

***Legal Reconstruction of Fiduciary Security Execution in Consumer Financing Contracts under Debtor Bankruptcy: Toward Legal Certainty and Fair Protection***

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**ABSTRACT**

The implementation of fiduciary guarantees in consumer financing contracts is one of the legal instruments that aims to provide protection for creditors in obtaining repayment of receivables if the debtor defaults. However, in practice, the execution of fiduciary guarantees often raises legal problems when the debtor is declared bankrupt. This condition is caused by a normative conflict between the fiduciary guarantee legal regime that grants executory rights to creditors and the bankruptcy law regime that places all debtors' assets as bankruptcy bonds under the control of the curator. This study aims to analyze the legal problems that arise in the implementation of fiduciary guarantees in consumer financing contracts when debtors experience bankruptcy and formulate a legal reconstruction model that is able to create a mechanism for implementing fiduciary guarantees that are fair and have legal certainty in bankruptcy situations. This study uses normative legal research methods with a statutory approach, a conceptual approach, and a case approach. The sources of legal materials used include primary legal materials in the form of laws and regulations and court decisions, as well as secondary legal materials in the form of books and scientific journals that are relevant to the object of research.

The results of the study show that the implementation of fiduciary guarantees in debtors' bankruptcy situations raises several legal problems, including the conflict of norms between the fiduciary guarantee law and bankruptcy law, the unclear position of separatist creditors, and differences in interpretation in judicial practice regarding the authority to implement the execution of the object of collateral. To overcome these problems, a legal reconstruction model is needed that includes harmonization between fiduciary guarantee arrangements and bankruptcy law, strengthening the position of separatist creditors, establishing a clear procedural mechanism in the implementation of execution, and strengthening the fiduciary guarantee registration system and institutional coordination in the bankruptcy process. The legal reconstruction is expected to create a mechanism for implementing fiduciary guarantees that provide legal certainty as well as fair protection for creditors and debtors in consumer financing contracts.

***Keywords: Legal, Reconstruction, Fiduciary, Security, Execution, Consumer, Financing, Contracts, Debtor, Bankruptcy, Toward, Certainty, Fair, Protection.***

## INTRODUCTION

### Background

The development of the consumer financing industry in Indonesia in the last two decades has shown significant growth in line with the increasing need for public access to financing to obtain consumer goods such as motor vehicles and household appliances. In practice, finance institutions use fiduciary guarantees as the main instrument to guarantee the repayment of debtors' obligations due to their flexible characteristics and do not require the physical handover of the collateral object to the creditor. Fiduciary guarantees provide a strong legal standing to creditors through preferential rights and executory rights as stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Through this mechanism, creditors are expected to be able to execute the collateral object quickly if the debtor defaults. However, in consumer financing practice, legal problems often arise when the debtor is not only in default but also declared bankrupt, thus creating a conflict between the mechanism of execution of fiduciary guarantees and the bankruptcy law regime that regulates the management of all debtors' assets by the curator for the benefit of all creditors.<sup>1</sup>

In the perspective of property guarantee law, fiduciary guarantee is a form of guarantee that gives property rights to creditors over a movable object with a mechanism of transfer of ownership in trust. The advantage of this system lies in its ability to provide legal certainty to creditors without interfering with the debtor's use of objects in daily economic activities. The fiduciary guarantee certificate even has an executory power equivalent to a court decision that has permanent legal force so that it allows the execution directly without going through a lengthy litigation process. However, the effectiveness of such mechanisms is highly dependent on the consistency of the legal system that regulates the relationship between creditors and debtors, including when extraordinary situations such as debtor bankruptcy arise that can change the structure of the legal relationship between the parties.<sup>2</sup>

Legal problems become even more complex when the debtor is declared bankrupt based on the provisions of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. In the bankruptcy system, all of the debtor's assets are in principle

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<sup>1</sup> Munir Fuady, *Debt Guarantee Law* (Bandung: Citra Aditya Bakti, 2013), pp. 3–6.

<sup>2</sup> J. Satrio, *Guarantee Law: The Right to Property Guarantees* (Bandung: Citra Aditya Bakti, 2002), pp. 306–309.

a bankruptcy estate managed by a curator under the supervision of a supervisory judge for the benefit of all creditors. Although creditors holding tangible guarantees such as fiduciaries are theoretically categorized as separatist creditors who have the right to execute their own guarantees, in practice there are various restrictions that can affect the exercise of these rights. For example, the existence of a period of suspension of execution and the authority of the curator to manage and secure bankruptcy assets often raises debates about the extent to which separatist creditors can exercise their rights independently of the bankruptcy process.<sup>3</sup>

In judicial practice, the conflict between the right of execution of creditors holding fiduciary guarantees and the principle of collectivity in bankruptcy law often gives rise to different interpretations. Some court rulings indicate that separatist creditors can execute their guarantees independently, while others assert that the execution must take into account the interests of the bankruptcy process as a whole. The difference in interpretation reflects the disharmony between the legal norms governing fiduciary guarantees and the legal norms of bankruptcy. This inconsistency ultimately creates legal uncertainty for the parties, especially for creditors who hope to obtain repayment of their receivables through the execution of the collateral object.<sup>4</sup>

