



Legal Risk Transformation: Loss of Creditors' Enforcement Rights of Third-Party Fiduciary Guarantees Objects Due to Lack of Registration

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Abstract

This study analyzes the shift in legal risk resulting from negligence in registering fiduciary guarantees and the superiority of protection for bona fide third parties. The primary objective is to examine how a creditor's failure to register a fiduciary guarantee transforms property rights into personal claims against the debtor, as well as to analyze how the protective principle of Article 1977 of the Civil Code nullifies the creditor's right of execution under a fiduciary guarantee deed. The research method used is normative legal analysis, employing a literature review approach to examine relevant legislation, legal doctrine, and case law pertaining to fiduciary collateral, property law, and third-party protection. Primary and secondary data are analyzed qualitatively to construct a coherent legal argument. The research findings indicate that the registration of fiduciary collateral is crucial in creating in rem property rights, providing executory power and enforceability against third parties. Failure to register results in the degradation of the creditor's rights to mere personal claims, which are vulnerable to legal risks. Furthermore, the existence of Article 1977 of the Civil Code effectively protects bona fide third parties who acquire movable property subject to fiduciary collateral. This protection nullifies the creditor's right to execute on the property, forcing the creditor to seek only personal compensation from the debtor. This underscores that without valid registration, creditors face significant risks, highlighting the importance of compliance with registration procedures for legal certainty.

Keywords: Fiduciary Security; Registration; Legal Risks; Third Parties in Good Faith.

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INTRODUCTION

Modern economic activities are highly dependent on the availability of credit facilities as a driving force for business transactions and the fulfillment of people's consumptive needs. Legal certainty in every credit agreement, for loan repayment is an essential factor that is guaranteed through a guarantee institution.¹ One of the most vital and popular instruments of guarantee in the Indonesian legal system,² especially for movable objects, is a fiduciary guarantee. The presence of Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Guarantee Law) is designed to provide strong legal protection for creditors, by providing preferential rights (the right to precedence) over the repayment of receivables to other creditors.

¹Asril, Juli. "Beberapa Permasalahan Terkait Hak Tanggungan Sebagai Lembaga Jaminan Atas Tanah." *Jurnal Ilmiah Manajemen, Ekonomi, & Akuntansi (MEA)* 4 no. 2 (2020): 492-510.

²Ferry Gunawan Christy,. "Tantangan Profesi Hukum dalam Melindungi Hak Cipta Sebagai Jaminan Kredit Perbankan Di Era Digital." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 13 no. 2 (2024): 165-187

The core of the fiduciary guarantee power lies in the principle of publicity which is realized through the obligation to register a fiduciary guarantee deed at the Fiduciary Registration Office. As explained by Sri Soedewi Masjchoen Sofwan in his book *Guarantee Law in Indonesia*, this registration gives birth to material rights (*zakelijk recht*) for creditors. This material right is *erga omnes* (applicable to anyone) and has the characteristics of *droit de suite*, which is the right that continues to follow the object of security in the hands of whoever the object is.³ With the issuance of a Fiduciary Guarantee Certificate, the deed has executory power equivalent to a court decision that has permanent legal force, allowing creditors to execute quickly and efficiently if the debtor defaults.

However, in practice in the field, the ideal ideals of the Fiduciary Guarantee Law are often not realized. The phenomenon where financing institutions (creditors) do not register a fiduciary guarantee deed is still rampant. Various mass media such as *Hukumonline.com* and *Kontan.co.id* often report on disputes arising from this practice, where finance companies rely on deeds under hand under the pretext of cost and time efficiency.⁴ This practice consciously or unconsciously creates a legal vacuum that is detrimental to the position of the creditor himself. When the fiduciary guarantee deed is not registered, the creditor's rights are never transformed into material rights. Consequently, these rights remain at the level of personal rights (individual rights) which are only binding on the parties who make them (debtors and creditors).

This condition triggers a significant shift in legal risks. The creditor's failure to register a fiduciary guarantee effectively shifts the risk from the debtor to the creditors' own shoulders. Rights that should be strong and privileged, are now degraded to just ordinary personal billing rights. As explained in various civil law literature, for example by Prof. Subekti in his book *Principles of Civil Law*, personal rights do not give the authority to reclaim objects from third parties who control them without rights, but only provide the right to demand the fulfillment of achievements from the debtor.⁵ This is the starting point of the problem to be examined: how does the creditor's negligence in registering a fiduciary guarantee lead to a shift in legal risk, from material rights to personal claims to debtors?

