

LEGAL PROTECTION FOR CREDITORS AGAINST FIDUCIARY GUARANTEES IN DEBTOR DEFAULT BASED ON CONSTITUTIONAL COURT DECISION NUMBER 18/PUU- XVII/2019

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Submitted : 02-10-2025, Accepted : 02-11-2025, Published : 03-12-2025

Abstract

Fiduciary is a form of movable asset security besides pawn, regulated under Law No. 42 of 1999. Following the Constitutional Court Decision No. 18/PUU-XVII/2019, the executorial power of fiduciary guarantee certificates has changed. The Court ruled that parts of Article 15 Paragraphs (2) and (3) of the Fiduciary Law are unconstitutional unless interpreted in accordance with the Court's decision. This research aims to examine the legal protection available to creditors in cases of debtor default after the ruling. Using an empirical juridical approach with a descriptive-analytical specification, the study finds that the execution of fiduciary guarantees must now follow judicial procedures similar to enforcing a final court decision beginning with a lawsuit, execution request, injunction notice, court determination, seizure, and sale of the object. Creditors may seek protection through alternative remedies, such as revising clauses in the fiduciary deed or filing simple lawsuits under Law No. 37 of 2004 on Bankruptcy. After the Constitutional Court's decision, a fiduciary certificate no longer has automatic executorial power, requiring mutual agreement and judicial involvement before enforcement.

Keywords: Fiduciary Guarantee, Constitutional Court, Legal Protection

Introduction

The Indonesian government's efforts to strengthen the economic sector represent a strategic initiative to promote equitable economic growth. This progress is supported by financial and banking institutions, which play a vital role in realizing national economic objectives. In 2025, through the Ministry of Finance, the Government distributed state funds to State-Owned Banks under HIMBARA to accelerate economic recovery and financial circulation.

One of the main activities of these financial institutions is extending credit or loans to the public, involving both movable and immovable assets. In doing so, institutions must uphold the principle of prudence, conducting comprehensive analyses of debtors' character, capacity,

business prospects, collateral, and repayment ability, as stipulated in Article 8 Paragraph (1) of Law No. 10 of 1998 on Banking. Preventive and repressive guarantees are essential to minimize credit risk, providing both early-stage security and remedies for defaults.

To secure lending, creditors often use fiduciary guarantees—a transfer of ownership based on trust while possession remains with the debtor, as regulated under Law No. 42 of 1999. Fiduciary guarantees grant creditors priority rights over other claimants. However, following the Constitutional Court Decision No. 18/PUU-XVII/2019, creditors can no longer unilaterally seize fiduciary objects when a debtor defaults. Any execution must proceed through legal mechanisms equivalent to enforcing a final court judgment, beginning with an execution request to the district court and proceeding under judicial supervision.

In light of this decision, creditors' legal protection lies in revising fiduciary deed clauses and utilizing simple lawsuit procedures in accordance with Supreme Court Regulation (PERMA) No. 2 of 2015, which allows efficient settlement of civil disputes involving claims of up to IDR 500 million. This ensures a balance between the creditor's rights and the debtor's legal protection while maintaining the integrity of fiduciary law enforcement in Indonesia.

Methods

Based on the formulation of the research problem, the type of research used is normative juridical research. Normative juridical research is a legal study that focuses on norms, doctrines, and statutory regulations to analyze law as a system of norms, not as a social phenomenon. This type of research aims to examine the application of positive legal principles, analyze legal concepts, and solve legal problems based on existing regulations.

Results and Discussion

Execution Mechanism for Fiduciary Guarantee Objects Following the Issuance of Constitutional Court Decision Number 18/PUU-XVII/2019

Registration of fiduciary collateral objects aims to protect the interests of creditors as recipients of fiduciary collateral if the debtor later commits a breach of contract/default, the creditor can carry out direct execution of the fiduciary collateral object. Based on the provisions

in Article 29 of Law Number 42 of 1999 concerning Fiduciary Collateral, the implementation of the execution of fiduciary collateral objects is divided into 3 (three) mechanisms which include:

- a) Implementation of the executorial title by the fiduciary recipient;
- b) Sale of objects that are the object of fiduciary guarantees under the authority of the fiduciary recipient himself through a public auction and taking payment of his receivables from the proceeds of the sale;
- c) Underhand sales carried out based on an agreement between the fiduciary giver and recipient if in this way the highest price can be obtained which is profitable for both parties. The underhand sales are carried out after 1 (one) month has passed since the written notification by the fiduciary giver and recipient to the interested parties and announced in at least 2 (two) newspapers circulating in the relevant area.

