

## **Transfer of Fiduciary Collateral Objects by Debtors Through Pawn without Creditor's Consent: A Case Study of District Court Decision No. 1012/Pid.Sus/2024/PN TJK**

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### **Abstract**

*This study examines the practice of transferring fiduciary collateral objects by debtors through pawning without obtaining the creditor's consent, with a particular focus on the District Court Decision of Tanjung Karang Number 1012/PID.SUS/2024/PN TJK. The increasing economic demands of society have encouraged the use of credit facilities from financing institutions, which commonly rely on fiduciary security as regulated under Law Number 42 of 1999. This instrument grants privileged rights to the fiduciary recipient. However, in practice, debtors frequently commit default by transferring the collateral object without the creditor's written consent, thereby violating the provisions of Article 23 paragraph (2) of the Fiduciary Law. The purpose of this research is to analyze the legal provisions regarding the transfer of fiduciary collateral objects without creditor approval under Law Number 42 of 1999, as well as to examine the debtor's legal liability in the case involving PT Adira Dinamika Finance Tbk. The research method employed is normative juridical, using statutory, case, and analytical approaches. Primary data sources consist of Law No. 42 of 1999 and the Indonesian Civil Code, supported by secondary data from academic literature and legal journals. The data were analyzed using a descriptive qualitative method. The findings indicate that the transfer of fiduciary collateral objects without written approval constitutes a criminal act, punishable by imprisonment of up to two years and a fine of Rp50,000,000, as stipulated in Article 36 of the Fiduciary Law. In the case of defendant Rio Aditia, it was proven that default and unlawful conduct occurred, resulting in financial losses for PT Adira Dinamika Multi Finance, Lampung Branch. Therefore, the creditor is entitled to claim compensation and execute the fiduciary collateral object based on the principle of *droit de suite*.*

**Keywords:** Fiduciary Collateral, Transfer of Objects, Creditor, Debtor

### **A. Introduction**

The needs of the community, both in the household and business sectors, are increasing along with the times. The growth in demand for goods and services does not always coincide with the increase in income, creating an imbalance between economic capabilities and the needs that must be met. Because not all households and business actors are able to meet

their needs with cash payments, the use of credit facilities is one of the solutions. Through financing institutions, people can obtain consumer goods with certain conveniences that are even looser than banking services, known as consumer finance institutions.<sup>1</sup>

Financing institutions are a form of business in the non-bank financial sector that plays an important role in supporting financing and managing development funds in Indonesia.<sup>2</sup> The activities of this institution are carried out through the provision of funds, capital goods, and consumption needs, without collecting funds directly from the public in the form of deposits, savings, current accounts, or bills of payment.

Although they are both engaged in the financial sector, the activities of finance companies have fundamental differences from banking. Banks are allowed to raise funds directly from the public, while finance companies do not have the authority to withdraw such funds. Meanwhile, in terms of distributing funds or financing to customers, the mechanism used by the two is basically similar. However, the main difference lies in the approach strategy and the level of speed of service provided to customers.<sup>3</sup>

The existence of consumer financing institutions in Indonesia began in 1988, marked by the issuance of Presidential Decree Number 16 of 1988 concerning Finance Institutions, as well as the Decree of the Minister of Finance Number 1252/KMK.013/1988 which regulates the provisions and procedures for the implementation of financing institutions. Furthermore, based on Article 2 of the Regulation of the Minister of Finance Number 84/PMK.012/2006, a finance company is defined as a business entity that is specifically established to carry out leasing activities, factoring, consumer financing, and other similar businesses.<sup>4</sup> What is meant by financing is the provision of funds or bills that are equivalent to it, which are given based on an agreement between the bank and other parties, where the recipient of the financing is obliged to return the funds or bills within a certain period of time accompanied by rewards or revenue sharing.<sup>5</sup>

In terms of fiduciary materiality, the provisions of the agreement and all its legal consequences must not conflict with Law Number 42 of 1999 concerning Fiduciary Guarantees which applies to financing companies. Consumer financing agreements are basically based on the principle of freedom of contract as a legal basis for the parties. Therefore, both creditors and debtors must be more careful when signing agreements so as

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<sup>1</sup> Danny Robertus Hidayat, "Legal Protection for Creditors with Guarantees for the Object of Guarantee of the Same Dependent Rights," *DiH: Journal of Law* Vol.14, no. No.7 (2018): pp.1-16, <https://doi.org/DOI.10.5281/zenodo.1188346>.

<sup>2</sup> Ahfisrkhmis Sulaeman et al., "Analysis of Non-Bank Financial Institutions and Their Role in the Economy," *Journal of Indonesian Economic Education* Vol.2, no. No.2 (2020): pp.142-154, <https://doi.org/https://doi.org/10.17509/jpei.v2i2.50730>.

<sup>3</sup> Sri Yunarsih Sallo, "Legal Protection for Creditors on the Object of Fiduciary Guarantee Transferred by the Debtor to a Third Party," *Dinamika* Vol.25, no. No.12 (2019): p.13.

<sup>4</sup> Gelnn Divy Parrangan, "The Function of Financial Services Authorities in Protecting the Interests of Consumers in Financing Agreements," *Lex Administratum* Vol.6, no. No.4 (2018): p.11, <https://ejournal.unsrat.ac.id/index.php/administratum/article/view/24532>.

