

Legal Consequence For Notary Regard To Late Fiduciary Registration By Online

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Abstract

The registration of fiduciary is an obligation which must be done by fiduciary Recipient as a form of legal certainty to be received, but there is still a fiduciary that is delayed by fiduciary or the recipient of the fiduciary registration in this case Notary, is whether a late fiduciary certificate is registered online can provide legal protection for the creditor? As well as the accountability of a notary who is late in registering the fiduciary guarantee certificate online. This research uses normative juridical research type, with approach method that is by statute approach and conceptual approach. The results of this research are: First, the notary will provide a solution to the creditor to make the deed of affirmation by the Notary to the deed of fiduciary that has been signed before, so that it can be re-registered and if it has been issued certificate fiduciary then the legal protection for the creditor becomes the preferent creditor. Second, the notary may be subject to administrative sanctions in accordance with the negligence that has been made.

Keywords: Legal Protection, Fiduciary Guarantee, Liability of Notary.

1. Introduction

Social fund regard to fulfill their alternative fund with carrying out a loan in financial institutions, either non-bank financial institutions or financing institutions. Banking institution is institutions that conduct business activities in the field of finance by collecting funds from the society in the form of savings and channeled to the society in the credit form. The financing institution in fulfilling the public funds uses consumer financing. Agreement for granting of funds in the form of loan and lending agreement followed by guarantee agreement. Guarantees which is required by banking institutions or financing institutions in the case of agreements that made between the creditor and the debtor are the main guarantees, principal guarantees, and additional guarantees. One of the guarantees used by the debtor to borrow the money from banking institutions or financing institutions is a fiduciary guarantee.

Fiduciary guarantee plays a role in national development and ensures legal certainty to interested parties. Therefore, the fiduciary guarantee shall be registered in accordance with Article 11 paragraph (1) of the Fiduciary Law (hereinafter referred to as UUJF). Besides to Article 11 paragraphs (1) UUJF, the registration related to fiduciary shall also be regulated in PP No. 10 of 2013 on the administration of electronic fiduciary registration. Especially for motorcycle charged with fiduciary has been regulated in Regulation of the Minister of Finance of the Republic of Indonesia No. 130/PMK.010/2012 concerning Registration of Fiduciary for financing companies conducting consumer financing for a motorcycle with fiduciary guarantee loading. The development of fiduciary registration has occurred in 2013, fiduciary registration is done by online. The registration of fiduciary guarantee electronically is fiduciary guarantee registration conducted by the applicant by filling out the application electronically.

However, the lack of legislation which regulated the fiduciary registration during 2000 to March 2015 is the absence of a fixed period of time regarding the registration period. The arrangement related to new period in Regulation of the Minister of Finance of the Republic of Indonesia No. 130/PMK.010/2012 about the registration of fiduciary guarantee for financing companies conducting consumer financing for a motorcycle with fiduciary loading which determine 30 days since the consumer financing agreement. Then there is the regulatory renewal related the procedure of the electronic fiduciary registration as regulated in PP No. 21 of 2015 about the procedure of electronic fiduciary registration and the cost of making the fiduciary deed which determines 30 days as from the date of the making of the fiduciary deed.

The registration of fiduciary shall be done by the applicant, which is a fiduciary receiver, the proxy or the representative. So that the fiduciary registration can be conducted by the fiduciary recipient itself or the party authorized. The arrangements regarding of epoch of the old fiduciary registration make the applicant free to register of fiduciary. However, this condition makes a legal certainty related to fiduciary cannot be fulfilled and will appear the legal problem. The registration of fiduciary is the form of the publicity principle and legal certainty (Kamelo, 2006: 213). Although in practice often occur a registration delays, no registration, or registration of fiduciary objects, but after the debtor is a breach of contract. The creditors have their own reasons

for not immediately to registering the guarantee object, whereas the existence of registration actually provides legal certainty and many of benefits that can be enjoyed by the creditor.

The UUJF puts the obligation to the fiduciary recipients to carry out the imposition of fiduciary objects with the fiduciary deed which shall be made by notaries' deed. Notary as a public official authorized to make an authentic deed can be held responsible for his actions in relating to his work that is making the authentic deed. If analyzed of the fiduciary deed which made by notaries, found the fact of juridical that are registered are fiduciary guarantee deed and fiduciary guarantee object (Kamelo, 2006: 214). Based on the background exposure, can be known that the fiduciary institutions are the popular institution of debt guarantee and suitable to use in the credit or financing agreement, for the credit of motorcycle adjusted the entrepreneur's requirement and globalization consumer.