Following Constitutional Court Decision Number 18/PUU-XVII/2019, the execution of fiduciary collateral objects remains subject to the provisions outlined in the Fiduciary Collateral Law. The Supreme Court has issued Technical Guidelines for the Administration and Technical Procedures of General Civil Courts, which regulate the mechanism for the execution of fiduciary collateral objects that can be carried out if the debtor has been declared to have committed an act of breach of contract.

The execution is carried out using the following mechanism:

- 1) The transfer of rights to receivables is also guaranteed by a fiduciary, resulting in the legal transfer of all matters and obligations of the fiduciary recipient to the new creditor;
- 2) The sale of the object of the fiduciary guarantee under the authority of the fiduciary recipient through a public auction, with the receivables being paid off from the proceeds of the sale;
- 3) A private sale conducted based on an agreement between the fiduciary giver and recipient if the highest price that benefits both parties can be obtained by doing so.

Execution by transfer of rights over receivables and private sale can be carried out based on an agreement between the creditor and the debtor. In this case, the sale of fiduciary collateral objects under the creditor's own authority through a public auction, especially for tangible

movable objects under the debtor's control, requires the transfer of the fiduciary collateral objects from the debtor to the creditor. Control of the tangible movable objects does not transfer to the creditor, therefore, the execution of fiduciary collateral cannot be carried out by means of a sale under the creditor's own authority through a public auction. This is because the sale of a movable object requires the actual and direct transfer of the object from the debtor to the creditor.

The execution of a fiduciary security object requires the debtor to hand over control of the object to the creditor. The creditor has the right to take possession of the fiduciary security object and, if necessary, request assistance from the authorities. The execution can be carried out peacefully and/or through coercive measures.

If the debtor voluntarily surrenders control of the fiduciary security object to the creditor, the execution is said to have proceeded peacefully. However, if the debtor refuses to voluntarily surrender control of the fiduciary security object, then the execution can be carried out against the debtor. Forced execution against debtors is sometimes carried out through arbitrary actions by the creditor and is often carried out using the services of third parties known in practice as "debt collectors." This is what occurred in a case registered with the South Jakarta District Court under Register Number: 345/Pdt.G/2018/PN.Jkt.Sel, where the creditor, as the recipient of the fiduciary security, unilaterally and arbitrarily seized and executed the fiduciary security object belonging to the debtor/fiduciary grantor, allegedly without following proper and proper legal procedures.

Unilateral creditor actions using third-party "debt collectors" often create unrest and disrupt public order. In its implementation, creditors can also use the services of third parties (debt collectors) to execute collateral objects in a manner that is sometimes impolite and unethical. To address this problem, the Chief of Police has issued and stipulated Regulation of the Chief of Police Number 8 of 2011 concerning the Security of Fiduciary Guarantee Execution with the aim of providing legal protection for creditors and debtors. The purpose of issuing the Regulation of the Chief of Police is to create security in the community by implementing the implementation of fiduciary guarantee execution in a safe, orderly, smooth and accountable

manner and can protect the safety and security of fiduciary guarantee recipients, fiduciary guarantee providers and/or the community from actions that can cause property losses and/or safety of life. In implementing the Chief of Police Regulation, there are several principles that serve as guidelines as follows:

- 1) Legality, meaning that the implementation of fiduciary security must comply with statutory provisions;
- 2) Necessity, meaning that fiduciary security is granted based on an assessment of the situation and conditions encountered;
- 3) Proportionality, meaning that fiduciary security is implemented by taking into account the nature of the threat faced and the power involved; and
- 4) Accountability, meaning that the implementation of fiduciary security can be accounted for.

