



# *Legal Protection for Ownership of Fiduciary Guarantee*

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**Abstract**— The study employs a statutory and conceptual methodology. The need for a fiduciary guarantee certificate to safeguard the parties' interests in a financing agreement will be determined by applying legal protection theory and ownership theory as analytical tools. The study's findings demonstrate that to reduce future disputes between debtors and creditors, debtors must comprehend the terms and legal ramifications of financing agreements utilizing fiduciary assurances. The debtor should be present when the deed is made to support the evidence and clarify the legal relationship between the fiduciary guarantee's goal and the financing agreement to lessen these issues. This is why this research suggests that the government quickly amend the Fiduciary Law and include an article stating that the parties must physically be present while executing a fiduciary guarantee deed.

**Keywords**— Breach of Contract; Fiduciary; Legal protection; Ownership.

## I. INTRODUCTION

This article seeks to resolve disagreements about executing fiduciary collateral objects in Indonesia. For parties entering into financing arrangements for fiduciary collateral things utilizing fiduciary certificates, Law Number 42 of 1999 respecting Fiduciary Guarantees (today known as UUJF) offers legal protection and assurance. This certificate can only be obtained by the parties signing a fiduciary guarantee deed before a notary. It is anticipated that this procedure will bolster the parties' case and comprehension of the legal measures they are pursuing to prevent future problems. Nonetheless, creditors that execute fiduciary collateral objects may encounter difficulties because they believe the debtor has broken the terms of the agreement. This scenario disturbs the community since coercion is frequently used in the execution procedure.

This research was conducted utilizing normative juridical research methodologies because of legal difficulties pertaining to claims over breach of contract that arose in the financing procedure for fiduciary guarantees. A conceptual and statutory approach was adopted to find the best legal structure to address these issues. Because a contract violation in a financing arrangement will result in a transfer of ownership of the object, the conceptual foundation for this study is the theory of legal protection and suitability. Because of this, it's essential to understand the rules and laws that safeguard each party to prevent disagreements and contract violations during the fiduciary financing process.[2]

The Indonesian legal system has created fiduciary succession to transfer an object's rights while retaining control over it from its former owner. Fiduciary collateral is the term used to describe the entity subject to this process, by the general explanation included in Article 1 number 2 UUJF. Anything that is moveable, tangible, intangible, or immovable can serve as fiduciary collateral. The approach is typically implemented due to a financial arrangement between the fiduciary recipient (the creditor), who has receivables, and the fiduciary supplier (the debtor), who has obligations. The foundation for the legitimacy of the agreement-making process is the Civil Code.[3]

In the realm of finance, financing, and credit transactions are commonplace. A fiduciary guarantee certificate is a crucial legal document in the context of this study since it is a document that assures creditors of the funding given to debtors. To protect loans or other money given to debtors in the case of a contract breach in the future, creditors require a fiduciary guarantee certificate. This certificate grants the authority to supersede any assets the debtor may own over those of other creditors. Not much emphasis has been placed on the necessity of the debtor's presence in making a fiduciary guarantee deed, notwithstanding the UUJF's regulation of the fiduciary guarantee certificate process. This truth is demonstrated by the fact that many debtors who execute a fiduciary guarantee deed still grant power of attorney to third parties. However, in performing a fiduciary act, parties—especially debtors—are not expressly required to be present in person under the terms of the UUJF.[4]

Making a fiduciary deed requires the presence of the debtor since it will serve as first proof if there is a dispute between the parties. Despite the legal fiction principle known as the assumption of knowledge (presumption iures de iure), it is undeniable that only some are equally knowledgeable. It is vital in this context to look at the conceptual underpinnings of agreements that form the basis of the legal relationship between debtors and creditors in financing fiduciary collateral items. According to Article 1320 of the Criminal Code, the parties' agreement is one of the requirements for a contract's legitimacy. This article's study will be conducted using legal protection theory and ownership theory to determine the necessity of the debtor's presence in performing a fiduciary deed.[5]

