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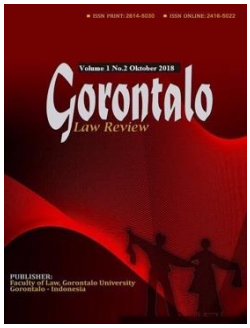

LEGAL PROTECTION OF DEBTORS ON FINANCING AGREEMENTS WITH FIDUCIARY GUARANTEES IN THE FORM OF MOTORIZED VEHICLES

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Abstrak

Perbuatan mengalihkan kendaraan bermotor objek jaminan fidusia kepada pihak ketiga tidak boleh dilaksanakan oleh pihak debitur tanpa persetujuan tertulis dari kreditur, tindakan debitur ini bisa dikategorikan penggelapan, maka keabsahan keberadaan kendaraan bermotor sebagai jaminan fidusia dalam perjanjian pembiayaan akan dipertanyakan statusnya. Dalam penelitian ini, peneliti menggunakan metode penelitian hukum normatif dengan jenis pendekatan yang digunakan dalam penelitian ini adalah pendekatan konsep dan pendekatan perundang-undangan. Berdasarkan hasil penelitian ditemukan bahwa dalam praktiknya di Kota Batam, pengalihan hak atas objek jaminan kendaraan bermotor yang dilaksanakan oleh debitur pertama kepada debitur kedua dilaksanakan dengan menyerahkan secara langsung objek kendaraan bermotor tersebut dengan menggunakan perjanjian di bawah tangan. Peralihan hanya dibenarkan jika adanya ijin dari pihak perusahaan pembiayaan. Debitur kedua yang memiliki itikad baik sudah memperoleh peralihan hak dari debitur pertama dengan melakukan pembayaran angsuran hingga lunas kepada perusahaan pembiayaan. Selanjutnya Perlindungan hukum terhadap debitur atas kendaraan bermotor sebagai jaminan fidusia dalam financing agreement bahwa debitur pertama wajib melakukan roya terhadap berakhirnya perjanjian fidusia, yang selanjutnya menyerahkan bukti kepemilikan kendaraan bermotor kepada debitur kedua yang beritikad baik terhadap terpenuhinya piutang kreditur, sehingga fungsi jaminan sebagai pelunasan hutang telah terpenuhi.

Kata Kunci: Fidusia; Debitur; Perlindungan Hukum

Abstract

Transferring a motor vehicle as a fiduciary guarantee to a third party may not be carried out by the debtor without written approval from the creditor. This debtor's actions can be categorized as embezzlement, so the validity of the existence of motorized vehicles as fiduciary guarantees in the financing agreement will be questioned. The researcher used a normative legal research method with a conceptual and statutory approach in this study. The results showed that in Batam, the rights transfer of the motor vehicle guarantee from the first debtor to the second debtor was carried out by directly handing over the motor vehicle using a private agreement. The transfer is only allowed if there is permission from the finance company. The second debtor who has good faith gets the transfer of the rights from the first debtor by making installment payments until it is paid off to the finance company. When the payments are fully paid, the legal protection given to the debtor for the motor vehicle will end after the first debtor performs Roya (abolition of the mortgage) and submits proof of ownership of the motor vehicle to the second debtor, who has good intentions in fulfilling the creditor's receivables.

Keywords: Fiduciary; Debtor; Legal Protection.

1. INTRODUCTION

National development is intended for all Indonesian people. It is based on Pancasila and the 1945 Constitution of the Republic of Indonesia (Indriani, 2019) and is carried out to achieve a prosperous and just society. To realize sustainable development, development actors, individuals, and legal entities, the government and the community, require substantial funds Indonesia (Indriani, 2019). On the other hand, the need for funding also increases along with the increase in development efforts. Most of the funding is obtained from lending and borrowing activities.

The public's need for capital or funding tends to increase due to economic developments and the need for capital to do business. In fulfilling this capital, the bank provides various types of credit to help needy people. One is credit assistance from third parties who can provide debtor loans. The bank is one of the financial institutions that carry out the process of lending and borrowing by providing credit assistance and other banking services. The provision of credit assistance is carried out by the bank either by trading new means of payment or with its capital (Mursid, 2018). In the current era, many non-bank financing institutions have emerged to improve the community's economy. The emergence of these various institutions has contributed greatly to the community's economic development. This financial institution exists as a form of providing funds or goods for public capital in purchasing goods whose payments are carried out periodically or in installments (Bawazier, 2010). This financial institution is also known as the consumer financing system. A guarantee is needed to keep the refund given on credit safe and smooth. Likewise, credit security in banking practice is carried out by binding a guarantee (Kamelo, 2006). Generally, there are two types of guarantees in credit, namely material guarantees and personal guarantees. Banks are mostly interested in material security, one of which is a fiduciary guarantee.