<sup>5</sup> Sallo, *Loc., cit.*

not to cause losses to either party in the future. In addition, each party is also obliged to uphold the principle of justice and carry out their respective rights and obligations.<sup>6</sup>

At the beginning of its development, fiduciary was born from an agreement based on mutual trust. Over time, this practice requires legal certainty to ensure the protection of the interests of the parties. Regulations regarding fiduciary guarantees are then outlined in Law Number 42 of 1999 concerning Fiduciary Guarantees.<sup>7</sup> Through this provision, the fiduciary obtains privileges in the form of a position that takes precedence over other creditors. The implementation of fiduciary guarantees is carried out by the debtor or fiduciary through the *constitutum possessorium mechanism*, which is the handover of ownership rights over the object without being accompanied by its physical transfer, to the creditor as the fiduciary recipient. This kind of guarantee pattern in practice has the potential to create opportunities for the transfer of the object of fiduciary guarantees.<sup>8</sup>

Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees basically prohibits the transfer of the object of fiduciary guarantees in the form of personal property. However, this provision provides an exception if the debtor obtains written approval from the creditor first. This provision was born because in practice there are often defaults committed by the debtor, which ultimately harms the interests of creditors related to the transfer of the object of fiduciary guarantee.<sup>9</sup>

The term "transfer of ownership rights" refers to the process of transferring property rights from the fiduciary to the fiduciary based on trust, provided that the object remains in the control of the fiduciary.<sup>10</sup> In essence, fiduciary is a mechanism for transferring property rights from the debtor as the original owner to the creditor, which is sourced from the principal agreement in the form of a debt-receivables agreement. However, all that is transferred is his rights through *juridische levering*, so that the creditor acquires these rights solely on the basis of trust as collateral for his receivables. Meanwhile, the object that is the object of fiduciary remains in the hands of the debtor, but its control status changes, no

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<sup>6</sup> Amrun Kahar et al., "Legal Analysis of Consumer Financing/Hire Purchase Agreements Between Electronic Credit Business Actors and Furniture Against Consumers Not Included in Fiduciary Agreements," *Journal of Citizenship* Vol.7, no. No.1 (2023): pp.1216-1228, <https://doi.org/https://doi.org/10.31316/jk.v7i1.5335>.

<sup>7</sup> Vivi Lia Falini Tanjung, "The Implementation of General Principles of Material Law in Law Number 42 of 1999 concerning Fiduciary Guarantees," *De Lega Lata: Journal of Legal Sciences* Vol.2, no. No.1 (2017): pp.213-235, <https://doi.org/https://doi.org/10.30596/dll.v2i1.1147>.

<sup>8</sup> Ni Kadek Diah Feryantini, Komang Febrinayanti Dantes, and Muhamad Jodi Setianto, "Juridical Review of the Implementation of Fiduciary Guarantee Execution According to Fiduciary Law Number 42 of 1999," *Journal of the Judiciary Community* Vol.5, no. No.1 (2022): pp.220-229, <https://doi.org/https://doi.org/10.23887/jatayu.v5i1.45944>.

<sup>9</sup> Ibnu Iyadh, "Comparison of the Transfer of Fiduciary Guarantee Objects in Law Number 42 of 1999 concerning Fiduciary Guarantees and Fatwa Dsn-MUI/Number 68/Dsn-MUI/III/2008," *"Dharmasisya" Journal of the Master of Law Program FHUI* Vol.2, no. No.3 (2023): p.21, <https://scholarhub.ui.ac.id/dharmasisya/vol2/iss3/21>.

<sup>10</sup> Rachmadi Usman, "The Meaning of the Transfer of Ownership Rights of Fiduciary Guarantee Objects on the Basis of Trust," *Ius Quia Iustum Law Journal* Vol.28, no. No.1 (2021): pp.139-162, <https://doi.org/https://doi.org/10.20885/iustum.vol28.iss1.art7>.

longer as *an owner* or *bezogter*, but as a *detentor* or *holder* who acts on behalf of the creditor as *the owner*.<sup>11</sup>

In fiduciary encumbrance on objects in the form of movable and immovable objects that can be traded, the debtor is in the position of the fiduciary, while the creditor acts as the fiduciary recipient. The fiduciary scheme provides benefits for both parties, where the object used as collateral remains in the control of the debtor as the owner, while the creditor does not physically control the object. Thus, what happens is the transfer of ownership rights without being followed by the physical handover. In contrast to pawning, which demands the transfer of control of the object, so that the pawned goods can no longer be used by the owner.<sup>12</sup> In the fiduciary system, the legal force over the object of the guarantee lies in its registration. If the fiduciary guarantee is not registered, then the principle of publicity as a form of announcement to a third party is not fulfilled. On the other hand, the object of fiduciary guarantees often faces obstacles, such as being difficult to resell if it has been damaged, physically defective, or unfit for use. Another problem that often arises in the community is that there are still many debtors as fiduciaries who do not understand the provisions prohibiting the transfer of collateral objects without written consent from creditors.

In the civil context, if the debtor transfers the object of fiduciary guarantee, he may be subject to the obligation to pay compensation in amount adjusted to the delay in payment of installments. The form of compensation includes the repayment of all debt obligations to creditors. If the debtor does not carry out these obligations, the creditor has the right to execute the object of fiduciary guarantee based on the fiduciary certificate he has.<sup>13</sup> In addition to civil sanctions, debtors also have the potential to be subject to criminal sanctions as stipulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees, which states that fiduciaries who transfer, mortgage, or lease fiduciary guarantee objects as referred to in Article 23 paragraph (2) without the written consent of the fiduciary recipient, can be sentenced to a maximum of two years in prison and/or a maximum fine of Rp50,000,000,- (fifty million rupiah).<sup>14</sup> Thus, it is clear that the act of transferring the object of fiduciary guarantee to another party is a criminal category, because legally the legal owner of the object is the fiduciary until all obligations of the debtor in the principal agreement are declared in pay.

In daily life, there are still often cases of transferring the object of fiduciary guarantee to a third party without the consent of the creditor as the fiduciary. This action is generally triggered by various factors, including the debtor's need to obtain additional funds in order to meet monthly installment obligations, as well as the debtor's lack of understanding

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Setianto Trimulyo, "The Implementation of Consumer Financing Agreements and the Implications of Default on the Guarantee Object (Case Study at PT. Oto Multiartha Mataram Branch)," *Journal of Ius Law and Justice Studies* Vol.5, no. No.1 (2017): pp.84-109, <https://doi.org/https://doi.org/10.29303/ius.v5i1.432>.

