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THE EXECUTORY POWER OF FIDUCIARY GUARANTEES IN BAIL LAW AND BANKING

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Abstract

This study aims to analyze the executive strength of fiduciary guarantees in guarantee and banking law. The research method used is normative juridical. The results show that the execution of civil law is carried out through a court institution either because a judge's decision has permanent legal force or other documents that have executive power that can be executed through the fiat chairman of the district court such as the fiduciary guarantee certificate. The executorial title contained in the fiduciary guarantee certificate which reads "For Justice Based on Almighty Godhead" is a statement containing an authority that the document (text) has the power of execution (forced execution) with the help of state apparatus. Due to the existence of the executorial title, the holder of the fiduciary guarantee can submit a request for execution to the court and the court will comply with the execution procedure.

Keywords: *Executive, Power, Guarantee, Law, Banking*

A. INTRODUCTION

Credit is the main business activity that must be carried out by banks because the largest income from bank business comes from credit income, namely in the form of interest and loan provision. From the point of view of national and international economic development, it can be seen how big a role is related to credit activities at this time. Various financial institutions, especially conventional banks, have helped meet the need for funds for economic activities by providing money loans, among others, in the form of banking credit. [1]

Bank as a form of financial institution that aims at "*financial intermediary*" with the main business of collecting and distributing public funds and providing other services in payment traffic. The bank as a business entity gets a large **profit** from its **business**. Asa financial institution, banks have the main obligation to maintain the stability of the value of money, encourage economic activity, and expand employment opportunities. The Indonesian banking industry aims to support the implementation of national development in order to improve, equate, and stability nationally towards improving the welfare of many people, so it is clear that the function of banking in Indonesia in addition to being a collector and distributor of public funds has a role to carry out national development. [2,3]

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The main element of crediting is trust. Trust is the creditor's belief that the credit recipient (debtor) can fulfill everything that has been agreed in the future. To gain such confidence and trust must come to a belief in the extent to which the concept of credit assessment can be properly fulfilled. [4]

According to Presidential Regulation Number 9 of 2009 concerning Financing Institutions (hereinafter referred to as the Presidential Regulation of Financing Institutions) is a financing activity for the procurement of goods based on consumer needs with installment payments.

Financing Institutions are business entities that carry out financing activities in the form of providing funds or capital goods. A Finance Company is a business entity specifically established to conduct Leasing, Factoring, Consumer Financing, and/or Credit Card business. Meanwhile, Consumer [5,6]*Finance* is a financing activity for the procurement of goods based on consumer needs with installment payments. Consumer needs include motor vehicle financing, household appliance financing, electronic goods financing and housing financing. [7,8]

Banks as financing institutions must pay attention to prospective debtors by assessing their disposition, ability, capital, guarantees and circumstances. One form of credit security with a guarantee agreement. Guarantees as a legal institution give birth to legal principles as stipulated in civil law that have an important position in the economic world. [9]

The implementation of credit provision by the Bank begins with a credit agreement between the creditor and the debtor. A credit agreement is a real principal agreement (principal), as a principle agreement, the guarantee agreement is the assessor. Then the existence and expiration of the guarantee agreement depends on the principal agreement. The credit provided by the Bank contains risks, so the Bank must pay attention to sound credit principles. To reduce this risk, a guarantee of credit is needed to provide confidence in the ability and ability of the debtor to pay off his debt as promised. For this reason, in providing credit facilities, banks assess customers using the 5C principle based on the principle of prudence, **namely**: *character*, *capacity*, *capital*, *conditions of economy*, and *collateral*. [10]

In general, guarantees are divided into two types, namely treasury guarantees and individual guarantees, treasury guarantees are guarantees that have a direct relationship with certain objects while individual guarantees are guarantees that only have a direct relationship with the guaranteeing party, not to certain objects. Regarding the kinds of treasury guarantees, first of all what is known by the Civil Code is lien and mortgage and secondly what is introduced by jurisprudence is fiduciary. [11]

One of the movable goods guarantees is a lien as stipulated in the Civil Code. Goods mortgaged according to its rules are obliged to be handed over to creditors until the debtor's debt is paid off. This obligation is what causes problems in practice, if the pledged goods are in the form of tools used to find income handed over by creditors, then as a result the debtor meets two obstacles, namely not obtaining income and the debt becomes unrepayable. [12]

Fiduciary, often called a trusting title guarantee, is a form of guarantee of movable objects in addition to a lien developed by jurisprudence. In fiduciaries, in contrast to liens, what is handed over as collateral to the creditor is the title while the goods remain in the possession of the debtor, so what happens is the surrender by *constitutum possessorium*. [13]