In granting a loan, the debtor can apply for collateral to the creditor. This guarantee can be in the form of movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with mortgage rights, or called fiduciary guarantees (Yasir, 2016). As regulated in Indonesia Law, Number 42 of 1999 concerning Fiduciary Guarantees (From now on referred to as the Fiduciary Guarantee Law), the object of fiduciary guarantees can replace the

Cessie of guarantees for receivables. Furthermore, the object of a fiduciary guarantee can be in the form of objects owned when submitted as a fiduciary guarantee (Hutagalung, 2003). Almost all parts of the business have to do with financing. This study specifically discusses the problem of financing in transportation or motor vehicles, which uses an installment payment system. Consumer financing is a business activity of a finance company to provide goods based on consumer needs with payment in installments.

The business sector closely relates to legal matters, for example, in the banking world, especially in funding services. Generally, the legal relationship occurs due to an agreement with another party. With this legal agreement, the parties involved are automatically obliged to carry out all the provisions stipulated in the agreed agreement because there are binding laws and regulations. For example, in motor vehicle funding or credit facilities, each unit that gets credit approval indirectly means that there has been a transfer of ownership rights based on the principle of trust between the debtor and the creditor. The problem or legal problem that must be clarified and ensured is the ownership of objects of fiduciary guarantees. The understanding of ownership of objects in the law of guarantees has a very broad meaning, which includes ownership rights to objects and property rights to objects. If the debtor submits the object as collateral to the creditor, it means that part of the object's ownership is transferred to the creditor. In this case, the debtor as the fiduciary giver has the right to enjoy the motor vehicle, which is the fiduciary guarantee. In contrast, the status of the right to the object is fully owned and controlled by the creditor.

In a financing agreement with a fiduciary guarantee, the first debtor is the owner of the collateral object. The vehicle proof of ownership book is on behalf of the first debtor's name. The creditor will hand over the book following the agreement carried out at the beginning. In practice, the debtor defaults if the collateral has been transferred to a third party without prior written approval from the creditor (Palapa, 2020). In the fiduciary guarantee agreement, the creditor entrusts the debtor to maintain and use the object of the guarantee by its function. Although the object of the guarantee remains in the debtor's control, the debtor must have good faith to maintain the object of the guarantee as well as possible. In the law of guarantees, the debtor cannot pawn, rent, or transfer objects of fiduciary guarantees to third parties except those that are inventory items. Especially for fiduciary guarantees, this is heeded with the condition that it must obtain approval from the creditor or the financing institution. This provision follows the mandate in Article 23 paragraph (2) of the Fiduciary Guarantee Law. Suppose the debtor carries out the transfer of the object of the Fiduciary Guarantee without obtaining approval from the creditor. In that case, it can be subject to criminal sanctions under Article 36 of the Fiduciary Guarantee Law.

A debtor cannot carry out the act of transferring collateral to a third party in any way without the written consent of the creditor. However, if this happens, the creditor can immediately collect all debts from the debtor at once without prior written notification. The debtor's act can be categorized as embezzlement with a threat of imprisonment for four years per Article 372 of the Indonesian Criminal Code. In contrast to the provisions of legal protection in Article 36 of the Fiduciary Guarantee Law, a fiduciary giver can be threatened with a maximum imprisonment of 2 years and a maximum fine of Rp. 50,000,000, - (Fifty million Rupiah). The debtor is threatened with such punishment if the debtor violates the provisions of Article 23 paragraph (2) of the Fiduciary Guarantee Law, which states that the fiduciary giver is prohibited from transferring, mortgaging, and leasing the object being guaranteed to other parties except with written approval from the fiduciary recipient.

Article 19 of the Fiduciary Guarantee Law regulates the transfer of fiduciary guarantees, in which the transfer of rights to receivables guaranteed by the fiduciary results in the transfer of all rights and obligations of the fiduciary recipient to creditors. In practice in Batam, Kepulauan Riau, the transfer of motor vehicles is carried out by the old debtor to the new debtor by the actual handover from hand to hand at the time of signing a private agreement. The transfer is only vaguely justified, meaning that the first debtor can only transfer if there is permission from the financing company first. Then, the second debtor, who has received the transfer of rights from the first debtor and has good faith, makes installment payments to the finance company. Based on the explanation above, the author is interested in conducting further research and putting it into articles. The problem in this study is the existence of motorized vehicles as fiduciary guarantees in the financing agreement and the legal protection of debtors in the financing agreement with fiduciary guarantees in the form of motorized vehicles.

2. RESEARCH METHODOLOGY

This is a doctrinal legal research with a statutory approach and also a type of research with content analysis, which is simply defined as a method in collecting and analyzing the content of a “text”. Text can be in the form of words, interpretation of pictures, symbols, ideas, themes and various forms of messages that can be communicated. Content analysis seeks to understand data not as a collection of physical events, but as a symbolic symptom to reveal the meaning of a text and gain an understanding of the message represented, according to the text’s purpose. This legal research uses primary and secondary legal materials. Primary legal materials are legal materials or library materials that have authority and legally binding power. Secondary legal materials are all form of publications which are not official documents. The publications include textbooks, legal dictionaries, legal journals, and comments on court verdicts and scientific works of scholars related to this research.

