

# The Position of Creditors in Consumer Financing Agreements Due to Fiducian Guarantee Not Registered

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## **The Position of Creditors in Consumer Financing Agreements Due to Fiducian Guarantee Not Registered**



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**ABSTRACT:** Research with the title creditor position in consumer financing agreements as a result of fiduciary guarantees not being registered, will raise two problems as follows, first, what are the characteristics of consumer financing agreements with fiduciary guarantees, and second, how default is non-fulfillment of achievements or obligations set by certain parties in an engagement. The methodology used in analyzing the problems in this study uses a normative juridical method with two approaches, namely the statutory approach and the concept approach, to produce an in-depth analysis. Based on the discussion that has been carried out in the previous chapter, the following conclusions can be formulated: First, that the characteristics of consumer financing agreements with fiduciary guarantees. The agreement is made by default the contents of the agreement, and the agreement is the principal agreement. Furthermore, it is bound by a fiduciary guarantee agreement which is an assecoir agreement (additional agreement) to the main agreement. After an agreement is reached, then the fiduciary guarantee will be charged and the fiduciary guarantee will be registered in accordance with Government Regulation No. 21 of 2015. The position of the creditor does not register the fiduciary guarantee object as a concurrent creditor. Second, default is the non-fulfillment of achievements or obligations set by certain parties in an engagement. Default in the guarantee is said to cancel the guarantee agreement, and only the main agreement applies. The implementation of the execution of fiduciary guarantees can be done in 3 ways, in accordance with article 29 UUJF, the 3 ways are by means of executorial titles, paratexecutie and private sales. Legal protection for debtors in the forced withdrawal of fiduciary collateral objects that are not registered, namely there are preventive and repressive protections. And the settlement can be done peacefully (kindly), win-win solution or through consumer dispute resolution institutions such as BPSK.

**KEYWORDS:** position; creditor; financing; consumer; fiduciary

### **I. INTRODUCTION**

Collateral is an important thing in daily activities, especially in economic activities. As is the case in banking, in lending money or capital between creditors and debtors. In granting a loan of money or capital, the creditor must provide certain conditions, namely requiring a guarantee that must be fulfilled by the debtor, and the debtor must be obliged to provide a guarantee/collateral to obtain the loan of money for a certain period of time.

For creditors, with the existence of a guarantee so that creditors can provide a sense of security in providing a loan of capital and it can be recovered in accordance with a predetermined period of time. Meanwhile, for the debtor himself, the guarantee he gives to the creditor will be useful if later the debtor cannot pay the debt that has been given by the creditor.

The purpose of a guarantee is to cover debts, if the debtor cannot pay the debt previously given by the creditor. It also equally protects both parties. The creditor gets protection against debt repayment by the debtor, and in other words provides protection in fulfilling an obligation by the debtor.

Guarantee law is regulated in the Civil Code (hereinafter referred to as BurgerlijkWetboek) in Book II concerning Objects. Pledge and Mortgage guarantees are also regulated, namely Pawn in Articles 1150-1160 BW and Mortgage in Articles 1162-1232 BW. Other guarantees are Fiduciary Guarantees and Mortgage Rights which are regulated in another law, namely Law No. 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as UUJF) and Law No. 4 of 1966 concerning Mortgage Rights on Land and Related Objects with Land (hereinafter referred to as UUHT).

Currently, it is not only banking that requires a guarantee, various other financial institutions also provide financing by requiring a guarantee. According to D.Y Witanto, financial institutions, both banks and non-banks, play a strategic role in the traffic of business transactions in this modern era, there is almost no business activity nowadays that does not require the services of financial and banking institutions, because the transaction system is carried out slowly. began to shift from a manual transaction system (manual transaction) to a digital transaction system (digital transaction) by using electronic devices and internet network connections, this fact was triggered by several reasons, among others because the digital transaction system was considered to

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provide convenience, speed, and practicality because it can be done anytime and anywhere without being limited by space and time.<sup>1</sup>

The increasing public need for the role of financial institutions in business and trade has automatically triggered the birth of non-bank institutions (LNKB) which provide financing service facilities for the community through an installment payment system (credit), this shows that the level of public demand for consumption of goods and services continues or continues to increase, these conditions become quite promising opportunities for business actors to be able to profit by opening business opportunities in the field of financing and financial services (finance) facilities.

A consumer financing activity such as the sale of movable objects also requires a guarantee in providing funds, one of which is a Fiduciary Guarantee. The Fiduciary guarantee agreement is an additional agreement (asseoir) to the main agreement. According to the UUJF, it is also called the term transfer of ownership rights in trust, where the mastery of the object is still carried out by the owner. Fiduciary guarantees require a guarantee as a form of repayment of certain debts. Usually the collateral is securities, house certificates or what is more often used as collateral is motor vehicle securities (BPKB), both four-wheeled vehicles or two-wheeled vehicles. Due to the principle of trust, the collateral is motorized vehicles with provisions, securities are in the power of the creditor and the collateralized goods can still be enjoyed by the debtor.<sup>2</sup>

The Fiduciary Guarantee Agreement will be born if both parties have agreed and jointly met with a notary to carry out the imposition and will later be registered at the Fiduciary registration office (Kemenkumham) through online registration, which will later produce a Fiduciary guarantee certificate that has material guarantee rights and rights execution if the debtor defaults without going through a court decision, namely through paratexecutive, private sale, or executorial title.

There are still many corporate institutions that do not register their Fiduciary guarantees, but take the law (eigenrichting) themselves when executing their objects. Sometimes parties from financing institutions order third parties (debt collectors) to withdraw objects by force on the road or without the knowledge of the debtor/consumer if they do not fulfill their obligations to pay (default). This legal action does not reflect an example of good and correct legal behavior in carrying out collateral execution so that it can hurt the debtor's sense of justice and legal certainty as a Fiduciary provider. sometimes even the creditors often neglect the rights of the debtor which should be considered by the creditor, things like this are clearly very detrimental to the debtor.

The Fiduciary Guarantee Law already regulates the obligation to register Fiduciary collateral objects, but until now several consumer finance institutions have ignored it. In 2012, the Minister of Finance issued a Regulation of the Minister of Finance Number 130/PMK.010.2012 concerning Registration of Fiduciary Guarantees for Financing Companies for Motorized Vehicles with Fiduciary Guarantees, in which there is an article that includes sanctions for consumer finance institutions when executing objects without Fiduciary Guarantee certificate.

Based on the description of the background above, in this study the following problems can be formulated: 1. What is the position of the creditor in the consumer financing agreement if the Fiduciary guarantee is not registered in the event of a default on the debtor? 2. How is the legal protection for the debtor in the forced withdrawal of Fiduciary collateral objects that are not registered.

## II. CONCEPTUAL FRAMEWORK

### 1. Legal Protection

According to Satjipto Raharjo, legal protection is to provide protection for human rights (HAM) that are harmed by other people and that protection is given to the community so that they can enjoy all the rights granted by law. The law can function to realize protection that is not only adaptive and flexible, but also predictive and anticipatory. Law is needed for those who are weak and not yet strong socially, economically and politically to obtain social justice.<sup>3</sup>

In the opinion of Phillipus M. Hadjon, legal protection for the people is a preventive and repressive government action. Preventive legal protection aims to prevent disputes from occurring, which directs government actions to be careful in making decisions based on discretion, and repressive protection aims to resolve disputes, including handling them in the judiciary.<sup>4</sup>

### 2. Debtors

Debtors in Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law), in Article 1 it is emphasized that "debtor customers are customers who obtain credit or financing facilities based on sharia principles or equivalent to It is based on the bank's agreement with the customer concerned." The debtor is also contained in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt (hereinafter

<sup>1</sup> D.Y. Witanto, 2015, Hukum Jaminan Fidusia dalam Perjanjian Pembiayaan Konsumen, CV. Mandar Maju, Bandung, hlm. 1.

<sup>2</sup> Hani Lisdiyani, 2015, Implementasi Jaminan Fidusia Dalam Pemberian Kredit di BMT Tamzis Yogyakarta, Fakultas Syariah dan Hukum Universitas Islam Negeri Sunan Kalijaga Yogyakarta.

<sup>3</sup> Satjipto Raharjo, 2000, Ilmu Hukum, PT. Citra Aditya Bakti, Bandung, hlm. 55.

<sup>4</sup> Phillipus M. Hadjon, 1987, Perlindungan Hukum Bagi Rakyat Indonesia, PT. Binallmu, Surabaya, hlm. 29.

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referred to as the Bankruptcy & PKPU Law), Article 1 confirms that a debtor is a person who has debt due to an agreement or law whose repayment can be billed in court.