Historically fiduciary institutions in classical form have been invented since Roman times. In this case, in Rome there was the so-called *Fiduciary Crediture*, a legal construction by which the debtor's goods were handed over to the creditor, but were intended only as collateral for the debt. At the same time, in Rome there was also the so-called *Fiduciary Amico*, but in this case it was only intended as the appointment of a deputy to preserve his interests. So there is no surrender of title or guarantee of debt as is done in the current fiduciary binding. [14]

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After the *Bierbrouwerij Arrest* **in the Netherlands** (Nederland), then in 1932 there was a hint that in Indonesia also followed the practice in the Netherlands regarding fiduciaries. Namely with the decision of the *Hoogerechtshof* (HGH), dated August 18, 1932, a case known as BPM Arrest. This ruling is a milestone in the beginning of fiduciary development in Indonesia. This form of guarantee is widely used in lending and borrowing transactions because the loading process is considered simple, easy and fast, but it does not guarantee legal certainty, because it is possible for the debtor to pledge objects that have been burdened with Fiduciary to other parties without the knowledge of the Fiduciary recipient. [15,16]

The Fiduciary Guarantee Institution has been recognized for its existence by the existence of the Law of the Republic of Indonesia Number: 42 of 1999 concerning Fiduciary Guarantees and this law in Article 40 is called the Fiduciary Law, which was promulgated on September 30, 1999. Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) is a law regulating fiduciary guarantees. Regarding the procedure for registering fiduciary guarantees and the cost of making a fiduciary guarantee deed, it is regulated in PP Number 86 of 2000.

A fiduciary guarantee institution is a guarantee institution that has been juridically formally recognized since the enactment of Law No. 42 of 1999 concerning Fiduciary Guarantees (UUJF). Article 1 number 1 of the Fiduciary Guarantee Act specifies that, "A fiduciary is a transfer of the right of ownership of an object on the basis of a trust provided that the object to which the right of ownership is transferred remains in the possession of the owner of the thing". Fiduciary guarantee is the right of guarantee for movable objects both tangible and intangible, registered or unregistered and also movable or immovable on the condition that the object is not burdened with dependent rights as referred to in Law No. 4 of 1996 concerning dependent or mortgage rights as referred to in Article 314 paragraph (3) of the Jis Trade Code Article 1162 of the Civil Code. [17]

Fiduciaries can also be concluded as agreements in which one of the parties binds itself to give up title to movable objects as collateral. In practice that occurs in society, the emergence of a fiduciary guarantee binding agreement generally begins with the existence of a debt-receivable agreement between creditors and debtors where the fiduciary guarantee binding agreement is intended as an anticipatory action for creditors if it turns out that the debtor cannot fulfill his obligations to pay off his debts as contained and agreed upon in the receivables debt agreement. The existence of the obligation to hand over a material right of movable goods to another party, proves that the fiduciary guarantee binding agreement is a material agreement (*zakelijk*). [18]

The term guarantee is translated from Dutch as *zekerheid* or *cautie*, which includes in general the ways in which creditors guarantee the fulfillment of their bills, followed by the debtor's liability for his goods. A guarantee is a dependent given by the debtor and or third party to the creditor because the creditor has an interest that the debtor must fulfill his obligations in an agreement. [19 20]

In principle, not all guarantees can be guaranteed to banking institutions or non-bank financial institutions, but the objects that can be pledged are objects that meet certain conditions. The terms of a good guarantee object are: [21]

1) It can easily help the acquisition of that credit by those who need it;
2) Does not weaken the potential (power) of the credit seeker to do or continue his business;
3) Providing certainty to the creditor, in the sense that the collateral at any time is available for execution, if necessary it can be easily cashed out to pay off the debt of the recipient (taker) of the credit.

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So far, the aforementioned lending and borrowing activities by exercising dependent rights or collateral rights as stipulated in Law Number 4 of 1996 concerning Dependent Rights which is an implementation of Article 51 of Law Number 5 of 1960 concerning the Basic Agrarian Law, and at the same time as a substitute for mortgage institutions on land and *credietverhand*. In addition, other collateral rights that are widely used today are Liens, Mortgages other than land, and Fiduciary Guarantees.