According to UUJF provisions, fiduciary conducted through 2 steps, they are a fiduciary imposition and fiduciary registration. Fiduciary imposition should be conducted through notary deed and hereinafter the notary deed registered at the fiduciary registration office by online to authorized institute that is Directorate General of General Law Administration of Ministry of Law and Human Rights. The fiduciary registration process will not take a long time since it was enacted on March 5, 2013, regarding the fiduciary registration by online which can provide the convenience for a notary in fiduciary registration, because of registered to the notary office itself and can printing immediately fiduciary certificate which has been registered.

2. Research Design

The theory of legal protection and legal certainty used to finishing the problem in this journal. The use of the theory is used because the main problem formulated in this legal research focuses on the legal protection that can be given by the creditor as the fiduciary receiver in the registration of fiduciary, which is about what legal protection can be given in case of delay in fiduciary registration. The use of this theory is necessary to know the form of the regulatory duration of fiduciary registration that can provide legal certainty of the parties. Regarding the theory of liability, the relevance of a notary liability in the late registration of a fiduciary deed is a sanction that will be received by a notary if proven to causes a loss by the parties on the act considered a breach of contract in job position to register the fiduciary deed.

2.1 Research Problem

Throughout the statement above, it was referred the problem formulation in this research is as follows: firstly, whether the fiduciary deed late to be registered can provide the legal protection for the creditor? Secondly, the liability to the notary who is late to register the fiduciary deed?

2.2 Research Method

The research used in this thesis is a normative legal research which means the research conducted by research legal norms, legal philosophy, legal doctrine, and legal principle in literature materials. Regarding the liability notary to the fiduciary deed which is late by online and the sanction by a notary for the late registration of fiduciary deed which is the notary obligation in committing the duty of his position as a notary who is designated by the creditor.

3. Finding and Discussion

3.1 The legal protection for the creditor on late Online registered fiduciary deed

Fiduciary or *Fiduciary Eigendomsverdracht* is often called as trustworthy of property, which is a form of guarantee for movable objects besides the pawning developed by jurisprudence (Tiong, 1984: 21). Fiduciary derived from the word fides which means the trust. Accordance with the meaning, the legal relationship between the debtor (fiduciary guarantor) and the creditor (fiduciary receiver) is a legal relationship based on the trust. Widjaja & Yani (2003: 119) reveal two fiduciary forms, that is *fiducia cum creditore* and *fiducia cum amico*" (Widjaja & Yani, 2003: 119). *Fiducia cum creditore* means a promise of trust made with the creditor (Widjaja & Yani, 2003: 120). Whereas, *fiducia cum amico* means a promise of trust made with a friend (Widjaja & Yani, 2003: 121).

Regarding the legal characteristic, fiduciary as well as other forms of guarantee is the accessory because it follows a basic engagement that already exists between the creditor and the debtor" (Tiong, 1984: 22) the same case is also expressed by Sofwan (1977: 26) this fiduciary agreement is an *accessoir*, that depends on main agreement which is usually a lending money agreement to the bank. Hereinafter, based on the J. Satrio, "consequence from the characteristic of the *accessoir*, that is the agreement of fiduciary is a conditional

agreement, namely with the condition of canceling. If the terms of the main agreement are paid off, then those agreement is to be canceled without court decision” (Satrio, 2002: 176).

“Fiduciary as a guarantee institution in practice which implemented by: the owner of the debtor’s guarantee goods in providing the guarantee to the creditors for the promises (especially the promise of the timing and manner of the debt return), surrendering his right to trustworthy collateral goods to the creditor, but with an appointment that if the debtor has been fulfilled all of its obligations especially the obligations to pay off the debt as promised by the debtor, so the ownership of the guarantee goods automatically return to the debtor. Fiduciary takes the form of trustworthy property surrender or called *fiduciareeigendoms-overdracht*” (Satrio, 2002: 175).

