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Legal Reconstruction on Fiduciary Guarantee Execution That Has Executorial Power Based on Justice

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Abstract

Based on the provisions of Article 29 paragraph 1 (a) of Law Number 42 year 1999 concerning Fiduciary Guarantees based on the Almighty God, this gives an executive title that aligns the power of the deed with the Court's decision. So the debtor is lack of legal protection when s/he conducts a default. Through the constructive paradigm, this research was directed to produce various constructive understandings, with themes of trustworthiness and authenticity. The approach method used was socio-legal research as an effort to understand the law in context, namely the context of the community so that great expectations can support the reconstruction of social reality. It was done by prioritizing the interaction between researchers and what was studied through sources and informants, and paying attention to the context. The results of the study found that the Reconstruction of fiduciary collateral certificate law that has executive power based on the law of consumer protection was carried out on Article 15 paragraph (3) of the Law of the Republic of Indonesia Number 42 year 1999 concerning Fiduciary Guarantees in which there is a balanced position between creditors and debtors. The matter of the execution of fiduciary guarantees is carried out in consultation, so as justice can be felt by both parties.

Keywords

fiduciary, guarantee, executorial, justice

1. Introduction

In realizing the people's welfare, the economic aspect of the country becomes very important to be organized and strived (Note 1). Credit is the right to receive payment or an obligation to make payments at the time requested or in the future, because of the delivery of goods now (Note 2).

Meanwhile, according to Thomas Suyatno, credit means the parties first give achievements in the form of goods, money or services to other parties, while the counter-achievements will be received later (within a certain period (Note 3)). One of the financing institutions that also functions to channel loans, for example motorized vehicles, two-wheeled or four-wheeled vehicles, is consumer financing. Presidential Regulation Number 9 year 2009 concerning Financing Institutions 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.

Consumer financing is one of the financing models carried out by financial companies, in addition to activities such as leasing, factoring, credit cards and so on. The market target of this consumer financing model is clear, namely consumers. A term used as opposed to the word manufacturer/producer. This form of guarantee is widely used in lending and borrowing agreements because the loading process is considered simple, easy and fast, even though in some cases it is considered to be less guarantee of legal certainty. Fiduciary has experienced significant development, for example concerning the position of the parties.

In Roman times, there were 2 forms of fiduciary namely "*fiducia cum creditore*" and "*fiducia cum amico*" (Note 4). Both forms arose from an agreement called "*pactum fiduciae*" followed by the surrender of rights in "*iure cession*". The legal relationship in "*fiducia cum creditore*" is the relationship of the parties which is based on the consideration of trust in morals which is intrinsic moral. Creditors of collateral holders cannot act like object owners.

Provisions in Article 1 of Act Number 42 year 1999 concerning Fiduciary Guarantees (hereinafter abbreviated as Fiduciary Guarantee Law) provide fiduciary limitations and definitions as a transfer of ownership rights of an object on the basis of trust provided that objects whose ownership rights are transferred remain in possession of the object owner (fiduciary giver). It is said based on trust, because the object used as a guarantee remains in the hands or under the control of the owner of the object, namely the debtor or debtor.

Fiduciary guarantee institutions allow fiduciary providers to control collateral, to conduct business activities financed from loans using fiduciary guarantees. Submission of ownership rights from the object is juridical or known as "*constituto possessorio*" (Note 5). "*Constituto possessorio*" or "*Constitutum possessorium*" is the surrender of a property without giving up the physical object in question. Initially, fiduciary objects are limited to the wealth of movable objects that are tangible in the form of objects in inventory, objects of merchandise, accounts receivable, machine tools and motorized vehicles. But by realizing the growing need of the business world and the need for legal certainty for the creditor who provides loans, the Government of Indonesia tries to summarize all the requirements for guarantees that are not covered and are regulated in positive law (before the entry into force of the Fiduciary Guarantee Act) into the Fiduciary Guarantee Act.

This fiduciary guarantee is an *accessoir* from a principal agreement as stated in the explanation of Article 6 letter b of Law Number 42 year 1999 concerning Fiduciary Guarantee and must be made with

a notarial deed referred to as a Fiduciary Guarantee deed (Note 6). However, according to Article 11 letter b of Law Number 42 year 1999 concerning Fiduciary Guarantee, it is explained that with a fiduciary agreement by notarial deed it is not enough, but must be registered with the Fiduciary Registration Office. Fiduciary collateral objects are movable objects that are very risky of their movement. Consequently the fiduciary recipients in the field application are difficult to implement the principle of *droit de suite*. The above constraints are exacerbated by the practice of applying fiduciary agreements in the field, among others, the creditor only stops at making credit agreements, while others stop at making authentic certificates only and are not registered with the Fiduciary Registration Office, and often do negotiations that provide additional costs for fiduciary recipients when executing objects fiduciary guarantees, so that fiduciary certificates do not provide legal education in the community.

In the implementation of the fiduciary recipient, based on Law Number 42 year 1999 concerning Fiduciary Guarantees, Article 15 paragraph (2) is as follows: (2). Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as the court's decision that has obtained permanent legal force. Elucidation of Article 15 of Act Number 42 year 1999 concerning Fiduciary Guarantee which reads as follows: Paragraph (2). In this provision, what is meant by "executorial force" is that it can be directly implemented without going through the court and is final and binding on the parties to carry out the decision. In fact, it gives a large freedom of space to business people or in this case the fiduciary recipient to take the action of taking motorized vehicles either directly or indirectly by using a debt collector service or commonly referred to as a puller of motorized vehicles with a power of attorney and a letter of assignment from the recipient fiduciary.

This is certainly not in accordance with HIR/RBG Article 195, whereby against the decision of a judge who has permanent legal force, the implementation is requested by the Chairperson of the local court or commonly referred to as fiat court and the executor is appointed by the Chairperson of the Court. This executorial execution process is what causes a prolonged dispute between fiduciary recipients and fiduciary providers, which sometimes results in a criminal act of plunder, theft, persecution and so on. Of course this causes loss to consumers or fiduciary providers (Note 7). Based on the description above, it was interesting to conduct a study on the ideal construction of the object of fiduciary guarantee based on the value of justice.

2. Research Methods

In this study, the paradigm used is the Constructivist paradigm. Constructivists, as described by Guba and Lincoln, adopt the relativist ontology (ontology of relativism), transactional epistemology, and hermeneutical or dialectical methodology. The research objective of this paradigm is directed to produce various constructive understandings, with themes of trustworthiness and authenticity (Note 8).