The complexity of this problem reaches its peak when the debtor commits another legal act, namely transferring or selling the object of fiduciary collateral to a third party. This is where there is a sharp clash of legal norms. On the one hand, the creditor feels that he still has the right to the object of the guarantee based on the fiduciary deed under hand. On the other hand, a third party emerges as a buyer in good faith who is protected by one of the strongest principles in the law of movable objects,⁶ namely Article 1977 of the Civil Code (KUHPerdata). This article states that "whoever has possession of a movable object is considered to be the owner of it" (*bezit als volkomen titel*), as long as the possession is obtained in good faith.

An article in the *Journal of Notarial Law* by Aditya Putra (2023) highlights that the protection of buyers in good faith is often prioritized by the courts to maintain the stability of legal traffic and transactions. As a result, the creditor's right of execution against the collateral object becomes completely paralyzed. Creditors' attempts to forcibly withdraw

³ Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia: Pokok-Pokok dan Jenis-Jenisnya*, (Yogyakarta: Liberty, 2000), p. 55.

⁴ "OJK Ingatkan Kembali Pentingnya Pendaftaran Jaminan Fidusia bagi Perusahaan Pembiayaan," *kontan.co.id*, Accessed 28 Juli 2025

⁵ Aditya Putra, "Problem Eksekusi Jaminan Fidusia Bawah Tangan dalam Sengketa dengan Pihak Ketiga," *Jurnal Hukum Notariil*, 8 no. 1, (2024): p. 112.

⁶ Mumek, Regita A. "Hak-Hak Kebendaan Ditinjau Dari Aspek Hukum Perdata." *Lex Administratum*, 5 no. 2 (2017): p.22

the object of collateral from a third party will face strong legal resistance, since the third party is protected by the principle of *bezit* whose position is recognized by law.⁷ So the fiduciary guarantee deed under the hand becomes powerless. This raises a second research question: how does the principle of control protection in Article 1977 of the Civil Code lead to the cancellation of the creditor's right of execution on the fiduciary guarantee deed under hand? At the same time, this is the starting point of the problem to be examined: how does the creditor's negligence in registering a fiduciary guarantee cause a shift in legal risk, from material rights to personal claims to debtors? Based on the above description, this study is crucial to analyze in depth the shift in legal risks experienced by creditors due to their own negligence, as well as to examine how the superiority of legal protection for well-intentioned third parties effectively paralyzes creditors' right of execution.

METHODS OF THE RESEARCH

This research is included in the category of normative legal research (normative juridical). It is called normative legal research because its main focus is to study and analyze law from its internal perspective as a system of norms. This research will examine the applicable laws and regulations (*das sollen*) to be applied to specific legal issues that have been formulated, namely regarding risk shifts and loss of creditors' execution rights due to the non-registration of fiduciary guarantees. This type of research was chosen because the problems raised are entirely in the realm of legal dogmatics,⁸ which demands the interpretation and analysis of legal principles, rules, and doctrines, not empirical fact testing in the field. The nature of this research is descriptive-analytical. The descriptive nature is reflected in the effort to describe systematically, factually, and accurately the legal norms contained in laws and regulations related to fiduciary guarantees (Law Number 42 of 1999) and protection for good-faith rulers (Article 1977 of the Civil Code). Furthermore, analytical nature is used to conduct an in-depth analysis of these legal materials, connect one norm to another, and interpret them to be able to answer the formulation of the problem of how the legal risk shifts occur and how the creditor's right of execution becomes null and void in disputes with third parties.

RESULTS AND DISCUSSION

A. Shifting Legal Risks Due to Registration Negligence: Transforming Property Rights into Personal Rights

The registration of property rights in the modern legal system plays a crucial role in creating legal certainty and protecting the interests of the parties. This principle of *registration*, particularly in land or property law, serves as an instrument of publicity that makes the right defensible against third parties. However, negligence or failure to carry out the registration obligation can trigger a fundamental shift in the legal status of a right, changing it from a material right (*in rem*) to a personal right (*in personam*)⁹. This shift is not

⁷ Ruff, Elis, Merry Tjoanda, and Novyta Uktolseja. "Kedudukan Bezitter Terhadap Objek Warisan." *PATTIMURA Law Study Review*, 2 no. 2 (2024): 195-203.

⁸ Suhaimi, Suhaimi. "Problem Hukum Dan Pendekatan Dalam Penelitian Hukum Normatif." *Jurnal Yustitia* 19 no. 2 (2018).

⁹ Imanda, Nadia. "Lahirnya Hak Tanggungan Menurut Peraturan Pemerintah Agraria Tentang Pelayanan Hak Tanggungan Terintegrasi Secara Elektronik." *Jurnal Notarie*, 3 no. 1 (2020): p. 151-164., Arba also explained that registration under land law serves as publicity and a strong means of proof, whereby without registration, land rights cannot be fully upheld against third parties. Muhammad. Arba, *Hukum Agraria Indonesia*. (Jakarta: Sinar Grafika, 2021). p. 87-88.

just an administrative issue, but has profound legal implications related to the legal risks carried by the parties.

