

## LEGAL CERTAINTY ON THE EXECUTION OF A FIDUCIARY WHOSE MOVABLE OBJECT HAS BEEN TRANSFERRED ON THIRD PARTIES

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### ABSTRACT

**Abstract:** The debtor does not have the legality or rights before the law to transfer the fiduciary guarantee object to a third party and the transfer of the fiduciary guarantee object without the approval of the creditor becomes invalid. This compensation is because the debtor has committed an unlawful act, therefore it requires innovation or renewal debt in this case the old debt is removed and replaced with a new debt by Chapter 1413 Civil Code. The Fiduciary Guarantee Act Should provide more specific arrangements regarding the position of objects that have been made object fiduciary guarantee because things made object Collateral are the main key in terms of providing guarantees from debtors to creditors. Given the fact that there are still many constraint-obstacles faced by creditors during the execution process of fiduciary collateral object

**Keywords:** Application; Legal Certainty; Fiduciary Execution

### Introduction

An agreement based on the surrender of property to an object as collateral is an agreement to provide security with the right of a dependent. The debtor becomes the owner of the thing as such, in essence having a stronger position than a right holder. If the debtor pays off the debt, then the property of the thing still passes back to the owner of the thing who owes it, and the debtor returns the thing to the debtor. Therefore, to meet these needs and to provide legal certainty to interested parties, Law Number 42 of 1999 concerning Fiduciary guarantees was promulgated on September 30, 1999, and announced in the State Gazette of the Republic of Indonesia of 1999 Number 168 which was formulated as a transfer of property rights based on trust.

In connection with this guarantee, what must be done by the fiduciary (creditor) if the fiduciary (debtor) makes a mistake in the form of intentional by the fiduciary (debtor) in the form of falsifying, changing, or in any way providing misleading information, which if known by either party is not. Giving birth to a Fiduciary Guarantee agreement, in such an event, the fiduciary recipient (creditor) can carry out his execution of the fiduciary guarantee object and prosecute criminally as stipulated in Article 35 of Law No. 42 of 1999 concerning Fiduciaries. In general, execution is the execution or decision of the court or deed, then the taking of repayment of creditors' obligations through the

proceeds of the sale of certain objects belonging to the debtor. The purpose of execution is to take repayment of the debtor's obligations through the proceeds of the sale of certain objects belonging to the debtor or third-party guarantor. One of the characteristics of a good material debt guarantee is that it can be executed quickly with a simple, efficient process and contains legal certainty. For example, a fiduciary execution provision in the United States that allows creditors to take their objects of fiduciary assurance can be avoided, fights/disputes (Breaking the Peace). (Sutardjo, 2003)

Fiduciaries as one type of debt guarantee must also have these quick, cheap, and definite elements. Because so far (before the issuance of Fiduciary Law Number 42 of 1999) there was no clarity on how to execute fiduciaries, so there were no provisions governing it. This provision is based on Article 29 paragraph 1(a) of the Fiduciary Guarantee Act which is a further regulation of Article 15 of the Fiduciary Guarantee Act, which is based on the executory title in the Fiduciary Certificate which includes the words For Justice Based on the Supreme Godhead". In principle, the sale of objects that are the object of fiduciary guarantee can be made through the auction of a public auction and it is also possible to sell underhand, provided that it is agreed upon by the fiduciary giver and beneficiary through an agreement which is an event in which one perso promises to another person or in which two people promise each other to do something (Rufaida, 2019).

Through agreements, an engagement or legal relationship is created that gives rise to rights and obligations for each party who makes the agreement they have made. The function of the agreement is the same as the legislation but only applies specifically to the makers. By law, agreements can be enforced into force through the courts. The law provides sanctions against perpetrators of breach of agreement or breach of promise (default). An important legal principle relating to the entry into force of treaties is the principle of freedom of contract. That is, the parties are free to make any agreement, both those that already have a regulator and those that have not been regulated or that have not been regulated, and are free to determine for themselves the content of the agreement (Situmorang, 1993).

A credit agreement with a fiduciary guarantee is not a guarantee right born under the law but is born because it must be agreed in advance between the bank as a creditor and the customer as a debtor. Therefore, juridically the binding of fiduciary guarantees is more special when compared to guarantees born under law as stipulated in Article 1131 of the Civil Code. The juridical function of binding fiduciary collateral objects in a fiduciary guarantee deed is an inseparable part of the credit agreement (Rufaida, 2019). Law Number 42 of 1999 concerning Fiduciary Guarantees does not recognize the term default but uses the term Default of Promise. The term Default in a credit agreement can be said to be the cause of bad credit or non-performing credit. The execution of fiduciary guarantees is the last step taken by creditors as fiduciary recipients if the debtor as a fiduciary defaults. The form of default can be in the form of non-fulfillment of

performance, whether based on the principal agreement, fiduciary agreement, or other guarantee agreements. Debtors who sell collateral objects, in this case, motor vehicles are a form of default where motor vehicles that should be used as needed and function are not maintained and maintained properly by the debtor's obligations as Fiduciaries ([Ramadhanneswari et al., 2017](#)).