3. RESULTS AND DISCUSSION

a) The Existence of Motor Vehicles as Fiduciary Guarantee in the Financing Agreement

Material problems are essential because any objects can be legal objects (*rechtsobject*). The object of law is one of the main meanings in the legal system, which is called the legal category (*rechtscategorie*). Due to objects, legal subjects can carry out legal relations, for example, making sales and purchase agreements, leasing, pledging, et cetera. Therefore, in a country's legal system, property matters are specifically regulated and adapted to its legal culture. Fiduciary, one of the guarantee institutions that have long been known in Roman society, initially grew and lived under customary law. In the Indonesian legal system, the fiduciary is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Article 1 of the law states that fiduciary is "*Pengalihan hak kepemilikan suatu benda atas dasar kepercayaan dengan ketentuan bahwa benda yang hak kepemilikannya dialihkan tersebut tetap dalam penguasaan pemilik benda*" (Translate: The transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains in the control of the object's owner).

The Fiduciary Guarantee Law also explains that a fiduciary agreement is intended to guarantee a debt agreement between the parties (debtors and creditors). Thus, fiduciary agreements depend on agreements that are *accesoir* or principal guarantees (debts and receivables). In other words, the ownership rights are not to be continuously owned by the creditor or the fiduciary recipient but solely as a guarantee for the repayment of the debt. The object of a fiduciary guarantee can be in the form of objects that already exist or things that will exist, tangible and intangible movable objects, or immovable objects that are not objects of mortgage

rights. It means that the object or fiduciary guarantee can be in the form of ownership rights that have economic value, for example, motor vehicles, securities, shares, savings, and land rights that have been registered before.

The object of a fiduciary guarantee is on the debtor's hand based on trust, guaranteed by law. Thus, the guarantee delivery agreement does not reduce the nature of the trust but only prevents the object of the guarantee from being pledged several times (parallel), thereby reducing its value. In the Indonesian Civil Code, there are no registered objects or unregistered objects. It becomes the weakness of the material arrangement in the Civil Code. However, in its development, it is currently known that there are registered movable objects and registered immovable objects. Registered movable objects such as motor vehicles are registered at *Kantor Samsat/ Sistem Administrasi Manunggal Satu Atap* (One-Stop Administration System office) at the local Police by attaching a Motor Vehicle Ownership Book (from now on referred to as *BPKB/Buku Kepemilikan Kendaraan Bermotor*). While examples of registered immovable objects such as certified land in the form of *Hak Milik* (Ownership Rights), *Hak Guna Usaha* (Cultivation Rights), *Hak Guna Bangunan* (Building rights), or *Hak Pakai* (The right of use), registered to the National Land Office.

Indonesia is one of the developing countries which wants to cultivate a potential economy to have real strength. It is carried out by utilizing the potential of capital in development. Therefore, expanding the possibility of providing credit facilities to the public is necessary. From the community's point of view, it is very necessary to have credit facilities for the weak economic groups and entrepreneurs, in general, to advance or develop their business. In this phase, guaranteeing institutions' role in providing credit becomes important. However, security requirements are needed for granting credit if someone needs a guarantee. Although Article 1131 of the Indonesian Criminal Code has guaranteed a person's assets against all engagements, the guarantee is not strong enough. Considering that the money from the sale of one's property will be divided equally among all creditors of that person as stated in Article 1132 of the Criminal Code.

The description above shows the need to avoid losses that may arise and to provide a sense of security for creditors against their receivables. Thus, a guarantee institution was created, as can be found inside and outside the Indonesian Criminal Code. Fiduciary institutions are often referred to as *pand* (pawn) without *bezit* (possession) or *bezitloos pand* because the one who controls the object is the debtor, whose position is not the owner (*eigenaar bezittery*). Pitlo named fiduciary as *zakerheids eigendom* (property rights only as dependents) or *fiduciare eigendom* (ownership rights over trust) or *uitgeholde eigendom* (deducted property rights) (Satrio, 2002).

The definition commonly used before the Fiduciary Guarantee Law appeared was *Fiduciare Eigendom Overdracht* (FEO), translated as a surrender of property rights on a trust basis. The highlight is the surrender or *overdracht*. The surrender of the property rights of the fiduciary object is only limited to trust as a debt guarantee. According to R Subekti, fiduciary means a trust given reciprocally by one party to another, that what appears to be a transfer of property is actually (internally) only a guarantee for a debt (Subekti, 1982). A fiduciary guarantee is a bond agreement that arises when there is an obligation on the part of the debtor and creditor to fulfill performance. If the delivery of movable objects is fiduciary, then the delivery is carried out in a *constitutum possessorium* while regarding receivables, it is carried out with a Cessie. According to Sri Soedewi Masjchoen Sofwan, the requirements that usually apply to the validity of a handover also apply to fiduciaries. The conditions for a valid submission are (Sofwan, 1980): 1) There is a *zakelijk* agreement; 2) There is a title for the transfer of rights; 3) The authority to control the object from the person who handed it over; dan 4) There is a certain way

to deliver: *constitutum possessorium* for tangible movable objects and Cessie for debts.