The latest developments in fiduciary guarantee law in Indonesia are also influenced by the Constitutional Court Decision Number 18/PUU-XVII/2019 which provides a new interpretation of the mechanism for the execution of fiduciary guarantees. The decision emphasizes that creditors cannot unilaterally determine the occurrence of default and execute directly if the debtor refuses to hand over the object of collateral. In such a condition, the execution must be carried out through a legal process that provides an opportunity for the debtor to file an objection. This change in interpretation has important implications for consumer financing practices because it changes the paradigm of execution execution that was previously considered simple and fast to be more procedural and requires stricter legal oversight mechanisms.<sup>5</sup>

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<sup>3</sup> Sutan Remy Sjahdeini, *Bankruptcy Law: Understanding Law No. 37 of 2004 concerning Bankruptcy* (Jakarta: Pustaka Utama Grafiti, 2016), pp. 148–151.

<sup>4</sup> Ridwan HR, *State Administrative Law* (Jakarta: Rajawali Pers, 2016), pp. 312–314.

<sup>5</sup> Maria S.W. Sumardjono, *Land Policy: Between Regulation and Implementation* (Jakarta: Kompas, 2001), pp. 112–115.

In the context of consumer financing, the object of fiduciary collateral is generally in the form of motor vehicles that have high economic value and are used by debtors in daily activities. When the debtor experiences financial difficulties and is then declared bankrupt, the question arises about how to properly execute the creditor's rights so that the creditor's rights are protected without ignoring the principle of protection for the debtor. This situation shows that the legal relationship in consumer financing is not only related to contractual aspects, but also related to legal protection for the parties in the face of unstable economic conditions. Therefore, a legal framework is needed that is able to balance the interests of creditors and debtors proportionately.<sup>6</sup>

In addition, in bankruptcy practice, disputes often arise regarding the authority between separatist creditors and curators in managing the object of fiduciary guarantees. In some cases, the curator argues that the object of the guarantee remains part of the bankruptcy and must therefore be managed in the bankruptcy proceedings, while separatist creditors argue that they have the right to execute their guarantees directly without the intervention of the curator. These differences of view show that the existing legal system has not provided clarity on the limits of each party's authority in a bankruptcy situation. This ambiguity can ultimately prolong the dispute resolution process and reduce the effectiveness of fiduciary guarantee mechanisms as a creditor protection instrument.<sup>7</sup>

From the perspective of legal research, various academic studies show that there is a gap between the normative arrangement of fiduciary guarantees and the practice of their implementation in bankruptcy situations. Several studies have shown that although the law gives a privileged position to creditors holding material guarantees, its implementation often does not run optimally due to conflicts of norms between various laws and regulations. This condition shows that the existing legal system is not fully able to guarantee legal certainty for the parties involved in consumer financing relationships, especially in bankruptcy situations involving many creditor interests.<sup>8</sup>

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<sup>6</sup> Urip Santoso, *Registration and Transfer of Land Rights* (Jakarta: Kencana, 2010), pp. 45–47.

<sup>7</sup> Boedi Harsono, *Indonesian Agrarian Law: The History of the Formation of UUPA, Its Content and Implementation* (Jakarta: Djambatan, 2008), pp. 468–470.

<sup>8</sup> Sudikno Mertokusumo, *The Discovery of Law: An Introduction* (Yogyakarta: Liberty, 2009), pp. 57–59.

Within the framework of legal protection theory, the state has an obligation to ensure that the legal system is able to provide fair protection for all parties involved in legal relations. Legal protection is not only aimed at parties with greater economic power, but also at parties who are in a weaker position in the legal relationship. Therefore, the arrangements regarding the execution of fiduciary guarantees in bankruptcy situations must be designed in such a way as to be able to provide a balance between the interest of the creditor to obtain the repayment of its receivables and the interest of the debtor to obtain protection against disproportionate acts of execution.<sup>9</sup>

Based on these various problems, it can be concluded that the regulation regarding the execution of fiduciary guarantees in consumer financing contracts when the debtor is in bankruptcy still leaves various legal issues that have not been fully resolved. The disharmony between the Fiduciary Guarantee Law and the Bankruptcy Law, the development of legal interpretation through the Constitutional Court's rulings, and the difference in practice in court decisions indicate the need to carry out legal reconstruction of the fiduciary guarantee execution mechanism. The reconstruction is expected to produce a legal regulatory model that is able to provide legal certainty as well as fair protection for creditors and debtors in consumer financing relationships.<sup>10</sup>

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<sup>9</sup> Philipus M. Hadjon, *Legal Protection for the People in Indonesia* (Surabaya: Bina Ilmu, 1987), pp. 25–28.

