



Research Paper

The Legal Impacts of No Write-Off of Fiduciary Guarantee Records after Debtor Debts Repayment

¹⁾Siti Malikhatun Badriyah, ²⁾R. Suharto, ³⁾Marjo, ⁴⁾H. Kashadi, ⁵⁾Siti Mahmudah, ⁶⁾Amiek Soemarmi

(Faculty of Law, Diponegoro University, Indonesia)

Corresponding Author: Siti Malikhatun Badriyah

Corresponding Author: Siti Malikhatun Badriyah

ABSTRACT: The function of fiduciary guarantee is to guarantee the implementation of debtor's performance (repayment of debtor's debts). Fiduciary guarantees are *accessoir* (additional agreement), so that the occurrence depends on the principal agreement. If the fiduciary guarantee end, it should be deleted from the fiduciary guarantee records. This is to avoid re-fiduciary guarantees.

In practice there is often nowrite-off of fiduciary guarantee records, even though the debtor had debt repaid repayment. The purpose of this study is to find out the legal impact on the fiduciary guarantee registration is not deleted after the debtor repays the debt. The research method used is qualitative with a socio legal approach. Techniques for collecting data with document studies and interviews. Data analysis techniques with inductive qualitative analysis. Data validation techniques with source and methods triangulation. The results of study show that there is often no write-off of fiduciary guarantee records after debtor debts repayment. This can be detrimental to fiduciary givers, especially in the case of transferring or guaranteeing the object of fiduciary guarantee, lack of legal certainty and legal protection of the parties and the people especially third parties.

Key Words: legal impact, fiduciary guarantee, write-off records, repayment of debt

Received 30 May 2019; Accepted 14 June, 2019 © the Author(S) 2019.

Published With Open Access At www.Questjournals.Org

I. INTRODUCTION

The economic development of various nations in the world is always closely related to financing factors[1]. One of the most important entrepreneurs in the world is funding for her project[2]. In every financing obtained from other parties it is always closely related to guarantee.[3] Guarantees are needed to ensure the security of creditors' receivables[4]. This guarantee is needed to guarantee repayment of creditors' receivables. One guarantee that is widely used in people's lives is fiduciary guarantee. Fiduciary guarantees come from the word *fides*, which means trust. In accordance with the meaning of this word, the legal relationship between the debtor as the Fiduciary Giver and the creditor as the Fiduciary Receiver is a legal relationship based on trust. Fiduciary Giver believes that Fiduciary Receiver are willing to return legal ownership to objects that have been handed over after the debt is repaid. On the contrary, the Fiduciary Receiver believes that the Fiduciary Giver will not abuse the collateral that is in his power.

"Fiduciary guarantee is a guarantee right for movable objects both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with Encumbrance Rights which remain in the control of the Fiduciary Giver, as collateral for certain debt repayments, which give priority to Fiduciary recipient of other creditors "(Article 1 point 2 of the Fiduciary Guarantee Act).

Fiduciary is the process of transferring legal ownership, while fiduciary guarantees are guarantees given in the form of fiduciary. The transfer of legal ownership here is not intended for the future, but only as guarantee for the debt, then this legal ownership will be returned to the Fiduciary Giver if the debtor has repaid the debt. So, legally the legal ownership are transferred from fiduciary giver to fiduciary receiver, while economically the object remains in the control of fiduciary giver.

Fiduciary guarantee occurs when it has been carried out through two stages. First, the stage of giving fiduciary guarantees is done by making a Fiduciary Guarantee Deed by a notary in Indonesian. This is to fulfill the principle of speciality in fiduciary guarantees. The Fiduciary Guarantee deed contains specific matters concerning the subject, object, guarantee value, object value of the guarantee, and receivables guaranteed by

fiduciary collateral. Second, the stage of registration of fiduciary guarantees in the Office of Fiduciary Registration (Article 11-14 of Act Number 42 of 1999 concerning Fiduciary Guarantees)[5]. The Fiduciary Registration Office is within the scope of the Ministry of Law and Human Rights. Fiduciary comes into existence on the same date as is noted in the Register of Fiduciary (Article 14 of the Fiduciary Guarantee Act). So, fiduciary guarantees existence since the registration of fiduciary guarantees was made. As proof of fiduciary guarantee, a Fiduciary Guarantee Certificate is issued. In the Fiduciary Guarantee Certificate there are rules that say "FOR JUSTICE BASED ON THE ALMIGHTY GOD."