The form of a fiduciary agreement must be in writing, but there is no need for the surrender of objects that are the object of a fiduciary guarantee. In Indonesian laws and regulations and jurisprudence, there are no provisions governing the form of the agreement. However, the agreement is usually made in written form. Meanwhile, in banking practice in Indonesia, fiduciary agreements are commonly made by state and private banks in the form of a bank agreement (deed of fiduciary guarantee agreement). A fiduciary guarantee in written form is not enough to establish the Fiduciary Law. It must be made with a Notary Deed in Indonesian to become a fiduciary guarantee deed. Charges with fiduciary guarantees must then be registered at the Fiduciary Registration Office.

The creditor can ask the debtor to make an additional agreement to get sufficient and safe payments. This special guarantee agreement designates certain assets the debtor owns as collateral to pay off the debt (Subekti, 1982). With this special guarantee, if the debtor is negligent in paying his debts, the creditor has the right to sell the promised goods and take part or all of the proceeds from the sale to pay off the debt without paying attention to other creditors. As referred to above, certain guarantees are also material guarantees. This debt guarantee is always held between the creditor and the third party for the benefit of the creditor. In this case, it is to bind the debtor. The settlement can use Article 1820 of the Civil Code if the debtor does not fulfill his debt. In addition to guaranteeing the settlement of debts between creditors and debtors as described previously, the law (In this case, the Criminal Code) also determines certain creditors who are given the right to receive repayments in advance than other creditors by taking into account the nature of the receivables. The subjects and the objects that have the privilege are determined by Article 1139 of the Criminal Code (which concerns certain objects) and Article 1149 of the Criminal Code (which concerns all objects). Because only certain receivables are given special rights, creditors who do not have receivables, as stipulated by law, cannot expect more from this provision.

There are two types of guarantees: guarantees in general and guarantees in particular. In particular, guarantees are further divided into material and personal or debt guarantees. In general guarantees, debt guarantees do not fully provide certainty regarding debt repayment because the creditor does not have the right to precede so that the creditor's position remains a concurrent creditor to other creditors. In fact, until now, the national guarantee law has not been formed. To meet the practice necessity that follows an open codification system or partially (Kamelo, 2006), laws that are a sub-system of the national property security law have been created, such as the mortgage and Fiduciary Guarantee Law. As for pawns (*pand*) and mortgages, they still apply the provisions contained in the Criminal Code. The problem is, do the norms, principles, and understandings formed beforehand in each of the laws conform with each other? So that in its implementation, there are no obstacles, both conflicts of norms, principles, and legal culture (Kamelo, 2006). A law that regulates guarantees by giving such priority can only be formed with the provision that refers to the system theory. If this system theory approach is ignored, there will be weaknesses in the guarantee law body that will be born. Therefore, the complexity of the problem of fiduciary guarantees as part of material guarantees can be resolved by looking at other material guarantees in a national guarantee law system.

b) Legal Protection for Debtors in Financing Agreements with Fiduciary Guarantees in the form of Motor Vehicles

Implementing a financing agreement with a fiduciary guarantee following Article 5 paragraph (1) of the Fiduciary Guarantee Law requires evidence for the parties as fiduciary recipients in the event of a dispute in the future; it is called a

notary deed. Before the emergence of the Fiduciary Guarantee Law, fiduciary did not have to be made in a particular form unless there were things confirmed in various laws and regulations. It means that fiduciary is free; it can be in oral or written form. This written form is an authentic or private deed (Ahyani, 2011), meaning that the fiduciary agreement is not always carried out in the form of a notary deed depending on the size of the loan. The requirement with a notary deed is a debt agreement with a nominal value above Rp. 25 million, but if the nominal value is below Rp. 25 million, it can be done by a private deed or a notarial deed. Examples of the use of fiduciary guarantees in the community are as follows: A as the debtor borrows money from the bank for Rp. 6 million by pledging *BPKB*. B as the creditor (Bank) examines whether the guarantee follows the information described. This guarantee is needed for the certainty of repayment from the debtor so that if it is not paid off at maturity, the creditor can take action against the guaranteed object. The agreement between the creditor and the debtor is in standard form and signed by both parties. The agreement is not made with a notarial deed because the nominal is not too large, and this was done before the Fiduciary Guarantee Law came into effect. So far, people have used private deeds because they are more practical and do not undergo complicated procedures. The Fiduciary Guarantee Law then appears and explains the fiduciary guarantee by notarial deed (Article 5). However, a notary deed is used only for fiduciary guarantees whose nominal value is above Rp. 25 million, while those under Rp. 25 million can use a private deed or a notarial deed.