In principle, research also emphasized the steps of empirical observation and analysis. This research is included in the non-doctrinal legal research tradition with the socio legal research approach that aimed to be used to better understand comprehensive legal issues and its application. In conducting the

analysis, descriptive analytical method was used, so that not only exploration and clarification of phenomena or social realities, but also looking for causality and interactional relationships of all selected data collected (Note 9). Data that has been collected from both field research and library research were analyzed with qualitative data analysis methods.

3. Research Results and Discussion

3.1 Fidusia Guarantee Execution Carried Out by Credit Financing Institutions

The execution of fiduciary guarantees is the confiscation and sale of objects that are objects of fiduciary guarantee. The cause of the execution of this fiduciary guarantee is because the debtor or fiduciary provider has failed to promise or does not fulfill his performance on time to the fiduciary recipient, even though the fiduciary giver has been given a subpoena. In Article 29 of Law Number 42 year 1999, there are 3 (three) methods for execution of fiduciary collateral objects, namely:

(1) If the debtor or Fiduciary Provider fails to promise, the execution of the object that is the object of the Fiduciary Guarantee can be done by:

a. Executorial title implementation as referred to in Article 15 paragraph (2) by Fiduciary Recipients;

The Fiduciary Guarantee certificate issued by the Fiduciary Registration Office includes the words "For Justice Based on the Almighty God". This fiduciary guarantee certificate has the same executive power as a court decision that has obtained permanent legal force.

Executorial power is meant to be directly carried out without going through the court and is final and binding on the parties to carry out the decision. Thus the execution of the execution title (the basis of the right of execution) by the recipient of fiduciary contains 2 (two) main requirements, namely:

a) Debtor or Fiduciary Giver has broken a promise,
b) There is a Fiduciary Guarantee certificate that states "For Justice Based on the One God Almighty".

Furthermore, although there is no explicitly stipulated method for the execution of this execution title (by auction or under hand) but given the nature of its execution and considering the underhand sale has been given a condition based on the agreement of the fiduciary provider and recipient, the execution of this execution title must be by auction.

b. Sales of objects thatbecome the object of Fiduciary Assurance on the power of the Fiduciary Recipients themselves through a public auction and take repayment of their receivables from the proceeds of the sale;

If the debtor fails to promise, the recipient of the fiduciary has the right to sell objects of fiduciary guarantee on his own authority. Sales in this way are known as the Parate Execution institution and are required to be sold through a public auction. Thus the Execution Parate is more or less the authority given (by law or court decision) to one party to forcibly carry out the contents of the agreement by themselves when the party other defaults.

However, because this power must be proven by the certification of fiduciary guarantees, the practical execution of one's own power contains the same requirements as the execution of the basis of execution rights (execution title) in item 1 (one) above.

c. Under-hand sales are carried out based on the agreement of the Fiduciary Giver and Recipient if the highest price can be obtained that benefits the parties.

The execution of fiduciary guarantees by means of underhand sales is a development of the execution system that was previously adopted in the execution of Mortgage Rights (Law No. 4 year 1966).

As in the mortgage law, in this fiduciary law the sale of hands on fiduciary objects also contains some relatively heavy requirements to be implemented.

There are 3 (three) requirements to be able to make sales categorized as under hand, namely:

1) The agreement of fiduciary providers and recipients, this condition is expected to be centered on the issue of prices and costs that benefit the parties.
2) After 1 (one) month has elapsed since written in writing by the fiduciary giver and or recipient to interested parties.
3) Announced at least in 2 (two) newspapers circulating in the area concerned.

Seeing the weight of the above conditions, it is probable (as long as this Land Rights Underwriting) sales under this hand will not be popular. It is estimated that this method will only be limited to large-scale credit.

It is likely that the way that has been going on will be more favored by the parties than in the new way in the Fiduciary Law. In the old way the debtor or collateral owner for the approval of the debtor will redeem or pay off the burden (binding value) of the item that is the fiduciary object, perhaps the redemption money is derived from the prospective buyer after that or at the same time the owner makes a sale and purchase with the buyer under the hand (in sign by the owner of the item). However, by looking at the motive or the reason for this underhand sale method, it is to obtain the highest price and then make a sale and purchase voluntarily, the auction sale through the Auction Hall may also be used in this opportunity.

(2) The sale as referred to in paragraph (1) letter c is carried out after 1 (one) month after the Fiduciary Giver and Recipient have notified the parties to the interested parties and announced at least 2 (two) newspapers in the area concerned.

To execute the object of Fiduciary Guarantee, the Fiduciary Giver is obliged to submit the object that is the object of the Fiduciary Guarantee. The various stages carried out by the financing institution against the occurrence of default by the debtor are as follows.

1) Persuasion efforts

Considering the due date of installments by calling or Sending Message Service (SMS), it is done to the facility recipient who enters his telephone number in the credit application, which experiences a late payment of 1 (one) to 2 (two) days, for those who do not have a telephone that is by visiting to remind (Note 10).

If there is no response from the recipient of the facility within 1 and 2 days, then on the 3rd day of the Account Reviable Dept. (AR) assigns Collector to directly collect the recipient of the facility, this collection is a maximum of 4 (four) visits in 1 (one) month.

2) Giving subpoena/warning

Before the seizure is carried out, the customer who has been in arrears for 3 (three) consecutive months or delinquent until the due date, the Branch Manager must provide a warning letter to the customer in advance 3 (three) times, namely:

a. Warning letter I, 7 (seven) days after the last installment due date or after 3 (three) consecutive times the customer does not make installments.
b. Warning Letter II, 7 (seven) days after warning letter I.
c. Warning Letter III, 7 (seven) days after warning letter II (Note 11).

3) Withdrawal of goods

The purpose of withdrawal of collateral is to withdraw credit that has been distributed to customers and capital leases and penalties that are the company's right. Withdrawal of collateral must still be done even if the insurance claim has been received, because there is still a mortgage right of 20% which still has to be received. After sent a Warning Letter III and has fulfilled the requirements to submit an insurance claim, then along with the submission of an insurance claim, the confiscation/seizure/execution of the collateral and sales will be carried out in accordance with Article 29 of the Law. No. 42/1999 (Fiduciary Guarantee Act) for loans registered with the Fiduciary Office.

In general rules, if the debtor is two months late from the specified payment period, the motorized vehicle must be withdrawn, especially for initial installments if it is twenty-four days late, then the object of the agreement or vehicle must be withdrawn because the debtor does not have good faith, this is because the first installment has been in arrears/default, it is feared to pay 12 (twelve) to 48 (forty eight) times the debtor will be able to do arrears many times (Note 12).