B. DISCUSSION

1. The Position of Fiduciary Guarantees in Banking Law

Fiduciary guarantees have been used in Indonesia since the Dutch colonial era as a form of guarantee born from jurisprudence known as *Bierbroueric* **Arrest jurisprudence** dated January 29, 1929, which in Indonesia is recognized based on **the** *Hooggerechtshof Arrest or Hooggerechtshof* decree of August 18, 1932 in the case of BPM Clignet. This form of guarantee is used because the loading process is considered simple easy and fast. The Fiduciary Guarantee Institution allows the Fiduciary Grantors to take possession of the pledged property, to conduct business financed from the loan using the Fiduciary Guarantee. [22]

At first, objects that were fiduciary objects were limited to the wealth of movable objects that were tangible in the form of equipment. In its development fiduciary objects include the wealth of intangible movable objects, as well as immovable objects. The guarantee in the fiduciary takes the form of "surrender of property rights in trust (*fides*)" or commonly referred to as *Fiduciare Eigendom Overdracht*. The trust factor in the surrender of title is aimed at the trust given reciprocally by one party to the other, that what is "out of possession is revealed to be a transfer of property", is actually only as a "guarantee" for a debt, the debtor's trust in creditors that his property rights will return after the debt is repaid. [23]

Fiduciary guarantees cannot be released with credit issues. As a treasury guarantee, in the practice of banking and non-bank **financing institutions**, fiduciaries are very popular and popular because they can meet the needs of the people. The fact is both theoretically and empirically that fiduciaries have significance when it comes to accommodating people's desire for credit needs. On the part of the credit recipient, he can still control the collateral for his daily business needs. On the part of banks or non-bank **financial institutions**, it is more practical to use the fiduciary binding procedure, because there is no need to provide a special place for the storage of collateral goods as in pawn institutions (*pand*). [24]

The guarantee requested by a bank or non-bank **financial institution** can be both a principal guarantee and an additional guarantee. The principal guarantee is in the form of goods, projects or bill rights financed by the credit, while the additional guarantee is the debtor's customer's assets. Wealth can be both movable and immovable goods, such as buildings/houses, cars, motorcycles, merchandise, company inventory, machinery in factories. One of the bindings of collateral over property is a fiduciary guarantee. In granting credit with fiduciary guarantees, the authority of the fiduciary must be carefully examined because it can cause legal problems in connection with the principles contained in Article 1977 of the Civil Code. [25]

Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the Fiduciary Guarantee Law) stipulates that "to guarantee certainty and legal protection for creditors and debtors, the binding of fiduciary guarantees must be stated in an authentic deed." Furthermore, Article 11 of the Fiduciary Guarantee Law provides that objects burdened with fiduciary guarantees must be registered with the fiduciary registration office. Registration of fiduciary guarantees aims to guarantee legal certainty, one of which is the certainty of

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execution of fiduciary objects in the event of a debtor default. The executory title "For the Sake of Justice Based on the Almighty Lordship" is attached to the head of the fiduciary guarantee certificate. With the title, creditors can carry out direct execution without litigation. Consumer financing activities actually have a legal basis in laws and regulations that are expected to be able to support the financing industry so that they can prevent and overcome problems that occur. Problems between consumers and financing institutions often occur due to differences in legal views on Article 11 of the Fiduciary Guarantee Law. This article is associated with the withdrawal of vehicle units by financing agencies that sometimes involve law enforcement, resulting in improper public opinion. [26,27,28]

Under Article 11, the fiduciary guarantee is deemed to be born after being registered with the fiduciary registration office. However, today there are problems related to the registration of fiduciary guarantees where the financing institution does not register so that it does not have a fiduciary guarantee certificate. There emerged a tendentious public opinion regarding the validity of the withdrawal.

Law Number 42 of 1999 concerning Fiduciary Guarantees confirms that objects burdened with fiduciary guarantees must be registered with the Fiduciary Registration Office. Objects that are the object of the fiduciary guarantee can be in the form of tangible or intangible movable objects, and immovable objects that cannot be burdened with dependent rights as specified in Law Number 4 of 1996 concerning Dependent Rights. With the imposition of a fiduciary guarantee, the principle of publicity is satisfied and is at the same time a guarantee of certainty to other creditors regarding the object that has been burdened with fiduciary guarantees. The fiduciary guarantee was born on the same date as the date on which the fiduciary guarantee was recorded in the Fiduciary Register Book. Registration of fiduciary guarantees is not only done for the holding of fiduciary guarantees, but also includes the amendment, transfer, and removal of fiduciary guarantees. The registration of the fiduciary guarantee, in addition to providing legal certainty to the interested persons also gives the fiduciary beneficiary a *preferential* **right** against other creditors.