The role of the important fiduciary in society makes the regulation of fiduciary No. 42 of 1999 must be able to guarantee the legal certainty and provide the legal protection for the interested party is with a fiduciary agreement made in the authentic deed form and registering to the ministry of law and human rights of the Republic of Indonesia as an authorized institute in the fiduciary deed registration by online.

The legal certainty in the country is the existence of certain rule and enforcement of those provisions are run well by the society. However, this has not been seen in the regulation of the fiduciary registration period in Indonesia during 2000 to March 2015. The provisions related to fiduciary registration have been regulated in the article 11 UUJF mentioned that fiduciary should be registered. Nevertheless, the provision concerning the obligation of fiduciary registration not be implemented by the fiduciary receiver. One of the consequences of not be implemented this registration is the creditor as a fiduciary receiver will not get a fiduciary certificate which is evidence that the creditor’s position will be the preferred creditor.

The protections means protecting from the dangerous things, it can be a form of interests, things or goods. In addition, protection also has a meaning of protecting which provided by someone to a weak person. Thus, the legal protection can be interpreted with all efforts of the government to ensure the legal certainty to provide a protection to citizens so that their rights as a citizen are not violated, and for those who violate it will get a sanction in according to the regulations.

The legal protection provided to the legal subject in the form of legal instruments either in preventive or repressive, either in written or unwritten. In other words, the legal protection as an illustration of the legal function, which is a concept whereby the law will provide a justice, discipline, certainty, benefit and peace (Rahayu, 2009).

Basically, accordance the provisions in article 14 paragraph (3) of Laws (UU) No. 42 of 1999 about fiduciary, a new fiduciary was born on the same date to the date of fiduciary in the fiduciary list book and the creditor will get a fiduciary certificate in the “the justice by virtue of the one and only God.” With a fiduciary certificate then the creditor/the fiduciary receiver has the right of direct execution (*parate executive*), such as happened in the bank loan. The legal power of the certificate is the same as a court decision that already has a permanent legal power.

In addition, for the imposition of fiduciary, article 5 paragraph (1) UUJF mandates that the imposition of objects with fiduciary made by notary deed in the Indonesian language and it is a fiduciary deed. Nowadays, many of financial institutions and banks (public bank or credit bank) operate consumer finance, leasing, factoring. Commonly, they use agreement procedures which include a fiduciary for a fiduciary object, ironically not made in a notary deed and not registered at the Fiduciary Registration Office to get a certificate. Such a deed called a fiduciary deed under hand.

However, in accordance with the mandate of UUJF, to obtain legal protection as stipulated in the UUJF, the imposition of objects by fiduciary deed must be made by an authentic deed and registered in the fiduciary register. If such provision is not fulfilled, the creditor's rights do not receive the protection as mentioned in UUJF. Fiduciary registration is a form of fulfillment of the publicity principle in the guarantee law. Publicity principle is a principle that explains that all rights of guarantee including material guarantee must be registered. Registration made by the Applicant is one form of protection to the Third Parties. The Third Party will recognize that the guaranteed item has been burdened with a guarantee for the benefit of a particular creditor, for a certain amount, with a specific pledge (Satrio, 2002: 245).

The determination of the time limit of fiduciary must be determined so that either Fiduciary Receiver, proxy or representative will register the fiduciary on time. The arrangement of the fiduciary period may provide time guidance to Applicant to register the fiduciary. If there is a specified time limit will make the purpose of

fiduciary registration will be achieved and will reduce the legal consequences which undesirable by the Parties. So, the arrangement of the fiduciary registration period needs to be regulated in order to guarantee legal certainty and provide legal protection to Creditor Party or third party.

The legal consequences of late registration of the fiduciary guarantee deed are to refer to the provisions of the positive law as set forth in:

1. Article 14 paragraph (3) of Law No. 42 of 1999 about fiduciary which determines that Fiduciary was born on the same date as the date of the Fiduciary recorded in the Fiduciary List Book.
2. Article 15 paragraph (3) of Law No. 42 of 1999 about fiduciary which determines that if the debtor breaches the pledge, the fiduciary receiver has the right to sell the object which became the object of fiduciary on his own power.
3. Article 4 paragraph (2) of the Government Regulation of the Republic of Indonesia No. 86 of 2000 about the fiduciary registration procedure and the cost of making a fiduciary deed which specifies that the issuance of fiduciary certificate and its delivery to the applicant shall be made on the same date as the registry date of the registration application fiduciary as referred to in paragraph (1).
4. Article 3 of Regulation of the Minister Finance of the Republic of Indonesia No. 130/PMK.010/2012 about fiduciary registration for finance companies conducting consumer financing for a motorcycle with fiduciary imposition determines that a finance company is prohibited from the withdrawal of fiduciary goods in the form of a motorcycle if has not issued a fiduciary certificate and submitted to the finance company.
5. Article 4 of Regulation of the Minister Finance of the Republic of Indonesia No. 130/PMK.010/2012 which determines that withdrawal of fiduciary goods in the form of motorcycle by finance company should be fulfilled the provision and requirement as regulated in Laws regarding a fiduciary and has been agreed by the parties in motorcycle consumer financing agreement.
6. Article 3 paragraph (6) of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No. 10 of 2003 about the electronic fiduciary registration procedure which determines that after making payment as referred to in paragraph (5), the fiduciary registration applicant prints a Fiduciary Certificate that has been electronically signed by the Fiduciary Registration Officer.

From the six legal bases mentioned above, the legal consequences of late registration of the fiduciary deed are a condition whereby still conducting the fiduciary execution by the creditor to the fiduciary object in the debtor's control may be exercised. In this case, the creditor is only late in registering the fiduciary, after registration, the creditor shall still obtain the Fiduciary Certificate from the Ministry of Justice and Human Rights of the Republic of Indonesia, as evidence of the fiduciary holder and can be used as a tool of fiduciary executing. The fiduciary certificate has the same executive power as the court decision which has obtained permanent legal force as set forth in Article 15 paragraph (2) of the Fiduciary Laws which provides that "The Fiduciary Certificate has the same executorial power as the court decision which has to obtain a permanent legal force.

The legal protection in relation to the registration of fiduciary, namely the creation of a Fiduciary Deed by a notary, shows that the creditor seeks to protect himself from the possibility of the debtor taking actions that lead to bad faith. Especially in relation to objects secured fiduciary. A more detailed description in the Fiduciary Deed is also intended to prevent any other interpretation of the debtor related to the treatment of goods which burdened by a fiduciary, where the interpretation itself is feared to be disadvantageous to the creditor. In fact, the Deed of Fiduciary made by Notary is not directly registered to the Fiduciary Registration Office since usually the amount of ceiling provided is also not so great then the creditor and Notary agree if the debtor already looks bad, so the Fiduciary Deed will be registered immediately. However, before the Notary has obtained a power of attorney from the Creditor Party to register the Fiduciary Deed so that the creditor will feel more secure if at any time the debtor breach of contract because the position of the Creditor is as a preferent creditor. Because in the fiduciary certificate contains the phrase "For the One Supreme God", so that the fiduciary certificate has the same executorial power as the court decision which has obtained a permanent legal force.

If the debtor is breach of contract, the creditor has the right to execute the executorial title as stated in the fiduciary certificate, the creditor also has the right to sell the object under fiduciary guarantee through the public tender as well as the repayment of the receivable from the sale or sale under the hand which is based on mutual agreement between the parties.

The application of Article 4 of the Government Regulation of the Republic of Indonesia Number 21 of 2013 which states that the application for guarantee registration shall be filed within 30 days from the date of the making of the fiduciary deed, but with the consideration of the creditor as well as other matters which related to the delay in the registration of fiduciary may affect the creditor to lose his position as a preferential creditor, the Notary Party may provide such legal remedy as the deed of affirmation of the deed of fiduciary which has been previously made, with the affirmation of which is to affirm the number and date of the latest fiduciary deed the contents are the same as the previous deed of guarantee. So, with the deed of the assertion that fiduciary that has not been previously registered can be re-registered. So, the Creditor has a position back as a preferent creditor.

3.2 The notary liability which late to register the fiduciary deed by online

Preferent right is the right of the recipient of the fiduciary to take over the execution of the object which becomes the object of fiduciary. The fiduciary law explains that the preference right is equalized by giving the precedence. The momentum of the birth of the preferential right is at the time of registration of fiduciary, so as long as fiduciary has not been registered then fiduciary recipients have no preference right but concurrent rights. If the fiduciary recipient's right of preference is not yet born, then his fiduciary has been sold or placed on the seizure of guarantee by another party, then the imposition of preferential right may be affected by the creditor losing his preferential right on the fiduciary and the creditor only as the holder of the concurrent right or the right of sharing with other fiduciary recipients of the guarantee object.