Conceptually, material rights are rights that are inherent in an object and give direct power over the object to its holder, which can be defended against anyone (the principle of *droit de suite* and *droit de preference*)¹⁰. A classic example is the title to land, which, once registered, provides legal certainty to the owner and can be transferred and encumbered with other rights. Registration serves as a formal legitimacy that allows the right to be widely recognized and minimizes disputes.

However, when registration is ignored, especially in transactions that are supposed to be subject to the registration regime, the status of such rights becomes vulnerable. This negligence may result in a right that should be essentially a material right, not having adequate publicity power. As a result, these rights lose their *in rem* nature and are degraded to mere personal rights.¹¹ Personal rights are rights that can only be claimed or defended against certain parties who are bound by a specific agreement or legal relationship. Examples are lease rights that have not been registered as property rights, or land sale and purchase agreements that have not been followed by the name of the certificate. Such personal rights cannot be defended against a third party in good faith, and the rightholder has only claims against the party with whom he entered into an agreement.

This transformation significantly shifts legal risks. In registered property rights, the risk of disputes and third-party claims is relatively low due to the publicity and legal certainty provided by registration. Conversely, when these rights are degraded to personal rights due to registration negligence, the legal risk increases drastically. The rightholder may face a situation where a third party acquires a legitimate right to the same thing through a valid and registered transaction, in such a situation, the principle of who registers first, is the one who is entitled (principle *first in time, first in right* or *qui prior est tempore potior est jure* in the context of registration) will apply, and the holder of personal rights will lose his claim to the property, even though he may have incurred costs or committed other legal acts.¹²

Further, failure to register can also cause problems in terms of execution or legal protection. In the event of a dispute, proving unregistered rights becomes more complex and risky. A court order may only order the payment of damages, not possession of the property, especially if the property has been transferred to a reputable and registered third party. This shows that without a valid registration, the legal protection of property rights becomes limited and moves from *in rem* protection to *in personam* claims for damages.

B. Superiority of Protection of Third Parties in Good Faith and Cancellation of Creditors' Execution Rights

On the one hand, there is a clash of norms between the claim of the creditor holding the deed under hand and the rights owned by a third party as the purchaser, where the creditor bases his claim on a fiduciary agreement, while on the other hand, a third party is protected by a strong legal principle in movable property law. Fiduciary in the context of guarantee law is the transfer of ownership rights of an object on the basis of trust, but the physical control of the object remains with the fiduciary (debtor). Fiduciary agreements are often made in the form of a deed under hand, which is valid and binding on the parties who made

¹⁰ Mariam Darus Badruzaman, *Sistem Hukum Benda Nasional*. (Bandung: Alumni, 2022). p. 15-18

¹¹ Mariam Darus Badruzaman, *Aneka Hukum Bisnis*, (Bandung: Alumni, 2007), p. 121-123.

¹² Akmaluddin, Syahputra, and Khalid . *Hukum Perdata Indonesia*, (Jakarta: Citapustaka Media, 2012), p. 136-137.

it, namely the debtor and the creditor. This deed under hand is the basis for creditors to claim the right of execution on the pledged property if the debtor defaults. However, the effectiveness of this underhanded deed in providing protection to creditors becomes very vulnerable when dealing with a third party in good faith who obtains the object.

A clash of norms arises when the object that is the object of fiduciary guarantee with the deed under hand is then sold or transferred to a third party. This third party, who is not aware of the existence of a previous fiduciary agreement and purchased the object legally and reasonably, is considered a third party in good faith, in the law of movable objects, there is a very strong legal principle, namely the principle of *nemo plus juris ad alium transferre potest quam ipse habet* (no one can transfer rights more than he has) and the principle of protection of third parties in good faith which is based on Article 1977 of the Civil Code (KUHPerdata). Article 1977 of the Civil Code states that "whoever controls movable goods that are not in the form of interest or receivables that are not designated, is considered to be the owner." This principle creates a presumption of ownership for the party who controls the movable object physically and in good faith.

When there is a transaction of buying and selling movable objects that are the object of fiduciary under hand, and the object is transferred to a third party in good faith, then the superiority of the protection of a third party in good faith will emerge. Although the creditor has a claim under a fiduciary agreement, the claim, which is only supported by a deed under hand and without perfect registration, often cannot override the right acquired by a third party who has met the conditions of good faith and physical possession of the property, in many jurisprudence and legal doctrines, the right of a third party in good faith to acquire ownership of the movable property takes precedence over the claim of the creditor who has acquired possession of the movable property. not equipped with a valid fiduciary guarantee registration¹³.