<sup>14</sup> Sallo, "LEGAL PROTECTION OF CREDITORS FOR THE OBJECT OF FIDUCIARY GUARANTEE TRANSFERRED BY THE DEBTOR TO A THIRD PARTY," *Loc., cit.*

regarding the prohibition of transferring the object of fiduciary guarantee without the creditor's consent. However, the most dominant reason is usually related to the debtor's inability to pay off installments, thus encouraging them to seek funds by transferring the object of credit guarantee to another party.<sup>15</sup>

Although the mechanism and provisions regarding the transfer of Fiduciary Guarantees have been clearly regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees, the reality is that problems still often arise in the field. One of them is the practice of transferring the object of Fiduciary Guarantee without the permission of the creditor, which is expressly prohibited as stated in Article 23 paragraph (2) of the law. The problem is even more complicated when the debtor defaults, because if the object of the guarantee has been transferred to a third party, the execution process becomes difficult to implement.<sup>16</sup>

Penelitian mengenai perlindungan hukum terhadap kreditur dalam konteks jaminan fidusia telah banyak dilakukan dengan fokus dan sudut pandang yang beragam, diantaranya:

The research conducted by I Made Suarja, Simon Nahak, and I Ketut Widia with the title "*Legal Protection for Creditors of Fiduciary Guarantee Holders who Transfer Hand*" emphasizes the aspect of the execution of fiduciary guarantees as stipulated in Article 29 of Law No. 42 of 1999.<sup>17</sup> The results of the study show that execution can only be carried out legally if the fiduciary guarantee deed is made notarily and registered with the Fiduciary Registration Office. If not, then the execution must be carried out through a court decision. This study further highlights the normative weaknesses related to the mechanism of execution of fiduciary guarantees and the legal protection of creditors if the object of the guarantee is transferred to a third party without consent.

Furthermore, research by Abdul Hariss, Nur Fauzia, and Gladys Amanda entitled "*Legal Protection for Recipients in the Event of Fiduciary Guarantee Objects That Have Not Been Registered Without the Consent of the Recipient*" discusses the issue of transferring fiduciary guarantee objects that have not been registered.<sup>18</sup> The results of the study confirm that the transfer of the object of fiduciary guarantee without the approval of the creditor is an illegal act according to the law and can give rise to civil and criminal liability for the debtor. This research focuses on the legal validity and protection of creditors when the administrative requirements of registration have not been met.

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<sup>15</sup> Husnul Hamka, "Criminalization of the Transfer of Fiduciary Guarantee Objects Without the Consent of the Fiduciary Beneficiary," *Philosophia Law Review* Vol.3, no. No.1 (2023): pp.1-13, <https://doi.org/https://doi.org/10.56591/pilar.v3i1.19320>.

<sup>16</sup> Widya Astuti, "Legal Protection of Creditors for the Transfer of Fiduciary Guarantee Objects by Debtors in the Perspective of Law No. 42 of 1999 concerning Fiduciary Guarantees and Sharia Maqashid (Case Study at PT. ADIRA Dinamika Multi Finance Tbk. Cirebon Branch)" (IAIN Syekh Nurjati Cirebon, 2024), p.5.

<sup>17</sup> I Made Suarja, Simon Nahak, and I Ketut Widia, "Legal Protection for Creditors of Fiduciary Guarantee Holders Who Transfer Hand," *Journal of Legal Construction* Vol.1, no. No.2 (2020): pp.431-435, <https://doi.org/https://doi.org/10.22225/jkh.1.2.2628.431-435>.

<sup>18</sup> Abdul Hariss, Nur Fauzia, and Gladys Amanda, "Legal Protection for Beneficiaries in the Event of Unregistered Fiduciary Guarantee Objects Without the Consent of the Beneficiary," *Legality: Legal Journal* Vol.15, no. No.2 (2023): pp.252-264, <https://doi.org/http://dx.doi.org/10.33087/legalitas.v15i2.511>.



Then, a study by Adinda Crysanti Meyda et al entitled "*Analysis of Fiduciary Guarantee Regulations to Achieve Legal Protection for Creditors with the Object of Two Motor Vehicle Collateral*" specifically examined the application of Law No. 42 of 1999 in the financing of two-wheeled motor vehicles.<sup>19</sup> This research emphasizes that fiduciary guarantees provide legal certainty for creditors in securing their rights when debtors are in default, as well as explaining alternative dispute resolution that can be done through arbitration. The focus of this research is more on the effectiveness of fiduciary regulation in the consumer financing sector.

When compared to previous studies, this study entitled "*Transfer of Fiduciary Guarantee Objects by Debtors through Pawn without Creditors' Consent (Case Study of Tanjung Karang District Court Decision Number 1012/Pid.Sus/2024/PN Tjk)*" has fundamental differences in the study aspect. Previous research has highlighted more normative aspects related to registration, execution, and legal protection of creditors in general. Meanwhile, this study specifically analyzes the transfer of the object of fiduciary guarantee through the practice of pawning without the approval of creditors, which not only causes default, but also enters the criminal realm in accordance with Article 36 of Law No. 42 of 1999. Using a case study of the Tanjung Karang District Court Decision Number 1012/Pid.Sus/2024/PN Tjk, this study provides a concrete analysis of the legal liability of the debtor, both from a criminal and civil perspective, and affirms the application of the principle of *droit de suite* inherent in the object of fiduciary guarantee.

Thus, this study enriches the treasure of academic studies on fiduciary guarantees, especially in the context of the practice of pawning as a form of transfer of collateral objects that violate positive legal provisions, as well as affirming the creditor's legal position in obtaining maximum legal protection.

## B. Research Method

The research method used in this study is research with a normative juridical approach. This approach relies on literature research by examining various literature sources, laws and regulations, and legal theories that are relevant to the problem being studied.<sup>20</sup> In order to deepen the analysis, this study uses three approaches, namely the analytical approach, the case approach, and the legislative approach. An analytical approach is used to decipher and understand the meaning of legal terms as stated in regulations related to research issues. The case approach is used to analyze legal norms through examples of real cases that develop in society, so that the application of legal norms in practice can be known. Meanwhile, the legislative approach is carried out by examining various relevant regulations, especially those related to the transfer of the object of fiduciary guarantees.