Then if the customer holds a resistance/refuses to provide collateral, the Financing will remind that the agreement that has been made jointly is the highest "law" for the parties that make it and the financial institution will only take the remaining principal of the loan that has not returned, as well as fines and the cost of withdrawing collateral. If with the explanation the withdrawal of collateral is still failing, then the financing institution is justified in asking for help from law enforcement officials for the costs of the company that will be calculated from the sale of collateral that was confiscated.

In the case of requesting assistance from law enforcers, it is stipulated in Article 6 of the Chief of Police Regulation Number 8 year 2011 concerning Security of Fiduciary Guarantee Execution stated that:

"Safeguarding the object of fiduciary guarantee can be carried out with conditions":

a. There is a request from the applicant;
b. Have a fiduciary guarantee certificate;
c. Fiduciary guarantee is registered with the fiduciary registration office;

d. Have a fiduciary guarantee certificate; and
e. Fiduciary guarantees are in the territory of Indonesia.

But in some cases, the execution of fiduciary guarantees has never been resolved in court, meaning that the parties are pursuing a family settlement. This shows that many cases should have been more than 3 (three) times when delinquency had to be processed, but the credit financing agency did not take firm action and ended with execution but rather a personal approach that was family-friendly.

Taking into account the legal settlement through the court will take a lot of time, energy and costs. Besides, the most important thing is that pawnshops always prioritize always being friends of the community. With patience and perseverance they will make approaches to customers and provide choices for solutions that should be able to be done related to the delinquency of the customer installments. One of the solutions offered is the sale of goods to cover the lack of installments.

However, that is only a little more with the settlement process carried out with mediation that puts the middle way for both parties. On the other hand, there is also a process of collateral withdrawal which is confiscated by a financial institution through the hands of third parties. Of course this is very contrary to the procedural principles set out in the financing agreement.

Then in carrying out the withdrawal process, the employee or the outsourcing company must have a professional certificate in the field of collection from the institution appointed by the association by giving a notification to the OJK (Financial Services Agency) and accompanied by the reason for the appointment. This is certainly regulated in Article 50 paragraph (5) of the Financial Services Authority Regulation Number 29/PO 05/2014 concerning Business Operations of Financing Companies.

From the description above, it can be concluded that the execution of fiduciary guarantees carried out by credit financing institutions is done based on the Fiduciary Guarantee Execution Act pursuant to Article 29 of Law Number 42 year 1999 concerning fiduciary guarantees which in the case of debtors defaulting. The credit financing institutions do not will immediately execute the collateral object from the debtor. Here, the initial steps to be taken by credit financing institutions are more persuasive efforts and prioritize discussion in order to maintain good relations with customers. The practice in the field proves that the execution of fiduciary guarantees used by credit financing institutions tend to make under-sale sales based on the agreement of the parties. This reason is to find the right buyer in the hope of getting a high price. In addition, this method is considered not to spend a lot of money, energy and time. However, on the other hand, there are still credit financing institutions still make withdrawals with the system through third parties.

3.2 Settlement of Dispute Resolution in Fiduciary Agreements Related to the Existence of a Fiduciary Guarantee Certificate that Has Executorial Power

3.2.1 Juridical Dispute Resolution (Litigation)

Based on the provisions of Article 29 of Law Number 42 year 1999 concerning Fiduciary Guarantee, it states that:

1) If the debtor or fiduciary provider fails, the execution of the object that is the object of fiduciary guarantee can be done by:
   a. The execution of the executorial title as referred to in Article 15 paragraph 2 by the recipient of the fiduciary;
   b. Sales of objects that are the object of fiduciary collateral through an auction of the power of the fiduciary recipient through a public auction and taking repayment of the receivables from the sale;
   c. Under-hand sales are carried out based on the agreement of the fiduciary provider and recipient if this is the highest price that benefits the parties.
2) The sale as referred to in paragraph (1) letter c is carried out after 1 (one) month after the written notification by the fiduciary giver and recipient to the parties concerned and announced at least in 2 (two) newspapers circulating in the the area concerned.

There are 3 (three) ways of executing fiduciary guarantees based on Article 29 of Act Number 42 year 1999 concerning Fiduciary Guarantees:

1) Direct execution with the executorial title which means its power with a court decision is legally enforceable.

This execution is justified by Law Number 42 year 1999 concerning Fiduciary Guarantees in Article 15 paragraph (2) which uses the *Irah Irah* "FOR THE SAKE OF JUSTICE BASED ON THE ONE ALMIGHTY GOD" which means that the power is equal to the power of a permanent court decision. The execution of the execution with the executorial title is the writing that contains the implementation of court decisions, which provides the basis for confiscation and seizure auctions (executorial verkoop) without the mediation of a judge.

2) Public Auction

This fiduciary execution is carried out by executing it by a fiduciary recipient through a public tender institution, namely the auction office, where the proceeds of the auction are taken to settle the bill payment of the fiduciary. Parate of the execution through this public auction can be done without involving the court as stipulated in article 29 paragraph (1) letter b Law Number 42 year 1999 concerning Fiduciary Guarantees.

3) Fiduciary execution can also be done through sales under hand but must meet the conditions. Sales under hand can be done with the following conditions:

a. Based on an agreement between the fiduciary giver and recipient.
b. If the sale is reached the highest price benefits the parties.
c. Notified in writing by the fiduciary giver and recipient to interested parties.
d. It was announced with at least two newspapers in the area.
e. Implementation of the sale is carried out after one month has elapsed since written notice.

To carry out the execution of the object of Fiduciary Guarantee, according to Article 30 of the Fiduciary Guarantee Act, the fiduciary person is obliged to submit the object which is the object of the

Fiduciary Guarantee in order to carry out the execution of the Fiduciary Guarantee. In case that the fiduciary giver does not submit the object of the fiduciary guarantee, the executor can ask help from the authorized agency the meaning of the authorities in carrying out the retrieval of objects of fiduciary guarantee from the hands of the fiduciary grantor is the POLRI (Police of the Republic of Indonesia) or the District Court (PN) pursuant to article 200 paragraph (11) HIR and Article 218 paragraph (2) Rbg.

According to Article 31 of the Fiduciary Guarantee Act, if the object of the Fiduciary Guarantee consists of trading objects or securities that can be sold on the market or in the stock exchange, the sale can be made in those places in accordance with the applicable laws and regulations. There are two possibilities from the auction results or sales of Fiduciary Assurance items in article 34 of the Fiduciary Guarantee Act, namely:

a) The result of the execution exceeds the guarantee value, the Fiduciary Recipient is obliged to return the excess to the Fiduciary Giver.
b) The results of execution are insufficient for repayment of debts, debtors or Fiduciary Providers remain responsible for unpaid debts.