At present, fiduciary guarantee registration can be done with an online system to further facilitate the registration process for fiduciary guarantees. This is done since the Circular of the Director General of General Legal Administration of the Ministry of Law and Human Rights of the Republic of Indonesia Number AHU-06.OT.03.01 concerning the Enactment of an Electronic Fiduciary Guarantee Registration Administration System, on March 5, 2013. This is then regulated by a Ministerial Regulation Republic of Indonesia Law and Human Rights Number 9 of 2013 concerning Enforcement of Electronic Administration System for Registration of Fiduciary Guarantees. Regarding the procedures for registering electronically fiduciary guarantees regulated in the Regulation of the Minister of Law and Human Rights Number 10 of 2013 concerning Procedures for Registering Electronic Fiduciary Guarantees. In 2015, the Republic of Indonesia Government Regulation Number 21 of 2015 was issued concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantee Deeds.

This fiduciary guarantee registration is carried out to fulfill the principle of publicity. By registering fiduciary guarantees, the public can find out that an object is burdened with fiduciary guarantees. This is to provide legal protection to the parties, namely Fiduciary Givers and Fiduciary Recipients. In addition, registration of this fiduciary guarantee is to protect the public, especially third parties who have an interest in the object of fiduciary collateral.

If the fiduciary guarantee has been deleted, it should end with a write-off of the fiduciary guarantee registration. Setiawan[6] said this term of write-off word was abolishment. This is to fulfill the publicity principle regarding the end of fiduciary guarantees. Thus the return of the rights of the fiduciary guarantee to the object of fiduciary guarantee which was previously submitted in confidence to the fiduciary recipient can be known to the public. In practice, often the fiduciary guarantee recipient does not write off fiduciary guarantee records after the debtor repays the debt. This can cause problems if the object owner will sell or guarantee objects. In the event that a fiduciary guarantee record is not carried out, there is still a record of the fiduciary guarantee. Therefore the public can assume that the object is still burdened with fiduciary guarantees. Therefore the object owner will find it difficult to sell the object. The owner of the object will also experience difficulties if he will guarantee the object of the fiduciary guarantee again, because fiduciary can occur again. Fiduciary repeated is a fiduciary guarantee carried out on the same object that was previously charged by fiduciary. The Fiduciary Guarantee Act Number 42 of 1999 prohibits repeated fiduciary[7] as mentioned in Article 17 of the Act, namely: "Fiduciary giver is prohibited from encumbering with a Fiduciary an object which already has a registered Fiduciary." Re-fiduciary cannot be done because objects has been burdened with fiduciary ownership not belonging to the fiduciary but the ownership rights have been transferred to the fiduciary receiver.

Failure to write off fiduciary guarantee after the debtor has paid off his debt raises problems for both parties and third parties and the general public. The problem that arises in this case is how the legal impacts of not writing off the fiduciary guarantee records after the debtor has paid off the debt. To analyze the problem of this research used the concept of basic legal ideas, the concept of balance, the concept of agreement, the concept of fiduciary guarantees.

II. WRITE-OFF OF FIDUCIARY GUARANTEE RECORDS IN INDONESIA

Fiduciary guarantees are guarantees of movable or immovable property that cannot be burdened with mortgages or mortgages by transferring ownership rights to objects based on trust provided that the object remains with the owner of the object, which gives the creditor preferential position. Thus this fiduciary guarantee contains elements:

1. Fiduciary guarantee is a guarantee right. As a guarantee, in this case the function is to guarantee the security of creditors' receivables.
2. Fiduciary objects include movable or immovable objects that cannot be burdened with encumbrance right or mortgages.
3. The absolute requirement for fiduciary guarantees is the transfer of ownership rights from fiduciary givers to fiduciary receivers. The transfer of ownership is not intended forever as the transfer of objects in the sale and purchase agreement.
4. Fiduciary guarantees preferential position to fiduciary receiver creditors.

To fulfill the principle of publicity, fiduciary guarantees must be registered. Fiduciary registration at the Fiduciary Registration Office can be known to the public. This is intended to protect the parties and

communities, especially third parties who have an interest in the object of fiduciary guarantee. Registration is also important to determine when fiduciary guarantees occur. With the occurrence of fiduciary guarantees, the fiduciary recipient creditor has the position of preferential and separatist. Preferred creditors are creditors who have the right to take precedence in repaying their receivables. Separate creditors are creditors who are not affected by the bankruptcy of debtors. Fiduciary registration is also important to avoid the re-fiduciary guarantee that is prohibited to do. The re-fiduciary guarantee prohibition is expressly regulated in Article 17 of the Fiduciary Guarantee Act.