Two subtopics will each get a presentation of the analysis. Initially, the two theoretical bases will be explained in the subsection labeled "The Urgency of Legal Protection and Ownership in Theoretical Reviews." Secondly, the analysis will proceed with a presentation titled 'Legal Protection Framework for Ownership of Fiduciary Guarantee Objects: The Urgency of the Debtor's Presence in Making a Fiduciary Guarantee Deed to Prevent Breach of Contract and Execution Disputes,' which elucidates the legal framework governing the financing process involving fiduciary guarantees, considering the interplay between theoretical frameworks and current legal issues.[7]

## II. LITERATUR REVIEW

### A. *Fiduciary Guarantee's Characteristics*

Some laws use the word "guarantee". Articles 1131 and 1132 BW specify the following among them: Article 1131 states that "All the debtor's property, both movable and immovable, both existing and new in the future, become collateral for all individual engagements." Article 1132: "The goal is a mutual guarantee for all those who owe it; Unless there are good reasons for the creditors to have priority, the proceeds from the sale of the items are divided by the balance, or the amount of each party's receivables. Next, in the Explanation of Section 8 of Law Number 7 of 1992 about Banking (State Gazette of the Republic of Indonesia of 1992 Number 31, Supplement to the State Gazette of the Republic of Indonesia Number 3472; subsequently referred to as Law No. 7/1992) as revised by Law Number 10 of 1998 about Modifications to Law Number 7 of 1992 about Banking (State Gazette of the Republic of Indonesia of 1998 Number 182, Supplement to the State Gazette of the Republic of Indonesia Number 3790; subsequently referred to as Law No. 10/1998), among other things, it says the following: An explanation of Article 8 "Banks must adhere to the principles of credit or funding based on sound Sharia Principles while implementing their Sharia-based lending or financing because it carries risks. The bank must consider assurances for extending credit or budget based on Sharia Principles, which convey the bank's confidence in the debtor customer's ability to fulfill their commitments per the agreement to mitigate this risk.

### B. *Owner of Objects in Fiduciary*

Fiduciary objects are imposed through a fiduciary guarantee deed (AJF), which implies that the fiduciary object has since been used as collateral to settle specific debts. The ownership rights of the fiduciary object have been transferred in the fiduciary agreement (AJF), meaning that either the fiduciary recipient or the creditor will eventually become the sole owner of the fiduciary thing. If the debtor or fiduciary provider mishandles the object, creditors or recipients are legally protected by the imposition of fiduciary objects. Execution in the event of default by the debtor or fiduciary provider is straightforward and precise. That's why, upon the debtor's or fiduciary giver's declaration of bankruptcy, the creditor or fiduciary recipient gets the right to sell the fiduciary object. Based on its historical background, the fiduciary guarantee institution did not emerge overnight. Instead, it was founded on the following factors like the fiduciary is held accountable for the incapacity of pawning and mortgage institutions to accommodate the parties' wishes, the objects of fiduciary security were only capital objects or debtor investment objects, which included movable rather than immovable objects. This meant that if the creditor received the objects of fiduciary protection, the debtor would no longer be able to operate his business, making it more difficult for him to fulfill his responsibilities to the creditor. The object of fiduciary security has grown to the point where

any object with economic value—not just capital goods—can be used as the subject of fiduciary guarantees. Other than that, initially, the object of a fiduciary contract lacked a record of rights or ownership, such as a document proving the object's ownership or rights. So if it consists solely of requests or demands, it is sufficient that the record of rights or ownership of the object of the fiduciary security is provided to the creditor, such as BPKB for currently registered motor vehicles.

### III. METHOD

The type of research used is normative juridical research. According to this theory, written standards created and issued by recognized organizations or authorities are the same as laws. According to this theory, the law is a closed, autonomous normative framework isolated from society's everyday activities. The descriptive-analytical research specification is the one that is being employed. While grammatical analysis examines an event (writing, deed, etc.) to ascertain the actual circumstances, descriptive research seeks to characterize a problem in a specific domain. To gather primary data for this study, data from the library is collected using a library data collection approach. The statutory, case, and conceptual strategies are among the methods employed. Law science perspectives and doctrines inform legal procedure (statute method) and conceptual approach (conceptual approach).

