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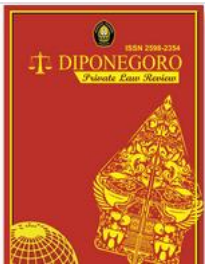

Legal Uncertainty In Fiduciary Guarantee Law: An Analysis Of Reality And Its Impact On Creditors

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ABSTRACT

The existence of Law Number 42 of 1999 concerning Fiduciary Guarantees arises due to the urgency of the public who experience anxiety about collateral objects. This regulation addresses all fiduciary guarantees, but there is confusion and legal uncertainty in their implementation in the community. This can be seen from the concept and reality in the field that is not balanced. Therefore, the author will discuss this issue using normative legal research methods by taking a statutory and conceptual approach, as well as the formulation of the problem discussed, namely legal uncertainty in UUJF in juridical, normative, and sociological aspects to the impact on legal uncertainty, especially on creditors. This study aims to provide views and understanding of how such legal uncertainty occurs and its impact on the creditors concerned. The results of this study show that regulations regarding fiduciaries are still said to have not provided legal certainty for the Indonesian people, especially from creditors.

Keywords: Fiduciary Guarantee, Creditor, Legal Certainty

INTRODUCTION

Guarantees have a very fundamental role in economic activity, which is generally due to stipulating the existence of a guarantee that needs to be completed for a person seeking capital if he requires obtaining money

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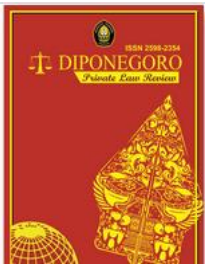

in the form of credit derived from loans both for short and long distances by institutions or financial institutions (both banks and non-banks) that are contributors to providing capital loans. On the debtor side, the form of arranged guarantees is in the form of guarantees that are not to turn off their business activities in their routines, while on the creditor an organized guarantee is in the form of guarantees that regain their credit in a timely manner and provide legal certainty (Winarno, 2013).

In the pattern of guarantee law in Indonesia, there are various institutions or guarantee bodies known as fiduciary guarantee institutions, called Fiducia Creditore which has long existed since Roman times (Heriawanto, 2019). Fiduciary Guarantee Institutions are allowed to have control of objects by fiduciaries who pledge to them and obtain loan costs by implementing such fiduciary guarantees to carry out their business activities (Usman, 2021), which is specifically in the regulation of Law Number 42 of 1999 concerning Fiduciary Guarantee. Although there are institutions that have authority in their responsibilities in their fields and binding legal rules, they are still not fully implemented by creditors as a form of implementation of the provisions of these regulations. This is due to the absence of clear strict rules regarding the limitation of the period regulated in the law (Manurung, 2015).

Based on the regulation of Article 1 part 2 of Law No. 42 of 1999 concerning Fiduciary Guarantee, namely an absolute right in the form of a guarantee that is not imposed by the right of liability for movable objects (shaped or formless) and objects that cannot be moved. as stated in the Law. No. 4/1996 regarding the fiduciary remaining in control of his dependent rights as collateral for the fulfillment of certain arrears who have a privileged position over the Fiduciary to other creditors. While the term fiduciary is a short reference to the sentence "Fiduciaire Eigendoms-overdracht" (FEO) which becomes a conception (Isnaeni, 2017). When referring to Article 1 point 1 of Law No. 42/1999, that fiduciaries as a form of transfer of objects as objects of fiduciary guarantees regarding property rights. Based on Law No. 42/1999, fiduciary is defined as "the existence of trust as the basis for the transfer of ownership rights to an object", in another

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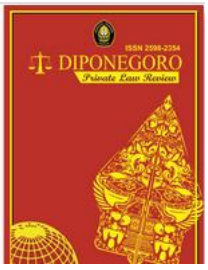

view, jurisprudence defines fiduciary as "trust in surrendering property rights" (Usman, 2021).