For example, the case of fiduciary execution whose movable object has been transferred to a third party is PT. Sinar Mas Multifinance Makassar Branch as stipulated in the Consumer Financing Agreement and Provision of Trust Guarantee (fiduciary) and stipulated in Article 23 Paragraph (2) of the Fiduciary Guarantee Law that the fiduciary is prohibited from transferring, mortgaging, or leasing to other parties objects that are the object of fiduciary guarantees that are not inventory objects, except with the prior written consent of the fiduciary recipient. If this is not heeded, the fiduciary may be subject to criminal sanctions as stipulated in Article 36 of the Fiduciary Guarantee Law that the fiduciary who transfers, mortgages, or rents objects that are the object of fiduciary guarantee as referred to in Article 23 Paragraph (2) which is carried out without the prior written consent of the fiduciary recipient, shall be punished with imprisonment for a maximum of 2 (two) years and a maximum fine of Rp. 50,000,000,- (fifty million rupiah). there are still debtors who lease fiduciary guarantee objects that are not inventory objects to third parties without written consent from PT. Sinar Mas Multifinance. This action, of course, will have legal consequences for debtors who have leased the object of the fiduciary guarantee to a third party ([Setyabudi & Mashdurohatun, 2022](#)).

The second example of a case is that often in Bandar Lampung debtors who borrow funds from PT Pegadaian pledge objects owned by third parties as collateral for the debtor's loans and not a few of these debtors default on the agreed lien agreement by not paying or paying off the loan on time. By existing provisions, the recipient or lien holder who acts as a creditor, in this case, PT Pegadaian has the right to sell the pawn even though the object belongs to a third party as a review or loan as specified in Article 1150 of the Civil Code, namely PT Pegadaian is authorized to take repayment from the pawn, namely by separate execution ([Amalina, 2023](#)).

The third case is what occurs in this fiduciary agreement between creditors and debtors, especially PT. OTO Multiartha as a creditor has many obstacles in carrying out executory titles against debtors who default. One of the reasons for the difficulty of executing fiduciary guarantees registered by PT. OTO Multiartha is because the collateral has been mortgaged by the debtor to a third party. Problems will arise if the creditor wants to carry out separate execution on fiduciary collateral mortgaged by the debtor to a third party, the implementation of this execution parade carried out by PT. OTO Multiartha whether it can be carried out directly, as well as the legal consequences arising from the implementation of the execution parade, as well as obstacles to the implementation of execution at PT. OTO Multiartha ([Ilvira et al., 2023](#)).

In principle, the debtor does not have the authority to transfer or sell the object of fiduciary guarantee, in this case, a motor vehicle to a third party, because there has been a fiduciary transfer of property rights from the Debtor to the Creditor so that the Debtor's position is as a borrower or substitute borrower for fiduciary collateral whose property rights have been transferred based on trust to creditors. In the fiduciary guarantee agreement, the ownership rights of the fiduciary guarantee object have been transferred to the creditor, while control of the object is still under the control of the debtor. The ownership rights in question are juridical ownership rights. From this explanation, it can be concluded that the debtor only controls the fiduciary object as the owner of the benefit or the owner economically.

### Research Method

This type of research is normative legal research, Normative legal research is a method of legal research that The subject of study is law which is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behavior. So that normative legal research focuses on the inventory of positive law, legal principles and doctrines, legal findings in cases in concreto, legal systematics, degree of synchronization, comparative law, and legal history. The type of research used in this study is descriptive legal research. Descriptive legal research is explanatory and aims to obtain a complete picture (description) of the state of law that applies in a particular place and at a certain moment, or about existing juridical symptoms, or certain legal events that occur in society (Ariawan, 2013).

The approach used in this legal research is the statutory approach (Statute Approach). The legislative approach is an approach taken by analyzing the rules and regulations related to the legal issue. In addition, a statutory approach was carried out, this study used a statutory approach. The data obtained are then analyzed qualitatively. Qualitative analysis is carried out by describing or describing data and facts resulting from research results with an interpretation, evaluation, and general knowledge. The data is then analyzed by the inductive method, which is a way of thinking based on the formulation of specific theoretical formulations, and then general conclusions are drawn (Marzuki, 2011).

### Result And Discussion

#### Result

The practice of giving fiduciaries to objects used as fiduciary security that is transferred to creditors is mentioned in detail. The mention is not only directed to the number or unit and type but is usually further detailed such as the brand, size, quality, condition, and so on. All of that is of course to avoid prolonged disputes in the future. In certain banks or the provision of fiduciary guarantees is carried out by deed under hand, there is already a form form filled with a detailed mention of the object of the guarantee. A fiduciary agreement usually agrees that the borrower (original owner) may use the

fiduciary property by its intent and purpose, with the obligation to maintain and repair all damage to the fiduciary property at the expense and expense of the debtor/borrower himself. Borrowers are prohibited from transferring, leasing, and mortgaging fiduciary objects to others without the permission of the creditor. The creditor agrees that he or his agent is entitled at any time to see the existence and condition of the fiduciary property and to do or order to do something that the debtor/borrower should do if he neglects to do so (Hafiz et al., 2019).