The mandate of the Fiduciary Guarantee Law, which requires a written agreement to an authentic deed, is intended to achieve legal certainty and the principle of publicity. The existence of the obligation to prove a fiduciary guarantee in the form of a notary deed is an excellent thing for the parties. However, this provision does not pay attention to practical interests. Small value debts will be burdensome for the parties in terms of financing if it has to be made in a notarial deed. Usually, the cost of a notary deed is charged to the debtor. So far, the guarantee agreement made between the creditor and the guarantor finds no problems, as long as it does not conflict with the provisions in the Fiduciary Guarantee Law, except for Article 5 paragraph (1) of the Fiduciary Guarantee Law, even if the agreement does not have a notarial deed. However, the parties must accept the consequences because the Fudisia Guarantee Law does not apply to agreements that do not have a notarial deed and cannot be registered to the Fiduciary Registration Office.

A fiduciary is a legal institution born from practice and does not get a meaningful arrangement in the laws and regulations because there are no procedural arrangements. Because the jurisprudence on fiduciary does not regulate these procedural matters, registering a fiduciary guarantee is not an obligation (Fuady, 2000). It results in deficiencies and weaknesses for fiduciary legal institutions in achieving legal certainty. The absence of an obligation to register fiduciary guarantees causes the element of publicity to be unfulfilled so that fiduciary guarantees are difficult to control. The practice can lead to something unhealthy, such as fiduciary objects that are guaranteed twice or transferred to another party without the creditor's knowledge. Given the importance of the function of the fiduciary guarantees registration, the fiduciary law requires each fiduciary guarantee to be registered with the authorized official.

A fiduciary guarantee registration obligation by law is a community need, so with this registration, the publicity principle has been fulfilled as the primary point in the Guarantee Law. Without legal protection, it is not easy to achieve the goal. One of the characteristics of modern debt guarantees is the fulfillment of the element of the principle of publicity. That is, the more published the guarantee for the debt, the better it is. Thus, creditors and the public can find out or access important information about the debt guarantee. The principle of publicity is becoming increasingly crucial for guarantees whose physical collateral objects are not handed

over to creditors. With this registration, it is hoped that the debtor will no longer be able to deceive creditors or prospective creditors by guaranteeing the fiduciary repeatedly.

The main point in the obligation to register a fiduciary guarantee at the Fiduciary Registration Office is to give preference to fiduciary recipients and other creditors that are definite, absolute, and complete (Ridwan, 1999). Even in Indonesian Civil Law, the fiduciary guarantee is intended to give the fiduciary party the right to keep control of the object of the fiduciary guarantee based on trust. Registration of Fiduciary Security at the Fiduciary Registration Office is the obligation of the fiduciary recipient, including his proxy or representative. The Fiduciary Guarantee at the Fiduciary Registration Office is recorded in the Fiduciary register on the same date as the date of receipt of the application. After the fiduciary guarantee agreement is registered, the Fiduciary Registration Office issues and submits a guarantee certificate to the fiduciary recipient on the same date as the date of receipt of the registration application (Abdullah, 2016).

Over time, the use of fiduciary guarantees is increasing due to the community's increasing needs. It is because fiduciary guarantees are considered very helpful, with the loading process simple, easy, and fast. Additionally, objects used as collateral remain in the debtor's control so that they can still be used in business activities financed from loans using the fiduciary guarantee. There are two types of guarantees, material guarantees, and personal guarantees. The most in-demand is material guarantees. Material guarantee is a guarantee action carried out by the creditor against the debtor or between the debtor and a third party to fulfill the debtor's obligations (Gie, 2005).

Registration of Fiduciary Guarantees between creditors and debtors is vital to meet legal needs that can further spur national development and guarantee legal protection for interested parties. It follows Article 11 of the Fiduciary Guarantee Law, which requires objects used as fiduciary guarantees to be registered with the authorized official at the fiduciary registration office. The obligation to register a fiduciary guarantee is expected to fulfill legal certainty. With the registration, the parties' position will be more protected so that business actors and the general public can determine whether an object has been encumbered with a fiduciary guarantee.

Legal protection for debtors can be seen in Article 29 of the Fiduciary Guarantee Law, as follows: (1) If the debtor or fiduciary provider is in breach of contract, the execution of the object of the fiduciary guarantee can be carried out by: a. Execution of the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient; b. The sale of objects of fiduciary guarantees on the authority of the fiduciary recipients themselves through public auctions and take a settlement of their receivables from the proceeds of the sale; and c. Private sales, made based on the agreement of the fiduciary giver and recipient if, in this way, the highest price can be obtained that benefits the parties. (2) The sale, as referred to in paragraph (1) letter c, shall be carried out after 1 (one) month has elapsed since the fiduciary giver and/or recipient has notified in writing to interested parties and announced it in at least 2 (two) newspapers circulating in the area concerned.