### 3. Definition of Agreement

The definition of agreement in BW Article 1313 stipulates that an agreement is an act by which one person or more binds himself to one or more other people. The conditions for a valid agreement are contained in the contents of Article 1320 BW, must fulfill four conditions, namely:

- a. The agreement of those who bind themselves, namely the existence of an agreement from the parties regarding the main matters agreed upon, what is desired by one party is also desired by the other parties and vice versa;
- b. Ability to make an agreement, according to law there is an element of competence in accordance with Article 1329 BW that, every person is capable of making agreements, if he is not declared incompetent by law;
- c. A certain thing, meaning what is agreed (rights and obligations) of both parties;
- d. A reason that is permissible, in this case is regarding the content of the agreement to be made not contrary to the law, public order and decency.

Conditions one and two are subjective requirements because these two conditions concern the subject of the agreement, while the third and fourth conditions are objective requirements because they concern the object of the agreement. The four terms of the agreement mentioned above are conditions for the validity of the agreement, so these conditions must be met by the parties who will make the agreement.<sup>5</sup>

The object of the agreement is the object or money contained in the deed of agreement signed by both parties as a form of agreement between the two parties as a legal relationship. Whereas regarding the subject in the agreement are both parties which both carry rights and obligations, meaning that the legal subject has rights and obligations in the legal actions carried out.<sup>6</sup>

### 4. Guarantee

The term collateral is a translation of the term *zekerheid* or *cautie*, namely the ability of the debtor to fulfill or pay off his debt to creditors, which is done by holding certain objects of economic value as collateral for loans or debts received by debtors against creditors.<sup>7</sup> The guarantee law is the law that regulates the guarantee of a person's receivables, the entire legal rules governing the relationship between the guarantor and the recipient of the guarantee in relation to the imposition of collateral to obtain a credit facility.<sup>8</sup>

The types of guarantees according to GunawanWijaya are as follows

#### 1) According to the way it happened

- a. Guarantees born by law

Guarantees that are born by law are guarantees whose existence is designated by law, without any agreement between the parties, namely what is regulated in Article 1131 of the Civil Code which states that all property belonging to the debtor, both existing and new ones, will exist in the future, will be responsible for all his engagements. This means that all debtor objects become collateral for all creditors. In the event that the debtor cannot fulfill his debt obligations to the creditor, then the debtor's property will be sold to the public, and the proceeds from the sale of these objects are divided between the creditors, in proportion to the amount of each receivable (Article 1132 of the Civil Code).

- b. Guarantees that are born because it was agreed

In addition to guarantees designated by law, as part of the principle of consensuality in contract law, the law allows the parties to enter into guarantee agreements aimed at repayment or implementation of debtor obligations to creditors. This guarantee agreement is an assessor agreement attached to the principal agreement issuing accounts payable between debtors and creditors. Examples are mortgages, mortgages, mortgages, fiduciaries.

#### 2) According to the object

- a. Guarantees that are movable objects

Collateral where the object used as collateral is a movable object. A movable object is an object that has good characteristics and according to law is stipulated as a movable object.

- b. Guarantees that have immovable objects or fixed objects

Collateral where the object used as the object of collateral is an immovable object.

- c. Collateral object in the form of land

Collateral where the object used as the object of collateral is in the form of land.

<sup>5</sup> Apriya Rukmala Sari, 2011, *Penyelesaian Wanprestasi Dalam Perjanjian Kredit Kendaraan Bermotor Dengan Jaminan Fidusia*, Fakultas Hukum Universitas Muhammadiyah Surakarta.

<sup>6</sup> Ibid.

<sup>7</sup> Rachmadi Usman, 2008, *Hukum Jaminan Keperdataan*, Sinar Grafika, Jakarta, hlm. 66.

<sup>8</sup> Anita Lydia, 2012, "Perlindungan Hukum Kreditor Dengan Jaminan Fidusia", Fakultas Hukum Universitas Pembangunan Nasional Veteran Jawa Timur.

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### 3) Collateral according to the authority to control the collateral object

- a. The one who controls the collateral object feels safer for creditors, especially for movable objects that are easily transferable and change in value. An example of a guarantee that controls the object is a pawn.
- b. Without mastering the collateral object

For guarantees that do not control the object. For example, mortgages and fiduciaries. This benefits the debtor because they can still take advantage of collateral objects.<sup>9</sup>

### 4) Guarantee by its nature

- a. Material guarantees (material), namely material guarantees. Material guarantees have the characteristics of "material" in the sense of giving precedence rights over certain objects and have inherent properties and follow the objects concerned.
- b. Immaterial guarantees (individuals), namely individual guarantees. Individual guarantees do not give precedence over certain objects, but are only guaranteed by a person's assets through a person who guarantees the fulfillment of the engagement in question.<sup>10</sup>
- c. General Guarantee. General guarantees are all the debtor's assets, both movable and immovable, both existing and new ones that will exist in the future, become dependents for all individual agreements (article 1131 of the Civil Code). It is also contained in article 1132 of the Civil Code, namely that these objects are shared as collateral for all those who owe them, the income from the sale of these objects is divided according to the balance, that is, according to the size of each receivable, unless there are reasons among the creditors. valid reason to take precedence.<sup>11</sup>

### 5) Consumer Financing

"Legal Institutions "Consumer Finance" is used as a translation of the term "Consumer Finance". This consumer financing is nothing but a type of consumer credit. It's just that, if consumer financing is carried out by finance companies, while consumer credit is provided by banks. Minister of Finance Decree No. 1251/KMK.013/1988 provides an understanding of consumer financing as an activity carried out in the form of providing funds for consumers to purchase goods whose payments are made in installments or periodically by consumers.

From the definitions above, it can be concluded that actually the consumer credit and consumer financing are the same, only the lenders are different. The parties in consumer financing are consumer companies (creditors) as providers of funds, consumers (debtors) as recipients of costs and suppliers as providers of goods."<sup>12</sup>

"The legal basis for consumer financing can be divided into two, namely:

1. The substantive legal basis for consumer financing is an agreement between parties based on the "principle of freedom of contract", namely an agreement between a financial company as a creditor and a consumer as a debtor. As long as it does not conflict with the applicable legal principles, then such an agreement is valid and fully binding, contained in article 1338 paragraph 1 of the Civil Code which states that an agreement made legally and applies as a law for those who make it.
2. Administrative legal basis, based on Minister of Finance Decree No. 1251/KMK.013/1988 concerning "Provisions and Procedures for Implementation of Financing Institutions. It is determined that one of the activities of a fund-financing institution is channeling funds called "Consumer Financing."<sup>13</sup>

### 6) Fiduciary and Fiduciary Guarantees 1

According to the origin of the word, fiduciary comes from the word "fides" which means trust. In accordance with the meaning of this word, the (legal) relationship between the debtor (Fiduciary giver) and creditor (Fiduciary recipient) is a relationship based on trust. Fiduciary Guarantee Institutions are well known and enforced in Roman legal society. There are 2 (two) forms of Fiduciary guarantees, namely Fiduciary cum creditore and Fiduciary cum amico. Both arise from an agreement called pactumfiduciae which is then followed by the transfer of rights or in iure cession.<sup>14</sup>

Fiduciary is a term that has long been known in Indonesian. The law that specifically regulates this matter, namely UUJF, also uses the term "Fiduciary". Thus, the term "Fiduciary" is already an official term in our world of law. However, sometimes in the Indonesian language for Fiduciary this is also referred to as "Transfer of Property Rights in Trust". In Dutch terminology it is often referred to by the full term FiduciareEigendomOverdracht, while in full English it is often referred to as Fiduciary Transfer of Ownership.<sup>15</sup>

Article 1 point 1 UUJF states that Fiduciary is the transfer of ownership rights to an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object. movable, especially

<sup>9</sup> Sheny Adisti, Fidusia Sebagai Jaminan Dalam Pemberian Kredit di Perusda BPR Bank PasarKlaten, (cited September 19), available from URL: <http://eprints.uns.ac.id/4764/1/134870908201008201.pdf>

<sup>10</sup> Salim HS, 2011, op.cit., hlm. 23.

<sup>11</sup> Anita Lydia, Op.cit.

<sup>12</sup> Munir Fuady, Hukum tentang Pembiayaan, PT. Citra Aditya Bakti, Bandung, 2014, hlm. 162.

<sup>13</sup> Ibid., hlm. 164-165.

<sup>14</sup> Ibid.

<sup>15</sup> Anita Lydia, op.cit.

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buildings that cannot be encumbered with Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for certain debt repayments, which gives the Fiduciary Recipient a priority position over other creditors (Article 1 number 2 UUJF).