<sup>10</sup> Supriadi, *Agrarian Law* (Jakarta: Sinar Grafika, 2008), pp. 160–162.

## Research Question

1. What legal problems arise in the execution of fiduciary security in consumer financing contracts when the debtor enters bankruptcy?
2. What model of legal reconstruction is needed to create a fair and legally certain mechanism for executing fiduciary security in bankruptcy situations?

## THEORETICAL FRAMEWORK

### 1. Legal Certainty Theory

Legal *certainty theory* is one of the fundamental concepts in legal philosophy that emphasizes that law must provide clarity, consistency, and predictability in its application. Legal certainty is needed so that every individual or legal entity can clearly understand their rights and obligations and obtain adequate legal protection in every legal relationship that is carried out. In the modern legal system, legal certainty is not only related to the existence of written rules, but also related to the consistency of interpretation and application of legal norms by law enforcement agencies. If a legal rule does not provide clarity about its implementation mechanism or causes conflicts with other legal norms, then legal certainty is disturbed and has the potential to cause injustice for the parties involved in the legal relationship.<sup>11</sup>

In the perspective of normative legal theory, legal certainty is closely related to the existence of legal norms that are systematically arranged in a hierarchy of laws and regulations. A good legal system must be able to provide clear guidelines on how a legal event should be resolved based on applicable norms. Thus, legal certainty can be achieved if each legal rule has a clear formulation, does not cause multiple interpretations, and does not contradict other legal norms in the same legal system. If there is a conflict between two legal rules that govern the same object, then this condition can cause legal uncertainty that has an impact on the difficulty in determining which legal norms should be applied in practice.<sup>12</sup>

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<sup>11</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), hlm. 31–34.

<sup>12</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), hlm. 124–128.

In the context of civil law and property guarantee law, legal certainty has an important role in ensuring the sustainability of economic activities and business transactions. Business actors need certainty that their rights will be protected by law in the event of a dispute or breach of contract. Therefore, the legal system must be able to provide guarantees that the dispute resolution mechanism and the implementation of material rights can be carried out effectively in accordance with the applicable legal provisions. When a legal system is unable to provide certainty about the implementation of these rights, public trust in the legal system will decrease and can hinder the development of economic activities.<sup>13</sup>

The theory of legal certainty also emphasizes the importance of stability and consistency in the application of the law by judicial institutions. The consistency of court decisions is an important factor in creating legal certainty because through these court decisions, legal norms are applied concretely in resolving disputes that occur in society. If there is a significant difference in the interpretation of the court's decision on the same legal norm, it can cause legal uncertainty for the parties to the case. Therefore, the judicial system must be able to maintain consistency in legal interpretation so that the public can predict the legal consequences of every action they take.<sup>14</sup>

In relation to the law of material guarantees, legal certainty is the basis for creditors to provide financing to debtors with certain guarantees. The creditor provides the loan with the belief that if the debtor does not fulfill its obligations, then the creditor has the legal right to execute the object of the guarantee in order to obtain the repayment of its receivables. Therefore, the legal system must provide clarity on the legal position of the creditor of the guarantee holder and the mechanism for implementing the execution of the guarantee. If the mechanism is not clearly regulated or causes conflicts with other legal rules, the creditor's right to obtain repayment of receivables may be uncertain.<sup>15</sup>

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<sup>13</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), hlm. 39–41.

<sup>14</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), hlm. 91–94.

<sup>15</sup> Steven L. Schwarcz, "The Impact of Bankruptcy Law on Financial Markets," *Washington and Lee Law Review* 71, no. 3 (2014): 1569–1572.

In a debtor bankruptcy situation, legal certainty becomes increasingly important because it involves the interests of many creditors with different legal positions. The bankruptcy legal system basically aims to create a collective mechanism in settling debtors' debts by managing all debtors' assets as bankruptcy bonds. However, the existence of creditors who have material guarantees poses their own complexities because they have preferential rights that allow them to execute their guarantees separately from the bankruptcy process. When the legal system does not provide clarity on the relationship between separatist creditor rights and the bankruptcy mechanism, the exercise of these rights can create legal conflicts that have an impact on uncertainty for the parties involved.<sup>16</sup>

Regarding the formulation of the first problem in this study, the theory of legal certainty is used as an analytical basis to identify various legal problems that arise in the implementation of the execution of fiduciary guarantees in consumer financing contracts when the debtor experiences bankruptcy. The disharmony between the fiduciary guarantee arrangement and bankruptcy law, differences in interpretation in judicial practice, and changes in the paradigm of guarantee execution after the development of jurisprudence indicate the existence of a vacuum or unclear norm in the existing legal system. Through the approach of legal certainty theory, this study can systematically examine how the conflict of norms causes legal uncertainty and how these conditions have an impact on the protection of the rights of creditors and debtors in consumer financing relationships.<sup>17</sup>

## 2. Legal Protection Theory

Legal *protection theory* is an important concept in legal science that emphasizes that the law must be able to provide protection for the interests of each party involved in a legal relationship. Legal protection aims to ensure that the rights and obligations of the parties can be exercised fairly in accordance with the provisions

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<sup>16</sup> Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986), hlm. 19–23.