The fiduciary guarantee agreement has an accessoir nature, which means that the fiduciary guarantee agreement becomes an agreement that arises and does not stand alone and has an attachment from the existence of a credit agreement, thus having the understanding that the agreement on fiduciary guarantees cannot occur without another agreement that precedes it, which is commonly called the principal agreement (Kamello, 2014). Contracts in installments that use fiduciary guarantees have a process that should be carried out as an effort to impose guarantees with fiduciaries that are in accordance with the provisions of the fiduciary guarantee law. The manifestation should coincide with the notarial deed which is understood as the fiduciary guarantee deed in the concurrent bearing of the object through the fiduciary guarantee, and must contain at least the details about the object according to the rules along with the object (Hemorrhoids, 2013). Based on Article 11 of the UUJF explains that if through a fiduciary agreement a notarial deed is still lacking in its implementation, but needs to be indexed through related registration, the notarial deed is an authentic deed and can be termed as an utorial deed, in a fiduciary agreement, a notarial deed that is not registered first, then as a fiduciary beneficiary will not get precedence over the object that has been guaranteed, similarly, there is no transparent systematics in the UUJF in the case of a person who needs to implement fiduciary collateral objects, while fiduciary guarantee objects become movable or movable objects that are at risk in their transition, so that in practice in the field it results in fiduciary recipients having difficulty in carrying out the droit de suite principle. The imbalance of protection is exacerbated by activities in the field in practice in the application of fiduciary agreements, including in the form of registration of fiduciary objects that are completely unimplemented (generally stop at making authentic deeds), the delivery of extra rates for fiduciary recipients in the execution of fiduciary security objects with the implementation of negotiations, resulting in fiduciary documents that do not provide legal explanation to the public. Not surprisingly, such recompense of peaceful realization, cases of weakness and difficulty of fiduciary execution form a

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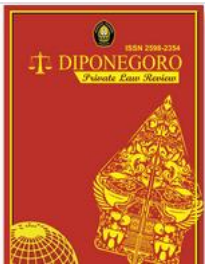

problematic, ineffective fiduciary guarantee caused by the complex execution (Sri Ahyani, 2011).

METHOD

Legal research with normative methods becomes a legal review carried out through analyzing materials taken from various laws, regulations, and other materials. The primary legal source used to study the issue is law, followed by secondary legal sources in the form of reading lists and tertiary legal sources in the form of legal dictionaries. Data collected by applying literature study techniques on legal materials, namely selecting legal materials should answer the problems raised with descriptive presentations that provide an overview and presentation equivalent to what is and structured.

RESULTS AND DISCUSSIONS

Legal Regulations Relating to Fiduciary Guarantee

In Burgerlijk Wetboek, also called BW, legal requirements for guarantees in the form of immovable property protected by mortgage guarantee institutions and movable goods protected by mortgage guarantee institutions. Initially, these two regulations were considered sufficient to answer the needs of the community in the credit sector. One that is closely related to the birth of fiduciaries is the lien institution. Pawn institutions did exist in the 19th century, but they were not sufficient realities of people's lives considering the continued development of the times. The regulation in Article 1152 paragraph 1 BW, which explains that the mechanism of the object used as collateral can still be controlled by the lien, null and void, is the basis for our inability to meet the needs of the community. The debtor cannot use the goods used as collateral for business purposes as long as it is still in the control of the creditor so that it is not possible to pay off all debts (Faridi, 2017). Thus, a form of guarantee called FEO was formed, namely the "Fiduciary Eigendom Overdracht". The presence of FEO raises new innovations that inspire the reality of

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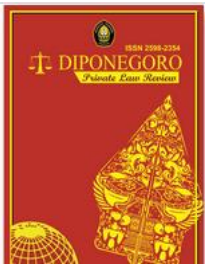

community needs, namely that the mechanism of objects used as collateral can still be controlled by debtors. However, the existence of FEO as a form of solution to the needs of the community at that time was not in accordance with laws and regulations. It can be said that the emergence of FEO is one of the infiltration of laws but by the courts FEO is allowed to meet the needs of the community (Syahrani, 2006).