The online fiduciary registration which implemented by all notaries in Indonesia where the Ministry of Justice and Human Rights as the parent that provides online registration facilities, this is based on the Minister of Finance Regulation (hereinafter referred to as Permenkeu) No 130 / PMK.0.10 / 2012 which regulates the fiduciary registration online. Then the Ministry of Justice and Human Rights conducted fiduciary registration online through the Directorate General of General Law Administration (Ditjen AHU) in providing services to the public. This provides the intent and purpose for fiduciary online is expected can provide legal services in the field of a fiduciary can run quickly, accurately, free from illegal charges and able to encourage economic growth in Indonesia for the achievement of the welfare of the community.

Implementation of the online fiduciary registration carried out by all Notaries existing in the territory of Indonesia either in the making of authentic deeds, fiduciary registration or the issuance of fiduciary certificates which are all obligations of the notary as a Public Officer, therefore, the Notary must be implementation of the online fiduciary registration in accordance with the Laws and Regulations as referred to in Article 13 through Article 16 of the Fiduciary Laws.

The responsibility or liability of the State relates to the use of authority in the public service function. the implementation of these functions can arise the loss or suffering for the community (Djatmiati, 2008: 3). The incidence of loss to the community may occur due to a defect in the use of authority or related to the behavior of the personal apparatus. These two things become parameters whether or not there is a responsibility or liability of the State for damages.

The use of authority by the government according to the French legal concept goes from the two main principles which have been established by *Conseild'etat* as the basis of public service. First is Legality and the second is Responsibility. *Legalite* (legality) means that the government must act in accordance with the law. Therefore the decisions are a risk of being canceled by the administrative court. Responsibility indicates that the government will be accountable for compensatory damages for people who suffer losses by government decisions or actions (Brown & Bell, 1998: 182).

A Notary who carries out his duties and authority in this matter is fully responsible for the making of fiduciary deeds of the parties, the registration is online and the issuance of fiduciary certificate on the fiduciary object and if the Notary is late to register the fiduciary object then it can be said that the Notary cannot guarantee the legal certainty and legal protection to the fiduciary recipients and givers where the guarantee object cannot be said as a fiduciary object but only called ordinary collateral.

The settlement of the notary liability to the making of the fiduciary deed that is if proven the notary makes a mistake, negligence, and carelessness to the procedure of making such fiduciary deed until cause loss to the parties or the plaintiff, the notary is obliged to indemnify to the loser either in the form of sanction compensation, interest, and penalty based on the decision of a judge who has permanent legal force. The notary liability to the making of a fiduciary deed as a civil case is by a court decision that cancels a fiduciary deed so that it becomes a deed under the hand and requires the notary to pay fees, damages and interest, and penalties

and administrative sanctions as provided in Article 44 paragraph 4), Article 48 Paragraph (3), Article 49 Paragraph (4), Article 50 Paragraph (5), and Article 51 Paragraph (4) the law of notary public of change (UUJN-P).

4. Conclusion

The validity of a maximum period is 30 days as from the date of making the fiduciary deed, but with the consideration from the creditor or other things which related the delay in the fiduciary registration can impact the creditor loss the position as preferent creditor, so, a notary party can provide the legal struggle such as making of affirmation deed for fiduciary deed which has been previously made, with the affirmation deed means the affirm of number and date of the recent fiduciary deed which the contents are the same with earlier fiduciary deed. So, with that affirmation deed, the previous fiduciary that has not been registered can be re-registered. So that, the creditors have a position back as a preferent creditor.

The notary liability of making the fiduciary deed after the validity of online fiduciary registration which is if the notary proved makes a mistake, negligence, and carelessness to the procedure of making fiduciary deed is by the court decision that cancels a fiduciary deed so that it becomes a deed under the hand then causes a loss for the parties or the plaintiff, so the notary is obliged to indemnify to the loser either in the form of sanction compensation, interest, and penalty based on the decision of a judge who has permanent legal force.

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