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<sup>19</sup> Adinda Crysanti Meyda et al., "Analysis of Fiduciary Guarantee Regulations to Achieve Legal Protection for Creditors with Motor Vehicle Guarantee Object Two," *Diponegoro Private Law Review* Vol.8, no. No.2 (2023): pp.184-200, <https://ejournal2.undip.ac.id/index.php/dplr/article/view/18416>.

<sup>20</sup> Nanda Dwi Rizkia and Hardi Fardiansyah, *Legal Research Methods (Normative and Empirical)* (Widina Publisher, 2023), p.12.

The data sources in this study consist of primary legal materials and secondary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 42 of 1999 concerning Fiduciary Guarantees, Regulation of the Minister of Finance Number 84/PMK.012/2006 concerning Finance Companies, and the Civil Code (Civil Code). The secondary legal material was obtained through literature review in the form of books, journals, scientific articles, documents, and other sources relevant to the topic of this research, which served as an additional reference to enrich the analysis.

The data collection technique is carried out through library *research*, which is by searching, studying, recording, and applying information obtained from various written sources. The collected data is then processed and analyzed using a qualitative descriptive method. This analysis process is carried out by systematically compiling data to produce a deep understanding of the legal issues being studied, as well as drawing conclusions that are able to answer the research problem. Thus, this research method is expected to provide a comprehensive picture of the transfer of the object of fiduciary guarantee by the debtor through a pawn without the approval of the creditor.

## C. Results and Discussion

### 1. Legal Provisions Regarding the Transfer of Fiduciary Guarantee Objects Without the Approval of Creditors According to Law No. 42 of 1999 concerning Fiduciary Guarantees

The growth of transactions in the multifinance sector, such as leasing, *factoring*, and credit cards, showed a performance that was not comparable to debtor financing, especially in terms of motor vehicles such as cars and motorcycles.<sup>21</sup> Nonetheless, every banking and finance institution inevitably faces challenges related to bad loans, and they strive to prevent and anticipate such problems from the start. If the debtor is proven to have committed an act that violates, such as pawning, transferring, or renting the object of fiduciary guarantee without obtaining the approval of the creditor, then this action has been regulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees.<sup>22</sup> In the article, it is stated that "Fiduciaries who transfer, mortgage, or lease objects that are the object of fiduciary guarantees as referred to in Article 23 paragraph 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees that are carried out without

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<sup>21</sup> Eko Puspita Ningrum, "Juridical Review of Problematic Credit Settlement in Financing Agreements with Fiduciary Guarantees for Four-Wheeled Motorized Vehicles (Case Study at Astra Credit Companies (Acc) Semarang Branch)" (Postgraduate Program of Diponegoro University, 2005), p.14.

<sup>22</sup> Sriono Sriono, "The Responsibility of Fiduciaries on Fiduciary Collateral in Credit Agreements," *Scientific Journal of Advocacy* Vol7, no. No.2 (2019): pp.149-159, <https://doi.org/https://doi.org/10.36987/jiad.v7i2.1563>.

the prior written consent of the fiduciary beneficiary, may be subject to criminal sanctions in the form of imprisonment for a maximum of 2 (two) years and a maximum fine of Rp. 50,000,000. Fifty Million Rupiah)".

In Law Number 42 of 1999 concerning Fiduciary Guarantees, there is a regulation that affirms the prohibition for fiduciaries to transfer, mortgage, or rent objects that are used as objects of fiduciary guarantee without the written consent of the fiduciary. This provision, as stated in Article 23 paragraph (2), provides legal protection for creditors so that their rights are not harmed by the debtor's unilateral actions. Furthermore, Article 36 of the same law stipulates that if the prohibition is violated, the fiduciary can be subject to criminal sanctions in the form of imprisonment with a maximum threat of two years and a maximum fine of fifty million rupiah. Thus, the transfer of the object of fiduciary guarantee without the written permission of the fiduciary is not only a civil offense, but can also cause criminal consequences for the debtor.

From the description of the article above, it can be concluded that the elements contained in the article that can give rise to criminal sanctions are:

a. Fiduciary

As written in article 1 paragraph 5 of Law Number 42 of 1999 concerning Fiduciary Guarantees says that "the fiduciary is an individual or corporation that owns the property that is the object of the fiduciary guarantee". The object that is the object of the agreement is only handed over to its owner, but in reality the object is still in the power of the sidebitor, known as *the constitutum sessorium*.<sup>23</sup>

b. Transfer, mortgage or rent

This provision is alternative, so the fulfillment of one of the actions in the element is sufficient to declare that the element has been fulfilled. In the legal context of the agreement, if a debtor fails to fulfill the provisions stated in the agreement or does not carry out the obligations that have been agreed, then the debtor is considered to have committed a default and all its legal consequences.<sup>24</sup>

c. Divert. Based on article 19 paragraph 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees, it is explained that:

- 1) The transfer of rights to receivables guaranteed by the fiduciary results in the transfer of all rights and obligations of the fiduciary to the new creditor for the sake of law.
- 2) What is meant by the transfer of fiduciary guarantees as in article 19 paragraph 1 is to be registered by a new creditor with the Fiduciary Registration Office.
- 3) Based on the explanation above, any transfer that does not get the approval of

<sup>23</sup> Rahmat Hidayat Andika, Lestari Suryamizon Anggun, and Adriaman Mahlil, "Debtor's Responsibility for the Destruction of Fiduciary Collateral in Bank Credit Agreements," *RIO LAW JOURNAL* Vol.4, no. No.2 (2023): pp.1-9, <http://eprints.umsb.ac.id/id/eprint/2495>.