The procedure for registering a fiduciary jamina begins with the creation of a fiduciary guarantee deed by a notary which is then registered at the Fiduciary Registration Office. The implementation of this fiduciary guarantee goes through 2 (two) stages: the stage of encumbrance of the guarantee and the stage of registration of the fiduciary guarantee. The imposition of fiduciary guarantees is made under the following conditions: [29]

1) Notarial deed;
2) In Indonesian;
3) Is a fiduciary guarantee deed that at least contains:
    a) The identity of the fiduciary giving and receiving parties;
    b) Fiduciary pledged principal agreement data;
    c) A description of the object to which the fiduciary guarantee is subject;
    d) Underwriting value; and
    e) The value of the thing that is the object of the fiduciary guarantee.

Registration itself has a juridical meaning as a series that is not separate from the process of occurrence of a fiduciary guarantee agreement. The registration of fiduciary guarantees is the embodiment of the principle of publicity and legal certainty. Fiduciary guarantees that have been registered in the fiduciary register book are evidenced by a fiduciary guarantee certificate that can be downloaded online. On the certificate there is an irah-irah "For the Sake of Justice Based on the

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Almighty Godhead" which means that the fiduciary certificate has the same executory power as a court decision that has obtained permanent legal force. This means that if the debtor defaults, then the creditor has the right to execute or sell the object of fiduciary guarantee on the creditor's own power.

The fiduciary guarantee institution underwent fundamental changes especially after the Fiduciary Guarantee Law was promulgated. The principal change is regarding the obligation to register fiduciary guarantees. Although this registration is very important, it still raises various questions and doubts about the obligation of the registration. This dissent among jurists remains an issue. Some say that what is registered is the fiduciary guarantee deed, others say not only the registered deed but the object must also be registered. The juridical fact, when analyzed from the clause of the fiduciary guarantee deed made by the notary, it is found that what is registered is a fiduciary guarantee deed and a fiduciary guarantee object. [30]

In connection with this guarantee, what should be done by the fiduciary beneficiary (creditor) if the fiduciary giver (debtor) shirks his obligations or defaults on promises in the form of negligence of the fiduciary giver (debtor) fulfilling his obligations at the time the repayment of his debt is ripe for collection, then in such an event, the fiduciary beneficiary (creditor) may execute his execution of the fiduciary guarantee object. [31]

2. The Power of Executory Law of Jaminan Fiduciary

This study is dotted with the Fiduciary Guarantee Institution which has been recognized as existential by the existence of the Law of the Republic of Indonesia Number: 42 of 1999 concerning Fiduciary Guarantees and this law in Article 40 is called the Fiduciary Law, which was promulgated on September 30, 1999. Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) is a law regulating fiduciary guarantees. The definition of fiduciary under Section 1 number 1 of the Fiduciary Act is:

> "A fiduciary is a transfer of the right of ownership of an object on the basis of a trust provided that the object to which the title is transferred remains in the custody of the owner of the object."

Meanwhile, what is meant by fiduciary guarantee is also explained in Article 1 number 2 of the Fiduciary Guarantee Law as follows:

> "Fiduciary Guarantee is the right of guarantee for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with Dependent Rights as referred to in Law Number 4 of 1996 concerning Dependent Rights that remain in the control of the fiduciary provider, as collateral for the repayment of certain debts, which gives priority to fiduciary recipients over other creditors."

Listening to the aforementioned explanation, we can clearly distinguish between fiduciary and fiduciary guarantees, where "fiduciary is the process of transferring ownership rights and fiduciary guarantees are guarantees provided in fiduciary form. [32]

Fiduciary is often called a trust guarantee of property rights, which is a form of guarantee of movable objects. In a fiduciary handed over as collateral to the creditor is a title while the goods remain in the possession of the debtor, so what happens is the surrender by *constitutum possessorium*. In a credit agreement with a fiduciary guarantee the creditor and the debtor agrees not to have to hand over the collateral goods, the debtor only submits proof of ownership of the goods to the creditor. As long as the debt has not been paid off, the ownership of the goods is transferred in trust. However, if the debtor defaults on his money, then the object of the guarantee is handed over to the creditor. Such a

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surrender is not known in the Civil Code, but the surrender of **the** [33] *constitution can* be lawfully made because basically the parties are free to promise what they want. [34]

In a fiduciary agreement the object of the fiduciary guarantee of its power remains in the hands of the owner of the thing (the debtor) in this case is the surrender of the thing without giving up the physicality of the thing. The creditor entrusts the debtor to continue to be able to use the collateral object as its function, the debtor must have good faith to maintain the collateral object as well as possible. The debtor is not allowed to transfer the collateral to another party. [35]

