analysis through systematic legal interpretation, emphasizing detailed description and comprehensive understanding of legal materials, which are then examined as an integrated whole.

Research findings are presented through clear, effective, well-structured, coherent, and logically sequenced exposition to facilitate thorough analysis and discussion of the legal issues. The analytical process maintains rigorous attention to legal systematicity while ensuring accessibility of complex legal concepts through methodical presentation.

RESULTS AND DISCUSSION

Legal Protection for Debtors Regarding Fiduciary Collateral Objects Withdrawn Unilaterally.

The term *fiducia* originates from the word “*fides*,” which means trust. Reflecting this meaning, the legal relationship between the debtor and creditor is based on trust. The subjects of fiduciary security are the fiduciary giver and the fiduciary recipient. Under the Fiduciary Security Law, the fiduciary giver refers to an individual or corporation that owns the object of the fiduciary guarantee. Meanwhile, the fiduciary recipient is an individual or corporation that holds a debt guaranteed by the fiduciary guarantee.

The Fiduciary Guarantee Law recognizes two distinct categories of assets that may serve as fiduciary security objects. These encompass both tangible and intangible properties, whether registered or unregistered, movable or immovable, with the crucial condition that such assets must not be encumbered by mortgage rights or hypothec. This broad classification enables various types of property to secure financial obligations while maintaining specific legal exclusions. The fiduciary security mechanism operates through a structured debtor-creditor

relationship. The debtor, which may be either an individual or legal entity, assumes a legally binding obligation to repay a debt to the creditor within a predetermined timeframe.

If one party fails to voluntarily fulfill its rights and obligations, the other party may file a claim in court due to the resulting losses. An example of this can be seen in Court Decision No. 36/Pdt.G.S/2023/PN PdG, where the debtor felt harmed by the creditor's unilateral repossession of the fiduciary collateral. In this case, the debtor had purchased a car on credit, which served as the fiduciary collateral. The debtor was required to make installment payments and consistently fulfilled these obligations without defaulting, paying on time every month. However, the creditor wrongfully accused the debtor of defaulting and forcibly repossessed the fiduciary collateral unilaterally, causing financial harm to the debtor.

Not only do the arbitrary actions of creditors cause losses for debtors, but the legal protections supposedly provided for debtors under Article 15(2) and (3) of Law No. 42/1999 on Fiduciary Security are themselves unclear and ambiguous, particularly regarding the meaning of the phrase "at their own authority" ("atas kekuasaannya sendiri") in Article 15(2) of Law No. 42/1999 on Fiduciary Security, as stated in: "The fiduciary security certificate as referred to in paragraph (1) has the same executory power as a court decision that has obtained permanent legal force," and Article 15(3) of Law No. 42/1999 on Fiduciary Security, as stated in: "If the debtor defaults, the fiduciary recipient has the right to sell the object of fiduciary security at their own authority." Both of these provisions focus solely on providing legal certainty for the rights of the fiduciary recipient (creditor) by allowing them to immediately execute the fiduciary security object.

Therefore, the incomplete substance of Article 15(2) of Law No. 42/1999 has implications on the regulation, as it also grants the creditor exclusive rights to execute the fiduciary object, with an authority equal to that of a final and binding court decision, yet without a clear mechanism or procedure for assessing what constitutes the debtor's actions as "default." Meanwhile, the fiduciary provider (debtor) is not given an equivalent legal mechanism to contest or verify such actions. This interpretation model can, in fact, give rise to arbitrary actions by the fiduciary recipient (creditor) in unilaterally executing the fiduciary object, as experienced by the debtor in the decision mentioned above.

As a result, this regulation demonstrates legal inequality between creditors and debtors. This is in conflict with Article 28D paragraph (1) of the Constitution, as stated in: "Every person has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law." and Article 28H paragraph (4) of the 1945 Constitution, as stated in: "Every person has the right to own personal property, and such property may not be arbitrarily taken by anyone." These articles can serve as a means of safeguarding legally for debtors, since every person has the right to fair legal certainty, guarantees, protection, and equal treatment before the law.

According to Satjipto Raharjo, the role of law is to safeguard individuals' interests by granting to them a certain authority to act in pursuit of those interests. This grant of authority is conducted in a measured manner, meaning its scope and depth are clearly defined. In protecting interests, there are two main forms of legal protection: preventive legal protection, which is carried out before a dispute occurs, and repressive legal protection, which aims to resolve disputes.

Legal protection is closely related to a person's right to be protected by law and their right to a sense of security. This is already stipulated in Article 28G of the 1945 Constitution of the Republic of Indonesia, as stated in: "Every person has the right to protection for oneself, family, honor, dignity, and property under their control, as well as the right to a sense of security and protection from threats or fear to do or not to do something that is a basic right." Everyone is entitled to legal protection. Almost all legal relationships must be protected by law.