Even though the deed states that the guarantee is carried out by handing over the title to the collateral object to the creditor, all of them are intended to be controlled by the creditor as collateral only. This is evident from the clauses of the guarantee agreement and if there is a sale of fiduciary property. The creditor is entitled to take repayment of his bill from the proceeds of the sale of fiduciary property, but on the other hand, he is obliged to hand over the remaining proceeds of the sale to the debtor/guarantor. This shows that materially the collateral is still the right of the debtor/guarantor. (Witanto, 2015)

Given that the purpose of the fiduciary is to provide security for the creditor's bills against the debtor or reversed, to guarantee the debtor's debt to the creditor and the fiduciary law, in addition to protecting the debtor, also intends to give a strong position to the creditor, then after the debtor defaults, the creditor must be given rights commensurate with an owner considering that the collateral is in the hands of the guarantor i.e. to terminate his agreement to borrow the collateral and demand it back, as seen in the provisions of Article 30 of the UUJF and Article 15 Paragraph (3), which grant the right of parate execution to the creditor. That people can transfer ownership rights while still taking possession of their property, is not new because such a thing although not expressly said by law but can be accepted as justified in law. Scholars see Article 540 and Article 1697 BW as the basis for the admissibility of submission consortium possesserium. It must be admitted that such a submission is an exception to the general provisions laid down in Article 613 BW. Furthermore, what is special in fiduciaries is that the object handed over ownership by the debtor in trust as collateral for the debt is a movable object, which is left in the hands of the debtor/debtor, while the provisions of Article 1152 of the Civil Code require that the guarantee be issued in the possession of the guarantor (Putri, 2021).

The requirement of the owner in Article I sub 5 of the UUJF may not be separated from the element of transfer of property rights to the fiduciary. Regarding the issue of "owner" it needs to be further reviewed if it is said that A is, the owner of the collateral object, then the meaning of course is, that A is the owner of a "certain" thing (Article 6 sub c UUJF), and by itself is the owner of the thing that already belongs to him. It may be difficult to say that an object that still belongs to someone else is "the" ours. However, the owner's requirement in Article I sub 5 mentioned above will be difficult to harmonize

with the provisions of Article 9 of the UUFJ which allows the person who guarantees the fiduciary for the new objects to be owned by him at a later date (Utami, 2018).

A fiduciary guarantee institution is a guarantee institution that has been formally juridically recognized since the enactment of Law Number 42 of 1999 concerning the Fiduciary Guarantee, hereinafter the law is written with the abbreviation UUF. Before this law was formed, this institution was called by various names. Roman Times called it Fiducia creditors Asser Van Oven called it zekerheids-eigendom (property rights as collateral), Blom called it Bezitloos zekerheidsrecht (the right of uncontrolled security), Kahrel gave the name Verruimd Pandbegrip (expanded pawn sense), A. Veenhooven in putting it Eigendoms overdracht tot zekerheid (Assignment of title as collateral) as an abbreviation can be used the term "fiduciary" only. (Badrulzaman, 2001)

Fiduciaries in Indonesian are also referred to as "trusting transfer of property". In Dutch terminology, it is often referred to in full terms in the form of Fiduciare Eigendoms Overdracht (FEO), while in full English it is often referred to as the term Fiduciary Transfer of Ownership (Kamello & SH, 2022). Meanwhile, the definition of fiduciary based on Article 1 number 1 of the UUF is the transfer of ownership rights of an object based on trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object. Under the Article, a fiduciary is generally formulated, which has not been linked or linked to a principal agreement so has not been linked to debt. The elements of fiduciary formulation are as follows:

- a. Elements in trust from the fiduciary's point of view.
- b. An element of trust from the fiduciary beneficiary's point of view;
- c. The element remains in the possession of the owner of the object;
- d. The outward impression remains the presence of collateral in the hands of the fiduciary;
- e. Preemptive (preferred) rights;
- f. Characteristic Accessoir (Yuniarlin, 2012).

One form of providing legal certainty of creditors' rights is to establish a fiduciary registration institution and the purpose of the registration is none other than to guarantee the interests of the party receiving the fiduciary. As stipulated in Law Number 42 of 1999 concerning the Fiduciary Guarantee, the fiduciary guarantee certificate has the same executory power as a court decision that has permanent legal force. Based on the executory title, creditors can directly execute through public auction the object of the fiduciary guarantee without going through the court, in addition, the Fiduciary Law also provides ease of execution to the fiduciary recipient (creditor) through the executing institution. In banking practice, it will cause problems if the debtor defaults and the object of the guarantee is in the control of the debtor because the object of a fiduciary guarantee is generally movable so conditions like this are very potential for the debtor to embezzle or transfer the object of fiduciary guarantee. Problems that arise in executing fiduciary guarantees, such as the debtor's assets as

fiduciary guarantees to be executed do not exist or are destroyed. The execution of fiduciary guarantees by execution will be difficult because of problems arising in such fiduciary guarantees. When the debtor defaults and the property has been pledged to a third party, it is difficult to execute. Thus, if the object of the fiduciary guarantee is lost or destroyed as a result of credit, there is no material guarantee anymore. For this reason, credit repayment has problems ([Manik et al., 2020](#)).