How to settle debtors defaults on credit agreements with fiduciary guarantees in Indonesia can be done in litigation way. Litigation is a settlement that uses the judiciary. Litigation is a dispute resolution system through the judiciary, disputes that occur and are examined through litigation channels will be examined and decided by a judge. This system is unlikely to be achieved by a win-win solution or solution that pays attention to both parties because the judge has to decide where one party will be the winning party and the other party becomes the losing party.

In the credit agreement with the fiduciary guarantee, the creditor gets legal protection, as stipulated in the Fiduciary Guarantee Act. The imposition of objects with a fiduciary guarantee deed must be made with an authentic deed, so that the principle of specialization appears. This principle is contained in Article 5 paragraph 1 of the Fiduciary Guarantee Act which states that the imposition of an object with a Fiduciary Guarantee is made by notarial deed in Indonesian and is a deed of Fiduciary Guarantee.

3.2.2 Non-Juridical Dispute Resolution (Non Litigation)

Alternative Dispute Settlement (ADS) or non-litigation is one of the processes to resolve a dispute outside the court that can be done by the parties to resolve the dispute.

Settlement of Bad Debt at the Bank can be done outside the court by using the Dispute Resolution or Alternative Dispute Resolution (ADR). The settlement of the dispute has a strong legal basis since the issuance of Law Number 30 year 1999 concerning Arbitration and Alternative Dispute Settlement. Settlement of disputes outside the Court results in agreements that are win-win solutions or mutually beneficial to each other that is guaranteed by the secrecy of the parties' disputes, avoiding delays caused by procedural and administrative matters, resolving problems comprehensively in togetherness and maintaining good relations.

The settlement of disputes outside the court is more widely chosen because the judicial process in Indonesia is considered inefficient and ineffective.

Legal basis for dispute resolution in a non-litigation manner are as follows:

a. Article 1338 of the Civil Code

This article states that all agreements are made legally, apply as a law for those who make it. This provision contains the principle of an open agreement meaning that in resolving the problem every person is free to formulate it in the form of an agreement. Any contents can be carried out in order to resolve the next problem as specified in article 1340 of the Civil Code. The agreement only applies between the parties who made it. Dispute resolution by non-litigation means that the provision becomes important in terms of reminding the parties to the dispute that he is given the freedom by law to choose the way to resolve the problem which can be stated in the agreement, provided that the agreement is made legally fulfilling the legal conditions of the agreement as determined in Article 1320 of the Civil Code.

b. Article 1266 of the Civil Code

This article states that the cancellation requirement is considered always included in the reciprocal agreement, in case one party does not fulfill its obligations. The provisions of the article are very important to remind the parties, in this case the creditor and debtor who made an agreement in resolving the problem. The agreement must be implemented consequently by both parties.

c. Article 1851 to Article 1864 of the Civil Code concerning peace

This article mentions that peace is an agreement, therefore the peace agreement is valid if it is made to fulfill the legal conditions of the agreement and is made in writing form. Peace can be done in the Court or outside the Court. Settlement of disputes in a non-litigation manner, peace is made outside the Court which is emphasized, however, legal disputes can be resolved by means of peace outside the Court and peace has the power to be carried out by both parties to the dispute.

d. Dispute resolution with arbitration

This way is done by settling civil disputes outside the general court based on an arbitration agreement made in writing before or after the dispute by appointing one or more arbitrators to give a decision on the dispute. What is meant by alternative dispute resolution? Alternative dispute resolution stipulated in article 1 number 10 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement states: “Alternative dispute resolution is a dispute resolution institution or dissenting opinions through a procedure agreed upon by the parties, namely a settlement outside the court by consultation, negotiation, mediation, conciliation or expert judgment”.

Alternative Dispute Resolution can be done in the following ways:

1) Negotiation is an effort to resolve the dispute without going through a judicial process with the aim of achieving mutual agreement on the basis of more harmonious and creative cooperation. Here the parties face to face discuss the problems they face in a cooperative and open manner.
2) Mediation is an effort to resolve disputes by parties through mutual agreement through mediators who are neutral, and do not make decisions or conclusions for the parties but support the facilitator to carry out dialogue between parties with an atmosphere of openness,

honesty, and exchange of opinions to reach consensus.

3) Conciliation is a way of resolving disputes in which the parties voluntarily seek negotiations to resolve a problem with the assistance of an impartial third party.
4) Arbitration on how to resolve disputes outside the litigation or judicial institution held by the parties to the dispute based on the agreement or contract that they have previously entered into or after the dispute has occurred.

From the above explanation, the settlement is carried out through non-litigation channels emphasizes negotiation and mediation. Through financing monitoring procedures and prior warning letters as long as the debtor has a good intention to carry out his obligations. However, if there is no good faith from the debtor (the fiduciary guarantee provider) then the execution will be conducted. If the object of a fiduciary guarantee has not been found, then the creditor can carry out an execution attempt by means of an executive title without decision from the court. The execution is carried out by proving the fiduciary deed that had been registered. However, if the object of collateral is known to exist and is successfully executed by auctioning or selling under the hand on condition that both parties agree, this is done to get the highest value. The proceeds from the sale of collateral objects will later be used for repayment of debt along with other costs and the rest will be returned to the debtor (fiduciary guarantee provider).

Besides that, approach way is also done to the parties to the execution, so that the parties requested execution realize what is their rights and obligations, and do not obstruct the execution. It is very good if the executioners finally want to hand over the object of execution voluntarily and sincerely, so that there is no need forced effort.

3.3 Reconstruction of Fiduciary Guarantee Execution Laws that Have Executorial Power Based on Justice

One of the main objectives of the law is to provide social justice for all Indonesian people, which is a form of protection of human rights, as mandated by the Pancasila values and the 1945 Constitution of the Republic of Indonesia (Note 13).

In general, the Finance Company carries out a financing agreement with a debtor that has already set a clause on the agreement document and or in fact the finance company also establishes the agreement by stating a standard clause whose location or form is difficult to see or cannot be read clearly, or whose disclosure difficult for the debtor to understand. As clauses follows:

a) A statement granting power of attorney from a debtor to a business actor either directly or indirectly to take all unilateral actions relating to goods purchased by consumers in installments;
b) Statement of submission of the Debtor to regulations in the form of new rules, additions, advances and/or further changes made unilaterally by the Creditors within the period the debtor utilizes the services purchased;

c) A statement that the consumer authorizes the business actor to impose mortgage rights or guarantee rights on goods purchased by consumers in installments.