<sup>17</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), hlm. 210–212.

of applicable law. In the rule of law, legal protection is one of the main functions of the legal system, which is to protect society from arbitrary actions and ensure that every individual receives fair treatment in the law enforcement process. Therefore, the legal system must be designed in such a way as to be able to create a balance between the different interests in a legal relationship, including in the relationship between creditors and debtors in consumer financing contracts.<sup>18</sup>

In the perspective of modern legal theory, legal protection is not only concerned with the existence of the rule of law that governs a legal relationship, but also with the mechanisms that enable the parties to effectively defend their rights. Legal protection must be able to ensure that each party has access to a fair and transparent dispute resolution mechanism in the event of a violation of their rights. Thus, legal protection is not only normative but also practical in the sense that the legal system must be able to provide effective solutions to problems that arise in the practice of legal relations.<sup>19</sup>

In the context of contractual relationships, particularly in consumer financing agreements, legal protection theory emphasizes the importance of a balance between the rights and obligations of the parties. Creditors as financiers have the right to obtain repayment of their receivables in accordance with the agreed agreement, while the debtor has the right to obtain protection against unlawful actions or not in accordance with applicable procedures. Therefore, the legal system must be able to create a mechanism that can protect the interests of both parties proportionately so that there is no domination of the interests of one party in the legal relationship.<sup>20</sup>

Legal protection in the field of guarantee law also has an important role in maintaining the stability of the financing system and economic activities in general. The existence of material guarantees such as fiduciary guarantees is basically intended to provide protection to creditors so that they have certainty in obtaining the repayment of their receivables if the debtor does not fulfill his obligations. However, legal protection for creditors should not ignore the rights of the debtor as a party who also has a legal position that must be respected. Therefore, the legal system must be

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<sup>18</sup> Satjipto Rahardjo, *Legal Studies* (Bandung: Citra Aditya Bakti, 2006), pp. 53–56.

<sup>19</sup> Peter Mahmud Marzuki, *Legal Research* (Jakarta: Kencana, 2005), pp. 158–161.

<sup>20</sup> Subekti, *Covenant Law* (Jakarta: Intermasa, 2005), pp. 17–20.

able to regulate a guarantee implementation mechanism that is not only effective but also pays attention to the principles of justice and balance between the parties.<sup>21</sup>

In a debtor bankruptcy situation, legal protection becomes increasingly complex because it involves the interests of various creditors with different legal positions. The bankruptcy legal system is designed to ensure that all creditors receive fair treatment through a proportionate distribution of bankruptcy assets. However, the existence of creditors who have material guarantees such as fiduciary guarantees poses their own challenges because they have preferential rights to the object of the guarantee. Therefore, a legal arrangement is needed that is able to balance the protection of creditors of the guarantor with the interests of other creditors in the bankruptcy process.<sup>22</sup>

In addition, legal protection theory also emphasizes the importance of legal mechanisms that are able to prevent the abuse of rights by one of the parties in the legal relationship. In consumer financing practices, problems often arise related to the implementation of collateral execution that is considered detrimental to the debtor, especially if the execution process is carried out without clear procedures or without adequate supervision. Therefore, legal reconstruction of the mechanism for the execution of fiduciary guarantees must consider the principle of legal protection that ensures that the execution is carried out in a transparent, accountable, and in accordance with the provisions of applicable law.<sup>23</sup>

In relation to the formulation of the second problem in this study, the theory of legal protection is used as a conceptual foundation to formulate a legal reconstruction model that is able to create a mechanism for the execution of fiduciary guarantees that is fair and has legal certainty in the situation of debtor bankruptcy. Through this theoretical approach, legal reconstruction is not only focused on strengthening the right of creditors to execute guarantees, but also on creating mechanisms that provide protection for debtors and ensure justice for all creditors involved in the bankruptcy process. Thus, the reconstructed legal system is expected

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<sup>21</sup> Mariam Darus Badruzaman, *Aneka Hukum Bisnis* (Bandung: Alumni, 1994), pp. 122–125.

<sup>22</sup> M. Yahya Harahap, *Bankruptcy Law* (Jakarta: Sinar Grafika, 2012), pp. 74–77.