Fiduciary guarantees are usually used for capital costs for businesses where the objects are guaranteed by the debtor however, the debtor can still own and control these objects.

The characteristics of fiduciary guarantees include:

- Fiduciary guarantees have the nature of a droid de suite, which always follows the object wherever or in the hands of whoever the object is. based on article 27 paragraph (2) UUJF.
- Fiduciary guarantees provide preferential rights, creditors as fiduciary recipients have the right to be prioritized to obtain debt repayment from the execution of the fiduciary collateral object in the event that the debtor defaults or fails to pay the debt. Based on article 27 paragraph (1) UUJF.
- Fiduciary guarantees have the nature of *asse-soir*, namely agreements that are additional and linked to the main agreement. Which means that the cancellation of the agreement depends on the principal agreement itself. Based on article 4 UUJF.
- Fiduciary guarantees have the nature of specialization and publicity, publicity means that a clear and detailed description of the object of the fiduciary guarantee in the fiduciary guarantee deed, which is public in nature is in the form of a fiduciary guarantee deed that has been registered online. Based on articles 6 and 13 UUJF.
- Fiduciary guarantees have executorial power, namely the power to carry out what is implemented in the decision by force by means of the state. Means that the creditor as a fiduciary recipient has the right to execute the collateral object if the debtor defaults. Execution of fiduciary guarantees is based on fiduciary guarantee certificates. That is based on article 29 UUJF.

### III. RESEARCH METHOD

Legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand.<sup>16</sup> This research is a normative research which seeks to study and explore and find answers about what should be from every problem based on norms, not examining social phenomena that occur as a result of legislation. The approach used in this research is a statutory approach. This approach is used because in solving the problems in this research, it will refer to existing and related laws.

### IV. DISCUSSION

#### 1. Position Of Creditors in Consumer Financing Agreements with Unregistered Fiduciary Collateral

##### A. Characteristics of Consumer Financing Agreements with Fiduciary Guarantees

This consumer financing institution is in demand by consumers based on the reasons that the application process/ procedure to obtain financing is very easy and there is no need for collateral for goods other than the goods concerned to be used as collateral objects whose binding is carried out Fiducially. The same as granting credit by banks, consumer financing institutions also require guarantees in the sense of confidence for finance companies that consumers will be able to fulfill their obligations in accordance with the signed financing agreement.<sup>17</sup> Even though they both provide fees, the fees provided by banks and consumer financing institutions are different. The provision of banks in providing costs in material form (loan credit) and the debtor is obliged to pay in accordance with the loan given to the previous creditor in cash.

While the provision made by consumer financing institutions is in the form of providing credit in the form of purchasing goods needed by the debtor or consumer, or what is usually called a sale credit. Later, the debtor himself already has the necessary objects, but still pays the debt to the consumer finance institution as a creditor.

Guarantees in consumer financing are in principle the same as credit guarantees in bank loans, especially consumer credit, namely the main guarantee, main guarantee and additional guarantee, Sunaryo describes it as follows:<sup>18</sup>

##### 1. Ultimate Guarantee

As financing in the form of credit, the main guarantee is the trust from the consumer finance company (creditor) to the consumer (debtor) that the consumer can be trusted and is able to pay periodically (in installments) until the financing he has received is paid off. Just like in banking, consumer financing parties (creditors) also pre-viewed prospective debtors (consumers) based on trust which is based on the 5C principle, namely:

- a. Character, so the creditor looks at the character or personality of the prospective debtor;
- b. Capacity, the creditor sees from the perspective of the ability of the prospective debtor whether he is capable of repaying his debt or not.
- c. Collateral, a guarantee or collateral provided by the debtor if the debtor is unable to pay the debt, the creditor can confiscate assets or objects belonging to the debtor;

<sup>16</sup> Peter Mahmud Marzuki, 2011, *Penelitian Hukum*, Kencana Pranada Media Group, Jakarta, hlm. 35.

<sup>17</sup> Ramadhan Muawad, "Jaminan Fidusia Dalam Perjanjian", (diakses 5 October 2017) available from [URL-http://ramadhanmuawad.wordpress.com/2015/10/29/jaminan-Fidusia-dalam-perjanjian-pembiayaan-konsumen](http://ramadhanmuawad.wordpress.com/2015/10/29/jaminan-Fidusia-dalam-perjanjian-pembiayaan-konsumen)

<sup>18</sup> Sunaryo, 2008, *Hukum Lembaga Pembiayaan*, Sinar Grafika, Jakarta, hlm. 105.

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- d. Condition, the creditor also sees and considers the conditions and economic situation in granting credit. Economic conditions and situations are usually related to political aspects, which may affect the country's economic factors or the value of the currency will decrease;
- e. Capital, the creditor must consider the condition of the debtor's wealth in providing credit, whether it is appropriate or not in providing credit to the prospective debtor and how much in granting credit or financing.

### 2. Principal Guarantee

- a. In addition to the main guarantee, to further secure the funds that have been given to consumers, consumer finance companies usually ask for basic guarantees, namely in the form of goods purchased with funds from consumer finance companies. So, even if the debtor or consumer is in a consumer financing agreement, they can still own the required goods. It's just that, the creditor also doesn't want to be harmed if there is a bad deed committed by the debtor, namely the goods needed by the debtor become the main guarant<sup>6</sup>;
- b. Usually the guarantee is made in the form of a fiduciary transfer of ownership (Fiduciary). Because of this fiduciary, usually<sup>11</sup> all documents relating to the ownership of the goods in question will be held by the consumer finance company (creditor) until the installments are paid by the consumer.

### 3. Additional Warranties

Even though they are not as strict as guarantees for granting bank loans, in practice consumer finance companies often ask for additional guarantees for consumer financing transactions. Usually, additional guarantees for transactions like this are in the form of acknowledgment of debt (promissory notes), or power of attorney to sell goods, and an assignment of proceeds (cessie) from insurance. Besides that, it is also often asked for "wife/husband's approval for personal consumers, and approval of commissioners/RUPS for corporate consumers, in accordance with the provisions of their articles of association.

Financing agreements are inseparable from binding legal aspects between consumers and consumer finance companies. The consumer financing agreement is made by default, namely the contents of the agreement have been prepared unilaterally by the company, so that the company can apply a take it or leave it policy, meaning that the contents of the agreement are no longer negotiable, if the consumer agrees with the agreement, he may take it and implement it (mubah/ choice), and if you do not agree with the contents of the agreement, then you can look for another financing institution (you may not take it).

In consumer financing transactions, there are three parties involved in the legal relationship of consumer financing, consumers and suppliers. According to Presidential Decree Number 39 of 1998 concerning Financing Companies Article 1 paragraph 6, a Consumer Finance Company is a business entity that finances the procurement of goods for consumer needs with an installment or periodic payment system. In consumer financing transactions, the consumer finance company serves as a creditor, namely the party providing funds to the debtor. Consumers are buyers of goods whose funds are financed by consumer finance companies.

In consumer financing transactions, this consumer is a debtor, namely the party receiving fees from a consumer finance company. Suppliers (suppliers) are sellers, namely companies or parties that sell or provide goods needed by consumers in the context of consumer financing.<sup>19</sup>After the supplier and the consumer as the debtor have agreed in the sale and purchase agreement, the party from the finance company will pay in advance according to the price of the goods to the supplier.

Furthermore, according to Sunaryo, the relationship between the parties in consumer financing can be described as follows:<sup>20</sup>

#### 1. Relationship between Consumer Financing Companies and Consumers

- a. There is a relationship between the consumer finance company and the consumer because a contract has previously been entered into, namely a contract, namely a consumer financing contract. On the basis of the contract they have signed, legally the parties are bound by the rights and obligations of each party;
- b. Obligations of consumer financing parties by providing funds or financing to consumers as debtors in purchasing consumer goods. Meanwhile, from the consumer side as the debtor, after payment has been made in advance by the consumer finance company for the goods needed, the debtor is obliged to pay/return to the creditor in accordance with the amount owed;
- c. Finance companies and consumers are also given rights. The right of the finance company to receive repayment from the consumer as the debtor. As well as consumer rights can also directly control the consumer goods needed.

#### 2. Relationship between Consumer Financing Companies and Suppliers

- a. The relationship between the consumer finance company and the supplier occurs after the supplier or supplier and the consumer as the debtor have agreed to enter into a sale and purchase agreement beforehand. The next obligation of the finance company as a creditor is to pay in advance for goods that have been agreed upon between the supplier and the debtor;

<sup>19</sup> Sunaryo, *op.cit.*, hlm. 106.

<sup>20</sup> *Ibid.*, hlm. 107.