In principle, the mechanism and efforts to withdraw fiduciary collateral when the debtor is declared in default have two distinct mechanisms. Discussion of the mechanisms represents the stages of a persuasive action. Meanwhile, discussing efforts to withdraw fiduciary collateral gives the impression that the word "effort" is a way to withdraw the fiduciary collateral so that it passes into the hands of the creditor, without further negotiation to resolve the problem persuasively.

In practice, the persuasive mechanism for withdrawing fiduciary guarantee objects is carried out in 3 (three) stages of the mechanism, namely:

- 1) Issuing a warning, where a warning letter is a mechanism used to provide a persuasive approach. In this case, the financing company will give the debtor one or two weeks to pay the late payment. Sometimes, the financing company will still listen to the debtor's complaints about their financial condition, which may lead to their inability to pay their installments.
- 2) Visiting the debtor, in this case, the approach is still persuasive and attempts to negotiate debt repayment or repossess the fiduciary collateral.

- 3) Using the services of internal and external debt collectors. Using the services of internal debt collectors means that the persuasive approach is still in the process of negotiating debt repayment or repossessing the fiduciary collateral. Using the services of external debt collectors means that the effort to repossess the fiduciary collateral is no longer focused on repayment of the overdue debt.

Withdrawal of fiduciary collateral objects in order to carry out execution if the debtor defaults or does not carry out his obligations in accordance with the conditions in the provisions of Article 1763 of the Civil Code which formulates that "whoever receives a loan is obliged to return it in the same amount and condition and at a predetermined time". Furthermore, the provisions of Article 1764 of the Civil Code regulate that if the debtor is unable to fulfill the obligation, then the debtor is obliged to pay the loan or the price of the goods borrowed. Based on the provisions in the formulation of Articles 29 to 34 of the Law on Fiduciary Guarantees, the execution of fiduciary collateral objects can generally be achieved through the following efforts:

- 1) Execution of the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient (creditor);
- 2) Sale of the object of the fiduciary guarantee under the authority of the fiduciary recipient through a public auction, with the receivables being paid off from the proceeds of the sale;
- 3) Private sales conducted based on an agreement between the fiduciary provider and recipient if the highest price that benefits both parties can be obtained in this manner;
- 4) Execution shall be carried out after a period of 1 (one) month from the date of written notification by the fiduciary provider and recipient to the interested parties and published in at least 2 (two) newspapers circulating in the relevant area;
- 5) The fiduciary provider is required to hand over the object serving as the fiduciary guarantee in order to execute the fiduciary guarantee;
- 6) If the proceeds from the execution exceed the loan value, the fiduciary recipient (creditor) is required to return the excess proceeds to the fiduciary provider (debtor);

- 7) If the results of the execution are not sufficient to pay off the debt, the debtor remains responsible for the unpaid debt to the creditor.

The above-mentioned fiduciary guarantee agreements only apply to agreements with fiduciary guarantees that have been registered with a fiduciary registration office that has executive power and has met the requirements of Constitutional Court Decision Number 18/PUU-XVII/2019.

Based on Constitutional Court Decision Number 18/PUU-XVII/2019, upon ownership of a fiduciary guarantee certificate, a creditor has the right to execute the fiduciary guarantee object under the following conditions:

- 1) Default or breach of promise is not determined unilaterally, but rather based on an agreement between the creditor and the debtor, or
- 2) Certain legal measures have been taken that determine/state that a default or breach of promise has occurred.

If the creditor and debtor disagree regarding a breach of contract and the debtor objects to voluntarily surrendering the fiduciary security, the creditor cannot execute the security itself (parate execution) but must submit a request for execution to the competent District Court.