### IV. RESULT AND DISCUSSION

It's common to think of personal and ownership rights as legal outcomes stemming from the state of an object. G. The original concepts of ownership by Jeremy Waldron and L. A. Hart were further expanded. Waldon's ownership idea can give a clear picture of the interactions and outcomes between individuals as subjects of Law and the items they own. Waldron created this idea by beginning to doubt the definitions of ownership and rights. Waldron defines property as something that belongs to the person who has the legal authority to decide what can and cannot be done. This is explained in his book *The Right to Private Property*. Waldron emphasizes "legally valid" as the authority to act based on the rule of Law. The argument based on the lack of societal norms or boundaries that forbid such behaviors is also rejected by this expression. The necessity of comprehending private ownership has been made clear by the implementation of a democratic system that upholds the rule of Law and includes all clauses pertaining to penalties, agreements, defaults, and monogamous families.[8]

Above all authority must be the Rule of Law, which forms the foundation for social norms in a state with legal protections. According to Waldron, a law must be logically enforceable in two ways: (1) it must be available to everyone so that they may choose what needs to be done, and (2) legal procedures must be able to shield ordinary people from the potential for abuse of power by individuals or public authorities. When protecting an individual's personal property, this idea of legal supremacy serves as a guide. The legal protections also guarantee that the state does not monopolize and that everyone has an equal chance to nurture their property using the powers the state has bestowed upon them.[9] Furthermore, Waldron's conception of ownership is based on the idea that one is not required to give precedence to any advantages that others could gain from cultivating one's possessions. Fulfilling an individual's interests is intimately linked to personal ownership. Since rights and interests go hand in hand, a person entitled to an item (a fiduciary promise) may utilize it, whichever best serves their interests. Waldron also introduces the idea of private ownership and argues for the rights resulting from this ownership. Claims on fiduciary collateral objects may be made through personal ownership as a type of special request (SR). In this instance, a financing agreement for the fiduciary guarantee creates a new subject entitled to the goods subject to the fiduciary rights.[10]

According to Waldron's ownership theory, the notion of ownership of the object that is the subject of the fiduciary guarantee is clearly connected to the existence of a fiduciary agreement. This argument is based on assigning ownership rights to a thing with fiduciary security rights attached to it. Article 1 UUJF generally states that a fiduciary acknowledges the existence of a trust, meaning that when an object is loaded with fiduciary security rights, the debtor, as the fiduciary giver, no longer owns it; instead, the creditor, as the fiduciary recipient, retains control over the object. Moreover, fiduciary promises maintain their adherence to the entity providing the fiduciary item, as explained by Article 20 UUJF. It is understood that there is a *droit de suite* principle at play in this situation, meaning that the owner of the thing always retains absolute rights to it.

A legal protection mechanism is required to ensure ownership rights of fiduciary objects. The Government introduced the concept of ideal legal protection in Paragraph 4 of the Preamble to the 1945 Constitution. The Indonesian government recognizes Philipus M. Hadjon as one of the experts who may define legal protection. The acceptance of the Constitution and the defense of every Indonesian citizen's human rights are examples of this description in action. According to Philipus M. Hadjon's concept of legal protection, human rights are

acknowledged and protected. Considering the philosophy of legal protection that has emerged in Western nations, it is necessary to restrict the State's and the populace's responsibilities.[11]

The people's interests are shielded against the arbitrary actions of those in positions of authority by restrictions on government commitments. To prevent arbitrariness among members of society, the same idea is also used to limit power and obligations among citizens. Implementing the Law can accomplish its intended purposes—providing justice, benefit, and certainty—with these limitations. Philipus M. Hadjon clarified that at least two strategies can be employed to offer legal protection. The government's first example of preventative legal guardianship is allowing legal subjects to voice their objections to government decisions. Imposing restrictive legal security is the second method. This function of legal protection will manifest itself in the context of settling existing disputes. One use for this capacity is the Indonesian administrative and general courts' dispute resolution capabilities. When a breach occurs, the fundamental form of this protection is demonstrated by the imposition of fines, jail time, or other consequences.

