

## Degradation of the Position of Fiduciary Creditors In Debtor's Bankruptcy

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**ABSTRACT:-** Collateral is very important in business activities. Financing institutions in disbursing funds to business actors to obtain capital really need collateral to ensure the security of their receivables. One of the characteristics of collateral is that it provides a preferential and separatist position to creditors who receive material collateral. Separatist creditors mean that creditors are not affected by the debtor's bankruptcy. Thus, if the debtor experiences bankruptcy, the creditor can immediately sell the fiduciary collateral object. After the issuance of the latest bankruptcy law, the position of creditors as separatist creditors, including fiduciary recipients, has been degraded. The research aims to discover and analyze the background to the degradation of the position of fiduciary recipients in debtor bankruptcy. This research uses empirical juridical methods by examining legal principles, legal regulations and the implementation of fiduciary guarantees. The research results show that the position of fiduciary recipients has been degraded. The facts show that there have been inconsistencies between regulations and there is a waiting time in the sale of fiduciary collateral objects in the event that the debtor goes bankrupt. This often becomes an obstacle for creditors in returning their receivables.

**Keywords:** degradation, guarantee, fiduciary, bankruptcy, collateral

### I. INTRODUCTION

Business actors in developing their businesses always need capital. This capital is obtained from internal and external sources. If the capital comes from external sources, other parties are needed, namely financing institutions, both banks and non-banks. Funds from other parties are usually in the form of loans. In this case, the financing institution as the party that distributes financing to other parties has a high risk. To anticipate the possibility of non-payment of the creditor's receivables, collateral is very necessary. Collateral is needed to mitigate risk.[1]Collateral is very important for creditors in obtaining their rights, namely the return of their receivables from debtors.[2]Norman Mugarura[3]suggests that guarantees are used to provide security against the risk of default in business practices. Lorenzo Gai And Federica Lelasi[4] argued that "for creditor security from the risk of default on creditor receivables, it is important to control moral hazard in financial institutions and ensure financial sustainability from public intervention." Regulations regarding collateral are very necessary in credit management to anticipate risks on the part of financial institutions as fund distributors[5].

Fiduciary is the transfer of ownership rights to an object on the basis of trust with the stipulation that the object whose ownership rights are transferred remains in the control of the owner of the object (Article 1 point 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees/Fiduciary Guarantee Law). Fiduciary Guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral. for repayment of certain debts, which gives the Fiduciary Recipient a preferred position over other creditors (Article 1 number 2 of Fiduciary Guarantee Law).

Article 1 point 1 of the Bankruptcy Law states that "Bankruptcy is a general confiscation of all the assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge." Bankruptcy has significant consequences for different groups of society as well as important issues for companies. Therefore, it is necessary to predict and anticipate the occurrence of bankruptcy and the risk of non-payment of creditor receivables[6].The benefit of bankruptcy prediction is to provide protection for business actors, both financial institutions and shareholders, to realize investment choices[7]. Bankruptcy

prediction also functions to provide early anticipation in managing the company's financial position[8]. One effort to predict and anticipate bankruptcy is to impose material collateral, one of which is fiduciary collateral.

If the debtor goes bankrupt, the creditor receiving the fiduciary should be able to immediately execute the collateral object. This is because the object of material collateral is separate from other assets. The object of fiduciary collateral is not included in the bankruptcy estate. Regulations regarding Fiduciary Recipient Creditors in the event that the debtor goes bankrupt are contained in the Fiduciary Guarantee Law and the Bankruptcy Law.

The results of the research show that in implementation in the field there has been a degradation of the special position of fiduciary creditors. If a debtor goes bankrupt, as a creditor holding material collateral, he should have the position of a separatist creditor. Therefore, if the debtor goes bankrupt, the creditor can immediately execute the fiduciary guarantee object. In practice, it turns out that creditors cannot immediately execute the collateral object, but there is a waiting time. This often becomes an obstacle for creditors in returning their receivables.

## II. RESEARCH PROBLEM

The problem of this research is why is there a degradation in the position of fiduciary creditors in debtor bankruptcy?

## III. RESEARCH PURPOSES

This research aims to determine and analyze the background to the degradation of the position of fiduciary creditors in debtor bankruptcy.

