

The Role of Notary in the Making of Fidusian Assets for Consumer Protection

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Abstract. *This study aims to determine the role of the notary in making fiduciary deeds for consumer protection based on the Law of the Republic of Indonesia Number 8 of 1999. The approach method in this research is the normative juridical method. The specification of this research is descriptive analytical. The data in this study are secondary data. These problems are analyzed using legal protection theory. Based on the results of the research, the role of the notary in providing services to the public, especially for making fiduciary deeds, is things that must be done so that no parties are harmed and the deed can provide protection and legal certainty. The parties come face to face with the Notary. Based on the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Act No. 30 of 2014 concerning the Position of Notary, making a Notary Deed, must be before a Notary according to the form and procedure stipulated by the Law, and refuse to make a deed, if power of attorney that is contrary to Article 18 paragraph (1) letter h. Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection, which states that the power of attorney is an integral part of the standard agreement prepared by the fiduciary recipient.*

Keywords: Notary; Consumer; Fiduciary.

1. Introduction

In order to maintain and continue sustainable development, development actors, both government and society, both individuals and legal entities, require large funds. As development increases, so does the need for funding, where most of the funds needed to meet these needs are obtained through borrowing and lending.¹

Guarantee institutions have a very important meaning in supporting economic development, which directly or indirectly provides benefits to creditors and debtors; As

¹ Dafitson Hustinob, *Kedudukan Akta Fidusia yang dibuat Oleh Notaris yang Diluar Daerah Jabatannya*, Unissula, Jurnal Akta, Vol 5 No 1 March 2018. <http://jurnal.unissula.ac.id/index.php/akta>

for the benefits for creditors, namely: 1) The realization of security in transactions between creditors and debtors. This means that credit or capital submitted by creditors to debtors, creditors are not afraid and worried if the capital transferred to debtors will not be returned; 2) Providing legal certainty, which means certainty for creditors to receive repayment of loan principal and interest, creditors or owners of capital can execute fiduciary collateral (forced return). Benefits for debtors, namely: 1) Obtaining credit facilities for financing;²

Basically, the material agreement is divided into two types, namely the main agreement and the access agreement. The principal agreement is an agreement to obtain credit facilities from banking institutions or non-bank financial institutions. Meanwhile, *accessoir* agreement is an agreement that is additional in nature and is related to the main agreement. For example, an *accessoir* agreement: an agreement for the imposition of guarantees, such as a pledge agreement, a guarantee and a fiduciary, therefore the nature of the guarantee agreement is an *accessoir* agreement where the guarantee agreement is always linked to the principal agreement. Followed by a guarantee agreement as an additional agreement. Both are made separately, but the position of the guarantee agreement really depends on the main agreement.³

In essence, a reciprocal agreement is where each party has rights and obligations in accordance with the agreement in the agreement. Indirectly, consumers have formed a bond with the financing institution, in this case the Financing Institution. Financing institutions generally use agreement procedures that follow the existence of fiduciary guarantees for objects of fiduciary collateral, meaning that the debtor as the owner of the goods becomes the provider of fiduciary duty to the creditor who is the recipient of fiduciary, because the customer's weak bargaining power against the creditor as the owner of the funds. In addition, the community's legal knowledge is still low, this weakness is exploited by business players in the financial industry,⁴

Regarding Act No. 8 of 1999 concerning Consumer Protection, there is a regulation which states that every consumer must be protected for their rights and guarantees regarding consumer protection get enough attention because as a consumer, they should be protected from various fraudulent transactions given the right to obtain clear and of course information the right not to discriminate.

² Migfar Magmum, *Tanggung Jawab Para Pihak Dalam Pembuatan Akta Jaminan Fidusia Pada Notaris Di Busan Auto Finance Rembang*, Unissula, Jurnal Akta, Vol 5 No 1 March 2018. <http://jurnal.unissula.ac.id/index.php/akta>

³ Arini Sutanti, *Perlindungan Hukum Bagi Konsumen Pemberi Anggungan Dalam Transaksi Kredit Pada Lembaga Keuangan Bank (Kajian Terhadap Pembebanan Hak Tanggungan) Pada PD BKK Susukan Kabupaten Semarang*, Unissula, Jurnal Akta Vol. 4 No. 4 December 2017. <http://jurnal.unissula.ac.id/index.php/akta>

⁴ Prayutiz Yuyut, *Perlindungan Hukum dalam Sengketa Antara Konsumen Kendaraan Bermotor dengan Lembaga Pembiayaan dihubungkan dengan UNDANG-UNDANG NOMOR 8 TAHUN 1999 Tentang Perlindungan Konsumen*, Volume 01, Nomor 01, Januari-Juni 2020, P. 75-90 <https://journal.unpak.ac.id/index.php/pajoul/index>.

2. Research Methods

The approach method in this research is normative juridical method. The specification of this research is descriptive analytical. The data in this study are secondary data. Qualitative descriptive data analysis method.