<sup>24</sup> Sandrarina Hertanto and Gunawan Djajaputra, "Juridical Review of Default Settlement in Sale and Purchase Agreements," *UNES Law Review* Vol.6, no. No.4 (2024): pp.10368-10380, <https://doi.org/https://doi.org/10.31933/unesrev.v6i4.1905>.



the fiduciary can be categorized as a criminal act. In the Explanation of Article 21 in Law Number 42 of 1999 concerning Fiduciary Guarantees, what is meant by "transfer" includes selling or renting in the context of its business activities.

d. Pawn or Rent

Based on the definition contained in the Great Dictionary of the Indonesian Language, pawning is defined as the delivery of goods as collateral for debt.<sup>25</sup> Thus, the object of fiduciary guarantee mortgaged by the debtor functions as collateral for the debt owned.<sup>26</sup> In addition, the term lease refers to the use of an item in exchange for the payment of rent, whereas renting means using the item by paying rent. Meanwhile, renting can be interpreted as giving trust to other parties to rent an item. From this explanation, it can be concluded that pawning and renting have a similar meaning, namely the handover of objects that are property.

e. Objects that are the object of fiduciary guarantees

Objects that can be used as fiduciary guarantees are basically objects that can be owned and transferred ownership rights, but it is not possible to be burdened with dependents or mortgages.<sup>27</sup> For this reason, the guarantee mechanism is carried out through fiduciary. The term fiduciary in Indonesian is understood as the transfer of property rights based on the principle of trust. In Dutch literature, this concept is known as *Fiduciare Eigendoms Overdracht* (FEO), while in English it is more commonly referred to as *Fiduciary Transfer of Ownership*.<sup>28</sup> The process of handing over ownership rights on the basis of trust begins with an analysis of the object of the guarantee in question. For example, in the case of an intangible object, such as a brand, the binding is carried out through a fiduciary guarantee scheme.

f. Assignment of Fiduciary Guarantee Objects

Based on article 1320 of the Civil Code, it is explained that the conditions for the validity of an agreement are:

- 1) Agreements of both parties
- 2) Ability to make an agreement
- 3) A particular subject matter in this case a certain object
- 4) A halal cause.

According to Article 1313 of the Civil Code, an agreement is understood as a legal act in which one or more parties bind themselves to the other party. In relation to fiduciary guarantees, Law Number 42 of 1999 emphasizes that debtors are basically not allowed to transfer the object of fiduciary guarantees. Transfer is only possible if there is written consent from the creditor as the fiduciary as stipulated in Article 23 paragraph

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<sup>25</sup> Zainal Arifin and Sitti Zubaidah, "Analysis of the Auction of Collateral at PT Pegadaian (Persero) Syariah Jember in 2020," *LAN TABUR: Journal of Sharia Economics* Vol.2, no. No.1 (2020): pp.1-15.

<sup>26</sup> Sriono, *Loc., cit.*

<sup>27</sup> Cok Istri Dian Laksmi Dewi, "Binding Material Guarantees with Fiduciary," *Yustitia Journal* Vol.13, no. No.1 (2019): pp.15-25.

<sup>28</sup> Usman, *Loc., cit.*

(2). In addition, another exception is given if the object used as a fiduciary object is a stock item, as mentioned in Article 20 of the same law.

## **2. Legal Analysis of the Liability of Answers by the Debtor in the Case of Transfer of the Object of Fiduciary Guarantee Without the Approval of the Creditor (Study of Decision Number 1012/Pid.Sus/2024/PN Tjk)**

That the defendant Rio Aditia Bin Untung Sarjuni began on November 6, 2023, the defendant was bound by a financing agreement of 1 (one) unit of black Honda Scoopy brand motorcycle in 2003 No.Pol. BE 2360 AHW frame number: MH1JM0419PK625145 engine number: JM04E1525157 on behalf of Kartini Pertiwi with PT. Adira Dinamika Multi Finance Lampung Branch for 33 (thirty-three) months with installments of Rp. 1,115,000,- (one million one hundred and fifteen thousand rupiah) every month and issued a certificate of fiduciary guarantee issued by the Ministry of Law and Human Rights Lampung regional office Number: W9.00175226.AH.05.01 of 2013 dated November 13, 2023 and a Financing Agreement letter from the office of PT. Adira Dinamika Multi Finance Lampung branch Number: 080723125139 dated November 6, 2023, and after the defendant obtained 1 (one) unit of black Honda Scoopy brand motorcycle in 2003 No.Pol. BE 2360 AHW frame number: MH1JM0419PK625145 engine number: JM04E1525157 in the name of KARTINI PERTIWI the defendant made 5 (five) monthly installments of the motorcycle payment and for the 6th (sixth) installment the defendant has never made any more installments because the defendant has stopped working and has financial difficulties, then in April 2024 in the Merbau Mataram area, South Lampung Regency, the defendant pawned 1 (one) unit of black Honda Scoopy brand motorcycle in 2003 No.Pol. BE 2360 AHW frame number: MH1JM0419PK625145 engine number: JM04E1525157 in the name of Kartini Pertiwi to AGUNG in the amount of Rp.6,000,000,- (sixty million rupiah) and the defendant pawned the motorcycle without written permission from PT. Adira Dinamika Multi Finance Tbk Lampung branch. That as a result of these acts, the defendant above PT. Adira Dinamika Multi Finance Lampung branch suffered a loss of Rp. 22,870,862 (twenty-two million eight hundred and sixty-two rupiah).

Based on the verdict involving the Defendant Rio Aditia, it is shown that the Defendant has been proven to have committed the crime of transferring the object of fiduciary collateral without obtaining written permission from the fiduciary recipient, namely PT. Adira Dinamika Multi Finance. This action violates the provisions stipulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees, which requires written consent before the transfer of the object of collateral can be carried out.

From the juridical aspect, all elements of the criminal act have been met, because it is proven that the defendant unilaterally transferred the object of fiduciary guarantee without official approval from the authorities. The testimony of witnesses and evidence submitted at the trial confirmed that the defendant had mortgaged the motorcycle to a

third party without permission from PT. Adira Dinamika Multi Finance Lampung Branch. In addition, non-juridical considerations, such as the defendant's working conditions and the losses incurred by the company, are also the basis for making the verdict.

The panel of judges finally sentenced the defendant to one year in prison, accompanied by a fine of Rp5,000,000, with the condition that if the fine is not paid, it will be replaced with imprisonment for three months. The defendant was also charged with paying a case fee of Rp3,000. The existence of complete evidence, including the fiduciary agreement deed and supporting documents, further strengthens the basis for legal considerations in this case.