The execution of the aforementioned fiduciary guarantees each has differences in the procedure for its execution. For executions using executory titles based on fiduciary guarantee certificates, the execution of the sale of collateral is subject to and complies with the Code of Civil Procedure as specified in Article 224 H.I.R./258 RBG, whose execution procedure requires a long time. Unlike sales under the hands of the executor, it must meet several requirements, including the existence of an agreement between the fiduciary (debtor) and the fiduciary recipient (creditor). The reason is to get a better sales value to get the highest price. Furthermore, execution is the easiest and simplest way for creditors to recover their receivables, when debtors default compared to execution through the assistance or intervention of the District Court. The bank can immediately apply for confiscation of the debtor's assets that are used as credit collateral by auction by the auction office where the proceeds from the auction sale can be used to repay the debtor's debt ([Manurung, 2015](#)).

The Act allows the execution of a fiduciary guarantee through an underhand sale made under the agreement of the fiduciary grantor and beneficiary if in such a way the highest price is obtained in favor of the parties (Article 29 paragraph (1) letter c of the Fiduciary Law). Since an underhand sale of a fiduciary guarantee project can only be executed if there is an agreement between the grantor and the fiduciary, the bank can't make an underhand sale of the object of the fiduciary guarantee if the debtor consents to it. The implementation of sales underhand can only be carried out after the lapse of 1 (one) month since notified in writing by the grantor and/or fiduciary recipient in 2 (two) newspapers circulating in the relevant area (Article 29 Paragraph (2) of the Fiduciary Law) ([Sugarda, 2008](#)).

The execution of the sale underhand is not preceded by a written notification in the newspaper but is immediately sought by the debtor after previously determined the minimum value of the sale of the object of fiduciary guarantee by the appraisal. This can be done if the cooperative debtor voluntarily wants to sell the fiduciary guarantee object himself, in this way, it is equally beneficial to the debtor and creditor, the credit can be repaid and the debtor's debt burden has been paid. If the proceeds of the sale of the fiduciary object exceed the value of the guarantee, the fiduciary may take the excess from the proceeds of the sale. Legal certainty is defined as the possibility that in a given situation Certainty is a matter (state) that is certain, a provision or decree. The law must essentially be certain and just. It must be a code of conduct and fair because the code of conduct must support an order that is considered reasonable. Only because it is fair and

enforced with certainty can the law perform its function. According to him, certainty and justice are not just moral demands but factually characterize the law. A law that is uncertain and unwilling to be fair is not just a bad law, it is not a law at all. Both qualities include understanding the law itself (den Begriff des Rechts). Law is a collection of rules or rules in a common life, the whole rule of conduct that occurs in a common life, which can be imposed by a sanction. Legal certainty is an inseparable feature of the law, especially for written legal norms. Laws without certainty value will lose meaning because they can no longer be used as a code of conduct for everyone. Ubi jus incertum, ibi jus nullum (where there is no legal certainty, there is no law) (Simbolon & SH, 2022). Legal certainty has two facets. First, regarding the question of the determination (bepaalbaarheid) of law in matters of concrete money. This means that the party seeking justice wants to know what is the law in a particular matter before he starts a case. Second, legal certainty means legal security. That is protection for the parties against the arbitrariness of the judge.

Real legal certainty is indeed more juridical in dimension, legal certainty is the possibility that in certain situations:

- a. There are clear, consistent, and accessible rules, issued by and recognized by the state;
- b. The ruling agencies (government) apply these rules of law consistently and also submit and obey them;
- c. Citizens adjust their behavior to these rules in principle;
- d. Independent and impartial judges apply these rules of law consistently as they resolve legal disputes, and;
- e. Judicial decisions are concretely implemented (Isnaeni, 2016).

The law enforced by the law enforcement agency whose duty is to do so, must ensure "legal certainty" for the sake of order and justice in public life. Legal uncertainty will cause chaos in people's lives and will act as they please and act vigilante. This kind of situation makes life in the atmosphere Social Disorganization or social chaos. Legal certainty is "Sicherheit des Rechts selbst" (certainty about the law itself). There are four things related to the meaning of legal certainty. First, that law is positive, meaning that it is legislation (gesetzliches Recht). Second, the law is based on facts (Tatsachen), not a formulation of judgment that will later be made by the judge, such as "goodwill", or "decency". Third, the fact must be formulated clearly to avoid errors in meaning, while also being easy to execute. Fourth, the positive law must not be changed frequently. The problem of legal certainty about the implementation of the law, indeed cannot be separated from human behavior at all. Legal certainty does not follow the principle of "pressing the button" (automatic subsumption), but something quite complicated, which has a lot to do with factors outside the law itself. Speaking of certainty, then, as Radbruch said, what is more appropriate is certainty than the existence of the regulation itself or the certainty of the rule (Sicherheit des Rechts) (Suhartoyo, 2020).