The mechanism for executing the security for the fiduciary security is the same as for executing a legally binding judge's decision. The mechanism and procedures for execution are the same as for executing a mortgage. There are 2 (two) types of execution of a judge's decision that has permanent legal force, namely real/actual execution and execution of payment of a sum of money, with the following procedures:

- 1) The applicant for execution submits a request to the Chief Justice of the First Instance Court to enforce the decision;
- 2) The Chief Justice of the First Instance Court will summon the losing party (respondent) for a warning (aanmaning) to enforce the decision within 8 (eight) days in accordance with Article 196 HIR/207 RBg;

- 3) If the applicant for execution still refuses to enforce the decision, the Chief Justice of the First Instance Court will issue a ruling ordering the clerk/bailiff/replacement bailiff to execute an execution sequestration (executory beslag) of the assets if no security sequestration has been placed in accordance with Article 197 HIR/208 RBg;
- 4) An auction sale order is issued, followed by an auction sale after prior announcement in accordance with the auction provisions, and concluded with the handover of the auction proceeds to the applicant for execution in the amount stated in the decision..

To maintain security and order during the execution process, creditors may request assistance from the police, as stipulated in Regulation of the Chief of the Indonesian National Police Number 8 of 2011 concerning Security for the Execution of Fiduciary Guarantees.

The government has issued a policy to follow up on Constitutional Court Decision Number 18/PUU-XVII/2019, namely Regulation of the Minister of Finance Number 213/PMK.06/2020 concerning Guidelines for Auction Implementation. This Minister of Finance Regulation stipulates that the application for a fiduciary execution auction must be accompanied by a statement from the seller (creditor) that the goods to be auctioned are in the possession of the seller because they have been voluntarily handed over and the debtor has agreed to the occurrence of default and there is no objection from the debtor (in accordance with the attachment to the Regulation of the Minister of Finance of the Republic of Indonesia Number 213 / PMK.06 / 2020 concerning Instructions for the Implementation of Auctions in point A number 10 concerning the Auction of Fiduciary Guarantee Execution in point 6 (six). This statement is an important requirement because without this agreement the fiduciary guarantee auction can be canceled. For example, if a creditor or seller has submitted an application for an execution auction and has received an auction schedule, but the debtor submits a letter of objection, then the auction is canceled..

Legal Protection for Creditors Regarding Fiduciary Guarantees in Debtor Default after the Issuance of Constitutional Court Decision Number 18/PUU-XVII/2019

The legal force in the Constitutional Court Decision is final and binding and must be

implemented by all parties, so that no other legal efforts can be made to test the decision that has been decided by the Constitutional Court. Because it is final and binding and must be implemented, one way is to return to the essence of the fiduciary guarantee that should be, namely by amending Law Number 42 of 1999 concerning Fiduciary Guarantees which is a resolution and initiated by the Legislative institution (DPR) and the Executive institution (President) to regulate the affirmation of the executorial power of the fiduciary guarantee certificate which has been considered to have the same power as a court decision that has permanent legal force, which the execution power is not required to follow the mechanism of the execution process as the process in a court decision, but still provides an opportunity for the debtor to file a rejection of execution if there is a condition that has a reasonable reason, then it can refuse to be executed. The affirmation of the interpretation of breach of promise/default so that it is not considered a provision that has multiple interpretations from various parties based on the provisions of Article 1238 of the Civil Code.

Furthermore, as an alternative aimed at reducing potential losses to creditors following Constitutional Court Decision Number 18/PUU-XVII/2019, several steps and efforts can be taken, including:

1. Changes to the Clauses in the Notarial Deed of Fiduciary Asset Guarantee.

The explanation in the Constitutional Court's ruling provides the conditions under which the parties agree on the concept of breach of contract and the voluntary granting of collateral by the debtor to the creditor to enforce the collateral. These important matters can be formulated in a notarial deed as a binding agreement for both parties. The notarial deed is required to be able to explain carefully and clearly and provide the parties with an understanding of the various clauses related to fiduciary and collateral. In addition, creditors and debtors are also required to understand the contents of each agreed clause to avoid differences in interpretation (multiple interpretations) when problems arise during the course of the agreement.

2. Simple Lawsuit as an Alternative Solution for Filing a Lawsuit.

Breach of contract lawsuits against debtors are often filed by creditors who admit to breach

of contract and/or who refuse to voluntarily surrender the fiduciary collateral. The impacts faced by creditors in filing a lawsuit against the debtor include court down payments, court costs, legal fees if using legal counsel, and lengthy and complex court proceedings.