With a fiduciary guarantee, pledging movable objects can be done without releasing the goods so that the debtor can still use his fiduciary object. Every Civil Law action that aims to transfer property rights must comply with Article 584 of the Criminal Code provisions. This provision explains that the surrender of the object (to transfer property rights) must be preceded by a civil event to transfer the property rights, for example, in a sale and purchase agreement. There will be no transfer of ownership rights if there is no transfer of rights, even though the sale and purchase agreement has occurred at the time of the agreement between the seller and the buyer.

Based on Article 585 of the Indonesian Civil Law, the motor vehicle ownership rights are transferred by submitting the Motorized Vehicle Ownership Book (*BPKB*). Here lies the importance of the relationship between the transfer of rights and the transfer of ownership. In providing motor vehicle loans, the bank or funding company usually will determine in advance what is the guarantee or collateral for the issued credit. The company determines it from the beginning to make it easier for banks to carry out executions in the event of a default. If the Notary is asked for his services by the bank to carry out the financing agreement, the Notary will first see the proof of ownership of the guarantee. According to existing legal arrangements, suppose it has been confirmed that it is correct. In that case, the Notary is obliged to legalize photocopies of all identities and do an authentic credit agreement deed. It all depends on what both parties want. If what is desired is only a private credit agreement deed, then the deed will only be legalized by a Notary, and then the binding of the guarantee is carried out on a fiduciary basis. In practice, more and more people use agreements written by the parties concerned, not before a notary. A written agreement like this is called a private deed (Wijaya, 2019).

There are times when the parties are dissatisfied because the private deed is not stamped by the Notary. They think that the private deed has weak legal force. The Notary, in this case, may put a stamp on the private deed. Before affixing the Notary stamp, the written agreement is given a number and date; the number must be recorded in the list of deeds, then signed by the Notary. With the legalization of the private deed, the judge has obtained the date and identity of the party who agreed and made sure that the signatures affixed under the letter really come from the people whose names are listed in the letter.

Proving the right on movable objects is done by showing valid related documents, for example, motor vehicles; the proof is by showing the Motor Vehicle Ownership Book (*BPKB*). However, this proof still has many weaknesses, one of which is that the *BPKB* is only a vehicle identity document and not a vehicle ownership document, so it is often found that the name listed on the *BPKB* is not the original owner of the vehicle. For other movable objects, what can be used as a proof is a purchase receipt, but this purchase receipt is only one of the supporting documents.

The basis for ownership of movable objects generally uses *BPKB* and purchase receipts, which can also be based on the type of agreement attached to the movable object, for example, the existence of a financing agreement or buying a lease with installments. Tan Kamello explained that in everyday life, the problem that often occurs is the status of ownership of the fiduciary guarantee object, which is still in question, whether it belongs to the creditor who receives the fiduciary or the debtor who gives the fiduciary (Kamelo, 2006). The owner of the collateral object is not the complete owner in buying and selling. The creditor, as the owner of the right, controls the proof of ownership of the motor vehicle (*BPKB* and other supporting evidence). Thus, the status of material rights of the motor vehicles as the fiduciary guarantee is wholly owned by the creditor. In contrast, the debtor as the fiduciary giver has the right to use the object of the fiduciary guarantee.

Article 1459 of the Indonesian Criminal Code explains implicitly that in a sale and purchase transaction, the property rights of the object will not transfer to the buyer before the object is handed over following the provisions of Articles 612, 613, and Article 616 of the Criminal Code. Specifically, for the ownership transfer of movable property, Article 612 of the Criminal Code states that the delivery of movable objects is carried out with the actual delivery by or on behalf of the owner. Based on the article, the transfer of ownership rights of motomotoricles has two ways: short-handed delivery and symbolic delivery (Papendang, 2013). Ownership of the motor vehicle has not been transferred from the lessee before the buyer has exercised the purchase option, but because the lessor is intended to be a funder, then as a finance

company, not as an owner, it is appropriate that the risk burden of financing in a force majeure situation is borne by the lessee.

In a financing agreement with a fiduciary guarantee between a debtor and a creditor, it is possible to transfer credit from one creditor to another. It can happen because the debtor, as a borrower of funds, wants to find lower interest rates on other creditors so that the transfer of fiduciary guarantees occurs. Transferring fiduciary guarantees has been regulated in Article 19 of the Fiduciary Guarantee Law, which states that the transfer of rights of receivables guaranteed by the fiduciary results in the transfer of all rights and obligations of the fiduciary recipient to new creditors by the law. The transfer of the fiduciary guarantee is registered by the new creditor at the Fiduciary Registration Office. In practice in Batam, Kepulauan Riau, the transfer of motor vehicles by previous debtors to new debtors is carried out by actual delivery of the motor vehicle at the time of signing the private agreement. The momentum proves that the new debtor has become the physical owner of the motor vehicle. However, legally, because the *BPKB* is still under the creditor's control, the owner of the vehicle is the person whose name is listed in the *BPKB* (the first debtor). The new debtor will become the vehicle's legal owner if there has been a change of name on the BPKB after being processed at the *SAMSAT* Office.