## IV. MATERIAL

### 1. The Concept of Fiduciary Guarantee

Broadly speaking, guarantees are divided into two, namely general guarantees and special guarantees. Special guarantees include material guarantees and personal guarantees. Material guarantees and individual guarantees are very different. Material collateral always has certain objects that are the object of collateral. This material guarantee gives rise to absolute property rights. It is absolute, meaning it can be defended against anyone. Material guarantees include Fiduciary Guarantees.

A Fiduciary Giver is an individual or corporation who owns the object that is the object of the Fiduciary Guarantee. A Fiduciary Recipient is an individual or corporation who has receivables whose payment is guaranteed by a Fiduciary Guarantee. In this case it is the creditor.

The principles contained in implied warranties are in Article 1131 and Article 1132 of the Civil Code. In principle, someone who is in debt is obliged to pay their debt. If necessary, the debtor sells his assets to pay the debt (Schuld and Haftung principles). The position of creditors is the same (principle of creditorium parity), namely as concurrent creditors. As a result, creditors receive less legal protection. Therefore, creditors generally ask for special collateral in the form of material collateral.

In Article 1132 of the Civil Code it is explicitly stated that there is an exception to the principle of equal position of creditors, namely if there is a valid reason to prioritize one receivable over another. A valid reason is if there are receivables with privilege rights, pledges and mortgages. Privilege is a guarantee that arises because of law. Pawns and mortgages are material guarantees that arise because of an agreement.

Currently, apart from mortgages and pawns, there are also fiduciary guarantees and mortgage rights. Article 1134 paragraph (2) of the Civil Code states that Pawns and Mortgages (in this case including Mortgage Rights and Fiduciary Guarantees) are higher than privileges. This shows that creditors holding material collateral have a strong position. This is in accordance with the principle of justice for the parties, considering the large risk for creditors regarding the return of their receivables. Therefore, this material guarantee is very necessary to guarantee the security of the receivables.

Fiduciary Recipient Creditors have a strong position because they are preferred creditors and separatist creditors. Preferred creditors are creditors who have the right to receive repayment of receivables before other creditors. This is regulated in Article 1 number 2 and Article 27 of the Fiduciary Guarantee Law. This arrangement is in line with the regulation in Article 1132 of the Civil Code regarding preferential rights for creditors holding material collateral.

### 2. The concept of bankruptcy

In Article 1 number 1 of Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, it is stated that "Bankruptcy is a general confiscation of all assets of the Bankrupt Debtor, the management and settlement of which is carried out by the Curator under the supervision of the Supervisory Judge as regulated in the Law. Invite this."

In a debtor's bankruptcy, the Fiduciary Recipient Creditor acts as a separatist creditor. Separatist creditors are creditors who are not affected by the debtor's bankruptcy. Article 27 of the Fiduciary Guarantee Law states that the preemptive rights of fiduciary recipients are not extinguished due to the debtor's bankruptcy.

As a separatist creditor, the fiduciary creditor should be able to carry out immediate execution in the event the debtor goes bankrupt. This is because the object of the mortgage right is an object that has been separated from the debtor's other assets. Juridically, objects that are the object of fiduciary collateral are not included in the bankruptcy assets in the event that the debtor goes bankrupt.

Based on Article 55 paragraph (1) of the Bankruptcy Law, fiduciary creditors as separatist creditors should be able to sell the goods which are the object of collateral themselves. From the sales proceeds, the fiduciary's creditor takes the repayment of the receivable. If there is any remaining sale proceeds after deducting creditors' receivables, then the remainder is deposited into the curator's treasury as bankruptcy assets. On the other hand, if the sales proceeds are not sufficient to pay off the creditor's receivables, the creditor can include the deficiency in the claim as a concurrent creditor (Article 138 of the Bankruptcy Law).

## V. RESEARCH METHODS

The approach method used in this research is an empirical juridical approach because the research will carry out literature research and field research to understand and analyze the degradation of the position of fiduciary creditors in debtor bankruptcy. The research specifications used are analytical descriptive. In accordance with the empirical juridical research approach, in this case library research was carried out to obtain secondary data and field research to obtain primary data. The analysis technique used is descriptive qualitative, namely the research results are combined with data analysis in the form of descriptions. The results of this analysis will be presented in the form of a systematic description by connecting one legal material with another in accordance with the problems raised in this research, namely regarding the position of fiduciary creditors in the debtor's bankruptcy.