Then when the initial signing of the financing agreement, the creditor or his proxy does not tend to explain the contents of the agreement and the terms of the agreement, only the debtor is asked to sign repeatedly.

The financing agreement that has been set by clause on the agreement document by the Company or Creditors states the standard clause such as the submission of the debtor to the new or additional regulations or the statement of authorization, such as facing a notary, or a statement of compliance with unilateral actions by a finance company. Therefore, it is not in accordance with the principle of the Principle of Freedom of Contract and results in Cancel by Law and is a prohibited act that violates the provisions of Article 18 of Law No. 8 year 1999 concerning Consumer Protection, and for the leadership of the company to be punished with a maximum imprisonment of 5 (five) years or a fine of Rp. 2,000,000,000.00 (two billion rupiah).

The Financing Company tends to make and register the Fiduciary Guarantee deed after the debtor is considered problematic, so that later the execution or withdrawal of the collateral object seems to have been lawful. Moreover, supported by the procedure for registering Fiduciary through Online systems and not through manual recording and checking, it makes the Financing Company or Creditors easily issue a Fiduciary Guarantee Certificate.

On the other issue, many financing companies carry out Fiduciary Registration but, after the expiration date, for example, after the financing agreement is made, the company only registers Fiduciary Guarantee 3 (three) months later. So this cannot be justified and tends to be tricky from the company.

In the process of binding fiduciary guarantees it is stated that the fiduciary guarantee must be made with a notary deed and registered with the fiduciary registration office to obtain legal certainty for the creditor. In the fiduciary deed made by this notary there is always a line that reads “FOR JUSTICE BASED ON ALMIGHTY GOD” this is what gives the executorial title, the title that aligns the power of the deed with the court decision.

Thus, the deed can be executed immediately (without the need for a court decision). Hence, the execution fiat is like executing a court decision that has definite power. That is, by asking for “fiat” from the head of the court, namely asking for the determination of the head of the court to carry out the execution and the chairman of the court who would lead the execution.

According to Ade Muri, the creditor who asked for this court decision never happened again after the issuance of Law Number 42 year 1999 because the creditors had the assumption that the executorial power of the fiduciary guarantee had strong legal authority and renunciation, so that in the execution process the creditor directly executes the fiduciary guarantee without being led by the head of the court (Note 14).

The execution of objects that are burdened by Fiduciary Assurance based on Law Number 42 year 2009 concerning Fiduciary and/or other Regulations, the Fiduciary recipient company must include the

Police to carry out security and or at least explain the position of the fiduciary guarantee certificate legal force remains. This avoids the assumption that people do not understand the situation.

In the implementation of fiduciary collateral, there is participation from the Police, because it is considered as a party that has the authority to examine the validity of the agreement and the Fiduciary Guarantee Certificate whether it has been carried out according to the procedures that apply as existing regulations, as the implementation of regulation of the police chief of the Republic of Indonesia No. 8 year 2008 concerning Security of Execution of Guaranteed Items Fiduciary.

Law Enforcer especially the Police in detail and carefully apply the Fiduciary Guarantee Act along with its implementing regulations and other regulations, so that if in the future there is a violation committed by a Financing Company and assumes a detriment to the public then the Police must receive reports and follow up and be able to proceed legally the actions of the Company should not be thrown at each other and just as if to let the actions and actions of the Financing Company be uncontrolled.

According to the jurisprudence of the Supreme Court of the Republic of Indonesia mentioned above, if a fiduciary grantor cannot fulfill his obligations or fails to fulfill his obligations to a fiduciary recipient as a creditor, then the fiduciary recipient as a creditor cannot own the object that is the object of fiduciary collateral. The fiduciary recipient can only sell-general sales (auction) the object of the fiduciary guarantee as general sales. This sale is carried out in a pawn are regulated in Article 1155 of the Civil Code and Article 1156 of the Civil Code. However, if as long as the fiduciary provider as a debtor has not neglected to fulfill his obligations to the fiduciary recipient as a creditor, then the position of the fiduciary recipient as creditor is only as a recipient of fiduciary collateral and has not been able to conduct public sales (auction) of objects that are objects of fiduciary guarantee that.

Based on the discussion above, the position of fiduciary recipient as creditor is as a holder of fiduciary guarantee and his authority is as a limited owner of the object that is the object of fiduciary guarantee, because if the fiduciary provider does not neglect his obligations, then the fiduciary recipient cannot make public sales against the object that is the object of the fiduciary guarantee.

As for the reconstruction of Reconstruction Norms Article 15 of Law Number 42 year 1999 concerning Fiduciary Guarantees based on justice are as follows:

Table 1. Law of the Republic of Indonesia Number 42 Year 1999 Concerning Fiduciary Guarantee Article 15

Before	Weaknesses	After
Article 15 1. In the certificate of fiduciary guarantee as referred to in Article 14 paragraph (1) the words “FOR JUSTICE BASED ON		Article 15 1. In the certificate of fiduciary guarantee as referred to in Article 14 paragraph (1) the words “FOR JUSTICE BASED ON

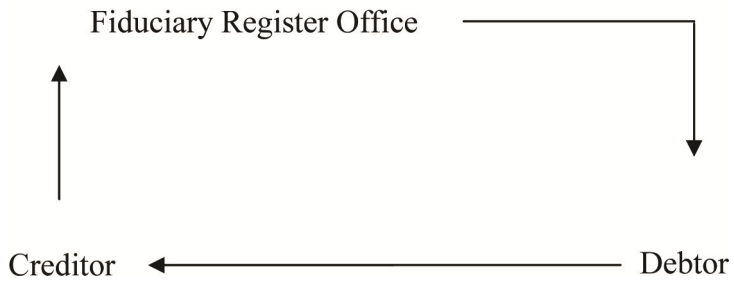
ALMIGHTY GOD" are included.		ALMIGHTY GOD" are included.
2. A fiduciary guarantee certificate as referred to in paragraph (1) has the same executive power as a court decision that has obtained permanent legal force.	a. In Article 15 paragraph (2) opens opportunities for finance companies to be able to carry out arbitrary actions against debtors.	2. A fiduciary guarantee certificate as referred to in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force insofar as it does not contradict the law.
3. If the debtor fails to promise, the Fiduciary Recipient has the right to sell the object that is the object of the Fiduciary Guarantee on his own power.	a. In Article 15 paragraph (3) gives full authority to the company in selling fiduciary collateral objects so as not to place rights from the debtor.	3. If the debtor fails to promise, the recipient of Fiduciary has the right to sell the object that is the object of the Fiduciary Guarantee on his own power by first deliberating and asking for approval from the debtor or by first requesting the determination of the court.