Many laws made by the House of Representatives (DPR) are based on their interests and they are made not for the welfare of the people but for the benefit of their individuals, therefore many products are made that do not guarantee legal certainty and what is ironic is that there are no laws that prosper the people. Indonesia is known as a Rich Country, a country that is strategically located and has become nicknamed a country that is the heart of the world. However, it is just a fairy tale because the reality is that many Indonesian people do not feel wealth and even they have to sleep under the bridge and many sleep in the storefronts. It's all due to the arbitrariness of self-interested leaders. (Usman, 2013)

The law must be certain because with certain things it can be used as a measure of truth and for the achievement of the objectives of the law that demands peace, tranquility, welfare, and order in society and legal certainty must be able to guarantee general welfare and guarantee justice for society. Concerning fiduciary execution, in practice execution by way of underhand sale is more carried out than execution through the auction office, this is because the sale of collateral on the object of fiduciary guarantee by way of underhand sale is more profitable. This is possible when the debtor is in good faith, this way of settlement is usually faster and there are no auction duty fees (Sagala, 2019).

### Discussion

In the fiduciary guarantee agreement, the issue of legal authority needs to be given clarity because it relates to the principle of delivery of objects and the principle of *Nemo plus iuris in alium transferred post quam ipse habet* or no one can transfer more right to another than he has himself. Deep The practice of credit guarantees has always confused the terms authorized to act and authorized to master. Based on the Civil Code, the teaching is adopted that the validity of a surrender requires requirements, among others, must be carried out by a person authorized to control the object (*be schikkings be voeg dheid*). Usually, the person is the owner of the object. So, what is meant in the Civil Code is the authority to control not the authority to act. The realization of the provisions of the Civil Code can be taken over in the fiduciary guarantee law so that fiduciary guarantees can only be given by owners who have the authority to control fiduciary guarantee objects. Juridically, this principle will have the consequence that if the fiduciary guarantee debtor is not the person who has the authority to control the fiduciary security object, then the fiduciary guarantee agreement that was born is a legal defect. Therefore, before binding the object of the fiduciary guarantee agreement, it must first be investigated whether the fiduciary guarantee party is the owner who has the authority to control the object or only as a holder. This must also be expressly stated in the fiduciary guarantee deed. (Subekti dan Tjitrosudibio, 2008)

The definition of authority to control fiduciary collateral objects includes two things, namely first, the fiduciary guarantee debtor is the owner of the right to the object followed by evidence of the existence of the right. Second, the fiduciary guarantor is the

physical owner of the thing, but the right to the thing still belongs to someone else. At which time is the authority required to control the fiduciary security object, whether the momentum required at the time of granting the fiduciary guarantee or at the moment when the fiduciary guarantee deed is registered with the fiduciary registration office? In addition, it is also necessary to ask, can a person who is not the owner of the collateral charge the guarantee. This question requires a juridical answer that can protect the legal interests of creditors, recipients of fiduciary guarantees, or third parties; Therefore, it is necessary to clarify the transfer of property rights in trust about the condition of the authority to control the object and not the authority to act on the object. This is where the importance of the legal relationship between the surrender made and the basis of rights to the collateral object to be handed over (Kamello & SH, 2022).

According to some jurisprudence, fiduciary guarantees can be concluded that fiduciary is defined as the transfer of property rights in trust over movable property as collateral that is emphasized as the aspect of the transfer of property rights. In the flats law, fiduciary is defined as a security right in the form of a transfer of rights to objects based on trust, which is agreed as a guarantee for the repayment of creditors' receivables which is emphasized in this law as the transfer of rights. It is not stated that what is handed over is property but it is expressly said that what is handed over in trust is right. Thus, the notion of rights handed over is still abstract and does not point to a certain thing. Thus, what is handed over to the fiduciary beneficiary creditor is not limited to property rights to objects but also other rights to objects. Both the definitions of fiduciary according to jurisprudence that has the same nature of surrender, namely the debtor, the debtor, surrenders property rights to objects in its function as collateral (Muslim et al., 2022) .

It is different from the definition of fiduciary in UUJF. In UUJF the meaning of fiduciary and fiduciary guarantee is distinguished. What is meant by fiduciary according to this law is the transfer of ownership rights of an object based on trust provided that the object whose ownership is transferred remains in the possession of the owner of the object. The definition of fiduciary here is more emphasized on two things, namely "transfer of ownership rights" and "control of collateral objects remains with the owner of the object". If we look at the description of the definition of fiduciary before and after the enactment of the UUJF, it can be concluded that there is a change in legal terminology, namely from submission to transition, from property rights and property rights to property rights. From a juridical point of view, the change in terms has legal consequences that need to be addressed carefully. Transfer of rights has a broader juridical meaning than transfer of rights. Transfer of rights is a legal act to give rights in trust, while transfer of rights is a legal act of transferring rights or changing rights from one situation / certain person to another situation / other person (Putri, 2021).