Thus, the action taken by Rio Aditia, namely transferring the object of fiduciary guarantee to Agung through the delivery mechanism (levering), can be categorized as a legal act of transferring ownership of an object. Therefore, the act is considered a violation of Article 23 paragraph (2) and can be subject to criminal sanctions in accordance with the provisions of Article 36 of the Fiduciary Guarantee Law.

From a civil perspective, this does not mean exempting the Defendant from civil charges with prior conditions by PT. Adira Dinamika Multi Finance Lampung Branch must prove the existence of an act of default or unlawful act that has been committed by the Defendant, this is important to do because it is related to the compensation requested.

That based on the case of the Defendant Rio Aditia, it is proven that the transfer of the object of his fiduciary guarantee is an injury to a promise or not fulfilled the achievement in an agreement, and can be said to be a default. What is meant by achievement in an agreement is the execution of things that have been agreed or written in an agreement by both parties who have bound themselves, so, fulfilling achievements in an agreement is when the parties fulfill their promises.

According to the provisions of Article 1234 of the Civil Code, achievements in an agreement can be in the form of an obligation to give something, perform an action, or an obligation not to do something. If these achievements are fulfilled, then the agreement is considered to be running as it should. On the other hand, when the content of the agreement is not executed by either party, the condition is called default.<sup>29</sup> In British legal terminology, default is known as *default* or *non-fulfillment*, which essentially describes a situation in which the obligated party fails to perform obligations according to the agreement, performs obligations imperfectly, or is late in fulfilling those obligations.<sup>30</sup>

Default is often also called harp, breach of promise, or negligence, which basically refers to a situation when a debtor fails to fulfill obligations as stipulated in the

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<sup>29</sup> Syantica S Sulengkampung, "Legal Consequences for Those Who Violate an Agreement That Has Been Agreed (Default)," *Lex Privatum* Vol.8, no. No.1 (2020): p.11, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/28518>.

<sup>30</sup> *Ibid.*

agreement. In order for a person to be categorized as in a state of default, there are certain conditions that must be met. From the material side, default can arise due to an element of intentionality, namely an act done with full will and awareness so as to cause harm to other parties, or due to negligence, which is a situation when a person who should have achieved is not careful and should suspect that his actions can cause losses. Meanwhile, from the formal side, a default is only considered valid if there has been a reprimand or summons given by the creditor to the debtor. This summons is generally in the form of an official written warning that demands that the debtor immediately carry out his obligations, either immediately or in a short time, accompanied by the threat of sanctions, fines, or punishments if the debtor continues to neglect to carry out his achievements.<sup>31</sup>

If associated with the verdict, the act of the defendant Rio Aditia who pawned the collateral object without permission from PT. Adira Dinamika Multi Finance Lampung Branch can be categorized as a default. This is because the Defendant did not carry out its obligations as stipulated in both the Fiduciary Guarantee deed and the Consumer Financing Agreement. In addition, the Fiduciary Guarantee Law expressly prohibits the transfer, mortgage, or rental of collateral objects without the consent of the fiduciary. Thus, it can be concluded that the Defendant did not carry out his achievements, both in terms of maintaining and maintaining the collateral object, and in the obligation not to pawn it to a third party. In terms of material requirements, the element of negligence has been fulfilled because the Defendant neglected to maintain the object of the collateral, thereby causing a transfer to another party. Meanwhile, in terms of formal requirements, the fulfillment of the element of default is evidenced by the facts of the trial which show that PT. Adira Dinamika Multi Finance Lampung Branch has given summons and reprimands to the Defendant, including through a direct visit to his residence.

The definition of "Unlawful Act" is interpreted as an act that hurts rather than a breach of contract, because the lawsuit is not based on the existence of a contractual relationship.<sup>32</sup> In article 1365 of the Civil Code itself, it states that if associated with the verdict, the act of the defendant Rio Aditia who pawned the collateral object without permission from PT. Adira Dinamika Multi Finance Lampung Branch can be categorized as a default. This is because the Defendant did not carry out its obligations as stipulated in both the Fiduciary Guarantee deed and the Consumer Financing Agreement. In addition, the Fiduciary Guarantee Law expressly prohibits the transfer, mortgage, or rental of collateral objects without the consent of the fiduciary. Thus, it can be concluded that the Defendant did not carry out his achievements, both in terms of maintaining and

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<sup>31</sup> Maralutan Siregar et al., "The Separation of Default and Unlawful Acts in the Perspective of Material Law and Application in Court," *Locus Journal of Academic Literature Review* Vol.2, no. No.6 (2023): pp.532-548, <https://doi.org/https://doi.org/10.56128/ljoalr.v2i6.187>.

<sup>32</sup> Yusri Ikromi, "Analysis of Legal Protection for Parties Harmed by Unlawful Acts in Agreements," *Al-Dalil: Journal of Social, Political, and Legal Sciences* Vol.2, no. No.2 (2024): pp.78-85, <https://doi.org/https://doi.org/10.58707/aldalil.v2i2.771>.

maintaining the collateral object, and in the obligation not to pawn it to a third party. In terms of material requirements, the element of negligence has been fulfilled because the Defendant neglected to maintain the object of the collateral, thereby causing a transfer to another party. Meanwhile, in terms of formal requirements, the fulfillment of the element of default is evidenced by the facts of the trial which show that PT. Adira Dinamika Multi Finance Lampung Branch has given summons and reprimands to the Defendant, including through a direct visit to his residence.