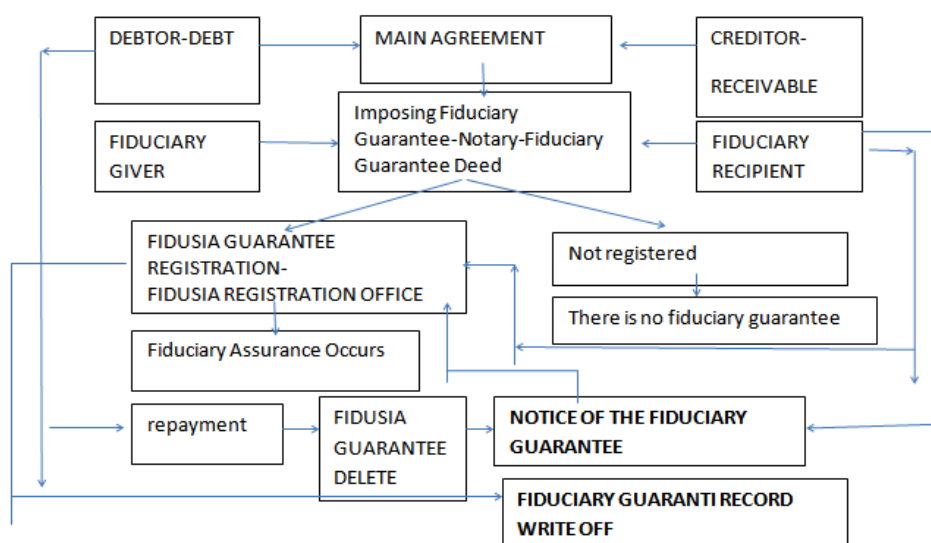
One of the main characteristics of fiduciary guarantee is the nature of *accessoir*. This means that fiduciary guarantees are an additional agreement from the principal agreement. The principal agreement is an agreement that raises receivables whose repayment is guaranteed under fiduciary guarantee. As a consequence as an *accessoir* agreement, the existence of a fiduciary guarantee depends on the principal agreement. Likewise, if the principal agreement ends, the fiduciary guarantee will end automatically. Therefore, if the debtor has paid off the debt, then the fiduciary guarantee is also automatically deleted. With the repayment of debtor debt, the debt in the principal agreement has been deleted (Article 25 paragraph (1) of the Fiduciary Guarantee Act). Therefore the additional agreement is also automatically deleted. Thus the ownership rights of objects must be returned to the owner of the object.

In the case of a fiduciary guarantee being deleted, the Fiduciary Receiver informs the Fiduciary Registration Office regarding the abolition of the Fiduciary Guarantee (Article 25 paragraph (3) of the Fiduciary Guarantee Act). This notification is carried out by attaching a statement regarding the abolition of debt. Based on the notification about write-off of the Fiduciary Guarantee, then the Fiduciary Registration Office crossed the Fiduciary Guarantee record from the Fiduciary Register Book. Furthermore, the Fiduciary Registration Office issues a statement stating that the relevant Fiduciary Guarantee Certificate is no longer valid.

At present, the notification of deletion of the Fiduciary Guarantee certificate is submitted through an electronic Fiduciary Guarantee registration system, as stipulated in Government Regulation Number 21 of 2015. Article 16 paragraph (2) Government Regulation Number 21 Year 2015 states that "In the case of Fiduciary Guarantee, then the Recipient Fiduciary, power of attorney or representative, must notify the Minister within a maximum period of 14 (fourteen) days from the date of deletion of the Fiduciary Guarantee. "Notification of abolition of Fiduciary Guarantee shall at least contain: a. information or reasons for abolition of Fiduciary Guarantee; b. number and date of the Fiduciary Guarantee certificate; c. name and place of residence of the notary; and D. date of deletion of Fiduciary Guarantee.

Based on the notification of fiduciary guarantee abolition then the Fiduciary Guarantee is removed from the list of Fiduciary Guarantees and the issuance of information on deletion states that the relevant Fiduciary Guarantee certificate is no longer valid. The process of Implementation and write-off of fiduciary collateral can be seen in chart 1

Chart 1
The Process of Implementing and fiduciary guarantee records Write-Off



Because of the obligation to register is to fulfill the principle of publicity, in the case of fiduciary collateral, deletion of fiduciary guarantee records should be carried out. This is so that the public knows that

they can easily know that an object is not burdened with fiduciary guarantees. The elimination of fiduciary collateral registration is a legal protection against fiduciary givers and the public, especially third parties. For the Fiduciary Giver, with the abolition of fiduciary guarantee registration, there is a legal certainty regarding the return of legal ownership to objects that were originally transferred in trust. Thus it will make it easier for the owner of the object if he will carry out legal actions against the object. The elimination of this fiduciary guarantee registration is also to protect third parties who have an interest in objects of fiduciary collateral. In practice it is still often not eliminated by fiduciary guarantees even though the debtor has repaid the debt. This is because there is no notification from the fiduciary regarding the debtor's debt repayment.