At first the development of fiduciary institutions in Indonesia was not yet well known. After the issuance of Law Number 42 year 1999 concerning fiduciary guarantees, fiduciary institutions began to become well-known and grow rapidly in Indonesia. The background of the emergence of fiduciary institutions in our country is because there is a shortage of mortgage agencies. The role of the pawning institution for the Indonesian people before the existence of a fiduciary institution at that time could not meet the needs of an increasingly growing community and the mortgage institution was deemed not to follow the development of the community.

With the existence of a fiduciary institution, the shortcomings of the mortgage institution can be covered by the fiduciary institution. The definition of fiduciary according to Law Number 42 year 1999 is explained in Chapter I of the general provisions of Article 1 as follows:

Fiduciary is the transfer of ownership rights of an object on the basis of trust provided that the object whose ownership rights are transferred remains in possession of the object owner (Note 15).

Thus, we can know from the chart below the substance of fiduciary guarantees according to Law Number 42 year 1999 concerning fiduciary guarantee:



Fiduciary guarantee is an agreement whereby the debtor binds its agreement to the creditor for the debt payable which makes the proof of ownership of an object to be used as collateral for the debt accompanied by an interest. An agreement that occurs between the debtor and creditor in a fiduciary guarantee called the accession agreement (additional agreement) is not the principal agreement of a loan agreement.

It is said to be an access agreement, it is an additional agreement or a follow-up agreement of a principal agreement, if the principal agreement is canceled then additional agreements will also be canceled. The fiduciary guarantee agreement that is accesoir is regulated in Article 4 of the UUJF (Fiduciary Guarantee Law).

Fiduciary guarantee is a follow-up agreement of a principal agreement which creates an obligation for the parties to fulfill an achievement. To fulfill an achievement of the parties in the fiduciary guarantee agreement, the parties must fulfill their respective obligations. In order not to cause harm between one of the parties, and in order to fulfill the achievements among the parties, the parties must register on a fiduciary guarantee to protect the interests of the parties, both the creditor and the debtor. And hopefully also, it is to eradicate bad debtors against creditors.

For example: misbehaving in terms of betraying the creditor, by selling goods that are the object of fiduciary collateral or the debtor is re-fiduciary against the object that is the object of fiduciary guarantee.

Fiduciary guarantees must be registered, as we have known various principles contained in the guarantee law. One of them is the principle of publicity which is a matter of necessity to provide information/announcements to the public regarding the status of ownership of an object that is used as collateral in a fiduciary guarantee agreement. So, with this principle of publicity, the debtor is required to register a fiduciary guarantee at the Fiduciary Registration Office.

The mechanism for registering fiduciary guarantees is regulated in Article 11, Article 12, Article 13, Article 14, Article 15, Article 16, Article 17, and Article 18 of Law Number 42 year 1999. Consumer financing that uses fiduciary collateral as a financing product is consumer financing for motorized vehicles with a load of fiduciary guarantees.

This is stipulated in the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies that Perform Consumer Financing for Motorized Vehicles with Fiduciary Assignments. It states that:

"Financing companies that finance consumers for motor vehicles with the imposition of a fiduciary guarantee must register the fiduciary guarantee referred to in the Fiduciary Registration Office, in accordance with the law governing fiduciary guarantee" (Note 16).

The existence of the Regulation of the Minister of Finance of the Republic of Indonesia has the purpose of why it must be registered for consumer financing for motorized vehicles must be registered, because it is to protect the interests of the parties both for consumers and for the financing company.

Even though the positive law has regulated the existence of fiduciary guarantees, but with the development of the era at this time there should be a new legal construction by producing justice for creditors. In this case, it does not reduce the sense of justice for the debtor, so that each party has the same position.

One of the basic policies in relation to legal development is the issue of legal certainty (*rechtszekerheid*). In general, the principle is accepted that all legal events that have not yet been regulated in the law do not yet have legal certainty. Conversely, if the legal event has received its confirmation in the law it is considered to have legal certainty. Is that true? Isn't the law intended for the community? This issue can be returned to the scope of legal certainty itself. Whether the law is only for the sake of law or until the implementation of the law (Note 17).

One of these symptoms can be seen from the fiduciary arrangements in the legislation. Fiduciary institutions are a legal symptom that provides benefits for the wearer especially to expedite credit repayments and also not weaken the potential recipient of credit (Note 18). Article 11 point 1 of the UUJF (Fiduciary Guarantee Law) states that objects burdened with a fiduciary guarantee must be registered, the meaning of the word "mandatory" in the above provisions needs to be explained.

According to J. Satrio because there is not a single provision in the Fiduciary Law which states that the fiduciary that is not registered is invalid, then the above provisions we interpret, that for the coming into effect of the provisions in the fiduciary law, the conditions must be fulfilled that the collateral object the fiduciary was registered (Note 19). Fiduciaries which are not registered cannot enjoy the benefits of the fiduciary law (Article 37 number 3 of the fiduciary law).

The purpose of the UUJF concerning fiduciary guarantees is not the registration of collateral objects, but the registration of the collateral deed known as the fiduciary guarantee deed. It is confusing for business actors who use fiduciary institutions because in the registration system that applies in "*fiduciaire eigendomsoverdracht*". It is known as the registration of objects and registration of fiduciary collateral for collateral that is not inventory, providing protection to creditors against third parties, if Guaranteed objects registered objects (Note 20).

The purpose of the registration above actually causes uncertainty, what should be registered? Because in the registration process, only a fiduciary guarantee deed is made before the notary. Whereas registration never happened, let alone to merchandise even though in article 11 UUJF listed registration of objects (Note 21).

The absence of the registration obligation is felt in practice as a weakness and weakness for this fiduciary law institution. Because in addition to causing legal uncertainty, the absence of the fiduciary guarantee registration obligation caused the fiduciary guarantee not to fulfill the element of publicity, making it difficult to control. This can cause unhealthy things in practice, such as fiduciary twice without the creditor's knowledge, the transfer of goods without the creditor's knowledge, and others (Note 22).

Considering how important the registration function is for a debt guarantee including collateral for debt including this fiduciary guarantee, the UUJF then regulates it by requiring every fiduciary guarantee to be registered with the authorized official (Note 23).