About fiduciary guarantees that the title to the property used as collateral has been transferred to the fiduciary beneficiary creditor. That is, the basis of rights (title) of the

thing is handed over to the creditor, but physical possession of the thing rests with the fiduciary debtor. As the owner of rights, it must be interpreted as the owner of security over objects, not the owner of the goods entirely in the sense of buying and selling. In terms of collateral law, people who are in the position of the owner of the guarantee have certain rights, including the right to pledge the collateral back to other parties. As the owner of the rights, creditors have the right to control proof of ownership of collateral objects, such as BPKB evidence for fiduciary guarantees for cars, trucks, two-wheeled vehicles, proof of receipts or purchase invoices for fiduciary guarantees for machinery machinery, proof of goods list reports for fiduciary guarantees of inventory objects Proof of ownership is letters/documents that have a direct relationship with fiduciary collateral. If the letter/document has been possessed by the owner of the fiduciary guarantee, and the fiduciary security object has been marked affixed so that the third party knows that the object has been fiduciary to certain creditors so that there can be avoided overlapping of foreclosure piercings. This will provide even stronger legal certainty with the existence of a fiduciary guarantee registration institution that has been regulated in Government Regulation No. 86 of 2000. The juridical consequence of the theory is that the creditor of the fiduciary beneficiary is the owner of the security, that is, the debtor of the debtor cannot transfer the object of the fiduciary guarantee except with the written permission of the creditor. The imposition of fiduciary guarantees is regulated in Articles 4 to Article 10 of Law Number 42 of 1999 concerning Fiduciary Guarantees. A fiduciary guarantee agreement is also an agreement accessory. The point is that a fiduciary guarantee agreement cannot stand alone, but follows other agreements that are the principal agreement. In this case, the main agreement is the receivable debt agreement. Consequences of the agreement accessory This is that if the principal agreement is invalid, or for any reason is lost or declared invalid, then legally the fiduciary agreement as an agreement accessory also becomes void. Fiduciary imposition is carried out using an instrument called the "Fiduciary Guarantee Deed". (Syaifuddin, 2012)

To execute the fiduciary guarantee, the fiduciary must deliver the object that is the object of the fiduciary guarantee. If the fiduciary does not deliver it at the time of execution, the fiduciary has the right to take the object that is the object of the fiduciary guarantee and if necessary may seek the assistance of the competent authority. Any promise to execute the object of the fiduciary guarantee in a manner contrary to the foregoing is null and void. If the execution proceeds exceed the guarantee value, the fiduciary beneficiary is obliged to return the excess to the fiduciary, but if the execution proceeds are insufficient for repayment of the debt, the debtor remains liable for the outstanding debt. Some obstacles in the execution include that the object of the fiduciary guarantee has been transferred to a third party and the object of the fiduciary guarantee is destroyed. These obstacles can hinder the execution and cause legal consequences for the execution. The object of collateral transferred to a third party can be done by buying and selling, exchanging, and others. The act of transfer is usually followed by the act of surrender so that the transferred object becomes the property of someone else. Generally, this

happens to fiduciary guarantee objects in the form of movable goods such as vehicles, machinery, or inventory items. (Suyatno, 2016)

The Fiduciary Act expressly prohibits a fiduciary or debtor from transferring, mortgaging, or leasing collateralized objects under fiduciary guarantees to a third party without the fiduciary or creditor's consent. This is regulated in Article 23 Paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee which reads: "Fiduciary is prohibited from transferring, mortgaging, or leasing to other parties Objects that are the object of Fiduciary Guarantee that are not inventory objects, except with the prior written consent of the Fiduciary Beneficiary". If the debtor transfers the object of fiduciary guarantee for his debt to a third party without the permission of the creditor or fiduciary beneficiary, the principle applies *droit de suit* which is the main characteristic of property rights, if the debtor defaults, the creditor can execute the object of fiduciary guarantee in the hands of whoever the object is. So the transfer of the object of the fiduciary guarantee to a third party or destruction does not eliminate the creditor's right to execute the object of the guarantee. In line with the principle *droit de suit* above, for the transfer of inventory, the Fiduciary Law stipulates that inventory items that are the object of fiduciary guarantee that have been transferred must be replaced by the fiduciary with an equivalent object as stipulated in Article 21 Paragraph (3) of the Fiduciary Law which reads: "The object of the Fiduciary Guarantee that has been transferred as referred to in Paragraph (1) must be replaced by the Fiduciary with an equivalent object". (Sunaryo, 2013)

For objects of fiduciary guarantee that have been transferred to third parties by the debtor, they must first be replaced with an equivalent value by the debtor, because the creditor does not bear liability for the consequences of the debtor's actions or omissions whether arising in the contractual relationship or arising from unlawful acts in connection with the use and transfer of objects that are used as objects of fiduciary guarantee as stipulated in Article 24 of the Fiduciary Guarantee Law. In addition, when the debtor transfers the object of a fiduciary guarantee for his debt to a third party without the permission of the creditor, the fiduciary is considered to have committed embezzlement. Problems that often occur in the execution of fiduciary guarantee objects when the collateral objects transfer to third parties. In practice, it is often found that when the execution of the fiduciary guarantee object is carried out, it turns out that the collateral object to be executed has been pledged or transferred to a third party. In connection with cases of execution of collateral transferred to a third party by pledging it to such a third party, in practice it often occurs.