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b. In relation to these requirements, if a consumer finance company defaults, while the sale and purchase contract and the consumer financing contract have been completed, the conditional sale and purchase that occurs between the supplier and the consumer may be canceled by the supplier. Furthermore, consumers can sue consumer finance companies for default.

### **3. Relations between Consumers and Suppliers (Supplier)**

a. The relationship between consumers and suppliers when entering into sale and purchase agreements for consumer goods needed by consumers as debtors. If you have agreed to the agreement, which also previously paid the price of consumer goods by the creditor, then the supplier as the seller gives the goods to the debtor.

Thus, consumer financing transactions have 2 (two) contractual relationships, namely:

- a. Consumer financing agreements between consumer finance companies and consumers;
- b. Sales and purchase agreements between suppliers (suppliers) and consumers (debtors).

Regarding the terms and mechanisms for consumer financing transactions, Sunanryo describes them as follows:<sup>21</sup>

#### **1. Application Stage**

Applications for consumer financing are usually made by consumers at the domicile of suppliers/dealers providing consumer goods. These suppliers/dealers are usually those who have worked with consumer finance companies.

#### **2. Checking and Field Inspection Phase**

The next stage is checking in the field by a consumer finance company. The purpose of this checking is to check whether the information data written by the prospective consumer is correct in the form. For example, such as: Visits to prospective customers (plant visits), checks to other places (credit checking), and other general/specific observations.

#### **3. Stage of Making a Customer Profile**

After conducting a field inspection, the marketing party from the consumer finance company will create a customer profile which contains the profiles of the prospective debtor, such as: the name of the prospective customer and wife/husband; address and telephone number; work; office address; proposed financing conditions; types and types of consumer goods, and others.

#### **4. Submission of Proposals to the Credit Committee**

The marketing department will submit a proposal for the application submitted by the prospective customer to the credit committee. So, after creating a customer profile, the marketing party from the consumer finance company submits a proposal to the prospective customer as a debtor which contains all the previous attachments to the credit committee.

#### **5. Committee Credit Decision Stage**

Proposals submitted by prospective customers depend on the credit committee's decision. The committee's credit decision is the basis for a consumer finance company to finance or not.

#### **6. Binding Stage**

If what is submitted is accepted by the credit committee, then the next step is to bind it which is carried out by a legal party from the financing company. These binding examples include: Consumer financing agreements and their attachments; Personal guarantee (if any); Company guarantee (if any); The binding of consumer financing agreements can be done underhand, legalized by a notary, or notarized.

#### **7. The stage of ordering consumer goods**

After the agreement signing process is carried out by both parties between the consumer finance company and the consumer (as the debtor), then the consumer finance company will carry out:

- a. Order consumer goods from suppliers. This order is stated in the purchase order confirmation/confirm purchase order and proof of delivery and receipt of goods;
- b. Receipt of payments from consumers to consumer finance companies (can be through suppliers or dealers).

#### **8. Stage of Payment to Suppliers**

After the goods have been handed over to the debtor, the consumer finance company pays for the goods ordered by the debtor to the supplier according to the price of the goods proposed.

#### **9. Billing/Payment Monitoring Stage**

After all payments to suppliers/dealers have been made, the next process is installment payments by consumers according to the specified schedule.

#### **10. Stage of Collecting Guarantee Letter**

If the debtor's debt has been paid off, the creditor must return:

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<sup>21</sup> Ibid., hlm.109.



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- a. Collateral (BPKB, and/or certificate and/or invoice);
- b. other documents, if any.

Based on the guaranteed character of the financing institution, it can be seen that the guarantee institution used is a Fiduciary guarantee, because the object that is actually guaranteed can still be controlled by the debtor. Fiduciary Guarantee is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in Law No. 4 of 1996, which remain in the possession of the Fiduciary giver (debtor), as collateral for settlement certain.

The debtor in entering into a consumer financing agreement is followed by a Fiduciary Guarantee, where the Fiduciary Guarantee is an accessory agreement to the main agreement. If both parties agree to the main agreement, then the additional agreement also comes into force.

In the case of a consumer financing agreement, the ownership of the object is still the owner of the debtor himself, so the debtor can still control the object. In contrast to pawnshops where you have to hand over the collateral object to the related company (pawnbroker), in the case of Fiduciary guarantees the debtor still controls the object, only if the standard agreement contains a clause bound by Fiduciary collateral, the transfer of ownership legally is handed over to the creditor or finance company consumers until payments made by debtors to creditors on a regular basis or installments have been completed or paid off.

### B. The Occurrence of an Agreement with the Imposition of Fiduciary Guarantees

Fiduciary is a guarantee for collateral where the collateral binding is based on a Fiduciary deed, which is an accessoir agreement or addition to the main agreement, namely accounts payable, followed by the delivery of the goods carried out Fiduciary or in trust, meaning that the goods can still be controlled and used by the debtor or owner. Therefore, the consequence of this assessor's agreement is that if the main agreement is invalid, then legally the Fiduciary agreement as an assessor's agreement is also null and void.<sup>22</sup>

The imposition of objects with a Fiduciary Guarantee is made with a notarial deed in Indonesian and is a deed of Fiduciary Guarantee. And for making a Fiduciary Guarantee deed, a fee is charged, the amount of which is further regulated by Government Regulation, namely PP No. 21 of 2015 concerning Procedures for Fiduciary Registration. In accordance with Article 6 of the Fiduciary Guarantee Deed, which at least contains: Identity of the Fiduciary Giver and Recipient; Main agreement data guaranteed by Fiduciary; Description of the objects that are the object of the Fiduciary Guarantee; Guarantee value; and the value of objects that are the object of Fiduciary Guarantees. Making a notarial deed so that the parties involved can be protected if an unexpected action occurs. Given that the object of Fiduciary collateral is movable property, it is only natural that the form of an authentic deed is considered the most capable of guaranteeing legal certainty regarding the object of Fiduciary security.<sup>23</sup>

After making a Fiduciary guarantee deed, the deed is registered online, where the policy has been regulated in Government Regulation Number 21 of 2015. The application for registration of Fiduciary Guarantees as referred to in Article 2 contains: Identity of the Fiduciary Giver and Fiduciary Recipient; Date, number of the Fiduciary Guarantee deed, name and domicile of the notary who made the Fiduciary Guarantee deed; Main agreement data guaranteed by Fiduciary; A description of the objects that are the object of the Fiduciary Guarantee; Guarantee value; and the value of objects that are the object of the Fiduciary Guarantee.

Regarding the application for registration of Fiduciary Guarantees in accordance with Article 4 submitted within a maximum period of 30 (thirty) days from the date of making the Fiduciary Guarantee deed. After that, applications for registration of Fiduciary Guarantees that have fulfilled the conditions referred to obtain proof of registration. Proof of registration as referred to at least contains: Registration number; Application filling date; applicant's name; name of the Fiduciary Registration Office; Application type; and Fiduciary Guarantee registration fee. (Article 5 paragraph 1 and 2 PP no 21 of 2015)

Payment of the Fiduciary guarantee registration fee is made through a perception bank. A perception bank is a bank that has been appointed by the relevant agency regarding the financing of Fiduciary guarantee registration (Article 6 paragraph 1), in this case Bank Negara Indonesia. After completing the payment, registration of the Fiduciary guarantee is recorded electronically (Article 6 paragraph 2). The Fiduciary Guarantee is born on the same date as the date the Fiduciary Guarantee is recorded. The Fiduciary Guarantee Certificate is signed electronically by the Official at the Fiduciary Registration Office (Article 7 paragraphs 1 and 2).

This registration is required to provide protection and legal certainty for related parties, namely Fiduciary recipients and Fiduciary givers because the basis of the agreement is the trust of both parties. With the registration of a Fiduciary guarantee, the parties will receive a Fiduciary guarantee certificate/deed as a copy of the Fiduciary registration book. The Fiduciary guarantee certificate includes the words or irah-irah "For the sake of Justice Based on Belief in the One and Only God" which has the same value as a court decision that has permanent legal force and has executive rights over Fiduciary collateral objects. If the financing

<sup>22</sup> Munir Fuady, *Jaminan Fidusia*, op.cit., hlm. 19.

<sup>23</sup> Gladys Octavinadya Melati, 2015, *Pertanggungjawaban Notaris Dalam Pendaftaran Fidusia Online Terhadap Penerima Fidusia*, Jumal, hlm. 68.

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has been paid off, the Fiduciary recipient must write off the Fiduciary guarantee, because the payment made by the debtor to consumer financing has been completed.