3. Results and Discussion

That in order to increase the dignity of consumers, it is necessary to increase awareness, concern and knowledge of consumers to protect themselves and to educate the attitude of business actors to be more responsible, in an increasingly advanced era of globalization such as today, business actors must continue to ensure certainty of quality, quantity, and security of goods and/or services provided to consumers.

Conditions like this, on the part of consumers can take advantage, to meet the needs of goods or services according to the capabilities and desires of consumers. However, conditions like this can also result in the position of business actors and consumers becoming unbalanced and consumers are usually faced with a weak position, due to low levels of education which results in low consumer awareness of their rights, therefore to control and supervise between business actors. and consumers, the government is present in this matter to make regulations on consumer protection, which must be considered and obeyed by consumers and business actors. This regulation does not intend to limit the business of business actors but on the contrary,

The issue of using standard clauses in the relationship between business actors and consumers. What is meant by standard clauses according to Article 1 point 10 of the Consumer Protection Law are any rules or conditions and conditions that have been prepared and determined unilaterally by the business actor as outlined in a binding document and/or agreement and must be fulfilled by consumer. In practice, it is often found that in order to bind a certain agreement, one of the parties has prepared a concept or a draft agreement that will apply to the parties. The concept is structured in such a way that at the time of signing the agreement, the parties only need to fill in a few subjective matters.⁵ This concept is what is called a standard clause or standard agreement.

The reasons for using standard clauses in the agreement to save time and money or practical reasons, thus avoiding too long or protracted negotiations, are because to reach an agreement on the contents of the agreement, it takes a long time to negotiate. It is important to avoid protracted negotiations so as not to take too long and cost more.

⁵ Sidabalok, Janus. (2014). *Hukum Perlindungan Konsumen di Indonesia*. Bandung. PT. Citra Aditya Bakti. p. 11.

The standardized agreement seeks to secure and protect the interests of the company from possible losses that may arise if the final agreement does not work properly. Agreements like this generally tend to benefit the business actors, therefore this standard clause issue is closely related to consumer protection, namely protecting consumers from the possibility of applying adverse or unfair terms in the agreement.

The practice of using standard agreements then raises legal problems, not only regarding justice which is reflected in the rights and obligations of the parties, but also more fundamentally regarding the validity of the agreement itself, in terms of its content there is an imbalance between the rights and obligations of the parties, meaning that the business actor or companies tend to protect their interests in such a way as to assign a number of rights while limiting the rights of other parties or consumers. Business actors or companies minimize their own obligations and regulate as many obligations as possible for other parties or consumers. In conclusion, it can be said that standard clauses tend to benefit business actors as well as burdens other parties or consumers.

Article 18 of the Consumer Protection Law makes a number of prohibitions on the use of standard clauses in the agreement, namely as follows:

- (1) In offering goods and/or services intended for trading, business actors are prohibited from making or including standard clauses on every document and/or agreement if:
 - a. states the transfer of responsibility of business actors;
 - b. declare that the business actor has the right to refuse the return of goods purchased by consumers;
 - c. states that the business actor has the right to refuse the return of money paid for goods and/or services purchased by consumers;
 - d. states that the power of attorney from consumers to business actors, either directly or indirectly, is to take all unilateral actions relating to goods purchased by consumers in installments;
 - e. regulate evidence concerning the loss of use of goods or use of services purchased by consumers;
 - f. give business actors the right to reduce the benefits of services or reduce the assets of consumers which are the object of sale and purchase of services;
 - g. declare the consumer's submission to regulations in the form of new, additional, advanced and/or further amendments made unilaterally by the business actor during the period when the consumer utilizes the service purchased;
 - h. states that the consumer authorizes the business actor to impose a mortgage, lien, or security right on goods purchased by consumers in installments.

- (2) Entrepreneurs are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose disclosures are difficult to understand.
- (3) Every standard clause that has been stipulated by a business actor in a document or agreement that meets the provisions as referred to in paragraph (1) and paragraph (2) shall be declared null and void by law.
- (4) Entrepreneurs are obliged to adjust standard clauses that are contrary to this Law.⁶

The provisions of Article 18 of the Consumer Protection Law concerning the prohibition of using standard clauses regarding the form of writing and the contents of the agreement. In terms of the form of writing, these clauses must be written simply, clearly, and clearly so that consumers can read and understand them well, while in terms of their content, it is prohibited to use unfair clauses.

The Consumer Protection Law requires business actors to immediately adjust the agreement used in accordance with this law, if in fact a standard agreement is still used which does not comply with the provisions above, the legal consequence is that the agreement is null and void, which means that the clause it is considered non-existent, because it has no legal force.

The provisions regarding the prohibition and requirements regarding the use of standard clauses are intended to place consumers' position equal to those of business actors based on the principle of freedom of contract and to prevent possible actions that harm consumers due to unbalanced position factors, ignorance, which may be exploited by business actors to gain profits.