When there is an allegation of manipulation from the debtor with a third party by making a mock agreement, the creditor who feels aggrieved can file a cancellation lawsuit against the pretend agreement in question. If successful in proving the manipulation of the mock agreement, then the execution can be carried out against the fiduciary guarantee. Conversely, if the creditor cannot prove it, then the legal consequences of the execution of the object of fiduciary guarantee if the object has passed to a third party, the execution cannot be carried out (nonexecutable). The cause is that

the execution could not be performed (none executable) Because the goods to be used as the object of execution do not exist because they switch to third parties. (Tunggal dan Tunggal, 2004)

Regardless of the possibility of whether the guarantee agreement held by a third party is a pretend act or not, if it is proven that the third party's guarantee is ahead of the guarantee held by the execution decision, then the execution of the declared collateral object cannot be carried out For the reason that the object of guarantee is first in the hands of a third party. Then instead, the execution can be transferred to the goods of another debtor and if the goods of the other debtor are not other than the goods pledged to a third party, then the execution is declared unworkable. As explained above, if the creditor as the execution applicant still wants the execution of the collateral object that is in the third party, he can try through a new lawsuit demanding that the guarantee agreement between the debtor and the third party is a pretend act. If it succeeds in proving and the court overturns it, then the execution can be carried out. Conversely, if it fails to prove, it means that the guarantee agreement between the debtor and a third party is valid and correct, thus the execution request must be declared unenforceable against the goods concerned. Furthermore, in practice, objects that are the object of collateral may be destroyed or lost, so that they can no longer be traded, as well as fiduciary guarantees. Collateralized property can disappear due to the actions of dishonest debtors, or due to natural disasters such as floods, or earthquakes. Dishonest debtors can obliterate collateral in various ways. One of them is to run away from the guaranteed treasure. Another way to eliminate collateral is to move the property to a specific location, making it difficult for banks to take over. (Sari dan Simanunsong, 2008)

Article 25 Paragraph (1) letter c of Law Number 42 of 1999 concerning Fiduciary Guarantee states that: "fiduciary guarantee is deleted due to the destruction of the object that is the object of fiduciary guarantee". Furthermore, Article 25 Paragraph (2) stipulates that: "The destruction of objects that are the object of Fiduciary Guarantee does not eliminate insurance claims as referred to in Article 10 point b". The insurance claim will be a substitute for the object of the fiduciary guarantee. The provision for the abolition of fiduciary guarantees with the destruction of objects that are the object of fiduciary guarantees is in line with the contents of Article 1444 of the Civil Code, which states that if certain goods that are the material of the agreement are destroyed, can no longer be traded or lost, in such a way that it is completely unknown that the goods still exist, then delete the bond, provided that the goods are destroyed or lost beyond the fault of the debtor, and before he neglected to hand it over. On the other hand, Article 5 of the Fiduciary Guarantee Act states that if part of the object of fiduciary guarantee or among the objects of fiduciary guarantee is lost or can no longer be used, the fiduciary hereby undertakes and therefore binds himself to replace that part of the object of fiduciary guarantee lost or unused with another object of fiduciary guarantee of the same kind whose value is equivalent to that which is replaced and which the

fiduciary beneficiary can agree to, While the substitute object of fiduciary guarantee is included in the fiduciary guarantee stated in this deed (SH, 2018).

Based on these provisions, it can be concluded that there is an inconsistency between the provisions in the Act and the contents of the deed because in the Fiduciary Act, it is clearly stated that the fiduciary guarantee is removed with the appearance of the object, but Article 5 of the Fiduciary Guarantee Act states that if the object is lost or can no longer be used, the fiduciary promises and therefore binds himself to replace the object of the lost fiduciary guarantee with value which is equivalent. The destruction of the fiduciary guarantee object under the Fiduciary Act does not eliminate the insurance claim, it means that when the fiduciary guarantee object is destroyed the insurance claim will appear to replace the value of the destroyed fiduciary guarantee object. Article 10 sub b of the Fiduciary Law, reads: "Fiduciary Guarantee includes insurance claims, if the object of the Fiduciary Guarantee is insured". Based on the Article Mentioned above, the replacement of collateral occurs automatically, fiduciaries incur losses covered by insurance. Money received by creditors or fiduciary beneficiaries will count toward payment or repayment of debtors' debts. If the amount of reimbursement is sufficient to pay the debtor's engagement obligations guaranteed by the fiduciary, then the debtor's debt is paid off, if more than the excess is returned to the debtor or fiduciary, while if less than the debt will remain the debtor's debt to the creditor, only for the remainder of the debt the creditor is now a concurrent creditor, except in addition to fiduciary guarantees, Creditors are also guaranteed by other special security rights. (Tje'aman, 2005)