<sup>23</sup> Rachmadi Usman, *Civil Guarantee Law* (Jakarta: Sinar Grafika, 2011), pp. 215–218.

to be able to create a balance between economic interests, legal certainty, and legal protection for all parties involved in consumer financing relationships.<sup>24</sup>

## RESEARCH METHODOLOGY

This study uses a normative legal research approach that aims to analyze the legal norms that govern the implementation of fiduciary guarantees in consumer financing contracts when debtors experience bankruptcy and formulate a legal reconstruction model that is able to provide legal certainty and fair protection for the parties. Normative legal research is research that focuses on the study of legal norms contained in laws and regulations, legal doctrines, and court decisions that are relevant to the problem being researched. In normative law research, law is seen as a system of norms that are arranged hierarchically and interrelated, so the analysis of a legal problem must be carried out by examining the relationship between the various legal rules that govern it. Through this approach, the research can identify conflicts of norms, legal vacancies, and regulatory disharmony that cause legal problems in the practice of implementing fiduciary guarantees in debtor bankruptcy situations.<sup>25</sup>

The approaches used in this study include several legal approaches that are commonly used in normative law research, namely the statute *approach*, the conceptual *approach*, and the *case approach*. The legislative approach is carried out by examining various laws and regulations related to fiduciary guarantees and bankruptcy, such as the Law on Fiduciary Guarantees and the Law on Bankruptcy and other related regulations. The conceptual approach is carried out by examining various legal concepts that develop in legal doctrine and theories related to legal certainty, legal protection, and the position of separatist creditors in bankruptcy law. Meanwhile, the case approach is carried out by analyzing various court decisions related to the implementation of fiduciary guarantee execution in bankruptcy situations to find out how legal norms are applied in judicial practice.<sup>26</sup>

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<sup>24</sup> Gunawan Widjaja and Ahmad Yani, *Fiduciary Guarantees* (Jakarta: RajaGrafindo Persada, 2000), pp. 87–90.

<sup>25</sup> Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review* (Jakarta: Rajawali Pers, 2014), pp. 13–16.

<sup>26</sup> Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Bayumedia Publishing, 2006), pp. 302–305.

The types and sources of legal materials used in this study consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include laws and regulations related to fiduciary and bankruptcy guarantees as well as court decisions relevant to research problems. Secondary legal materials include various legal literature such as books, national and international scientific journals, as well as research results related to guarantee law, bankruptcy law, and consumer financing law. Meanwhile, tertiary legal materials include legal dictionaries, legal encyclopedias, and various other resources that can help explain legal terms or concepts used in research. The use of various sources of legal materials aims to obtain a comprehensive understanding of the legal issues being studied.<sup>27</sup>

The technique of collecting legal materials in this study is carried out through library *research*, namely by examining various legal sources that are relevant to the research problem. The literature study was conducted by tracing and analyzing various legal literature that discusses fiduciary guarantees, bankruptcy, and legal protection in consumer financing relationships. In addition, this research also utilizes various scientific publications contained in national and international legal journals to obtain a broader perspective on the development of the regulation and practice of fiduciary guarantee implementation in various legal systems. Through this technique of collecting legal materials, research can obtain accurate and comprehensive data to support the analysis of the legal problems being studied.<sup>28</sup>

The analysis of legal materials in this study was carried out qualitatively using legal *interpretation* methods and legal reasoning methods. Qualitative analysis is carried out by examining various legal materials that have been collected to identify legal problems that arise in the implementation of fiduciary guarantee execution in debtor bankruptcy situations and formulate a legal reconstruction model that is able to provide legal certainty and fair protection for the parties. The legal interpretation method is used to understand the meaning of legal norms contained in laws and regulations, while the legal argumentation method is used to build a logical and systematic legal construction in formulating solutions to the problems being studied. Through the analysis process, this research is expected to produce

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<sup>27</sup> Mukti Fajar ND and Yulianto Achmad, *Dualism of Normative and Empirical Law Research* (Yogyakarta: Pustaka Siswa, 2010), pp. 157–160.

<sup>28</sup> Amiruddin and Zainal Asikin, *Introduction to Legal Research Methods* (Jakarta: Rajawali Pers, 2016), pp. 68–70.

conceptual recommendations regarding the reconstruction of fiduciary guarantee execution arrangements in consumer financing contracts in debtor bankruptcy situations.<sup>29</sup>

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<sup>29</sup> Salim HS and Erlies Septiana Nurbani, *The Application of Legal Theory to Thesis and Dissertation Research* (Jakarta: Rajawali Pers, 2013), pp. 19–22.

## RESEARCH RESULTS

### Legal Issues Arising in the Implementation of Fiduciary Guarantees in Consumer Financing Contracts When the Debtor Goes Bankrupt

One of the main legal issues that arise in the implementation of fiduciary guarantees in consumer financing contracts when the debtor goes bankrupt is the conflict between the material guarantee legal regime and the bankruptcy law regime. In the law of material guarantees, the creditor holding the fiduciary guarantee has preferential rights and executory rights to the object of the guarantee if the debtor defaults. However, when the debtor is declared bankrupt, the debtor's entire assets in principle become a bankruptcy estate that is under the control of the curator for the benefit of all creditors. This condition raises a normative conflict regarding whether the creditor holding the fiduciary guarantee can directly execute the object of the guarantee or must follow the mechanism that applies in the bankruptcy process. These inconsistencies often create legal uncertainty in practice because the two legal regimes have different basic principles in regulating the settlement of debtors' debts.<sup>30</sup>