## VI. DISCUSSION

In the business world, capital is a determining factor in the success of a business. Every business actor always needs capital to start or develop a business. Financial capital is a key factor of production that gives rise to an array of complex contracting relationships among owners, managers, and creditors.[9] Capital can be obtained from oneself (internal) or from other parties (external). If capital is obtained from other parties, whether bank or non-bank financing institutions, then it is generally based on an agreement.

Sudikno Mertokusumo[10], Siti Malikhatun Badriyah[11] stated that an agreement is a legal relationship between two or more parties based on an agreement to give rise to legal consequences. In an agreement there are three stages, namely the pre-contractual stage, the contractual stage and the post-contractual stage. At the pre-contractual stage, an offer and acceptance occurs between the parties. After that, there is a conformity of will at the contractual stage. It is at this stage that the agreement takes place. With the occurrence of an agreement, an agreement arises between an agreement. An agreement is a legal relationship in the field of property between two parties which gives rise to rights on one party and obligations on the other party in an achievement.

This achievement can be in the form of giving or handing over something, doing or not doing something that is required by the agreement. This pretation must be implemented by the parties. Based on the principle of the binding force of an agreement (*pacta sunt servanda* principle) as stated in Article 1338 of the Civil Code that "An agreement made legally applies as law for the parties as binding law." If the agreement that has been made by the parties complies with the terms of a valid agreement, then the agreement is valid. If the agreement is valid then the parties are obliged to carry it out.

One of the agreements that often occurs in people's lives is a debt and receivable agreement. The definition of debt and receivables is the same as a loan and borrowing agreement as regulated in the Civil Code, Article 1721, which states: "a loan and a loan is an agreement in which one party gives another party a certain amount of goods and they are used up on condition that the latter it will return the same amount of the same kind of situation."

In a debt and receivable agreement between a debtor and a creditor there will also be an obligation. Creditors are obliged to fulfill their achievements in the form of handing over certain items that have been used up. The debtor is obliged to return the goods he borrowed. In financing for capital procurement, debt and receivable agreements are widely used. Because the financing agreement for procuring capital contains high risks for the party providing the loan (creditor). To reduce this risk, guarantees are needed.

The function of collateral in an agreement is to create confidence in the debtor's ability and ability to carry out its obligations. To obtain this confidence, before providing a loan, the financing institution as a creditor will assess the prospective debtor. This assessment includes Character, Capacity, Capital, Collateral, Economic Conditions. These five elements are usually called the five C (5'C) of Credit.

Of the five elements, the easiest and considered to provide more legal protection for creditors is collateral. This is because collateral can be used directly to obtain credit repayment in the event the debtor defaults.

The fiduciary creditor has the right to sell the fiduciary collateral object without going to court if the debtor defaults. The sale of fiduciary collateral objects in the event that the debtor defaults can be carried out in 3 ways as regulated in Article 29 of the Fiduciary Guarantee Law:

- 1) Sale of fiduciary collateral objects under the authority of the fiduciary recipient himself to sell fiduciary collateral objects. The proceeds from the sale of the fiduciary collateral object are used to pay off the debtor's debt. If there is still a remainder from the sale of the fiduciary object after deducting creditors' receivables, then the remainder must be returned to the fiduciary.
- 2) Sale of Fiduciary Guarantee objects based on the executorial title on the fiduciary guarantee certificate. On the fiduciary guarantee certificate there is a statement "For Justice Based on Belief in One Almighty God." This shows that the fiduciary guarantee certificate has executorial power. Executorial power means that a fiduciary guarantee certificate has the same power as a court decision that has permanent legal force.
- 3) Underhand sales.

The sale of fiduciary collateral objects in the first and second ways must be carried out by auction. Auction as a method of selling has a private function and a public function. Auctions are said to have a private function because auctions are market institutions that bring together sellers and buyers. Auctions function to facilitate the flow of goods trade traffic. Apart from that, auctions can also fulfill justice for the giver and holders of mortgage rights. Auctions also fulfill a public function because auction sales are known to the public. Thus fulfilling the principle of publicity in fiduciary guarantees. With the auction, the public and parties with an interest in the object of fiduciary guarantee can find out.