If the fiduciary collateral object is destroyed, the collateral object to cover the debtor's debt does not exist, but the credit agreement continues and the debtor remains liable. For this reason, guarantee law generally protects creditors, if the object of fiduciary guarantees is destroyed under Article 1131 of the Civil Code, the debtor remains responsible for its debts to creditors. The responsibility of the debtor is up to all objects that belong to the debtor, both existing and future, which become loan repayment to creditors as stipulated in Article 1131 of the Civil Code. In the event mentioned above, keep in mind that the principal agreement where a fiduciary guarantee is given, remains intact so as not to change the position of the fiduciary as a debtor. It's just that creditors whose bills are only secured by fiduciaries whose objects are destroyed are positioned as concurrent creditors with general guarantees as stated in Article 1131 of the Civil Code. Furthermore, problems arise in practice, when executing the object of fiduciary guarantee or execution of the debtor's property. Problems that often occur in the execution of fiduciary collateral objects/assets of debtors to be executed do not exist or are destroyed. The destruction of the debtor's assets to be executed can be due to the object of fiduciary guarantee/debtor's assets no longer exist in the sense that the debtor's assets have run out. The exhaustion of the debtor's assets which are the object of fiduciary guarantee can occur because they have been sold out before the execution is carried out or due to natural disasters in the form of fire, floods, and so on.

Legal consequences of the execution of the object of fiduciary guarantee if the object ceases to exist or is destroyed, execution cannot be carried out (nonexecutable). The cause is that the execution could not be performed (nonexecutable) Because the item to be used as the object of execution does not exist. Therefore the execution must be declared non-executable (nonexecutable) For this reason, the object of the fiduciary guarantee to be executed does not exist or may be destroyed in nature or temporary. Referring to Article 34 Paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee which reads: "If the execution proceeds are insufficient for debt repayment, the debtor remains responsible for the outstanding debt". In connection with the destruction of the object of fiduciary security belonging to the debtor at the time the execution is executed, the factor of the absence or destruction of the debtor's property as an object of security does not eliminate or invalidate the right of the execution applicant (the creditor) to demand repayment of the debt. Even if at the time of execution, the execution cannot be carried out because the debtor's assets are destroyed/non-existent. (Widjaja dan Yani, 2002)

Based on Article 34 Paragraph (2) of the Fiduciary Law above, the completion of execution of this matter does not eliminate the creditor's bill of rights against the debtor. Juridical bills remain only the execution cannot be executed, because the assets of the debtor to be executed do not exist at the time the execution is executed. Therefore, the creditor's right to request re-execution at some point remains open if the creditor knows and can show the debtor's assets. Whenever there is a debtor's property, it means that he still has the right to request execution. The implementation of collection to debtors can be done alone by the bank or with the help of third parties (service bureaus) or lawyers. Previously, the bank sent an official bill confirming that the debtor should pay off the amount of credit in arrears along with the fees and interest owed by stating the deadline for paying it off. This credit bill is then followed by several warnings, especially if the debtor does not pay it off or heed the warnings given. (Swantoro, 2018)

The problem will be easily overcome, if the customer is still cooperative, and various solutions can still be negotiated to be able to pay and pay off the outstanding loan. In using certain service bureaus, such as lawyers, lawyers collect on behalf of and for the benefit of the bank. Especially for state-owned commercial banks (BUMN and BUMD), the applicable provisions require submission of state receivables settlement through the State Receivables Affairs Committee (PUPN). The legal relationship between the bank and the service bureau or other third party is an act of granting power of attorney that needs to be stated in a deed that must be done for the benefit of the bank (Civil Code Articles 1792 to Article 1819). If in the credit settlement, the debtor customer still does not heed the warning given by the bank, then the bank begins to consider the possibility of settlement through the search for collateral. Disbursement of collateral encumbered by fiduciary property guarantees under Article 29 of the Fiduciary Act, has the right to auction pledged goods without the approval of the Chief Justice of the District Court. As an applicable principle in fiduciary guarantee law, the search is carried out using the sale of the collateral property, either by auction or underhand (Mahendra et al., 2022).

## Conclusion

The application of the principle of legal certainty to the implementation of fiduciary execution whose movable objects have been transferred to third parties, by Law Number 42 of 1999 concerning Fiduciary Guarantees in fiduciary guarantee agreements, the ownership rights of fiduciary guarantee objects have been transferred to creditors, while control over the objects is still in the control of the debtor. The ownership rights in question are juridical ownership rights. From this explanation, it can be concluded that the debtor only controls the fiduciary object as the owner of the benefit or the owner economically. In other words, the debtor has no legality or right in the eyes of the law to transfer the object of the fiduciary guarantee to a third party and the transfer of the object of the fiduciary guarantee without the consent of the creditor becomes invalid., the responsibility of the debtor who transfers the object of fiduciary guarantee is compensation in the form of recovery as before, this compensation is because the debtor has committed an unlawful act.

Factors inhibiting legal certainty in the execution of fiduciaries whose movable objects have been transferred to third parties is an agreement usually agreed that the borrower (original owner) may use the fiduciary property by its aims and purposes, with the obligation to maintain and repair all damage to fiduciary property at the expense and expense of the debtor/borrower himself. Borrowers are prohibited from transferring, leasing, and mortgaging fiduciary objects to others without the permission of the creditor. Even though the deed states that the guarantee is carried out by handing over the title to the collateral object to the creditor, all of them are intended to be controlled by the creditor as collateral only. This is evident from the clauses of the guarantee agreement and if there is a sale of fiduciary property.

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