III. THE LEGAL IMPACTS OF NO WRITE-OFF OF FIDUCIARY GUARANTEE RECORDS AFTER DEBTOR DEBTS REPAYMENT

If the debtor has paid off the debt, the principal agreement guaranteed by fiduciary collateral is removed. In the event that the principal agreement is discharged, then under the law the additional agreement is automatically discharged. As a consequence of fiduciary guarantees that are *accessoir*, the abolition of the principal agreement results in the abolition of fiduciary guarantees. Thus, even though the fiduciary guarantee record has not been written off, if the debtor of the debt settlement results in automatic fiduciary guarantee removal. This can be seen from Article 25 Paragraph (1) of the Fiduciary Guarantee Act which states that "Fiduciary collateral is discharged due to the following: a. the elimination of debts guaranteed by fiduciaries; b. release of rights to Fiduciary Guarantees by Fiduciary Recipients; or c. destruction of objects that are objects of Fiduciary Guarantee " The write-off of fiduciary guarantee records is not one of the causes of the Abolishment of fiduciary guarantees, but the write-off remains important, especially for fiduciary givers and the public. If write-off is not done, it is as if fiduciary guarantees have not been discharged. Thus the principle of publicity regarding the abolishment of fiduciary guarantees has not been fulfilled. This can cause losses to the fiduciary giver as the owner of the object or a third party who has an interest in the object of the guarantee. As explained above, that in the implementation of fiduciary guarantees there is a transfer of ownership rights to the object of fiduciary guarantee from the fiduciary giver to the fiduciary receiver. If not written off the fiduciary guarantee record, the public will assume that the ownership of the object has not returned to the fiduciary giver. On the other hand, which is obliged to notify about the abolishment of fiduciary guarantee is the power fiduciary receiver or his representative. In general, after repayment of debt, there is the possibility of not notifying because they feel they no longer have an interest in the object of guarantee.

Losses incurred if not carried out write off for the fiduciary giver if in the case of going to do legal action against object of fiduciary guarantee, for example will sell to other party can experience difficulty, because other person assumes that there is still fiduciary guarantee. Another difficulty that arises is in the event that the object will be used for fiduciary collateral again, because there are still records of the object still burdened with fiduciary guarantees. This can be hampered by re-fiduciary guarantees that are prohibited in legal regulations. Article 17 of the Fiduciary Guarantee Law regulates the prohibition on re-fiduciary guarantees. In addition, Article 17 Paragraph (2) of Government Regulation Number 21 Year 2015 states that if the Fiduciary Receiver, his power or representative does not notify the deletion of the Fiduciary Guarantee as referred to in Article 16, the relevant Fiduciary Guarantee cannot be registered again.

The new fiduciary giver can refuse the item after the object is carried out by fiduciary guarantee records. The write-off of fiduciary guarantee records indicates that the principle of publicity has been fulfilled regarding the abolishment of fiduciary guarantees. Thus the public can know that the object is free from fiduciary guarantees. Thus, if he is going to buy the object, it will not cause problems. Likewise, if the object will be pledged as an object of fiduciary guarantee.

Conversely, if the record has not been written off, then it is re-registered, then in this case the fiduciary giver has made a fiduciary reprimand and criminal sanctions can be applied to him. If viewed from Article 25 paragraph (3) of the Fiduciary Guarantee Act, then the party is obliged to notify the Fiduciary Registration Office regarding the elimination of fiduciary guarantees as creditors as fiduciary recipients. This is to be carried out by the Office of Fiduciary Registration and then issued a statement stating that the fiduciary guarantee certificate is no longer valid as stipulated in Article 26 of the Fiduciary Guarantee Act. Thus, the party is obliged to notify the Fiduciary Registration Office regarding the elimination of fiduciary guarantees as creditors as fiduciary recipients. If in the future the debtor as a fiduciary is accused of repeating fiduciary for pledging the object, it is actually not a mistake of the fiduciary giver. This is the fault of the fiduciary recipient who did not notify the Fiduciary Registration Office about the removal of fiduciary guarantees so that fiduciary re-occurrence occurred.