The implication is the cancellation of the creditor's right of execution against the pledged object. Although the creditor has a fiduciary agreement, the absence of a perfect fiduciary registration means that the right of guarantee does not have absolute *droit de suite* force against a third party. In other words, the creditor cannot "follow" or "reclaim" the pledged object from the hands of a third party in good faith. The creditor's right of execution for the object becomes lost, and the creditor's claim will only turn into a personal claim against the defaulting debtor, namely a claim to demand compensation or debt repayment from other debtor assets, not from the object that has been transferred to the third party. This situation highlights the importance of fiduciary guarantee registration in accordance with Law Number 42 of 1999 concerning Fiduciary Guarantees. The registration of fiduciary guarantees at the Fiduciary Registration Office will provide executory power and practicability to third parties, so that creditors have a strong right to execute the collateral even if the object has changed hands. Without registration, an underhand fiduciary agreement is only binding on the parties and does not provide adequate protection for the rights of a third party in good faith,¹⁴ so as to shift the legal risk completely to creditors.

The creditor's negligence to register the fiduciary guarantee at the Fiduciary Registration Office, as required by Law Number 42 of 1999 concerning Fiduciary Guarantee,

¹³ Sutiyo, Bambang. "Penafsiran Kontrak Menurut Kitab Undang-Undang Hukum Perdata dan Maknanya Bagi Para Pihak yang Bersangkutan." *Jurnal Hukum Ius Quia Iustum* 20 no. 2 (2013): 207-233.

¹⁴ Nanda Sahputra Umara, "Pemisahan Pertanggungjawaban Perampasan Barang Dalam Penguasaan Pihak Ketiga Yang Beritikad Baik Dalam Putusan Tindak Pidana Korupsi." *Jurnal Hukum Novelty* 8 no. 2 (2017): 232-251.

fundamentally shifts the legal risk carried by the creditor. Under ideal conditions, a registered fiduciary guarantee would give the creditor property rights. This means that the creditor has an inherent right to the pledged object, which can be defended against anyone (in rem), even if the object changes hands. Registration provides publicity, executory power, and priority to creditors, thereby minimizing the risk of disputes and facilitating execution if the debtor defaults. However, when registration is ignored and the fiduciary guarantee is based only on the underhand deed, the creditor's right to the object is degraded to a mere personal right of collection to the debtor. This means that the creditor can only demand debt repayment or compensation from the debtor personally, and does not have a strong claim to the pledged object if the object is no longer in the debtor's possession or has been transferred to a third party. Without registration, the material rights that would otherwise attach to the fiduciary guarantee seem to "vanish" and turn into weaker contractual claims, leaving creditors in a vulnerable position to the risk of losing access to collateral assets. The risk shift described above is further exacerbated by the principle of protection against control,¹⁵ as stipulated in Article 1977 of the Civil Code (KUHPercivil). This article states that "whoever controls movable goods that are not in the form of interest or receivables that are not on design, is considered to be the owner." This principle becomes a fortress for a third party in good faith who acquires movable objects that are the object of unregistered fiduciary guarantees. When the debtor sells or transfers the object pledged by the fiduciary under hand to a third party in good faith – meaning that the third party is not aware of the fiduciary guarantee and legally obtains the object – then the protection of Article 1977 of the Civil Code will apply. The third party, as the physical and good-faith owner of the property, is legally considered the rightful owner. As a result, the creditor's right of execution for the pledged object becomes null and void. Although the creditor has a fiduciary agreement, the absence of registration makes his rights incapable of overriding the rights of third parties protected by the principle of *nemo plus juris* (no one can transfer rights more than he has) which is reinforced by the presumption of ownership of Article 1977 of the Civil Code. The creditor can no longer claim or reclaim the object from a third party, and the only legal recourse left is to sue the debtor personally for default.

CONCLUSION

Fiduciary guarantee registration is key to transforming creditors' rights from mere vulnerable personal claims to strong and defensible property rights against third parties, thereby minimizing legal risks and ensuring the effectiveness of execution. Without registration, the creditor is in a very weak position, where his right of execution can be nullified by legal protection against a third party in good faith.

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¹⁵ Ayustini, Megawati Putri, Abrar Saleng, and Ilham Arisaputra. "Perlindungan Hukum terhadap Hak Penguasaan Tanah Ornamen yang Dialihkan oleh Pihak Lain di Kabupaten Gowa." *UNES Law Review* 6 no. 1 (2023): 206-218.

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