In line with the opinion of Attorney General Fadil Zumhara who explained that the law will always run dynamically so that change is inevitable(Zumhara, 2023). Therefore, there are indications that pawn institutions that are no longer able to answer the needs of the community force the government to make a breakthrough in the legal umbrella that is expected to be in accordance with the circumstances of the community. In other words, the existence of law must always reflect the real situation of society itself so that it will not cause a severe event in the form of a legal vacuum. With the existence of a new institution at that time called FAO, it did not necessarily create a strong legal umbrella for people who would make a credit agreement.

In the opinion of General Sudirman University Professor, Juswito Satrio stated that the fiduciary guarantee runs based on and maintained by jurisprudence and there is no regulation on it. Although the legal umbrella is only in the form of jurisprudence, the existence of fiduciaries can be said to be an alternative in society. The existence of provisions in book II BW that regulate liens will still not indicate to prevent the parties from creating another agreement that is not in harmony with the regularity between legal relationships so that the fiduciary agreement is considered to provide a guarantee(Satrio, 2007). The absence of a law was born Law No. 42 of 1999 concerning Fiduciary Guarantees or later often referred to as UUJF.

Uncertainty of Fiducian Guarantee Legal Regulations

A law and regulation, at least two aspects are needed that can be considered to provide legal certainty. First, in the formulation of norms and principles in laws and regulations, there must be a certainty where there will be no conflict between the articles in it or with articles outside the law. In other words, there is no overlap of a law and regulation. While the second, in the implementation of legal norms and principles, a legal

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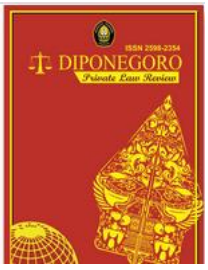

certainty can be presented on the consequences of making laws and regulations. If in the formulation of laws and regulations have pocketed legal certainty while at the level of implementation it does not touch the community, it can be said that such legal regulations are only juridical decorations in people's lives or can also be called dead legal norms (doodregel)(Kamello, 2014).

At the level of implementation of a law and regulation, legal certainty will be seen and assessed whether it has binding force on the community or not. Thus, it can be a common question whether a legal certainty has been created from the promulgation of a law and can run effectively in the reality of society. Based on a legal theory, the existence of legal rules can apply by looking at three aspects, namely juridical, sociological and philosophical aspects(Soerjono Soekanto & Mustafa Abdullah, 1987). From this aspect, it can be stated in the assessment of UUJF. If examined carefully, a statement can be drawn that actually the regulations regarding fiduciary guarantees do not reflect the existence of legal certainty in it both in juridical, normative and sociological terms.

Viewed from normative juridical, legal uncertainty in UUJF is seen in several articles that give rise to double or ambiguous interpretations and conflicting articles. It can be seen in Article 1 of the UUJF that there are three different definitions of separation regarding fiduciaries, fiduciary guarantees and objects. This certainly creates a confusion where it should use only one word, which is enough with fiduciary guarantees. The separation of differences in understanding of fiduciaries and fiduciary guarantees has implications for the confusion of other articles. For example, in Article 7 of the UUJF uses the word fiduciary which should use the right word in the form of a fiduciary guarantee because in that article it contains the meaning that the guarantee is a fiduciary guarantee, not a fiduciary. Therefore, it is necessary to reformulate the understanding or terminology of Fiduciary Guarantee in which there is a fiduciary meaning. Therefore, in the formation of the understanding or terminology of a term must really pay attention to the teaching of making definitions that formulate general matters preceding various specific matters of the term that distinguish it from other terms.