The definition of "Unlawful Act" is interpreted as an act that hurts rather than a breach of contract, because the lawsuit is not based on the existence of a contractual relationship.<sup>33</sup> In article 1365 of the Civil Code itself states that: "Every unlawful act, which brings harm to another person, obliges the person who, by mistake, publishes the loss, to compensate for the loss". In accordance with the provisions in the article, it is said that a person who commits an unlawful act must meet several elements, namely:<sup>34</sup>

bahwa: "Tiap perbuatan melanggar hukum, yang membawa kerugian kepada orang lain, mewajibkan orang yang karena salahnya menerbitkan kerugian itu, mengganti kerugian tersebut". Sesuai dengan ketentuan dalam pasal tersebut, maka dikatakan seseorang melakukan perbuatan melawan hukum harus memenuhi beberapa unsur, yaitu:<sup>35</sup>

- a. The existence of an act
- b. The act is against the law
- c. There is a mistake on the part of the perpetrator
- d. There is a loss for the victim
- e. There is a clause relationship between the act and the loss
- f. Adanya Suatu Perbuatan

If it is associated with the transfer of the object of collateral by the Defendant Rio Aditia, then this element is fulfilled because the act of transferring the object of collateral is the meaning of "doing something"

- a. This act is against the law

If it is associated with the transfer of the object of collateral by the Defendant Rio Aditia, it is an act that violates Law Number 42 of 1999 concerning Fiduciary Guarantees, and then violates the rights of PT. Adira Dinamika Multi Finance Lampung Branch as the owner of the guarantee.

- b. There is a mistake on the part of the perpetrator

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<sup>33</sup> Yusri Ikromi, "Analysis of Legal Protection for Parties Harmed by Unlawful Acts in Agreements," *Al-Dalil: Journal of Social, Political, and Legal Sciences* Vol.2, no. No.2 (2024): pp.78-85, <https://doi.org/https://doi.org/10.58707/aldalil.v2i2.771>.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*



When associated with the transfer of the object of collateral by the Defendant Rio Aditia, it is clear that the act is a mistake with an element of intentionality committed by the Defendant. Based on the legal facts at trial, one of which is from the Defendant's own confession, which said that it was true that the Defendant pawned 1 unit of Honda Scoopy Motorcycle (as an object of guarantee) because the Defendant was no longer able to pay the installments.

c. There is a loss for the victim

If it is associated with the transfer of the object of collateral by the Defendant Rio Aditia, it is clear that here PT. Adira Dinamika Multi Finance Lampung Branch suffered material losses due to the transfer of the object, so that in accordance with the facts of the trial of PT. Adira Dinamika Multi Finance Lampung Branch suffered a loss of Rp. 22,870,862,- (twenty-two million eight hundred seventy thousand eight hundred and sixty-two rupiah)

d. Causal Relationship

If it is related to the transfer of the collateral object by the Defendant Rio Aditia, it is clear that with the transfer of the fiduciary collateral object without the consent of the fiduciary recipient, namely PT. Adira Dinamika Multi Finance Lampung Branch. The failure of the Defendant caused losses to the fiduciaries.

Based on article 1234 of the Civil Code, there are provisions regarding Default committed by one of the parties to the agreement, namely:

*"Reimbursement of costs, losses and damages due to non-fulfilment of an agreement begins to be obligatory, if the debtor, although it has been said to be negligent, remains negligent in fulfilling the obligation, or if something to be given or done can only be given or done within a time beyond the specified time".*

If certain conditions, namely material and formal requirements, have been met, the party who commits the default can be sued as a result of the default law. The legal consequences of the default have been regulated in articles 1234, 1266, and 1267 of the Civil Code, namely.

- a. Obligation to pay compensation (article 1234 of the Civil Code) "Reimbursement of costs, losses and damages due to non-fulfillment of an agreement begins to be obligatory, if the debtor, even though it has been said to be negligent, is still negligent in fulfilling the obligation, or if something that must be given or done can only be given or done within a time that exceeds the specified time".

- b. Cancellation of Agreement (Article 1266 of the Civil Code)

"The cancellation condition is considered to always be included in the reciprocal agreement, if one of the parties does not fulfill its obligations. In such a case the consent is not null and void, but the annulment must be sought in court". "This request must be made, even though the condition of nullity regarding the non-fulfillment of obligations is stated in the agreement. If the condition of cancellation is not stated in the agreement, then the judge, looking at the situation, at the request of the defendant, is free to give a period to fulfill the obligation, but the period of time may not exceed one month".

- c. Fulfillment of the agreement or fulfillment of the agreement with costs, losses and interest (Article 1267 of the Civil Code)

"The party against whom the alliance is not fulfilled, can vote; compel the other party to comply with the agreement, if it is still practicable, or demand the cancellation of the agreement, by reimbursement of costs, losses and interest."

When associated with the case in Decision Number 1012/Pid.Sus/2024/PN Tjk where there was a default on the consumer financing agreement between the Defendant RIO ADITIA and PT. Adira Dinamika Multi Finance Lampung Branch, where there was arrears of installments/installments in the 6th installment by the Defendant Rio Aditia and the transfer of the object of fiduciary guarantee carried out by the defendant himself so that PT. Adira Dinamika Multi Finance Lampung Branch suffered material losses, so that PT. Adira Dinamika Multi Finance Lampung Branch is entitled to legal protection for this incident.

Therefore, in the event of injury, the promise/default has met the material requirements where the arrears of the installments/installments are intentional by the Defendant Rio Aditia, and the transfer of the object of the guarantee is carried out which is negligence by the Defendant, where the negligence lies in the non-fulfillment of the achievement to maintain the guarantee and keep it from being transferred to a third party. So that with these two incidents, PT. Adira Dinamika Multi Finance Lampung Branch has met the formal requirements by issuing a summons or reprimand by coming to the residence of the Defendant Rio Aditia to inform him of his obligation to pay installments/installments of the consumer financing agreement made between the parties.