Registration of Fiduciary guarantees is regulated in UUJF namely in Articles 11-18. Article 11 confirms that objects burdened with Fiduciary guarantees must be registered, in this case it must be done. Regarding the procedure for registering Fiduciary guarantees, it has been regulated in PP No. 21 of 2015 in Articles 3-10. Registration of Fiduciary guarantees is also regulated in the Regulation of the Minister of Finance of the Republic of Indonesia No. 130/PMK 010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies Conducting Consumer Financing for Motor Vehicles with Fiduciary Guarantees (hereinafter referred to as PMK RI Number 130/PMK 010/2012, i.e. Articles 1 and 2. In Article 1, finance companies that carry out consumer financing for motorized vehicles with a Fiduciary guarantee are required to register the said Fiduciary guarantee at the Fiduciary Registration Office, in accordance with the law governing Fiduciary guarantees.

Finance companies are required to register Fiduciary guarantees at the Fiduciary Registration Office no later than 30 (thirty) calendar days from the date of the consumer financing agreement. (Section 2). In a copy of the Financial Services Authority Regulation Number 29/POJK.5/2014 concerning Business Conducting Financing Companies Article 22 that Financing Companies are required to register Fiduciary guarantees at the Fiduciary registration office no later than 1 (one) month from the date of the financing agreement.

Completed registration with the issuance of a Fiduciary certificate, indicating the validity of the Fiduciary guarantee. The validity of the Fiduciary guarantee gives the creditor the right to carry out the execution of the Fiduciary guarantee object in accordance with Article 29 paragraph (1) UUJF, if the consumer (debtor) defaults, namely by:

1. Parate Executive.
2. Executorial Titles (Irah-Irah contained in Fiduciary certificates, which causes Fiduciary certificates to have the same power as Inkraht Court Decisions);
3. Selling Under Hand.

### C. Position of Creditors Not Registering Fiduciary Collateral Objects

Basically the position of the creditors is the same (parity creditorium) and therefore have the same right to the results of execution in accordance with the size of their respective bills (paripassu pro rata parte), however this principle recognizes exceptions, namely the class of creditors whose rights take precedence The principle of ParitasCreditorium applies to concurrent creditors only.<sup>24</sup>

Creditors in Guarantee Law are divided into 3 (three), namely Concurrent Creditors, Preferred Creditors, and Privilege Creditors.

Concurrent creditors born from general guarantees are regulated in Article 1131 jo 1132 BW. Concurrent creditors are creditors with paripassu and pro rata rights, meaning that creditors jointly obtain repayment (without any precedence), which is calculated based on the amount of each receivable compared to their overall receivables, and all of the debtor's assets.<sup>25</sup> According to Sri Soedewi, concurrent creditors are creditors whose position is the same (joint creditors) and no one has to take precedence in fulfilling their receivables.<sup>26</sup>

Based on this general guarantee, all creditors have the same status with other creditors (concurrent creditors), no creditor has priority in payment.

This preferred creditor was born from a special guarantee (Article 1131 in conjunction with Article 1132 BW) which has special collateral rights that make this creditor's position better than other creditors in paying off his receivables because it is given by law or agreed upon.<sup>27</sup>

This special guarantee is between the creditor and the debtor having a guarantee for easier and more secure debt repayment, because of that there is one thing that is specifically bound as debt repayment, therefore it becomes a special guarantee.

Because an object is tied to one or more creditors, the creditor will have priority in repayment of the debt, that is, there is a preference. Droit De Preference or the presence of preferences. So it can be concluded that special guarantees contain properties, namely rights that are born are material rights, are absolute, there are droit de suite, there are preferences, there are priorities, there are material claims, and are separatist.<sup>28</sup>

The basis for this preferential creditor arrangement is Article 1132 BW which in its last sentence emphasizes that it is possible to pre-pay debts if there are valid reasons. The legitimate reason referred to is the existence of an object that is specifically bound in the debt agreement for the certainty of repayment of the debtor's debt. What is meant is a guarantee, so that

<sup>24</sup> Fred B.G. Tumbuan, 2001, Pokok-Pokok Undang-Undang tentang Kepailitan Sebagaimana Diubah oleh Perpu Nomor 1 Tahun 1998, Dalam Penyelesaian Utang Piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang, Editor: Ridhi A. Lontoh, Alumni, Bandung, hlm. 128.

<sup>25</sup> Fani Martiawan, 2014, Eksistensi Kreditor Separatis Sebagai Pemohon dalam Perkara Kepailitan, Perspektif, Volume XIX Nomor 1 Januari 2014, Fakultas Hukum Universitas Wijaya Kusuma Surabaya, Surabaya, hlm. 9.

<sup>26</sup> Sri Soedewi Masjchoen Sofwan, 1980, Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Perorangan, Badan Pembinaan Hukum Nasional Departemen Kehakiman, Jakarta, hlm.44.

<sup>27</sup> Fani Martiawan, loc.cit.

<sup>28</sup> Ibid.

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if there is a binding guarantee for the settlement of the debtor's debts against the creditor, this creditor becomes the preferred creditor and the settlement of the receivable takes precedence over other creditors who do not bind a guarantee.<sup>29</sup>

In addition to concurrent creditors and preferred creditors, in Guarantee Law, they are also known as privileged creditors. Privileged creditors are creditors who are privileged and prioritized for repayment in accordance with Article 1134 BW. This creditor is privileged and takes precedence because it is given by law, not because of a guarantee agreement made by the parties such as preferred creditors. Creditors' rights arising from this Law are referred to by the technical term "Privilege".<sup>30</sup>

This privilege creditor is not the holder of material rights, because there is no object that is specifically bound. This creditor privilege only gets payment of its receivables when requested. According to HerlinBudiono, privileges are rights that are given by law to a creditor so that the level is higher than other debtors, so that from the execution results get priority payment, solely based on the nature of the debt.<sup>31</sup>

As with material rights, creditor privileges have rights that provide guarantees for priority payment, although they are similar in nature to material rights, they are not material rights, and there is no possibility of a conflict with material rights or other rights.<sup>32</sup> Preferred creditors and privileged creditors both receive priority repayment, but basically preferred creditors are given priority in repayment unless the law determines otherwise. If in general you want to arrange the order of priority rights, it will look as follows:<sup>33</sup>

1. Article 1139 number 1, namely case costs due to the auction of certain objects (special privileges);
2. Article 1149 number 1, namely court costs caused by auction and settlement of an inheritance (general privilege);
3. Pledge, Mortgage, Mortgage and Fiduciary (preferred creditor);
4. The remaining privileges.
5. Concurrent creditors.

Based on the types of creditors in the Guarantee Law, it can be seen that those who receive the highest rate or repayment first are preferred creditors, then followed by privileged creditors, this is the general principle. There are exceptions to this principle, namely if the law determines otherwise based on the nature of the receivables (Article 1134 BW) and to find out the order of priority, it can be seen in Article 1139 (special privileges) and Article 1149 (general privileges). After the two creditors have been repaid, the concurrent creditor is the last to pay off the debt.<sup>34</sup>

Privileged receivables are preferred creditors who have the right to take precedence, namely mortgage, mortgage, fiduciary and mortgage holders. Meanwhile, based on article 1131 which states the right to take precedence, namely preferred creditors or holders of collateral rights and creditors privileges or those who are given special rights.

So, the preferred creditor must have an agreement beforehand. Meanwhile, creditor privileges are not necessarily agreed upon. Because privileges are related to services, even though they are not agreed upon, they are still given privileges in accordance with article 1134 BW.

Based on the elaboration above, it can be seen that creditors who do not register Fiduciary guarantees, that Fiduciary guarantees are not born legally, therefore their position cannot be said to be the holder of collateral. The position of a creditor who does not hold collateral, adheres to the principle of concurrency, and is called a concurrent creditor, which means that he does not have the right to take precedence, and his payments are balanced with other creditors (paripassu prorata parte).

Regarding the fulfillment of unsecured debt (Unsecured Debt) A debt is called unsecured, if the transaction:

- Not guaranteed by certain objects or goods that are deliberately given by the debtor to guarantee the fulfillment of debt repayments.
- Thus, debts or loans are 'not protected' by collateral items that are specialists with separatist and preferential rights, so that creditors do not have the primary right to fulfill debt payments from other creditors.
- The creditor's position relative to the debtor's assets is that of a concurrent creditor.

For payment fulfillment, based on article 1131 BW namely:

### a. The debtor's property or wealth becomes collateral for the debt

All assets or assets of the debtor:

- 1) Both movable and immovable goods.
  - 2) Both those that exist now and those that exist in the future, become dependents or guarantees for all individual engagements made.
- However, based on article 1131 BW, the debtor's assets or goods serve as collateral for debts for all creditors who make loans to debtors.

<sup>29</sup> Ibid.