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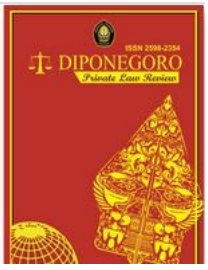

Furthermore, in the sound of Article 1 number 4 and Article 11 paragraph (4) of the UUJF contains a double interpretation and shows the inconsistency of laws and regulations. The registration of the fiduciary object is regulated in article 1 number 4. However, Article 11 paragraph (1) explains that on the contrary, only registered objects can be used as fiduciary guarantees. In addition, there is legal uncertainty when it comes to proving fiduciary guarantees. In accordance with Article 6 letter C of the UUJF, a proof for the object of guarantee lies in the certificate or letter of ownership. From the certificate, the object of fiduciary guarantee can be known whether it is registered or not. When viewed in public reality, proof of ownership of fiduciary guarantees can be in the form of certificates from objects, such as Vehicle Number Certificate (STNK) and Motor Vehicle Owner's Book (BPKB) for the type of car or motorcycle vehicle. Regarding proof of certificate of a building/house built on a piece of land not owned by a person. Until now, the position of buildings that do not belong to a person does not have the strength of proof of identity itself, which is not in harmony with proof of ownership of the certificate. Thus, UUJF has not fully provided legal certainty to be effective. Therefore, regulations regarding the registration of buildings or houses are still needed to implement the UUJF(Kamello, 2014).

When viewed from the aspect of imposing fiduciary guarantees, the UUJF stipulates that there must be a notarial deed. This is very different from the fiduciary exercise before the enactment of the UUJF, which allowed the imposition of fiduciary guarantees by deed under hand. Theoretically, in line with the opinion of civil law experts, Sudikno Mertokusumo provides an understanding that the existence of a deed is used for two things, namely it can be used as evidence (probationis causa) and as a refinement of legal deeds (formality causa)(Mertokusumo, 1982). When viewed in terms of legal binding force, notarial deeds have stronger force than underground deeds. This is based on the fact that a notary certificate has proof of birth while a certificate under the title does not have. Therefore, from this presentation, it would be the way of thinking behind the government at that time in making UUJF.

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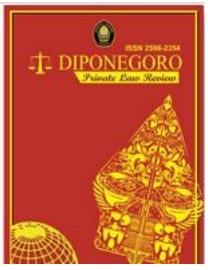

However, when viewed in the reality of people's lives, the imposition of fiduciary guarantees with notarial deeds is considered burdensome and detrimental to creditors, especially creditors of small entrepreneurs. In the reality of life, it is common to find that the majority of fiduciaries do not register a fiduciary guarantee deed. This is allegedly by several causes, such as(Huru, 2019):

1. Registration of fiduciary guarantees requires relatively large costs and nominal guarantees are small. Therefore it is not in harmony with the principle of expediency;
2. Relatively long processes and procedures. This is related to organisators and regions.

However, the UUJF regulations do not explain what the legal consequences will be if the party deviates from the provisions of fiduciary registration in order to avoid fees. The issue is also the registration of fiduciary guarantees carried out by the Fiduciary Registration Office (KPF). Fiduciary Registration Offices were first established in Jakarta, then in each provincial capital and then established in tier II regions gradually. With the inconvenience of this place, it causes problems considering the distance between provincial capitals and level II regions that are relatively far apart. Considering that in general, fiduciary guarantee creditors are located in municipalities or districts, so it requires rates and periods that are not short. This certainly leads to ineffectiveness or loss of legal interest for creditors.

Reality and Impact of Legal Uncertainty of Fiduciary Guarantee Regulations on Creditors

From the existence of regulations that tend to be ambiguous and ambiguous, then raises several impacts that are quite influential on creditors in fiduciary guarantees. As explained earlier, a fiduciary agreement must first be made to establish creditor protection(Wihandriati, 2022). Since it is an instrument of fiduciary guarantee, it is made to meet the principle of publicity. Therefore, the preferred right of the fiduciary creditor will not exist if the fiduciary guarantee agreement is not registered(Suprianto & Budiman, 2020).