Another legal problem is related to the position of creditors of fiduciary guarantee holders as separatist creditors in the bankruptcy process. Theoretically, separatist creditors have the right to execute their guarantees as if there were no bankruptcy. However, in the practice of bankruptcy law in Indonesia, there is a provision regarding the period of suspension of execution that provides an opportunity for the curator to manage and secure the bankruptcy assets before the execution is carried out. This provision often raises debates about the limits of the curator's authority and the rights of separatist creditors in executing their guarantees. In some cases, creditors holding fiduciary guarantees must wait for certain bankruptcy proceedings before being able to exercise their right of execution, thereby reducing the effectiveness of fiduciary guarantees as an instrument of protection for creditors.<sup>31</sup>

In addition, there are also problems regarding the curator's authority over the object of fiduciary guarantee that is part of the bankruptcy bond. In some bankruptcy practices, the

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<sup>30</sup> Trias Palupi Kurnianingrum, "Juridical Implications of the Position of Separatist Creditors in Bankruptcy," *Journal of Rechts Vinding* 7, no. 3 (2018): 431–434.

<sup>31</sup> Rizky Amalia and Budi Santoso, "Legal Position of Secured Creditors in Indonesian Bankruptcy Law," *Diponegoro Law Review* 5, no. 2 (2020): 210–214.

curator takes over the management of the collateral object on the grounds that all of the debtor's assets declared bankrupt must be in the possession of the curator for the benefit of the bankruptcy process. On the other hand, creditors of fiduciary guarantees argue that they have property rights that give direct authority to execute the object of the guarantee. This difference of view often gives rise to legal disputes between curators and creditors regarding who is authorized to manage or sell the object of fiduciary collateral in a bankruptcy situation.<sup>32</sup>

Another legal problem that often arises is related to changes in the mechanism of execution of fiduciary guarantees after the development of jurisprudence and judicial decisions that affect the practice of execution of guarantees. In consumer finance practices, the execution of previous fiduciary guarantees is often carried out through the *parate execution mechanism*, which is direct execution by creditors without going through a court process. However, the development of legal interpretation emphasizes the importance of protecting debtors in the process of executing guarantees. As a result, the execution mechanism that was previously considered simple and fast has become more complex and requires additional procedures that can prolong the dispute resolution process between creditors and debtors.<sup>33</sup>

The next problem is related to the potential conflict of interest between creditors, fiduciary guarantee holders and other creditors in the bankruptcy process. In the bankruptcy system, the basic principle used is the principle of *creditorum parity*, which is a principle that puts creditors in an equal position in the distribution of bankruptcy assets. However, the existence of creditors who have material guarantees such as fiduciary guarantees provides an exception to the principle because they have preferential rights to the object of the guarantee. This condition often creates tension between the interests of separatist creditors and concurrent creditors who also have rights to bankruptcy assets.<sup>34</sup>

In addition to conflicts between creditors, legal problems also arise in the practice of implementing the sale of fiduciary collateral objects in the bankruptcy process. In some cases,

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<sup>32</sup> Ardiansyah dan Nur Putri Hidayah, "Authority of Curator over Secured Assets in Bankruptcy Proceedings," *Hasanuddin Law Review* 7, no. 1 (2021): 55–59.

<sup>33</sup> Hendrianto dan Luthfi Yazid, "The Execution of Fiduciary Security after Constitutional Court Decision in Indonesia," *Sriwijaya Law Review* 6, no. 2 (2022): 167–170.

<sup>34</sup> Nindyo Pramono, "Legal Protection for Creditors in Bankruptcy Proceedings in Indonesia," *Yuridika* 35, no. 2 (2020): 252–256.

the value of the collateral object sold by the curator or through an auction mechanism is not always sufficient to cover the creditor's entire receivables. This raises questions about how the remaining creditors' receivables should be treated in the bankruptcy process and whether the creditors holding fiduciary guarantees can still collect the shortfall as concurrent creditors. The lack of clarity regarding the mechanism for settling the remaining receivables shows that the existing legal system has not fully provided certainty for creditors in obtaining the repayment of their receivables.<sup>35</sup>

Another legal problem is related to the weak coordination between the consumer financing legal system and the bankruptcy law system. In consumer finance practice, the legal relationship between creditors and debtors is regulated through financing contracts that usually contain clauses regarding fiduciary guarantees and default settlement mechanisms. However, when the debtor is declared bankrupt, the contractual provisions often have to be adjusted to the mandatory provisions of bankruptcy law. The insynchronization between the contractual arrangement and the bankruptcy arrangement often creates legal uncertainty regarding the debtor's debt settlement mechanism in a bankruptcy situation.<sup>36</sup>

Based on these various problems, it can be concluded that the implementation of fiduciary guarantees in consumer financing contracts when the debtor experiences bankruptcy raises various legal problems related to conflicts of norms, unclear authority, and disharmony between various legal regimes that regulate the relationship between creditors and debtors. These problems show that the existing legal system is not fully able to provide legal certainty and balanced protection for the parties involved in consumer financing relationships. Therefore, legal reconstruction efforts are needed that are able to harmonize the fiduciary guarantee arrangement and bankruptcy law so that the implementation of guarantee execution can be carried out fairly, transparently, and provides legal certainty for all parties.<sup>37</sup>

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<sup>35</sup> I Made Budi Arsika dan I Nyoman Putu Budiarta, "Settlement of Secured Claims in Indonesian Bankruptcy Law," *Kertha Patrika* 43, no. 3 (2021): 230–233.