In practice there are still doubts regarding registration of fiduciary guarantees. The doubt is that the UUJF is less decisive in determining what should be registered. This issue also still creates differences of opinion among legal experts. Some say that what is registered is a fiduciary guarantee deed, but some argue that not only is the fiduciary deed registered but the items are also registered. If an assurance certificate made by a notary is analyzed, a juridical fact is found that the person registered is a fiduciary guarantee deed and a fiduciary guarantee (Note 24).

Fiduciary guarantees are used by members of the community to guarantee small credits with collateral items that are of little value. If such an item is registered, compared to the value of the guarantee object, the registration fee will be felt very heavy. Besides that, the hassle must also be taken into account, considering that at least temporarily the place of registration only exists or even only in the big cities. It is very wise for lawmakers to submit to those who have their own interests to determine whether it is necessary to register or not (Note 25).

The substance of fiduciary guarantees according to Law Number 42 year 1999 concerning fiduciary guarantees aims to provide financing services in the form of fiduciary guarantees for people who need to fulfill their living needs. In addition, the public also does not need to worry about the legal certainty of the fiduciary guarantee, because fiduciary guarantees already have a legal umbrella in Indonesia since the issuance of Law Number 42 year 1999 concerning fiduciary guarantees.

The legal power of fiduciary guarantees does have a strong legal force, because it has been regulated in article 15 which states that if a breach of contract by a debtor the recipient of a fiduciary has the right to sell the object that is the object of the Fiduciary Guarantee on his own power. However, this is not absolute because there are still legal remedies that can be carried out by the debtor in maintaining the guarantee object.

However, the execution of fiduciary guarantees in the country of Indonesia is not in line with the values and norms that apply at this time, especially with the value of justice. In the concept of justice, there is a balance between the two parties or equal position.

Justice is identical with conformity (proportionality), not the opposite of the word "tyranny". It is fair, in other words, to give understanding to individual rights and give those rights to each owner. Through an effort to interpret a fair meaning proportionally, the substance of justice is not only accepted by the

party given the right in this case if we refer to the responsibility of the government in maintaining the rights between creditors and debtors in credit financing activities in the economic field. Pancasila as the foundation of the state has the values of the balance of law, namely religious moral, humanity, and social values (nationalism and social justice) (Note 26).

Even though fiduciary guarantees have strong legal powers such as a court decision, but the creditor is obliged to seek a mediation process first with the debtor in the event of default (Note 27).

Various problems occur in society in fiduciary law both civil and criminal. In the case of criminal law the creditor often unilaterally takes the object of fiduciary collateral because of a breach of contract from the debtor, so that in its implementation the debtor reports the matter to the realm of theft cases.

That in terms of execution of objects of fiduciary collateral, it is very important to avoid the existence of good criminal acts such as violence, seizure so that the debtor does not consider that the vehicle has been taken by someone else (Note 28).

Unlike the case with a fiduciary guarantee, a fiduciary guarantee certificate does not create a complex and risky legal consequence. Creditors can exercise their execution rights because they are considered unilateral and can cause arbitrariness from creditors. It could also be because considering the financing of fiduciary objects, it is usually not full in accordance with the value of the goods. Or, the debtor has already carried out a part of the obligation that has been carried out, so that it can be said that above the item stands the right of part of the debtor's property and partly owned by the creditor. Especially if the execution is not through an official price appraisal body or public tender body. These actions can be categorized as acts against the law (PMH) in accordance with Article 1365 of the Civil Code and can be sued for compensation.

In practice the implementation of fiduciary guarantees occur at this time, the execution of the implementation is felt to have no justice for the debtor. In the process of taking collateral objects such as the occurrence of a seizure process carried out by the creditor. The creditor asks for help from a third party to take the object of collateral to the debtor by relying on debt collectors who are currently troubling the war, because they take their vehicles by force, they are robbery and can be punished (Note 29).

In the conception of criminal law, the execution of the fiduciary object under hand enters the criminal offense of Article 368 of the Criminal Code if the creditor imposes coercion and the threat of seizure. This article states:

1) Whoever is intended to benefit himself or another person against the law, forcing someone with violence or threat of violence to give something, which is wholly or partially owned by that person or someone else, or to make debt or write off debts, is threatened because of extortion with a maximum imprisonment of nine months.
2) The provisions of article 365, second, third and fourth paragraph apply to this crime.

This situation can occur if the creditors carry execution unilaterally, even though they are known to be partly or wholly owned by another person. Although it is also known that some of these items are

subject to creditors who want to execute but are not registered in the fiduciary office. Even the imposition of other articles can occur considering that the execution is not an easy thing, for that it requires legal guarantees and legal apparatus support legally. This is the urgency of balanced legal protection between creditors and debtors.

Even if the debtor transfers objects from a fiduciary object is carried out under the hands of another party, it cannot be charged under law No. 42 year 1999 concerning fiduciary guarantees, due to unauthorized or legal fiduciary guarantees made. It is possible that the debtor who transferred the guarantee of the report was reported on the accusation of embryo accordingly.

Article 372 of the Criminal Code emphasizes: Whoever intentionally and unlawfully owns an item that is wholly or partly belongs to another person, but that is in his power of hundred maximum rupiah.

However, this issue can also add to the problem of being able to report to each other because some of the goods belong to the creditor and debtor. If this is taken then a long, tiring and costly legal process will occur. As a result, the margins that the company wants to achieve are not lost, including time and thought loss.

In contrast to the fiduciary guarantee in Singapore where the process of execution is passed through the pre-insolvency stage where it is carried out with the negotiation process between the creditor and the debtor. However, if the negotiation process does not proceed properly, the creditor or investor can begin the process of insolvency against the debtor as a last resort, namely assuming that the state is unable to pay (Note 30).

Many financial institutions carry out executions on objects that are burdened by Fiduciary guarantees which is so far the finance companies feel their actions are safe and smooth even with the form of violence. According to the authors, this happens because the debtor's legal understanding and knowledge of creditors is still weak as the owner of the funds. So that this weakness is utilized by business people in the financial industry, especially in the financial institutions that carries out the fiduciary guarantee practices.

So that there is a need for legal protection for the debtor in the process of implementing the agreement, when there are achievements made by the debtor by prioritizing the process of negotiation and mediation between the two parties.

As an initial concept of an agreement between the two parties, then it should be resolved when the parties resolve each other. They want to make a fiduciary agreement.