To ensure an efficient judicial process based on the principles of simplicity, speed, and low cost, by distinguishing between the value of the object in a lawsuit and the absence of lengthy evidence, the Supreme Court has issued legislation, namely Supreme Court Regulation (PERMA) Number 2 of 2015 concerning Procedures for the Settlement of Small Claims, as amended by Supreme Court Regulation (PERMA) Number 4 of 2019 concerning Amendments to Supreme Court Regulation Number 2 of 2015 concerning Procedures for the Settlement of Small Claims. This PERMA formulates and regulates dispute resolution through the small claims mechanism.

Small Claims Law is a procedure/effort for the examination process in civil lawsuits, whether in breach of contract and/or tort cases, with a maximum material claim value of IDR 500,000,000.00 (five hundred million rupiah). The mechanism and procedures for providing evidence can be resolved quickly and simply, except in cases where the dispute is resolved through a special court or disputes concerning land rights.

The formal requirements that must be met to conduct a trial in court in relation to simple lawsuits are as follows:

- 1) There may not be more than one Plaintiff and Defendant, unless they have the same legal interest;
- 2) The Plaintiff and Defendant must be domiciled within the same jurisdiction of the Court. If the Plaintiff resides outside the jurisdiction of the Defendant's residence or domicile, the Plaintiff may, in filing their lawsuit, appoint an attorney, incidental attorney, or representative whose address is within the jurisdiction or domicile of the Plaintiff's institution.

- 3) The Plaintiff and Defendant must always attend in person at every stage of the trial process, with or without the assistance of an attorney, incidental attorney, or representative with a letter of assignment from the Plaintiff's institution.

In addition to the formal requirements outlined above, the Panel of Judges will conduct a preliminary examination to determine whether the case filed is a simple lawsuit. During the simple lawsuit hearing process in court, a simple lawsuit cannot be subject to provisional, exception, counterclaim, intervention, rejoinder, duplicate, or conclusion claims. Legal remedies available include filing an objection by the Defendant against a default judgment or a judgment rendered without the Defendant's presence.

The refinement of the clauses in a notarial deed serves as the basis for an agreement that explicitly regulates the provisions, reducing the potential for differences of opinion or multiple interpretations of each clause created and agreed upon by the parties and providing a clear and unequivocal legal standing between the parties. A notarial deed is a primary non-litigation measure that can be used to avoid litigation. However, if litigation is unavoidable, the simple lawsuit mechanism can be utilized as a solution to streamline the judicial process while still observing the specified requirements. Therefore, the solution provided can close the gap both non-litigation and litigation.

The legal remedy that can be taken by creditors if the debtor cannot fulfill its obligations (breach of promise/default) is by using the bankruptcy legal mechanism. In accordance with the formulation in the provisions of Article 59 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, it states that if a creditor holding rights (holder of a pledge, fiduciary security, security right, mortgage, or other collateral rights on property, can execute his rights as if bankruptcy had not occurred) must exercise his rights within a period of no later than 2 (two) months after the onset of the state of insolvency.

If the creditor deems the two-month period insufficient, and if it is proven that the object used as fiduciary collateral is still in the debtor's possession and/or the debtor does not voluntarily surrender the fiduciary collateral to the creditor, the creditor may be forced to file an execution

request with the Commercial Court, within a 60-day period.

The implication of Constitutional Court Decision No. 18/PUU-XVII/2019 of January 6, 2020, regarding legal protection for creditors is the complicated process of executing the collateral and then proceeding with the auction registration process. With the limited time available for creditors to liquidate the object used as collateral for debt repayment, the risk of the receivables not being covered increases. Therefore, creditors are required to make the most of the time allotted.