<sup>36</sup> Fajar Sugianto and Tomy Michael, "Consumer Financing Agreements and Bankruptcy Law in Indonesia," *Journal of Ius Quia Iustum Law* 28, no. 4 (2021): 712–715.

<sup>37</sup> Ahmad M. Ramli dan Sinta Dewi Rosadi, "Legal Harmonization of Secured Transactions and Bankruptcy Law in Indonesia," *Padjadjaran Journal of Law* 9, no. 1 (2022): 98–101.

## **The legal reconstruction model is necessary to create a legally fair and definite mechanism for implementing fiduciary safeguards in bankruptcy situations**

One of the legal reconstruction models needed to create a fair mechanism and have legal certainty in the implementation of fiduciary guarantees when debtors experience bankruptcy is the harmonization between material guarantee law and bankruptcy law. So far, the insynchronization between the two legal regimes has often caused normative conflicts regarding the implementation of creditors' rights to the collateral object. In fiduciary guarantee law, creditors have material rights that give the authority to execute the object of the guarantee directly if the debtor defaults. However, in bankruptcy law, all of the debtor's assets are part of the bankruptcy estate which is under the control of the curator. Therefore, it is necessary to reconstruct the arrangement that expressly regulates the relationship between the two legal regimes so that the implementation of the execution of fiduciary guarantees does not cause a conflict of authority between creditors and curators in the bankruptcy process.<sup>38</sup>

The next model of legal reconstruction is to strengthen the position of creditors of fiduciary guarantee holders as separatist creditors in the bankruptcy process. Theoretically, separatist creditors have the right to execute their guarantees as if there were no bankruptcy. However, in the practice of bankruptcy law in Indonesia, the exercise of these rights often faces various procedural restrictions, including a period of suspension of execution and the involvement of the curator in the management of the collateral object. This condition creates legal uncertainty about the extent to which separatist creditors' rights can be exercised independently. Therefore, legal reconstruction needs to clarify the limits of curatorial authority and strengthen the rights of separatist creditors so that the implementation of fiduciary guarantees continues to provide effective protection for creditors.<sup>39</sup>

Legal reconstruction also needs to be directed at the establishment of a clearer procedural mechanism in the implementation of fiduciary guarantee execution in bankruptcy situations. One of the main problems that arises in practice is the lack of an integrated procedure between the fiduciary guarantee legal system and the bankruptcy law system. As a

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<sup>38</sup> Tri Jata Ayu Pramesti, "Harmonization of Fiduciary Security and Bankruptcy Law in Indonesia," *Brawijaya Law Journal* 10, no. 1 (2023): 64–68.

<sup>39</sup> Dimas Prasetyo dan Indra Perwira, "Secured Creditors Position in Bankruptcy Proceedings under Indonesian Law," *Padjadjaran Journal of Law* 10, no. 2 (2023): 188–192.

result, the execution often experiences administrative obstacles and conflicts of authority between creditors and curators. Therefore, the legal reconstruction model should include the regulation of more systematic execution procedures, including coordination mechanisms between creditors, curators, and commercial courts in the process of executing the object of fiduciary guarantee in the situation of the debtor's bankruptcy.<sup>40</sup>

In addition to procedural aspects, legal reconstruction must also pay attention to the principle of balance between the protection of creditors and the protection of debtors. A legal system that is only oriented towards creditor protection has the potential to cause abuse of enforcement rights that harm debtors. On the other hand, a legal system that emphasizes too much debtor protection can reduce legal certainty for creditors in obtaining repayment of their receivables. Therefore, the legal reconstruction model should be designed to create a balance between the interests of creditors and debtors so that the mechanism for implementing fiduciary guarantees can run fairly and proportionately in bankruptcy situations.<sup>41</sup>

Legal reconstruction can also be directed at strengthening the fiduciary guarantee registration system that is more transparent and digitally integrated. An effective registration system is essential to ensure legal certainty regarding the status of the collateral object and the position of the creditor of the fiduciary guarantee holder. Through a transparent and accessible registration system, various potential disputes regarding the ownership or position of the collateral object can be minimized. The digitization of the registration system also allows the verification and supervision process of the implementation of fiduciary guarantees to be carried out more effectively so that it can increase the confidence of business actors in the material guarantee legal system.<sup>42</sup>

In addition to normative and administrative aspects, legal reconstruction also needs to include institutional strengthening in the implementation of fiduciary guarantee execution in bankruptcy proceedings. One of the problems that often arises in practice is the lack of

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<sup>40</sup> Rafika Nurhayati, "Legal Mechanism of Fiduciary Execution in Bankruptcy Cases," *Hasanuddin Law Review* 9, no. 2 (2023): 212–216.