4. Conclusion

4.1 Summary

First, the execution of fiduciary guarantees conducted by credit financing institutions is carried out based on the Fiduciary Guarantee Execution Act pursuant to Article 29 of Act Number 42 year 1999concerning fiduciary guarantees. In the event that the debtor defaults, the credit financing institution will not directly execute against collateral objects from debtors. Here, the initial steps to be

taken by credit financing institutions are more persuasive efforts and prioritize discussion in order to maintain good relations with customers. The practice in the field proves that the execution of fiduciary guarantees that are used by credit financing institutions tend to make under-sale sales based on the agreement of the parties. This reason is to find the right buyer in the hope of getting a high price. In addition, this method is considered not to spend a lot of money, energy and time. But on the other hand, there are still credit financing institutions make withdrawals with the system through third parties. Second, the settlement of disputes in the fiduciary agreement related to the existence of a fiduciary guarantee certificate that has executive power can be taken in two ways, namely by juridical (litigation) and non-juridical (non-litigation). The juridical can be taken for the debtor by filing a lawsuit in the District court in accordance with the provisions of the civil procedure law, or the grosse deed execution request. In this way, it can be used as a way to resolve bad loans that are faster and easier than filing a civil suit on the basis of default. Whereas for creditors can file a civil suit through the District Court on the basis of default (breaking a promise). Then the non-litigation settlement can be done in negotiation or mediation, where through the financing monitoring procedure and giving a warning letter in advance as long as the debtor has a good intention to carry out his obligations. However, if the debtor is not able to carry out his obligations, what is done is an approach to the party requested for execution, so that the party requested execution realizes what is their rights and obligations. Moreover, it does not obstruct the execution. It is very good if the executioner finally wants to submit the object of execution with voluntary and sincere, so there is no forced effort. Third, Reconstruction of the law of fiduciary guarantee certificate which has the executorial power based on the law of consumer protection. It is carried out on Article 15 paragraph (3) of the Law of the Republic of Indonesia Number 42 year 1999 concerning Fiduciary Guarantees where there is a balanced position between creditors and debtors in terms of execution Fiduciary guarantees. It is carried out in consultation so as to place justice for both parties.

5. Suggestions

a. It should be directed to the government and the House of Representatives so that the fiduciary guarantee law and the Consumer Protection Act and revisions are carried out so that in the future it will provide more legal certainty to consumers and businesses.

b. The formation of an executing institution should be made for the fiduciary guarantee agreement, given that the fiduciary is a guarantee institution for movable objects whose physical control is by the fiduciary provider, so that a dispute between the creditor and the debtor can be resolved by the institution by prioritizing mediation

c. Creditors and debtors who are disputing should prioritize mediation settlement, so that there is a balance between the two parties, because the initial agreement is based on a good intention.

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Notes

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Note 2. Raymond P. Kent dalam Thomas Suyatno, *Dasar-Dasar Perkreditan*, Gramedia Pustaka Utama, Jakarta, 1991, page 13.

Note 3. *Ibid*.

Note 4. Tan Kamelo, *Hukum Jaminan Fidusia: Suatu Kebutuhan Yang Didambakan*, Cetakan II, PT. Alumni, Bandung, 2014, page 42.

Note 5. Andi Prajitno, *Hukum Fidusia, Problematika Yuridis Pemberlakuan Undang-undang No. 42 Tahun 1999*, cetakan I, Bayumedia Publishing, Malang, 2009, page 91 & 92.

Note 6. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*, PT. Citra Aditya Bakti, Bandung, tahun 2002, page 123.

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Note 10. Interview result with Ade Kemri A.P Siaphutar, Head of Prospenrindo Finance, Cabang Rantau Prapat, On 22 August 2018.

Note 11. Interview result with Basar Siregar, Head of PT.Oto Multiartha Cabang Rantau Prapat, Tanggal On 22 August 2018.

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Note 14. Interview result with Ade Muri, SH, Judge of District Court Medan, on 20 October 2017.

Note 15. Article 1 No. 1 Law No. 42 year 1999 on Fiduciary Guarantee.

Note 16. Article 1 Paragraph (1) Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies that Perform Consumer Financing for Motorized Vehicles with Fiduciary Assignments.

Note 17. Tan Kamello, *Op, Cit*., page 116.

Note 18. *Ibid*, page 119.

Note 19. J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, *Op.Cit*, page 242.

Note 20. Andi Prajitno, *Op.Cit*., page 113.

Note 21. *Ibid*, page 140.

Note 22. Munir Fuady, *Jaminan Fidusia*, PT. Aditya Bakti, Bandung. 2003, page 29.

Note 23. *Ibid*, page 29.

Note 24. *Ibid*, page 213-214.

Note 25. J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, *Op.Cit*, page 243.

Note 26. Muhammad Chairul Huda, *Strengthening Pancasila As National Ideology*, Journal Pembaharuan Hukum, *Implementate The Balancing Values To Improve Law's*, Vol. 5 No. 1 April-August 2018.

Note 27. Interview result with Jawasmer, Kasubbid Pelayanan Hukum Umum, Kanwil Hukum Dan Ham Sumatra Utara, Medan, on 13 October 2017.

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Note 30. C. Pre-insolvency arrangements.

(1) Creditor may negotiate for private compromise or arrangement with debtor

11.9.5 An unsecured creditor or one whose security is unenforceable or lacking in priority may prefer to avoid the consequences of insolvency proceedings (where no or minimal recovery of sums owed is possible) and negotiate for some private compromise or arrangement with the debtor. Such private settlements are governed by the usual contractual principles.

(2) Individual debtor may come up with proposals for voluntary arrangement with creditor

11.9.6 Where private negotiations fail, an individual debtor may wish to come up with proposals for a voluntary arrangement between itself and its creditor. The procedure for coming to a voluntary arrangement and the period of moratorium on bankruptcy application, enforcement of security, execution and other legal proceedings against the individual debtor are governed by Part V of the Bankruptcy Act (Cap 20, 2009 Rev Ed).

(3) Corporate debtor may apply for judicial management of its business

11.9.7 A corporate debtor may wish to apply for judicial management of its business in order to rehabilitate its business with the purpose of effecting a more beneficial realisation and distribution of its assets to its creditors. The procedure by which this is done and the period of moratorium on winding up application, enforcement of security, execution and other legal proceedings against the corporate debtor is governed by Part VIIIA of the Companies Act. A corporate debtor may also present a scheme of arrangement with its creditors under Section 210 of the Companies Act. Such a scheme of arrangement will become binding on its creditors if it is approved by a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, at a meeting and confirmed by the Court.

4) Creditor or financier may commence insolvency proceedings against debtor as final resort

As a final resort, a creditor or financier may wish to commence insolvency proceedings against the debtor. Bankruptcy proceedings against the individual debtor are governed by the Bankruptcy Act. Winding up proceedings against a corporate debtor are commencedpursuant to section 254 of the Companies Act and generally governed by Part X of the Companies Act.