With this, PT. Adira Dinamika Multi Finance Lampung Branch can file a lawsuit for unlawful acts and default against the Defendant Rio Aditia to fulfill one of the legal consequences of the default, namely the obligation to pay fees, damages and interest due to the non-fulfillment of the achievement to pay the installments/installments, which is based on the legal facts in the trial of PT. Adira Dinamika Multi Finance Lampung Branch suffered a loss of 1 (one) unit of black Honda Scoopy brand motorcycle worth Rp. 22,870,862,- (twenty-two million eight hundred and seventy-eight hundred and sixty-two rupiah). Or PT. Adira Dinamika Multi Finance Lampung Branch can request the Defendant Rio Aditia to fulfill his achievements, namely by handing over the collateral object to be executed or paying the installments/installments that are in arrears accompanied by compensation costs, as well as interest that has been stipulated in the consumer financing agreement. Based on the principle of *droit de suite*<sup>36</sup> contained in Article 20 of the Fiduciary Law, namely:

*"The fiduciary guarantee continues to follow the object that is the object of fiduciary guarantee in the hands of whoever the object is, except for the transfer of the inventory object that is the object of the fiduciary guarantee".*

So in this case, the object of the fiduciary guarantee is not the object of supply, so the

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<sup>36</sup> Galih Kurnia Sakti and Ana Silviana, "Legal Protection of Third Parties from the Principle of Droit de Suite in the Execution of Dependent Rights," *Notarius* Vol.17, no. No.1 (2024): pp.189-202, <https://doi.org/https://doi.org/10.14710/nts.v17i1.46950>.

fiduciary guarantee still follows the object of the guarantee even though it has been mortgaged to a third party, namely Agung. So that with this, PT. Adira Dinamika Multi Finance Lampung Branch can execute the object of collateral as determined in article 29 paragraph (1) of the Fiduciary Law, namely:

*"If the debtor or fiduciary violates the promise, the execution of the object that is the object of fiduciary guarantee can be carried out by:*

- a. *The execution of the executory title as stipulated in article 15 paragraph (2) of the Fiduciary Law by the fiduciary beneficiary, namely PT. Adira Dinamika Multi Finance Lampung Branch; The sale of objects that are the object of fiduciary guarantee on the power of the fiduciary himself through public auction and taking the repayment of his receivables from the proceeds of the sale;*
- b. *An under-handed sale is carried out based on the agreement of the grantor and the fiduciary if in such a way a high price can be obtained that benefits the parties."*

Furthermore, in this case, the Fiduciary or creditor gets legal protection to sue the Defendant Rio Aditia on the basis of default and unlawful acts, then the so-called compensation arises. There are many similarities between the concept of compensation due to breach of contract and the concept of compensation due to unlawful acts. However, compensation due to unlawful acts is too harsh if applied to compensation for default, an example of which is *punitive damages*, which are compensation that must be given to the victim in an amount that exceeds the actual loss.<sup>37</sup> So that the form of compensation for unlawful acts known by law is:<sup>38</sup>

a. Nominal Damages

*"If there is a serious unlawful act, such as an act that contains an element of intentionality, but does not cause real harm to the victim, then the victim can be given a certain amount of money according to a sense of justice without calculating how much the loss actually is."*

b. Compensation

*"Compensatory damages are compensation that is a payment to the victim for and as much as the loss actually experienced by the victim of an unlawful act. Therefore, compensation like this is also called actual compensation. For example, compensation for all costs incurred by the victim, loss of profits/salary, illness and suffering, including mental suffering such as stress, shame, defamation, and others"*

c. Punitive Damages

*"Punitive damages are a large amount of compensation that exceeds the actual amount of damages. The amount of compensation is intended as a punishment for the perpetrator. This punitive compensation deserves to be applied to cases of severe or sadistic intentionality. For example, it is applied to the severe persecution of a person without a sense of humanity."*

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<sup>37</sup> Siregar et al., *Loc., cit.*

<sup>38</sup> Ikromi, *Loc., cit.*

If it is related to the case, because the defendant Rio Aditia can be said to have transferred the object of collateral without the consent of the fiduciary, namely PT. Adira Dinamika Multi Finance Lampung Branch, the Defendant Rio Aditia can be asked for compensation due to the unlawful act. The defendant Rio Aditia for his actions can be asked for compensation in the form of nominal damages and compensation, because as a result of the actions of the defendant Rio Aditia, PT. Adira Dinamika Multi Finance Lampung Branch has suffered real losses due to the transfer of the fiduciary guarantee object and lost the cost of paying legal fees to defend it when filing a civil lawsuit, as well as wasting time to undergo trials that consume a lot of time and energy.

So based on the legal facts in the trial of PT. Adira Dinamika Multi Finance Lampung Branch due to this act suffered a loss of Rp. 22,870,862,- (twenty-two million eight hundred and seventy-eight hundred and sixty-two rupiah), and if it is assumed that PT. Adira Dinamika Multi Finance Lampung Branch pays the legal representative's honorarium to get his rights back and a waste of time and energy, so PT. Adira Dinamika Multi Finance Lampung Branch incurred a lot of money, and the defendant Rio Aditia could be asked for nominal compensation for the act.

#### D. Conclusion and Recommendation

Based on the provisions of Law Number 42 of 1999 concerning Fiduciary Guarantees, the debtor as the fiduciary is prohibited from transferring, pawning, or renting the object of fiduciary guarantee to another party without the written consent of the creditor as the fiduciary beneficiary, as stipulated in Article 23 paragraph (2), except for inventory objects. Violation of this provision can be subject to criminal sanctions in the form of imprisonment for a maximum of two years and a maximum fine of Rp50,000,000 as stipulated in Article 36. The elements of a criminal act in the article are fulfilled if the fiduciary transfers the object of fiduciary guarantee without the written consent of the fiduciary.

This is proven in Decision Number 1012/Pid.Sus/2024/PN Tjk, where the defendant Rio Aditia was found guilty of transferring the object of fiduciary guarantee without permission. This action not only fulfills the elements of a criminal act, but is also a form of default as well as an unlawful act. For his actions, the defendant was sentenced to a criminal offense, while PT Adira Dinamika Multi Finance as a creditor has the right to claim compensation for material losses incurred and execute the collateral object based on the principle *of droit de suite*, which emphasizes that the fiduciary guarantee remains attached to the object even though it has been transferred.

Thus, this case demonstrates the importance of compliance with fiduciary agreements and affirms serious legal consequences for violators, while demonstrating the legal protection afforded to creditors to ensure certainty and fairness in fiduciary-based financing relationships.

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