<sup>30</sup> Mariam Darus Badruzaman, 2010, Mencari Sistem Hukum Benda Nasional, Alumni, Bandung, hlm. 86.

<sup>31</sup> Herlin Budiono, 2008, Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan, Citra Aditya Bakti, Bandung, hlm. 108.

<sup>32</sup> Fani Martiawan, op.cit, hlm. 10.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

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- The right of each creditor to the proceeds from the sale of all of the debtor's assets; referring to article 1136 BW.
- Divided based on balance in accordance with the principle of proportionality; according to the size of each receivable on a paripassu pro rata basis in a fair manner;
- There is no precedence and priority among creditors;

### b. Based on article 1132 BW, the object becomes joint guarantee for all creditors.

So even though all objects or assets of the debtor according to article 1131 BW are borne for all engagements made by the debtor:

- However, creditors are not given preferential and separatist rights (privilege)
- But only as a concurrent creditor together with other creditors.
- Each of them gets an equal share of the proceeds from the sale of the debtor's objects in accordance with the size of each receivable.
- Regarding the method of fulfillment based on a pro rata system, it is emphasized again in article 1136 BW, which reads: "all people who owe the same level, are paid according to the balance."<sup>35</sup>

It can be stated that, there is a risk faced by creditors because it is not protected by a guarantee. So the payment must be made jointly with other creditors.

The way to fulfill this can be done through a litigation process. If the debtor defaults or defaults, while the credit transaction is not bound by an assessor with a guarantee agreement for certain goods, so that the fulfillment guarantee is subject to the provisions of Article 1131 BW, the ways of fulfillment that can be pursued and attempted by the creditor are:

#### a. File a civil lawsuit with the district court

If a compromise or settlement is not reached and the debtor does not want to correct his negligence, the only way that must be done is through a "litigation process", suing the debtor to fulfill the implementation of his obligations through court, or through arbitration if in the credit agreement disputes arising from the agreement resolved by the arbitral tribunal.

#### b. Asking for collateral confiscation of the debtor's assets

In order for the lawsuit to be more effective and not empty (illusory), the creditor can ask the district court to place collateral against the debtor's assets (conservatoirbeslag = CB). The legal basis C is in article 227 paragraph (1) RGB, article 720 Rv:

- Allowing the confiscation of the debtor's goods as long as a final decision has not been made;
- The goal is that the item is not darkened or lost by the debtor, during the trial process;
- Thus, when the decision is executed, the implementation of the debt payment demanded can be fulfilled by selling the confiscated goods at auction.<sup>36</sup>

## 2. Protection For Debtors in Forced Withdrawal of Unregistered Fiduciary Collateral Objects

### A. Default in Guarantee Agreement

Achievement is something that can be in the form of an obligation or an object in an agreement which consists of 3 (three) forms, namely: giving something, doing something, and not doing something.<sup>37</sup>The legal basis for achievement is in article 1234 BW. Meanwhile, default is a situation where the debtor, as the responsible party, does not fulfill the performance that has been agreed upon with the creditor properly so that it is a mistake for the debtor.<sup>38</sup>WirjonoProdjodikoro said, default is the absence of an achievement, and achievement in contract law means something that must be implemented as the contents of an agreement.

Meanwhile, by default (default or non-fulfillment or what is also referred to as breach of contract), what is meant is not carrying out the achievements or obligations as they should be imposed by the contract on certain parties as intended in the contract concerned.<sup>39</sup>Non-fulfillment of obligations is caused by two possibilities, namely:

- a. Debtor's mistake, whether done intentionally or negligently (article 1238 BW)
- b. Force majeure (overmacht/force majeure), meaning beyond the capability of the debtor. The elements of a force majeure are as follows:
  - An event occurred that destroyed the object of the engagement;
  - An incident occurred which prevented the debtor's actions from achieving.
  - The event cannot be known or expected to occur at the time of making the engagement.<sup>40</sup>

An act of the debtor which can be said to be in a state of default, must contain the following main elements:

<sup>35</sup> M. Yahya Harahap, 2009, Ruang Lingkup Permasalahan Eksekusi Bidang Perdata, Edisi Kedua, Sinar Grafika, Jakarta, hlm. 180.

<sup>36</sup> Ibid., hlm. 181-182.

<sup>37</sup> Yahman, 2011, Karakteristik Wanprestasi dan Tindak Pidana Penipuan yang Lahir Dari Hubungan Internasional atau PRT, Prestasi Pustaka Raya, Bandung, hlm. 30.

<sup>38</sup> Ibid., hlm. 31.

<sup>39</sup> Munir Faudy, loc.cit., hlm. 87-88.

<sup>40</sup> Tommy Simatupang, Prestasi, Wanprestasi dan Ganti Rugi, diaksestanggal 5 Februari 2018, situs: <http://www.berandahukum.com/2016/05/prestasi-wanprestasi-dan-ganti-rugi.html?m=1>

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### 1. There is an element of action

In the act referred to here, there is a real action from a person or group of people or institution. For legal subjects or legal entities, their actions must conform to the conditions or agreements that have been agreed upon. Doing something (also called active) and not doing something (also called passive), these two things cannot be done based on the agreement made between the two parties and also adjusted to the positive law that is currently in effect.

### 2. There is an element of an unlawful act

The elements of an unlawful act are guided by the jurisprudence issued in the case of Lindenbaum and Cohen (HogeRaad decision dated January 31, 1919. These elements are as follows:

- i. Acts that are contrary to the prevailing laws and regulations;
- ii. Actions that violate the subjective rights of other legal subjects protected by law;
- iii. Actions that violate the legal obligations of the legal subject or legal entity itself;
- iv. Acts that violate the norms of decency
- v. Acts that are contrary to societal habits in always acting kindly and positively with the aim of respecting self-interest and the interests of the wider community.

### 3. There is an element of error on the part of the debtor

An act can be said to be an unlawful act, with an element of error (schuld) contained in the act. This can be seen in Article 1365 BW which stipulates that "Any unlawful act, which causes harm to another person, obliges the person who because of the mistake of issuing the loss, compensates for the loss." The element of error referred to here has factors including:

- i. Deliberate factor;
- ii. Negligent factor;
- iii. Factors in which there are no justifications or reasons for forgiveness, even though the person is in a state of overmacht, not sane or defending himself.

### 4. There is an element of loss that occurs

- a. Regarding the element of loss (schade) this is also guided by Article 1365 BW.
- b. There is a causal relationship in these actions that causes losses.<sup>41</sup>

Achievements in tangible form can be seen in the debtor's achievement fulfillment activities as lending funds to creditors. The 4 (four) forms of Default put forward by Subekti:

#### 1. Not carrying out any achievements at all

Regarding this form of default, the causative factor is that the debtor has no desire at all to fulfill his achievements, or it could also be because subjectively and objectively the debtor does not allow for further achievements.

#### 2. Execute but not on time (late)

Achievements in this form, the debtor fulfills his achievements correctly as agreed, but the time for fulfilling these achievements is too late from the agreed time.

#### 3. Carry out but not as promised

The implementation of achievements like this, will be considered by the debtor as still not carrying out his achievements by creditors. Because the achievements that were given or carried out by the debtor were not what the creditor expected, as the debtor and creditor had agreed.

#### 4. The debtor does what according to the agreement is not allowed to be done

This form of achievement is an offense for the debtor. This is because, because in the agreement between the debtor and the creditor it has been agreed that it is prohibited to do so, but the debtor continues to do so.<sup>42</sup>

Apart from the four defaults stated by Subekti, there are also 3 forms of default according to J. Satrio. These forms include:

1. Debtors who are completely unaccomplished;
2. Debtors who make achievements but are late;
3. Debtors who perform wrongly.<sup>43</sup>

#### The legal consequences of default are:

1. There is compensation, the situation is that the debtor pays all the losses suffered by the creditor. The elements that must be included in compensation include:

<sup>41</sup> Purwahid Patrik, 1994, *Dasar-Dasar Hukum Perikatan (Perikatan Yang Lahir Dari Perjanjian dan Dari Undang-Undang)*, Mandar Maju, Bandung, hlm. 11.

<sup>42</sup> R. Subekti I, 1982, *Jaminan-Jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*, PT. Alumni, Bandung, hlm. 58.

<sup>43</sup> J. Satrio II, 2002, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, PT. Citra Aditya Bakti, Bandung, hlm. 68.