For private sales of fiduciary objects, there must be an agreement between the fiduciary giver and the fiduciary recipient. In addition, private sales of fiduciary collateral objects must be announced in at least two daily newspapers circulating in the local area. This is to fulfill the principles of justice for those giving fiduciary rights and those receiving fiduciary rights.

The main function of fiduciary guarantees is basically the same as guarantee institutions in general, namely to guarantee the security of creditor receivables.[12] Fiduciary guarantees will provide more confidence to creditors that debtors will carry out their obligations in accordance with the main agreement. There are various types of agreements that can be guaranteed by fiduciary guarantees, one of which is a debt and receivables agreement.

The definition of debts and receivables is the same as a loan agreement found in the Civil Code Article 1721 which reads: "a loan is an agreement in which one party gives another party a certain amount of goods and they are used up on condition that the latter will return the same amount from the same type of situation." Regarding the rights of fiduciary recipients in the event of a debtor going bankrupt, in Indonesia there are conflicting regulations regarding creditors holding mortgage rights in the event of a debtor going bankrupt. Fiduciary guarantee is one of the material guarantees. Therefore, it gives rise to material rights. Material rights have the following characteristics: they are absolute rights, they provide a preferential position, namely the position of having priority in repayment of receivables compared to other creditors (Article 27 Paragraph (1) of the Fiduciary Guarantee Law). The priority right is the right of the Fiduciary Recipient to collect the receivables from the execution of the object which is the object of the Fiduciary Guarantee. (Article 27 paragraph (2) of the Mortgage Law in conjunction with Article 55 paragraph (1) of the Bankruptcy Law. In addition, creditors also have the position of separatist creditors. Separatist creditors are creditors who are not affected by the debtor's bankruptcy. Rights Priority of the Fiduciary Recipient is not removed due to bankruptcy and/or liquidation of the Fiduciary Giver (Article 27 Paragraph (3) of the Fiduciary Guarantee Law.

Article 55 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payments (Bankruptcy Law) states that "by still paying attention to the provisions as intended in Article 56, Article 57, and Article 58 every creditor holding a pledge, guarantee fiduciaries, mortgages, mortgages, or collateral rights for other objects, can execute their rights as if bankruptcy had not occurred." As a separatist creditor, the fiduciary recipient should be able to directly execute the collateral object. On the other hand, there is a different regulation in Article 56 paragraph (1) of the Bankruptcy Law which states that "The creditor's right of execution as intended in Article 55 paragraph (1) and the right of a third party to claim his assets which are in the control of the bankrupt debtor or curator, suspended for a maximum period of 90 (ninety) days from the date the decision to declare bankruptcy is pronounced." This clearly shows that the Bankruptcy Law is inconsistent in regulating the position of creditors holding mortgage rights. On the one hand, based on Article 55 paragraph (1) of the Bankruptcy Law, creditors can exercise their rights as if bankruptcy had not occurred. In Article 56 paragraph (1) of the Bankruptcy Law, execution by creditors must wait for the stay period, which is a maximum of 90 days after the debtor is declared bankrupt.

From the provisions of Article 56 paragraph (1) of the Bankruptcy Law, it can be seen that there is a degradation in the position of separatist creditors. This provision denies the separatist rights of fiduciary creditors recognized by Article 55 paragraph (1) of the Bankruptcy Law, because it determines that objects encumbered with fiduciary guarantees are the same as bankruptcy assets. This is also different from Article 27 of the Fiduciary Guarantee Law.

The occurrence of inconsistencies in regulations regarding creditors in the event of a debtor going bankrupt and the degradation of the position of fiduciary creditors in Indonesia results in a lack of legal certainty and legal protection for creditors. This often causes conflicts that lead to disputes in court.

## VII. CONCLUSION

The position of fiduciary creditors in debtor bankruptcy has experienced degradation. This can be seen from the execution of fiduciary guarantees in the event that the debtor goes bankrupt, they should be able to immediately sell the fiduciary collateral object, but in practice they have to wait a 90 day waiting period first. There are inconsistencies in regulations regarding the position of separatist creditors in the event of a debtor going bankrupt. This can give rise to legal uncertainty and a lack of legal protection for creditors.

## RECOMMENDATIONS

Legislators should make laws and regulations relating to the position of creditors receiving fiduciary collateral in the event of a debtor going bankrupt in an integrated manner and not in conflict with each other.

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