The form of legal protection for debtors who feel harmed by arbitrary actions in parate execution is to file a judicial review petition against Law No. 42 of 1999 at the Constitutional

Court under case number 18/PUU-XVII/2019, on the grounds that the law has not provided justice and legal certainty for creditors. According to the court's decision, it was stated that the application of Article 15 paragraphs (2) and (3) of Law No. 42 of 1999 on Fiduciary Security, insofar as the phrases "executory power" and "the same as a court decision that has obtained permanent legal force" are concerned, is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force. Therefore, all legal mechanisms and procedures for the execution of fiduciary security certificates must be carried out and applied in the same manner as the execution of a court decision that has obtained permanent legal force.

Through Constitutional Court Decision No. 18/PUU-XVII/2019, creditors no longer have the authority to unilaterally determine that a debtor has defaulted. If the debtor is late in payment or defaults by failing to pay credit installments, the creditor is no longer authorized to unilaterally declare that the debtor has defaulted, nor can parate execution be carried out immediately. Instead, there must be an agreement or voluntary surrender by the debtor, along with the involvement of legal processes, or the creditor must file a lawsuit in court regarding the property used as fiduciary security. Therefore, it is the court that will ultimately determine whether the debtor is in a state of default.

Therefore, this decision provides legal protection and certainty for debtors by restricting arbitrary actions by creditors that are not in accordance with legal rules. This enables debtors to obtain rights and guarantees of protection over their fiduciary objects, so that execution can only be carried out through mechanisms that follow the applicable legal procedures fairly. Fiduciary security is a material security in which the right to execute only arises after the debtor defaults (breaches their obligations). Conversely, as long as the debtor fulfills their obligations, the status of the object used as security may not be interfered with.

Creditor's Responsibility Regarding the Unilateral Withdrawal of Fiduciary Security Objects Without Default by the Debtor.

Responsibility is a person's awareness of their own actions or conduct, whether intentional or unintentional. Responsibility also means acting as a manifestation of awareness of one's obligations. If examined further, responsibility is an obligation that must be borne or fulfilled as a result of one's own actions, or as a result of another party's actions, or as a form of dedication or sacrifice for others. Regarding the experts' opinions on responsibility, according to Ridwan Halim, legal responsibility is defined as a further consequence of carrying out a role, whether that role consists of rights and obligations or authority. In general, legal responsibility is understood as the obligation to act or behave in a certain manner in accordance with existing regulations.

The concept of legal responsibility is fundamentally linked to the concept of violations. In principle, a person is required to bear legal responsibility if, due to their actions, another party suffers harm. In this context, civil law recognizes legal liability based on fault, known as liability based on fault. It can be said that liability based on fault essentially gives rise to certain legal risks that must be faced or borne by the party at fault, such as claims for compensation. This is further emphasized by Article 8 paragraph 1 of Financial Services Authority Regulation No. 6/POJK.07/2022 concerning Consumer and Public Protection in the Financial Services Sector, as stated in: "Financial Services Business Actors (PUJK) are required to be responsible for losses suffered by Consumers (debtors) arising from mistakes, negligence, and/or actions contrary to the provisions of laws and regulations in the financial services sector, carried out by Directors, Commissioners, Employees, and/or third parties who work for or represent the interests of the PUJK."

Therefore, if one party commits a mistake, they can be held accountable for any resulting harm. This can be seen, for example, in Court Decision No. 36/Pdt.G.S/2023/PN Pdg, where the creditor made a mistake by unilaterally concluding that the debtor had been negligent, causing the credit to default on installment payments, and thus inappropriately declared and

judged that the debtor had defaulted. Default itself is defined as the non-fulfillment of obligations or breach of contract or negligence committed by the debtor, either by failing to perform what was agreed or by doing something that, according to the agreement, is not permitted. Default means the non-performance of an obligation due to the debtor's fault, whether intentional or negligent. W. R. Subekti states that there are four forms of default, as follows: not performing what was promised to be done, performing what was promised, but not as promised, performing what was promised, but late and doing something that, according to the agreement, is not permitted

From the explanation above, it can be stated that the debtor did not default because their actions do not fall under any of the types of default mentioned. Therefore, the debtor can demand accountability, since not only did the creditor unilaterally judge that the debtor had defaulted, but the creditor also caused losses by unilaterally withdrawing the fiduciary security object when the debtor did not default on credit installments, and the process of withdrawing the fiduciary security object was carried out unilaterally without a court mechanism. The creditor's act of unilaterally withdrawing the fiduciary guarantee object as debt repayment without the consent or knowledge of the debtor is clearly contrary to applicable legal provisions and causes losses, both material and immaterial, to the debtor, which is classified as an unlawful act. This is explained in Article 1365 of the Indonesian Civil Code, as stated in: "Every unlawful act that causes harm to another person obliges the person whose fault caused the harm to compensate for that harm."