<sup>41</sup> Lia Sautunnida, "Balancing Debtor and Creditor Interests in Fiduciary Security Execution," *Sriwijaya Law Review* 7, no. 1 (2023): 45–48.

<sup>42</sup> Rini Setiawati dan Andri G. Wibowo, "Digitalization of Fiduciary Registration System for Legal Certainty in Indonesia," *Indonesian Journal of International & Comparative Law* 10, no. 1 (2023): 87–90.

coordination between the various institutions involved in the bankruptcy process, such as curators, commercial courts, and state auction institutions. This condition can slow down the execution process and cause legal uncertainty for the parties. Therefore, a more effective institutional coordination mechanism is needed so that the implementation of fiduciary guarantee execution can be carried out quickly, transparently, and accountably in the bankruptcy process.<sup>43</sup>

Legal reconstruction can also be done through a comparative approach by studying best practices from other countries that have more effective material guarantee legal systems. Some countries have developed a more modern legal system of tangible collateral by integrating the principles of economic efficiency and legal certainty in the arrangement of collateral. This comparative approach can provide a new perspective in formulating a model for the reconstruction of fiduciary guarantee law in Indonesia, especially in terms of simplifying execution procedures and strengthening legal protection for the parties involved in the financing relationship.<sup>44</sup>

Based on these considerations, the ideal legal reconstruction model in the implementation of fiduciary guarantees in debtor bankruptcy situations must include several main aspects, namely the harmonization of laws and regulations, the strengthening of the position of separatist creditors, the establishment of clear procedural mechanisms, balanced legal protection for creditors and debtors, the digitization of the guarantee registration system, the strengthening of institutional coordination, and the application of best practices from the legal system other countries. By implementing this comprehensive legal reconstruction approach, it is hoped that the fiduciary guarantee legal system in Indonesia can provide stronger legal certainty and create a fairer and more efficient debt settlement mechanism for all parties involved in consumer financing relationships.<sup>45</sup>

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<sup>43</sup> Ahmad Rizki dan Rahayu Hartini, "Institutional Coordination in Bankruptcy Asset Execution," *Yuridika* 39, no. 1 (2024): 74–78.

<sup>44</sup> Alexander M. Lopez, "Secured Transactions Reform and Bankruptcy Interaction," *International Insolvency Review* 32, no. 2 (2023): 213–216.

<sup>45</sup> David Milman dan Rebecca Parry, "Reform of Secured Credit and Insolvency Law," *Journal of Business Law* 2023, no. 5 (2023): 401–404.

## CONCLUSION

The results of the study show that:

1. The implementation of fiduciary guarantees in consumer financing contracts when the debtor experiences bankruptcy raises various legal problems related to the conflict of norms between material guarantee law and bankruptcy law. Normatively, the Fiduciary Guarantee Law gives preferential rights and executory rights to creditors holding fiduciary guarantees to execute the object of the guarantee if the debtor defaults. However, in a bankruptcy situation, the debtor's entire assets become part of the bankruptcy estate which is under the control of the curator in accordance with the provisions of bankruptcy law. This condition creates legal uncertainty regarding the authority to execute fiduciary guarantees, especially related to the position of separatist creditors, the limits of curatorial authority over the object of guarantees, and the mechanism for implementing execution in bankruptcy proceedings. In addition, the development of judicial practices and changes in legal interpretation of the fiduciary guarantee execution mechanism also create new complexities that have an impact on reducing the effectiveness of fiduciary guarantees as a protection instrument for creditors in consumer financing contracts.
2. A legal reconstruction model is needed that is able to create a mechanism for the implementation of fiduciary guarantees that are fair and have legal certainty in the debtor's bankruptcy situation. The legal reconstruction must be directed at harmonizing the fiduciary guarantee arrangement and bankruptcy law so that there is no conflict of norms in practice. In addition, it is necessary to strengthen the position of creditors of fiduciary guarantee holders as separatist creditors through clearer arrangements regarding the right of execution of the object of the guarantee in the bankruptcy process. The legal reconstruction model should also include the establishment of an integrated procedural mechanism between creditors, curators, and commercial courts in the execution of fiduciary guarantees. In addition, legal reconstruction must pay attention to the principle of balance between the protection of creditors and the protection of debtors and supported by the strengthening of the fiduciary guarantee registration system and institutional

coordination in the bankruptcy process. Through this comprehensive legal reconstruction, it is hoped that the fiduciary guarantee legal system in Indonesia will be able to provide legal certainty, fairness, and effectiveness in the implementation of fiduciary guarantee execution in consumer financing contracts when debtors experience bankruptcy.

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