Based on the theory of protection, the preventive action in transferring motor vehicles as objects of fiduciary guarantee to other parties through private agreements is not regulated in detail on how to transfer fiduciary guarantee objects to other parties. The transfer is only vaguely justified because the first debtor can only transfer if permission is from the financing company. Transferring the object of the fiduciary guarantee by a private agreement has not been regulated in the financing agreement. If the first debtor defaults, the company should be able to use the preferential rights granted by the Fiduciary Guarantee Law to execute the fiduciary guarantee. However, because the first debtor has transferred the object of the fiduciary guarantee to the second debtor, it is difficult for the company to control the default of the first debtor. Therefore, the dispute resolution carried out by the finance company against the negligence of the first debtor cannot be prosecuted through a formal legal process (civil procedure law) or non-litigation (arbitration). With the registration of the fiduciary agreement deed, the fiduciary registration office will record the fiduciary guarantee deed in the fiduciary register book and provide a fiduciary guarantee certificate to creditors. The registration of a fiduciary deed gives birth to a guarantee for the fiduciary giver, provides certainty to other creditors regarding the objects that become fiduciary guarantees, gives creditors rights, and fulfills the principle of publicity because the Fiduciary Registration Office is open to the public (Patrik & Kashadi, 2000). From the legal relationship, there is no arrangement between the first debtor and the second debtor or between the financing company and the second debtor. However, in practice, a legal relationship occurs between the first debtor and the second debtor through the transfer of fiduciary collateral objects by making a private purchase agreement. The question is what the actual legal protection for the second debtor is.

In the Fiduciary Guarantee Law, there are no provisions governing legal protection for the second debtor who has received the transfer of collateral from the first debtor based on a private purchase agreement. According to Tan Kamello, this legal protection must be seen within the framework of civil law by considering the principle of good faith. In this principle, buyers with good intentions must get legal protection. What often happens is that the second debtor continues to pay installments to creditors well and without problems. However, when the second debtor has paid off the installments and wants to get *BPKB*, the financing company is unwilling to provide it. The act of not submitting *BPKB* to the second debtor is contrary to the regulations because the creditor has received all installments from

the second debtor. If the creditor does not submit the *BPKB* to the second debtor, the financing company should not have to accept payments from the second debtor from the start.

Based on the research in this article, it was found that consumers, as the first debtors, transferred the rights of motor vehicles to third parties using private agreements. This action will cause a juridical problem for the creditor. To whom will the motor vehicle ownership rights be handed over if the debtor who receives the transfer of the motor vehicle (the second debtor) is no longer at his original residence by the identity card listed when the financing agreement was made. Related to the previous problem, the second debtor has already obtained his rights from the first debtor by showing a private agreement. In Indonesian Civil Law, proof can be done through a private deed or an authentic deed. The law does not provide a juridical understanding of private agreements. However, Article 1874 of the Criminal Code states that private writings are considered private deeds, including letters, registers, business and household documents, and other writings made without the intercession of a public official.

The finance company may acknowledge or deny the signature affixed to the private agreement with all legal consequences for transferring rights of the object guarantee carried out by the first debtor to the second debtor. The private agreement between the first and second debtors is proof that between the parties, there has been a legal action in transferring ownership rights of fiduciary guarantees objects to the financing company. The legal problem for the second debtor is at the time of juridical collection of rights from creditors who do not give rights to the ownership of motor vehicles to the second debtor because the initial agreement was between the first debtor and the creditor (financing company).

The first legal solution the debtor can take is that the second debtor submits a statement to the Financing Company, which contains the release of liability if the first debtor demands ownership rights to the motor vehicle from the creditor. For this reason, the legally responsible person is the second debtor based on a private agreement. Furthermore, the second alternative is that the second debtor can use his right to take the litigation or non-litigation route by claiming the debtor's rights to the Financing Company to surrender the ownership rights of the motor vehicle or *BPKB*. The second debtor can provide all proof of receipts of payments made to the first debtor so that the Financing Company does not suffer losses economically. The third alternative is if in the future, there is an acknowledgment from the first debtor that the motor vehicle belongs to him, then the finance company can show all the evidence that the second debtor has submitted to the finance company.

The author of this research recommends three things: 1) Public awareness is necessary for financing agreements with fiduciary guarantees. Thus, the parties included can pay more attention to their obligations, rights, and responsibilities in fulfilling the achievements of the agreement; It also aims not to violate the provisions in Indonesian law, especially the Fiduciary Guarantee law, as criminal law; 2) The government and the Indonesian House of Representatives need to socialize the regulations on credit financing with fiduciary guarantees to increase consumer awareness to comply with Law Number 42 of 1999 concerning Fiduciary Guarantees; and 3) The government and the Indonesian House of Representatives need to make changes by reconstructing Article 36 and Article 25 paragraph (3) of the Fiduciary Guarantee Law. It is intended to provide legal protection for the second debtor who has good intentions to fulfill creditors' receivables for motor vehicles as fiduciary guarantees in the financing agreement.