The Government has adopted the legal protection mechanism for financing agreements for fiduciary collateral objects per the theoretical description of legal protection. The existence of a system for creating fiduciary deeds and certificates demonstrates the legal protection that acknowledges and defends citizens' right to limit arbitrariness amongst one another. To register fiduciary guarantees and receive a guarantee certificate from the government, a fiduciary guarantee deed executed before a notary becomes genuine documentation in UUJF. This certificate is proclaimed to have the same executorial authority as a court ruling, which has an unchangeable legal effect, according to UUJF. Furthermore, as stated by the Government in Article 15 paragraph (3) of the same Law, if the debtor breaches the terms of the agreement, the executorial nature of a fiduciary guarantee certificate may be applicable, granting the fiduciary recipient the authority to sell the fiduciary object.

Based on this presentation, the government has supplied guidelines about the implications of a financing arrangement for fiduciary collateral items. The declarations in Article 1 and Article 15 UUJF accommodate these two elements, according to the principle of ownership and legal protection. As a result, the subject of the fiduciary's assurance has received rights from the fiduciary. The fiduciary provider (debtor) and the fiduciary recipient (creditor) can now transfer ownership thanks to the mechanism included in a financing agreement for fiduciary objects. On the other hand, control over assets that belong to the fiduciary is permitted by the fiduciary's trust concept. The government has established legal protection mechanisms in the form of preventative and repressive measures in the event that promises are broken regarding the accomplishment of the agreed-upon goals.

The fact that the parties have registered a certificate for fiduciary affairs is genuine preventive proof designed to avert any disputes. This certificate provides evidence that both parties have mutually understood the goals that the debtor and creditor must accomplish. It also shows that violators of this agreement will face legal repercussions. A fiduciary guarantee certificate is supposed to safeguard a repressive form in addition to having legal force. In the event that a breach of contract occurs and the debtor refuses to voluntarily transfer the fiduciary guarantee's object, the issue may be settled using the fiduciary guarantee certificate.[12]

The Government stressed in the Court Decision the need to protect all parties by interpreting the executorial nature of UUJF's Article 15, paragraphs (2) and (3). In the event of a contract breach, creditors can seize fiduciary collateral items thanks to the government's ongoing efforts to guarantee the transfer of rights based on trust through a financing agreement mechanism for fiduciary collateral objects. Nevertheless, the procedures mandated by the Constitutional Court must be followed to execute the fiduciary guarantee goal. The debtor's desire to carry out direct execution must be considered. This criterion is put in place to shield borrowers against aspects of coercion used by creditors. Next, if the debtor refuses to surrender willingly, the government safeguards the creditor by providing a channel for the court to be notified of the execution processes.

The provisions of Article 20 UUJF, which applies the *droit de suite* or absolute rights over objects principle, provide another layer of legal protection that the government extends to creditors based on ownership recognition. This protection ensures that ownership rights are recognized by the government regardless of who owns the fiduciary security object. This clause also safeguards fiduciary proper recipients, allowing them to have their rights given priority if other creditors have comparable interests. This protection results from the fiduciary registration concept of publicity, which enables each individual to guarantee that items registered as fiduciary collateral cannot be re-registered by another party. Aside from that, the fiduciary rights holder will prioritize getting the debt paid back if the debtor files for bankruptcy and the asset needs to be liquidated.