If a debtor does not voluntarily surrender the object used as fiduciary collateral, the creditor can pursue legal remedies. One form of legal effort that can be undertaken by a creditor is to submit an application to the Curator with the aim of lifting the suspension or changing the conditions of the suspension of the creditor's execution rights. As explained in Article 56 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, it stipulates that if the creditor's execution rights to demand his assets which are under the control of the bankrupt debtor or curator are suspended for a maximum period of 90 (ninety) days from the date of the issuance of the bankruptcy declaration decision or after the start of the state of insolvency.

The suspension/postponement referred to in these provisions has several purposes, including:

- 1) Increase the likelihood of achieving reconciliation;
- 2) Increase the likelihood of optimizing the bankruptcy estate;
- 3) Enable the Curator to carry out his duties optimally.

During the suspension period, all legal demands to obtain payment for a receivable cannot be submitted in court, either by the creditor or the third party in question, who are prohibited from carrying out the execution process or requesting confiscation of the goods that are collateral/security.

Creditors can submit a formal application to the curator to request the suspension. If the curator rejects the creditor's application, the creditor or a third party can submit the application to the Commercial Court Supervisory Judge. Furthermore, the Supervisory Judge, within a

maximum period of 1 (one) day after the application to the Curator to lift the suspension or change the conditions of the suspension is received, is obliged to order the Curator to immediately summon the Creditor and/or third party by registered letter or by courier to be heard at the examination hearing regarding the application to the Curator. Furthermore, the Supervisory Judge is obliged to issue a decision on the creditor's application within a maximum of 10 (ten) days after the application is submitted to the Supervisory Judge.

If the request to the Curator to lift the suspension or change the conditions of the suspension is granted, then the creditor can ask for assistance from the police for security reasons when taking the object that is the object of the fiduciary guarantee in accordance with the Regulation of the Chief of the Indonesian National Police Number 8 of 2011 Concerning the Security of the Execution of Fiduciary Guarantee. Furthermore, the creditor can also submit an execution request to the Commercial Court after the issuance of the decision to lift the suspension period by the Supervisory Judge. However, in this case, if the request is rejected by the Supervisory Judge, then the creditor can submit an objection to the Commercial Court within a maximum period of 5 (five) days after the decision is made by the Supervisory Judge, and the Commercial Court is obliged to issue a decision on the objection within a maximum period of 10 (ten) days after the objection has been received. Therefore, no legal action can be taken against the Commercial Court's decision, including a cassation or judicial review (PK).

If the execution of the collateral object can run well and smoothly and the object that is used as the fiduciary collateral object has been successfully sold, the creditor is obliged to provide an accountability report to the Curator regarding the results of the sale of the object that is the collateral/security and to hand over the remainder of the proceeds from the sale of the collateral object after deducting the amount of interest, debt and costs to the curator. Furthermore, if there is a claim from the curator or other creditors who are privileged in a higher position than the Creditor holding the fiduciary security rights, then the creditor holding the rights is obliged to hand over a portion of the proceeds of the sale for an amount equal to the amount of the claims of the other privileged creditors. Furthermore, if the proceeds from the sale of the object that is

the collateral/security are not sufficient to pay off the debts in question, namely the debtor, then the creditor holding the rights can submit a claim for payment of the shortfall from the bankrupt estate who has the status of a concurrent creditor, after a request for reconciliation of the receivables has been submitted.

Conclusion

Following the Constitutional Court Decision No. 18/PUU-XVII/2019, creditors or fiduciary recipients no longer have the authority to unilaterally execute fiduciary collateral. The use of force or debt collectors to seize collateral is prohibited. Execution must now follow judicial procedures, where creditors file an execution request to the Head of the District Court. The court then issues a summons and warning (*aanmaning*) to the debtor; if the obligation remains unfulfilled, an execution seizure and auction of the collateral object may proceed under court supervision. To ensure legal protection, creditors are advised to revise clauses within the Notarial Deed of Fiduciary Guarantee and, when necessary, file a **simple lawsuit** in accordance with Supreme Court Regulation (PERMA) No. 2 of 2015 concerning procedures for simple civil lawsuits. This regulation provides a faster and more efficient settlement mechanism for breach of contract or unlawful acts involving claims of up to IDR 500 million, ensuring a balance between creditor rights and debtor protection after the Court's ruling.

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