An act is considered unlawful if it fulfills the elements of Article 1365 of the Indonesian Civil Code. The required criteria are outlined below:

1. Existence of an Unlawful Act (Onrechtmatig)

An unlawful act is an action or inaction that infringes on the rights of others or disregards the legal responsibilities of the person involved, or contrary to morality or the care that must be observed in social interaction with others or their property. The process of executing fiduciary security conducted by the creditor is classified as an unlawful act because the creditor unilaterally withdraws the fiduciary security object as debt repayment without the consent or knowledge of the debtor, and the creditor will conduct an execution auction.

2. Existence of Loss (Schade)

In his book "Contract Law," Subekti explains that "losses arising from default or unlawful acts can be in the form of material and immaterial losses." Material loss constitutes a real, calculable loss experienced in monetary terms, so when a claim for material loss is granted in a court decision, the assessment is made objectively.

Meanwhile, immaterial loss is a loss suffered due to an unlawful act that cannot be proven, restored, or causes the loss of enjoyment of life, fear, illness, or shock, and thus cannot be calculated in monetary terms. In this case, both material and immaterial losses are suffered by the debtor as the fiduciary provider.

The material loss incurred by the debtor as a result of the creditor's default is the creditor's negligence in unilaterally withdrawing the fiduciary security object as debt repayment without the consent or knowledge of the debtor, and the creditor will conduct an execution auction without going through the court, causing the debtor to lose the fiduciary security object.

Therefore, the panel of judges in its decision ruled that the creditor must return the fiduciary security object to the debtor. Furthermore, the immaterial loss incurred by the debtor is the fear experienced when the fiduciary guarantee object is forcibly taken, and the debtor cannot exercise their rights, enjoy, or benefit from the object, especially since the vehicle is used by the debtor for daily work. Thus, the debtor can claim compensation for immaterial loss.

3. Causal Relationship Between the Act and the Loss (Causaliteitverband)

The causal relationship is the cause-and-effect connection between the unlawful act and the loss. This causal relationship is implied in Article 1365 of the Civil Code, which states that

an act that, due to its fault, causes loss. Therefore, the loss must arise as a result of a person's act.

This causal relationship can be described as the cause-and-effect link between the act committed and the resulting consequence. The loss would not have occurred if the perpetrator had not committed the unlawful act. The creditor committed an unlawful act by unilaterally withdrawing the fiduciary security object as debt repayment and conducting an execution auction without the debtor's voluntary surrender of the object, which is directly linked to the loss incurred by the debtor, causing the debtor to lose the vehicle and its benefits for daily work.

4. The Loss is Caused by Fault (Schuld)

An unlawful act requires the element of fault (schuld). An act is deemed by law to involve fault and may result in legal liability if it meets the necessary criteria: either intent or negligence is present, and there are no valid justifications or excuses, as an example force majeure, self-defense, or lunacy.

The perpetrator of the unlawful act is only responsible for the loss caused if the act can be attributed to their fault. The fault committed by the creditor is the arbitrary act of unilaterally withdrawing the fiduciary security object as debt repayment without the consent or knowledge of the debtor and conducting an execution auction, which clearly constitutes a wrongful act and is not justified by the applicable laws and regulations.

Therefore, the creditor must be held responsible for the obligation to make good (compensate) for what they have done that has caused loss. The basis for this responsibility is the obligation to pay compensation for actions that cause loss, as well as the obligation to fulfill the promises made or to act in accordance with established regulations. The creditor's responsibility includes paying for all losses suffered by the debtor, both material and immaterial. Furthermore, as the fiduciary recipient, the creditor is also obligated to return the fiduciary security object, given that they have committed an unlawful act and fulfilled all its elements when executing the fiduciary security object unilaterally and without going through the court process.

CONCLUSION

Relying on the discussion and analysis outlined above, it can be concluded that legal protection for debtors in the unilateral withdrawal of fiduciary security objects was not optimal before the Constitutional Court's decision. The provisions in Article 15 paragraphs (2) and (3) of Law No. 42/1999 on Fiduciary Security created an imbalance in the positions of creditors and debtors, resulting in the potential for arbitrary actions by creditors in carrying out parate execution.

This is contrary to the principles of justice and legal certainty guaranteed by Article 28D paragraph (1) and Article 28H paragraph (4) of the 1945 Constitution. Constitutional Court Decision No. 18/PUU-XVII/2019 provided an important correction to this injustice by affirming that the execution of fiduciary security objects executed by the creditor acting alone but must be done through a court mechanism or with the voluntary consent of the debtor. This decision serves as the legal foundation for protecting debtors and ensuring fair legal certainty in the process of fiduciary security execution.

Furthermore, creditors must be held responsible for any losses incurred by debtors, as emphasized in Article 8 paragraph (1) of Financial Services Authority Regulation No. 6/POJK.07/2022 concerning Consumer and Public Protection in the Financial Services Sector. The creditor's act of unilaterally withdrawing the fiduciary security object without the debtor's default constitutes an unlawful act as regulated in Article 1365 of the Civil Code. The creditor's actions also fulfill all four elements of an unlawful act. Therefore, the creditor is obligated to be liable by returning the fiduciary security object to the debtor and providing compensation for both material and immaterial losses incurred.

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