To anticipate possible problems that will come in the imposition of fiduciary guarantees, such as default, and to provide security, creditors are

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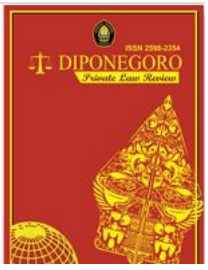

encouraged to make agreements using notarial deeds or using deeds under hand(Yuliadi, 2020). Employers believe that in addition to reducing registration costs, a fiduciary guarantee legalized using a notarial deed is sufficient to protect creditors. The imposition of fiduciary guarantees is only for the holding of deeds, after all, in practice it is not problematic.

Any transaction, manner or action that a creditor may choose to take during the fiduciary registration process may result in a different outcome in the future exercise of the creditor's rights as a fiduciary beneficiary. If the collateral is charged with the deed under hand, it means that the fiduciary is only an ordinary creditor, which if the debtor defaults, then the creditor must first prove the existence of a debt recognition agreement. It should be underlined that the fiduciary guarantee agreement written from the deed under hand, cannot be used as a basis for claiming the preferred rights of creditors.

Practice in the field shows that some business institutions still use underhand deeds as a form of imposing fiduciary guarantees(Muhtar, 2013). Even if the deed under the hand contains the title of the fiduciary agreement, because it is not established in a standard way (using a notarial deed), until the deed of agreement does not need to be registered, and this results in the destruction of executory power in the deed document. Despite such consequences, such activities are common, since it is proven that there are no negative practical consequences in practice, other than the reasons for the performance of the organization of financial institutions. This indirectly forms the entrepreneur's view that the current fiduciary agreement with the word under hand does not pose much risk, and only affects the selling price and services so that it is more expensive because of the administrative costs charged to business actors who register fiduciaries.

Furthermore, on collateral objects that are only charged using a notarial deed, in the event that if the debtor defaults, then by the notarial deed the creditor will be considered as the one who receives the fiduciary, but not the preferred creditor, because the deed is not registered (only ordinary creditors). The creditor will have preferential rights if the fiduciary guarantee imposed by the notarial deed has been registered. This preferred

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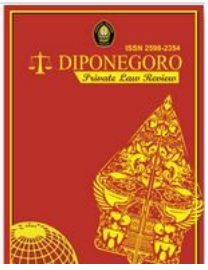

right has a wide scope to concern the execution of collateral wherever the collateralized object is located.

Another problem especially in fiduciary registration offices is that there is no regulation to register, namely a certain time to register a fiduciary guarantee deed to the KPF register(Yasin, 2020). Then there are also limited facilities and officers. This limitation causes fiduciary beneficiaries to lose interest in applying for registration, moreover, the application for issuance of a fiduciary guarantee certificate cannot be completed within one day (according to regulations) even if the date of issuance of the certificate is the same as the date of application.

There is an assumption that lawmakers have indeed created an unfavorable environment, because some banking institutions do not even require financing institutions receiving business loan assistance from them to follow steps to register fiduciaries in accordance with existing regulations. The lack of legal awareness possessed by the public, as well as the absence of pressure from legislators to regulate fiduciary practices is one of the factors causing the lack of enforcement and awareness of the law that should be important(Nur, M. Hadhri & Concludeti, 2020). For registration of the deed of imposition of fiduciary guarantee in KPF, a time limit must also be given. In essence, it not only sensitizes the public and business actors, but also increases the efficiency of the state treasury.

There are still many objects of fiduciary guarantees that we can easily find in various financial institutions that are not made by notarial deed and are not registered or carried out only on the basis of a deed under hand, this also makes registration impossible. Basically, this happens because people are used to accepting execution based on the agreement received. This situation led to many confiscations by financing institutions on the street or wherever the collateralized object was located, and the owner handed it over without protest and resistance(Rutan, Sahban & Risma, 2021). Such elements come from the middle class, to which businesses respond by not registering a fiduciary.