The Debtor's Presence is Required to Prevent Contract Breach and Execution Disputes: The Legal Protection Framework for Ownership of Fiduciary Guarantee Objects 1.mTo provide legal protection and clarity on the ownership of fiduciary collateral objects, the government has established several regulations that can be used as an umbrella to address fiduciary rights assurances made by a debtor to a creditor. The fiduciary has maintained control over the object through a finance agreement based on fiduciary deposits, per the fiduciary principle outlined in Article 1 of the UUJF. The Government requests that the UUJF be registered at the office that handles

fiduciary concerns right away. Presidential Decree Number 139 of 2000 authorized the government's establishment of Fiduciary Registration Offices in every Provincial Capital City. The registration procedure will guarantee that the publication principle can carry out the parties' fiduciary agreements. This fiduciary certificate is crucial documentation supporting the legitimacy of the ownership claim for the object that serves as the fiduciary's guarantee, as previously discussed in the subtopic. In the event of a breach of contract, creditors will have legal protection to execute with the help of a fiduciary guarantee certificate. If the debtor is unwilling to relinquish the item freely, the creditor can obtain possession through the legal system. If a mechanism for resolving these requirements exists in the agreement, creditors are not allowed to assert claims for breach of contract in this situation unilaterally.[13]

The party receiving the fiduciary must register the fiduciary guarantee deed before a notary within a maximum of 30 days of the deed's completion to obtain a certificate, per the terms of Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making a Fiduciary Guarantee Deed. A fiduciary guarantee deed must have, at minimum, the following elements, according to Article 6 UUJF there are the parties' identities, primary agreement information, item description, the loan amount, value of the object. The debtor must verify the accuracy of the information, considering the fiduciary guarantee deed's completeness. A fiduciary guarantee deed executed in front of a notary is, in theory, crucial documentation in the event that the debtor and the creditor ever engage in civil litigation. Because of this, a requirement that can support the evidence is the debtor's presence, who can attest personally to the accuracy of the information provided about the fiduciary object and his readiness to enter into a financing agreement willingly. Nevertheless, UUJF does not require the debtor's attendance to complete the deed.[14]

Since there are no unique conditions for creating a fiduciary guarantee deed in the UUJF, Article 1902 of the Criminal Code (CC) is cited in the deed's creation. Parties may designate proxies or representatives to carry out the act, as stated in the second paragraph of that article. Furthermore, the authority may only be provided with the permission of the parties, as stated in CC Articles 1792–1819. In this case, the debtor may end up losing future benefits if they designate a power of attorney or agent to execute a fiduciary guarantee deed. Of course, there is no proper way to resolve default and execution disputes if we apply the legal fiction principle, which holds that all citizens are presumed to have knowledge of the regulations' contents and comprehend the legal ramifications of their existence. The statutory regulations make it clear that when a debtor consents to the process of granting a fiduciary to a creditor, there has been a rights transfer. However, this does not imply that the debtor has fully comprehended the terms of the fiduciary agreement they have made or the legal ramifications that arise from its existence.

Since the notary will read the agreement's contents throughout this process, the debtor must be present in person when the fiduciary deed is being prepared. Even though fiduciary agreements are usually accepted, debtors nonetheless have the right to request information about the specifics of the arrangements they have made. The debtor's direct attendance allows the parties and the notary who assisted in the deed-making to guarantee that the debtor is aware of all requirements that must be met and circumstances that could result in a contract violation. When entering into a fiduciary deed, understanding and agreeing upon a payment settlement method in the event of default or agreement violations by the debtor is equally essential for creditors and debtors. Nonetheless, we make reference to the idea of legal protection and ownership. If so, a fiduciary guarantee deed is the foundation for a certificate that will be considered substantial evidence in preventing and resolving disagreements regarding who owns fiduciary collateral items.[15]

## V. CONCLUSION

According to the study, the debtor's participation in a fiduciary deed is essential to defending their legal rights. This clause promotes equality in talks, guards against possible power abuse, prevents miscommunication when addressing contract violations, and gives all parties to finance agreements with fiduciary assurances more clarity and transparency. The debtor has the chance to ask questions that he needs to know the answers to before consenting to the procedure for transferring rights to fiduciary objects, and they can read the transactions in detail when the debtor is present in person during the deed execution. To reduce disputes originating from the execution process in the case of a breach of contract, this condition might reinforce the proof and comprehension of the legal connection arising from the financing agreement about the fiduciary guarantee. The research suggests that the government amend the Fiduciary Law immediately and include a clause requiring the parties to be present at the meeting when they execute the deed directly.

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