4. CONCLUSION

Based on the previous analysis and discussion, it is concluded that motor vehicles are movable objects that can be guaranteed through fiduciary guarantees. From the Indonesian Civil Code perspective, a motor vehicle as a fiduciary guarantee

in a financing agreement is an unnamed agreement based on Article 1319 of the Civil Code while still adhering to the principle of freedom of contract. The legality of transferring the motor vehicle in a fiduciary guarantee from the first debtor to the second debtor contains a prohibition unless there is permission from the creditor. Legal protection provided for debtors in the financing agreement is obtained by registering the object of collateral because legal protection will appear if there is registration. This registration can fulfill legal certainty to the fiduciary giver and recipient. Civil law protects parties with good intentions, as stated in Article 531 and Article 533 of the Criminal Code. The second debtor who gets this legal protection has proof of a motor vehicle payment receipt and has good faith to buy a motor vehicle by paying off the remaining installments of the vehicle financing to the finance company through a private agreement.

5. REFERENCES

Abdullah, J. (2016). Jaminan Fidusia di Indonesia (Tata Cara Pendaftaran Dan Eksekusi). *Jurnal Bisnis dan Manajemen Islam.* 4(2). 115-132, DOI: http://dx.doi.org/10.21043/bisnis.v4i2.2693

Ahyani, S. (2011). Perlindungan Hukum Bagi Kreditur melalui Perjanjian Jaminan Fidusia. *Jurnal Wawasan Hukum.* 24 (01). 308-319, DOI: http://dx.doi.org/10.25072/jwy.v24i1.19

Bawazier, M.S. (2010). *Akibat Hukum Jika Debitor Wanprestasi Dalam Pembiayaan Konsumen Dengan Jaminan Fidusia Pada PT. FIF di Kota Pekalongan*. Semarang: Tesis Program Studi Magister Kenotariatan Program Pasca Sarjana Universitas Diponegoro.

Fuady, M. (2000). *Jaminan Fidusia*. Bandung: Citra Aditya Bakti.

Gie, K.K. (2005). *Hukum Bisnis Untuk Perusahaan Teori dan Contoh Kasus*. Jakarta: Pranada Media.

Hutagalung, A.S. (2003). *Analisa Yuridis Mengenai Pemberian dan Pendaftaran Jaminan Fidusia*. Jakarta: Fakultas Hukum Universitas Indonesia.

Indriani, I. (2019). Pengaruh Perkembangan Pembangunan Nasional Sebagai Aspek Pengubah Hukum Dari Segi Ekonomi, *Rechtsregel: Jurnal Ilmu Hukum*, 2 (1), 589-600. DOI: http://dx.doi.org/10.32493/rjih.v2i1.2987

Kamelo, T. (2006). *Hukum Jaminan Fidusia: Suatu Kebutuhan Yang Didambakan*. Bandung: Alumni.

Mursid, A.F. (2018). Perjanjian Kredit yang mencantumkan Kausula Asuransi Jiwa. *JUSTISI*, 4(2), 111-118. DOI: https://doi.org/10.33506/js.v4i2.536

Palapa, J. (2020). Penyelesaian Debitur Wanprestasi dengan Jaminan Fidusia. *SOL JUSTICIA*, 3(1), 26-38. Retrieved from *http://ojs.ukb.ac.id/index.php/sj/article/view/122*

Papendang, C. (2013). Penyerahan Hak Milik Pada Transaksi Jual Beli Kendaraan Bermotor Dalam Praktik. *Jurnal Lex Privatum*. 1(2). 145-155, https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/1711

Patrik, P., & Kashadi. (2000). *Hukum Jaminan*. Semarang: Fakultas Hukum UNDIP.

Ridwan, I. (1999). *Hukum Jaminan Fidusia, Pedoman Praktis*. Semarang: Penerbit Universitas Diponegoro.

Satrio, J. (2002). *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*. Bandung: Citra Aditya Bakti.

Sofwan, S.S.M. (1980). Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan. Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman.

Subekti, R. (1982). *Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*, Bandung: Alumni.

Wijaya, H.T. (2019). Keabsahan Akta Dibawah Tangan Kredit Motor Dalam Perjanjian Jaminan Fidusia. *Jurnal Hukum Bisnis Bonum Commune*. 2(1). 77-86, DOI: https://doi.org/10.30996/jhbbc.v2i1.2315

Yasir, M. (2016). Aspek Hukum Jaminan Fidusia. SALAM; Jurnal Sosial & Budaya Syar-i, 3(1), 75-92. DOI: https://doi.org/10.15408/sjsbs.v3i1.3307