Registration of fiduciary guarantees through established procedures by business actors in the practical world is rarely done(Abdullah, 2016). When it comes to fiduciary agreements, made according to standard rules,

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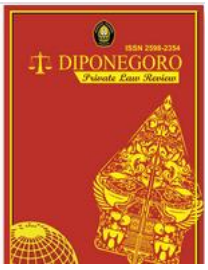

registered or not, this ultimately makes many parties vulnerable, especially for fiduciaries. This means it concerns execution and/or protection of third parties. Law enforcement, business actors, and especially notaries who in this case as general officials, must at least have a basic idea of the importance of fiduciary registration. However, it is unfortunate that the law does not emphasize the importance of this issue, so notaries often exclude fiduciary registration for their clients, in order for clients to consider their services cheap to use. In fact, not registering a fiduciary guarantee has many potential risks later on.

In connection with its enforcement, UUJF gives creditors the right to obtain fiduciary guarantees in the form of control of fiduciary guarantee objects(Dwiwijaya, 2019). Problems arise when the debtor defaults but refuses to hand over collateral to the creditor. There is no provision in the UUJF that sanctions debtors. It is stipulated that creditors can only ask for help from the authorities. However, UUJF regulations do not specify who is in authority, whether bank employees, security guards, police or judges. This is what causes uncertainty in practice regarding the terms of execution of the object of fiduciary guarantee seen here(Kamello, 2014).

CONCLUSION

The conclusion of this explanation is the emergence of fiduciary guarantees due to public unrest over collateral stored by creditors which results in debtors not being able to use these collateral as an effort to pay off their debts to creditors. Initially, this fiduciary guarantee took the form of legal infiltration because at that time the laws and regulations governing fiduciary guarantees had not been regulated, until finally the Hooge Raad was allowed for the needs of the community. Then the development of fiduciary law grew until finally Law No. 42 of 1999 concerning Fiduciary Guarantee or later currently referred to as UUJF. However, the emergence of the fiduciary guarantee law cannot be ascertained full legal certainty. There is still a lot of ambiguity or legal uncertainty both in juridical, normative, and sociological terms in fiduciary guarantee regulations. From a juridical point of view, as in Article 1 of the UUJF, there is a confusing

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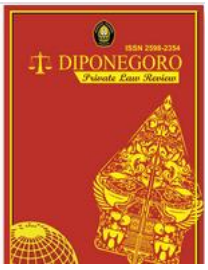

separation of the definition of fiduciary from fiduciary guarantee, then in Article 1 number 4 and Article 11 paragraph (1) where both articles give a double meaning related to the registration of goods or deeds of fiduciary guarantee. In proving fiduciary guarantees, there is also still no legal certainty as in Article 6 letter C proof can be seen from proof of ownership, but in the UUJF it has not been explained about proof of ownership of buildings on other people's land. In addition, the imposition of a fiduciary deed with a notarial deed is also burdensome for small entrepreneurs because of the relatively expensive costs and registration places that are only in Jakarta and difficult to reach. With these ambiguous laws and regulations, it can have an impact on creditors. As is known, registration of fiduciary guarantees can be with deeds under hand and notarial deeds, with the difference in registration can affect the exercise of creditor rights such as preferred rights and their execution. In addition, with the object of fiduciary guarantee held by the debtor can harm the creditor if the debtor defaults but the debtor does not want to deliver the fiduciary security. The creditor can only depend on the authorities, but in the UUJF itself it is not regulated who will handle the case. With these various uncertainties and impacts, it is necessary to review the legal certainty in the UUJF. With legal certainty that has been valid in the Law, it can provide comfort and security for creditors in making fiduciary guarantees, because after all, this fiduciary guarantee itself exists as an effort to protect the rights of creditors in providing their wealth as debt to the debtor.

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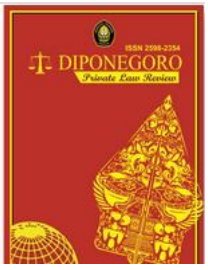

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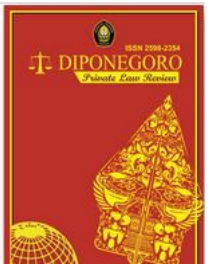

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