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- a. Cost is a payment or expenditure of funds that has actually been made by the party who is obliged to pay compensation. Losses include:
  - i. It can be in the form of interest, namely the loss suffered by the creditor in the credit agreement is in the event that the time period for the creditor to provide a loan to the debtor has passed, in which installments of funds should have been received monthly by the creditor so that it can be played back in the maximum operation of activities to achieve calculated profits, be delayed in the long term due to default debtors.
  - ii. It can be in the form of objects, namely losses experienced by creditors if the object used as Fiduciary collateral which is still controlled by the debtor is damaged, so that the execution of the guarantee is written in the civil code. Compensation in the form of costs and objects is called damages, while compensation in the form of interest is called interest.<sup>44</sup>
- b. BW provides arrangements regarding the scope of compensation, namely: Article 1243 BW. The provisions stipulate that, "Reimbursement of costs, losses and interest due to non-fulfillment of an agreement, only then begins to be required, if the debtor, after being declared negligent in fulfilling the agreement, continues to neglect it, or if something must be given or made within the time limit that has been exceeded.
  1. There is an cancellation of the agreement or what is also known as breaking the agreement. This can also be done with the aim of bringing the parties who promise to a situation where the agreement has not been made. In this case the cancellation is retroactive until the moment the agreement occurs. Its main focus is to abolish the agreement. So, even though there has been a transfer of debt or goods, they still have to be returned.
    - a. Regarding the cancellation of the agreement, it is regulated in Article 1266 of the Civil Code. These provisions stipulate that void conditions are considered forever included in reciprocal agreements, if one party does not fulfill its obligations. In this case the agreement is not null and void, but the cancellation must be requested to the judge. The request must also be made, even though the conditions for non-fulfillment of the obligation are stated in the agreement. If the cancellation conditions are not stated in the agreement, the judge is at liberty to give a period of time for the opportunity to fulfill his obligations, a period which may not exceed one month;
    - b. The cancellation of the agreement is not canceled automatically, but must be requested to the judge. So that the judge's decision came out whose constitution was "cancel the agreement". In the event of canceling this agreement, the judge is required to have discretionary power, which means a power in assessing how big or small the debtor's mistakes are, then compared with the severity of the impact of canceling the agreement that can befall the debtor.<sup>45</sup>

The legal consequences of default in the form of cancellation of the agreement and compensation can be applied in the event of a Fiduciary guarantee agreement, namely by canceling the guarantee agreement, and only the main agreement applies, and asking for compensation for losses from the main agreement (the debt agreement).

Based on the above description, it is known that Fiduciary guarantees will be valid if they have been registered, what is registered is the Fiduciary Guarantee Deed, but in fact often debts with Fiduciary guarantees do not go through the process of making a Fiduciary Guarantee Deed at a Notary, which in other words, is not registered either. so that the Fiduciary guarantee agreement is invalid. The material rights of the Fiduciary guarantee have only been born since the registration was carried out at the Fiduciary Registration Office and as proof is the issuance of the Fiduciary guarantee certificate. The registration has a juridical meaning as a series that is inseparable from the process of making a Fiduciary agreement. Fiduciary guarantee registration itself is a manifestation of the principle of publicity. By registering a Fiduciary guarantee, it means that the principle of publicity has been fulfilled so that it can be controlled and can avoid things that are unhealthy in practice, such as double Fiduciary or repeated Fiduciary by the debtor without the knowledge of the creditor.<sup>46</sup>

In line with the elaboration regarding the urgency of registration above, then the Fiduciary guarantee must be registered, until the Fiduciary guarantee certificate is issued, and gives birth to material guarantee rights for the creditor. However, this is often violated by the Savings and Loans Cooperative in granting credit as previously described. Savings and Loans Cooperatives often do not register Fiduciary deed of guarantee, and Fiduciary deed is often not made by a Notary. This problem is a common problem in terms of registration, this is as MunirFuady describes:<sup>47</sup>

The issue of registration of Fiduciary guarantees is a very basic and very basic problem, bearing in mind that many parties intentionally or negligently do not register Fiduciary guarantees. It is said to be very basic because in this case the position of the Fiduciary recipient is very weak, if the imposition of Fiduciary collateral objects and the registration of Fiduciary guarantees are not carried out by a Notary.

The non-registration of this Collateral is happening a lot nowadays, it can happen because of small debts with short maturities, it would be detrimental if you have to involve a Notary, and in the end just use the trust system. By registering, the guarantee agreement is valid and material rights are born, and therefore there are material rights which can later be used to protect creditors. If it is not registered, the guarantee agreement is invalid, in other words, the guaranteed object is null and void and finally the

<sup>44</sup> Shman, loc.cit., h. 49.

<sup>45</sup> T. Joseph Bockrath, 2000, Contracts and The Legal Environment for Engineers and Architects. Six Edition, Mc-Graw Series in Construction Engineering and Management, United States, hlm. 78.

<sup>46</sup> Munir Fuady, 2003, Jaminan Fidusia, Cetakan Kedua Revisi, Citra Aditya Bakti, Bandung, hlm. 231.

<sup>47</sup> Ibid, hlm. 231.

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object is not being burdened with any collateral and cannot be executed if the debtor defaults. Therefore, if it has not been registered, then the debtor is in default, the collateral object from the debtor cannot be confiscated in order to repay the debt, instead, only the debt agreement can be disputed, while the position of the creditor is a concurrent creditor, receiving legal protection only from Article 1131 BW.

### B. Execution of Collateral Objects

Basically, there are two forms of execution in terms of the target to be achieved by the legal relationship stated in the court decision. Sometimes the target of a legal relationship to be fulfilled is in accordance with the injunction or dictum of the decision, which is to take a real action or real action, so that this kind of execution is called a real execution. Sometimes the legal relationship that must be fulfilled in accordance with the verdict, is to pay a certain amount of money. Execution like this is called the execution of payment of money. Related to guarantees, it is also related to debts, therefore the execution that can be applied is the execution of payment of money. In practice, there are three ways to execute cash payments in terms of guarantees, namely the first is by using Executorial Titles, Execution Parates and Underhand Sales.

Regarding the executorial title, the execution power of the Mortgage deed and debt acknowledgment deed made notarized, it is stated in Article 224 HIR/258 RBg which stipulates that the original letter (grosse) of the Mortgage deed and debt acknowledgment deed, made before a Notary in Indonesia and affixing an irah -irah words "For the sake of Justice Based on Belief in the One and Only God" (formerly On behalf of His Majesty)" in his head, and has the same power as a court decision or (judge).<sup>48</sup>

Execution using an executorial title requires fiat from the Court. Fiat execution is the execution of a deed such as executing a court decision that has definite power, by asking for "fiat" from the head of the court, namely asking for a decision from the head of the court to carry out the execution. The chairman of the court presides over the execution as referred to in the HIR.<sup>49</sup> After obtaining fiat from the Court, the execution process is carried out through an auction. In terms of practice, the execution of payment of a sum of money generally continues through the process of selling auctions of the defendant's assets, so that careful procedures are needed in carrying out the execution, the outline of which is:

1. Must go through the execution process beslag (executory seizure);
2. Then proceed with the auction sale involving the auction agency.<sup>50</sup>

The main conditions attached to this execution auction are based on Article 200 paragraph (1) HIR. The execution is preceded by an execution seizure (executorybeslag, executive seizure). The sale was made of the defendant's goods which had been placed under confiscation (executorybeslag, leggen op, to take seizure).<sup>51</sup>

Regarding ParateExecutie, this method is a method of direct execution without the need for fiat execution from the District Court, but it is still carried out through a public auction, this execution can be carried out without involving any court institutions at all. In carrying out this execution, there are still doubts for the Bank (as a creditor) to exercise power (in parate execution), given the vulnerability of legal uncertainty in practice. Banks as creditors will easily become the target of lawsuits and resistance from debtors or third parties who work with debtors with bad intentions.<sup>52</sup>

Sales through auctions are intended to obtain a fair and fair price. In other words, to protect the interests of the guarantor so that there is no price manipulation by the creditors of the partnership. the terms of sale in advance is an effort to protect the interests of the guarantor, so it is up to the guarantor to use the right of protection or not.<sup>53</sup>

The last method of execution is underhand selling. When the debt is not paid, then execution by way of selling under the hands (not through a public auction) is in principle not justified. Execution by selling under the hands is only possible if one of the following conditions is met:<sup>54</sup>

1. If agreed by both parties;
2. With the approval of the judge.

Underhand sales are carried out based on the agreement of the debtor and creditor, this is if in the way the highest price can be obtained which benefits the parties. This sale is carried out after the expiration of one month after being notified in writing by the Fiduciary giver and recipient to interested parties.

This underhand sales agreement is actually carried out where to fulfill a purpose, so that the object has been sold to be purchased by another party. Because to pay off the debt of the debtor to the creditor. if the remaining money purchased is still insufficient to pay the debtor's debt, the debtor must be able to fulfill the remaining debt that must be paid.