The failure to write off the fiduciary guarantee raises legal uncertainty regarding the elimination of fiduciary guarantees and the failure to fulfill the principle of publicity regarding the abolition of fiduciary guarantees. This often occurs because of the negligence of the fiduciary recipient to inform him about the elimination of fiduciary guarantees. In addition, in the Fiduciary Guarantee Act there is no stipulation of

sanctions for creditors of fiduciary recipients who make no notification regarding the abolition of fiduciary guarantees. As a result, the fiduciary gets less legal protection.

In this regard, in the future it is necessary to develop a guarantee law in order to provide legal protection to the parties and the community in a balanced manner. Therefore, the following efforts are needed:

1. Regulations concerning the obligation of the party submitting the notification regarding the abolition of fiduciary guarantees to be carried out in writing the fiduciary guarantee record is the fiduciary receiver. The clause is added if no notification is made by the fiduciary receiver, the fiduciary may submit a notification regarding the abolition of the fiduciary guarantee. In addition, arrangements are needed regarding sanctions on fiduciary receiver if they do not apply for notification of the abolition of fiduciary guarantees.
2. It is recommended that a fiduciary guarantee implementation institution be formed with a membership consisting of elements from the government, business people, and the community. This is so that the implementation of fiduciary guarantees still pay attention to the balance of the relationship of the parties and fulfill the principles of guarantee law that are adjusted to the values that develop in the community.
3. Business actors should actually carry out fiduciary guarantees in accordance with applicable law and pay attention to the legal principles of guarantee.
4. There needs to be massive socialization to business people and the community so that they understand more about fiduciary guarantees

IV. CONCLUSION

Legal impacts on fiduciary guarantee registration that are not write off after debtors debt repayment, causing losses to the fiduciary giver and the community, especially the third party who has an interest in the object of fiduciary guarantee. The failure to write off this also does not fulfill the principle of publicity regarding the abolition of fiduciary guarantees, because the public cannot know with certainty the abolition of fiduciary guarantees, whereas in fact the repayment of debtors' debts is automatically fiduciary guarantee as an additional agreement. In addition, it can lead to legal uncertainty regarding the abolition of fiduciary guarantees, because there are still records regarding fiduciary guarantees at the Fiduciary Registration Office. As a result, if the fiduciary giver will carry out a legal act against the object of fiduciary collateral that has not been carried out deletion, it can experience difficulties both in terms of making the transfer and pledging the object. Therefore efforts are needed to provide legal protection to the parties and the community.

REFERENCE

- [1]. B. M. Maali and M. A. Atmeh, "Using social welfare concepts to guarantee Islamic banks' deposits," *Int. J. Islam. Middle East. Financ. Manag.*, vol. 8, no. 2, pp. 134–149, 2015.
- [2]. P. Crosetto and T. Regner, "It's never too late: Funding dynamics and self pledges in reward-based crowdfunding," *Res. Policy*, vol. 47, no. 8, pp. 1463–1477, 2018.
- [3]. S. Anis Mashdurohaturun, Gunarto, Bambang Suprabowo, "In Effect of fiduciary agreement of moving object as a guarantee against obligation-violating debtor," *Int. J. Humanit. Soc. Sci. Res.*, vol. 3, no. 7, pp. 39–45, 2017.
- [4]. S. P. Bhanot, "Cheap promises: Evidence from loan repayment pledges in an online experiment," *J. Econ. Behav. Organ.*, vol. 140, pp. 246–266, 2017.
- [5]. Siti malikhatun Badriyah, "Dilemma's Use of Leasing Agreement Object as Fiduciary Guarantee Object," in *International Conference on Law, Business, and Social Justice (IC-LBSJ 2016)*, "Encouraging a Better ASEAN Community Relationship, 2016.
- [6]. I. K. Setiawan, "The Abolishment of Fiduciary on the Object of Fiduciary in Denpasar City," vol. 5, no. 2, pp. 121–126, 2018.
- [7]. I. Komang Sugiantara Artha Putra and H. Abdullah Idrus, "Protection of Parties Against the Destruction of Fiduciary Assurance Objects in Financing Agreements At Financing Institutions (Bca Finance Study)," *Int. J. Humanit. Relig. Soc. Sci.*, vol. 3, no. 2, p. 2017, 2017.

Siti Malikhatun Badriyah " The Legal Impacts of No Write-Off of Fiduciary Guarantee Records after Debtor Debts Repayment" *Quest Journals Journal of Research in Humanities and Social Science* , vol. 07, no. 6, 2019, pp. 38-42