In general, executions in the field of civil law are carried out through a court institution either because of a judge's decision with permanent legal force or other documents that have executory powers that can be executed through the fiat of the chief justice of the district court as in the fiduciary guarantee certificate. According to Harahap, execution is a legal action taken by the court to the losing party in a case. If the creditor's receivables are secured by collateral containing executory titles such as fiduciary treasury guarantees, the creditor may directly request the execution of the auction sale through the fiat of the chief justice of the district court without having to go through the lawsuit process. The Fiduciary Guarantee Act has also authorized the parties to grant authority in making sales of the object of guarantee on their own power over treasury guarantees. [36,37]

The executory title contained in the fiduciary guarantee certificate which reads "For the Sake of Justice Based on the Almighty Lordship" is a statement containing an authority that the document (manuscript) has the power of execution (forced execution) with the help of state tools. Upon the existence of such executory title the fiduciary bail holder may apply for execution to the court and the court shall comply with the execution procedure.

In accordance with the provisions of Article 196 paragraph (3) of the HIR, the creditor must apply to the chief justice, in order to execute the collateral object under the executory title of the fiduciary guarantee certificate. The chief justice will summon and order the debtor to carry out his obligations. After that time is past and the debtor remains unable to pay off the debt, then the chief justice will order the bailiff to confiscate the collateral object. The execution of such execution is carried out by means of selling the object of fiduciary guarantee in public (auction) or in a manner deemed appropriate by the chief justice. [38]

The fiduciary grantor is obliged to hand over the object of the fiduciary guarantee in the course of carrying out the execution of the fiduciary guarantee. If the fiduciary grantor does not surrender the object of the fiduciary guarantee at the time the execution is executed, the fiduciary beneficiary shall be entitled to take the object of the fiduciary guarantee and if necessary may seek the assistance of the competent authority. The regulations regarding fiduciary guarantees do not further provide for the authority to be asked for assistance in the execution of fiduciary guarantees. Therefore, the Indonesian National Police as a state tool that serves and plays a role in maintaining public security and order, law enforcement, protection, protection, and service to the community, is authorized to provide assistance in securing the implementation of court decisions or the execution of fiduciary guarantees.

The execution of Fiduciary Guarantees has the same binding legal force as court decisions that have permanent legal force, so they require security from the Indonesian National Police. therefore, the Regulation of the Chief of Police of the Republic of Indonesia Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees was formed. The Indonesian National Police (Polri) is a state tool that plays a role in maintaining public security and order, law enforcement, protection, protection, and service to the community in the context of maintaining homeland security. The position of the National Police in state organizations has a dominant influence in the implementation

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of the police in a proportional and professional manner which is a condition for supporting the realization of *good governance*.[39]

C. CONCLUSION

One of the bindings of collateral over property is a fiduciary guarantee. In granting credit with fiduciary guarantees, the authority of the fiduciary must be carefully examined because it can cause legal problems in connection with the principles contained in Article 1977 of the Civil Code. Fiduciary is often called a trust guarantee of property rights, which is a form of guarantee of movable objects. In a fiduciary handed over as collateral to the creditor is a title while the goods remain in the possession of the debtor, so what happens is the surrender by constitutum possessorium. In a credit agreement with a fiduciary guarantee the creditor and the debtor agrees not to have to hand over the collateral goods, the debtor only submits proof of ownership of the goods to the creditor. As long as the debt has not been paid off, the ownership of the goods is transferred in trust. However, if the debtor defaults on his money, then the object of the guarantee is handed over to the creditor.

In a fiduciary agreement the object of the fiduciary guarantee of its power remains in the hands of the owner of the thing (the debtor) in this case is the surrender of the thing without giving up the physicality of the thing. The creditor entrusts the debtor to continue to be able to use the collateral object as its function, the debtor must have good faith to maintain the collateral object as well as possible. The debtor is not allowed to transfer the collateral to another party.

The execution of thefield of civil law is carried out through the institution of the court either because of a judge's decision with permanent legal force or other documents that have executory powers that can be executed through the fiat of the chief justice of the district court as in the fiduciary guarantee certificate. The executory title contained in the fiduciary guarantee certificate which reads "For the Sake of Justice Based on the Almighty Lordship" is a statement containing an authority that the document (manuscript) has the power of execution (forced execution) with the help of state tools. Upon the existence of such executory title the fiduciary bail holder may apply for execution to the court and the court shall comply with the execution procedure.

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24) Sofwan, *Some Problems of Implementing Fiduciary Special Guarantees In Practice And Their Development In Indonesia*.Pp. 75

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27) Empty Article 1 number 1 Regulation Institution Financing.

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