<sup>48</sup> Ibid.

<sup>49</sup> Munir Fuady, op.cit., h. 143.

<sup>50</sup> Yahya Harahap, op.cit., h. 25.

<sup>51</sup> Ibid., h. 116.

<sup>52</sup> Ibid., h. 150.

<sup>53</sup> Ibid., h. 237.

<sup>54</sup> Munir Fuady, op.cit., h. 157.

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With regard to the forced withdrawal of a fiduciary execution, it is permissible as long as it includes a fiduciary certificate by requesting a fiat of execution from the court or from a public auction institution to carry out the execution. That way the withdrawal has been deemed valid by law.

### C. Protection for Debtors in Forced Withdrawal of Unregistered Fiduciary Collateral Objects

Creditors in financing agreements who do not register their Fiduciary guarantees, are only domiciled as concurrent creditors, and settlement of unpaid debt disputes is through the Court. However, in fact, many financial institutions do not register their Fiduciary guarantees but when the debtor defaults, the financial institution appoints a debt collector to forcibly withdraw objects. This is an illegal action according to UUJF.

For people who understand the law, the actions taken by financial institutions through debt collectors can be reported to the authorities. The debt collector's actions are postulated as unlawful acts because they are considered one-sided and can lead to arbitrariness on the part of creditors.<sup>55</sup>This creditor's actions also include unlawful acts (PMH), in accordance with Article 1365 BW which confirms, every act that violates the law and causes harm to others requires the person who caused the loss because of his mistake to compensate for the loss.

Execution of Fiduciary objects by force is also included in criminal acts regulated in the Criminal Code (hereinafter referred to as the Criminal Code) Article 368 of the Criminal Code regarding acts of coercion and threats of deprivation. As for the provisions of Article 368 of the Criminal Code stipulates whosoever with the intent to unlawfully benefit himself or another person, forces a person by force or threat of violence to give something, which wholly or partly belongs to that person or another person, or to make a debt or write off receivables, is punishable by extortion with a maximum imprisonment of nine months.

Further in Article 3 Regulation of the Minister of Finance of the Republic of Indonesia No. 130/2012 states that financing institutions are prohibited from withdrawing Fiduciary Collateral objects in the form of motorized vehicles if the Fiduciary Registration Office has not issued a Fiduciary Guarantee certificate and handed it over to the financing institution. If the financing institution does not register a Fiduciary Guarantee agreement, then the financing institution's rights are not protected in accordance with the Fiduciary Guarantee Law.

Legal protection in financing is a protection given as a government action to disadvantaged communities in order to obtain human rights that belong to them in accordance with legal provisions. Legal protection in this case can be divided into two, namely Preventive and Repressive legal protection.

Preventive legal protection is protection provided by the government with the aim of preventing violations before they occur. This is usually located in statutory regulations with the intention of preventing a violation and providing limits on carrying out obligations.

Preventive protection in the implementation of consumer financing lies in BW and other laws and regulations as in Article 1131 and Article 1132 of the Civil Code. Article 1131 of the Civil Code states that all the debtor's assets, both movable and immovable, both those that already exist and those that will exist in the future, are borne by all individual engagements. The above definition shows that a person binds himself to an agreement, since then his assets, both existing and future, automatically become dependents for all engagements even though the assets are not handed over or expressly stated as collateral.

Preventive protection in the implementation of consumer financing also lies in other laws and regulations, namely:

1. Fiduciary Guarantee Law
2. Regulation of the Minister of Finance Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies Conducting Consumer Financing for Motorized Vehicles.
3. Regulation of the Head of the National Police of the Republic of Indonesia 2011 concerning Safeguarding the Execution of Fiduciary Guarantees
4. Regulation of the Financial Services Authority Number 29/POJK.05/2014 concerning the Implementation of Financing Company Business.

Repressive legal protection is the final protection in the form of sanctions, fines, imprisonment and additional punishment given when a dispute has occurred or an offense has been committed. The laws and regulations governing the implementation of consumer financing also contain sanctions for various forms of repressive legal protection, while these sanctions include:

1. Article 62 of Law Number 8 of 1999 concerning Consumer Protection states that criminal sanctions for business actors who violate the use of the clause as contained in Article 18 are imprisonment for a maximum of 5 (five) years or a fine of Rp. 2,000,000,000.00 (two billion rupiah);
2. Article 5 PMK Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies Conducting Consumer Financing for Motorized Vehicles with Fiduciary Guarantees which imposes administrative sanctions for finance companies that violate the terms of withdrawing Fiduciary guarantees that have not issued Fiduciary guarantee certificates namely by:
  - a. Warning.
  - b. Suspension of business;

<sup>55</sup> Munir Fuady, *op.cit.*, hlm. 19.



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- c. Revocation of business license
3. Article 1365 BW which reads, every act that violates the law and causes harm to other people, obliges the person who caused the loss because of his mistake to compensate for the loss;
4. Article 368 of the Criminal Code is related to acts of coercion and threats of confiscation.

Based on this description, it shows that the government has provided legal protection for debtors in implementing consumer financing agreements with preventive and repressive legal protection.

The Consumer Protection Law regulates several principles developed in building harmonious relations between consumers and business actors. The principle referred to is found in Article 2 of the Consumer Protection Act, namely:<sup>56</sup>

### 1. Benefit Principle

This principle implies that the application of the Consumer Protection Law must provide maximum benefits to both parties, both consumers and business actors. So, with the existence of the Consumer Protection Act, both parties concerned are given their rights.

### 2. The Principle of Justice

This principle regulates the rights and obligations of consumers and business actors. It is hoped that through this principle consumers and business actors can obtain their rights and fulfill their obligations in a balanced manner. Therefore, in implementing consumer financing agreements, both parties, debtors and creditors, in addition to being granted rights, must also carry out their obligations in accordance with the Protection Act. Consumer.

### 3. The Principle of Balance

Through the application of this principle, it is hoped that the interests of consumers, business actors and the government can be realized in a balanced manner, no one party is more protected.

### 4. The principle of consumer security and safety

It is hoped that the application of the Consumer Protection Act will provide guarantees for the security and safety of consumers in the use, usage and utilization of the goods and/or services consumed or used.

### 5. Principle of Legal Certainty

It is intended that both consumers and business actors obey the law and obtain justice in the implementation of consumer protection, and the state guarantees legal certainty.

Based on the elaboration above, the debtor who experiences the forced withdrawal of these objects includes the need for legal protection in a repressive form. Because in this case the creditor has carried out unilateral execution by using the services of a debt collector against the debtor's collateral which should not be justified because the Fiduciary guarantee is also not registered.

Settlement can be done amicably or out of court. In accordance with article 47 of the Consumer Protection Act, consumer dispute resolution outside the court is held to reach an agreement regarding the form and amount of compensation and/or regarding certain actions to ensure that losses suffered by consumers will not occur again. Article 23 of the Consumer Protection Act confirms that consumers can file a lawsuit against business actors through the consumer dispute resolution agency (BPSK) or to a court of law.

## V. CLOSING

### A. Conclusions

Based on the discussion that has been carried out in CHAPTER II and CHAPTER III, the following conclusions can be formulated:

1. First, the characteristics of consumer financing agreements with fiduciary guarantees. The agreement is made by default the contents of the agreement, and the agreement is the principal agreement. Furthermore, it is bound by a fiduciary guarantee agreement which is an assecoir agreement (additional agreement) to the main agreement. After an agreement is reached, then the fiduciary guarantee will be charged and the fiduciary guarantee will be registered in accordance with Government Regulation No. 21 of 2015. The position of the creditor does not register the fiduciary guarantee object as a concurrent creditor.
2. Default is the non-fulfillment of achievements or obligations set by certain parties in an engagement. Default in the guarantee is said to cancel the guarantee agreement, and only the main agreement applies. The implementation of the execution of fiduciary guarantees can be done in 3 ways, in accordance with article 29 UUJF, the 3 ways are by means of executorial titles, paratexecutie and private sales. Legal protection for debtors in the forced withdrawal of fiduciary collateral objects that are not registered, namely there are preventive and repressive protections. And the settlement can be done peacefully (kindly), win-win solution or through consumer dispute resolution institutions such as BPSK.

<sup>56</sup> Ibid.

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### B. Recommendation

1. It is hoped that the consumer finance institution as a creditor will comply with the rules by imposing and registering Fiduciary guarantees because this is mandatory.
2. It is expected that the consumer finance institution as a creditor will execute the withdrawal of the Fiduciary collateral object in good faith and include a Fiduciary guarantee certificate if the debtor defaults.

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