The use of standard clauses in the agreement between business actors and consumers sometimes occurs in the abuse of circumstances, which means that when people know or should understand that the other party is due to a special situation such as an emergency, dependency, cannot think long, abnormal or inexperienced mental states are moved to commits a legal act, even though he knows or should understand that he actually has to prevent it.

This abuse can occur if an agreement is born because of the superiority of one party, namely the economic and psychological advantages of one party against the other.

The Consumer Protection Act provides restrictions and prohibitions on including certain standard clauses in the agreement, intended to prevent the abuse of the situation by parties with a stronger position, which in turn will harm consumers.

The Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia is a constitutional state, which guarantees protection and legal certainty for every citizen.

⁶ Undang-Undang Republik Indonesia Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen Pasal 18

Article 27 paragraph (1): "all citizens shall have equal position before the law and government and are obliged to uphold the law and government without exception."⁷

Article 28D paragraph (1): "Every person has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law"⁸

Article 28G paragraph (1): "Every person has the right to protection of himself, family, honor, dignity and property under his control, and the right to a sense of security and protection from the threat of fear to do or not do something is a human right"⁹

Based on the theory of legal protection by Satjipto Rahardjo, that law aims at integrating and coordinating various interests in society because in a traffic of interests, protection of certain interests can be done by limiting various interests on the other hand, to protect subjects with applicable regulations and enforced with a sanction, if it is related to the problem of the notary's role in drawing up fiduciary deeds for consumer protection, to guarantee protection and legal certainty, authentic written evidence is needed regarding actions, agreements, and legal decisions and events made before or authorized officials.

The state appoints and takes the oath of a Notary who is assigned to serve the public in making evidence needed by the public, to guarantee protection and legal certainty. Notary is also a counselor, advisor, and information provider in the field of law, people who are unfamiliar with the law need the expertise of a notary to enter life in the legal field. Based on the mandate of law, a notary is an appointed public official who is authorized to make authentic deeds and has other authorities as based on other laws. According to other laws, it states or determines that an action or legal action must be made in the form of a Notary Deed. Refer to other laws that are not laws governing the Position of a Notary,¹⁰ Article 5 paragraph (1) states that the Fiduciary Deed must be made with a Notary Deed.

The function of a notary deed has an important role, both the deed as evidence and the deed as a condition for the validity of a legal event, for formal agreements such as the fiduciary guarantee imposition agreement, there is an obligation that the agreement is made with a notary deed in Indonesian, thus the role of the notary. In the legal world with the continental system in general and the business world in particular, it is very important especially in relation to formal agreements in addition to the desire of the parties themselves to enter into other types of agreements in the form of notary deeds. Notary deeds are perfect evidence so that they can guarantee certainty, order and legal protection for parties with the core of truth and justice.

⁷ The 1945 Constitution of the Republic of Indonesia Article 27 verse (1).

⁸ Ibid, 28D (1).

⁹ Ibid, 28G (1).

¹⁰ Adjie, Habib. (2017). *Penafsiran Tematik Hukum Notaris Indonesia Berdasarkan Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris*. Bandung, PT. Refika Aditama.

A notary deed is intended for an action that has a very broad legal consequence, the parties are protected from reckless actions and mistakes, because a notary usually also acts as a legal advisor for both parties and through his advice it is hoped that the parties are aware of the legal consequences that could be arisen from their actions and besides the obligation of a notary to read out the contents of the deed, before the parties sign the deed concerned, it can also function as protection against reckless and reckless actions.

Notary services in the business world are increasing day by day as one of the legal needs of the community, given the large responsibilities a notary carries, so the notary office is carried out by those who in addition to having adequate legal knowledge must also be held by those who are ethical and have high character.

The implementation of the Notary Position in serving the community, must also pay attention to the Law relating to the Deed that will be made, because later the deed will be used as a guideline or proof of legal certainty for anyone with an interest in minimizing unwanted things in the future, which later can harm the parties and of course the notary itself.

Discusses the making of a Fiduciary Deed with regard to the Consumer Protection Law. The imposition of fiduciary through a notarial deed is a form of attention from the government towards the interests of debtors or consumers, through advice and reading of the deed of granting fiduciary before signing is one way to protect the safety and security of the public from actions that can cause property loss and/or life safety. Notaries must also know about these rules, that notaries as public officials who carry out the profession in providing legal services to the public, Notaries must also provide legal counseling in connection with making deeds, especially to improve the dignity of consumers, to achieve a balance of protection of the interests of consumers and actors.

This impartiality can be fulfilled properly if the parties have been given a comprehensive explanation of all rights, obligations, and including all legal consequences of legal actions that will be carried out by their clients. It is up to the client to make his choice, while the notary keeps the legal signs.

One of the things that must be considered by the notary when reading the agreement between the perpetrator and the consumer is the standard clause. Standard clauses are agreements that have been made or prepared in advance with certain standards unilaterally or by one of the parties and consumers only have two choices, namely approve or reject it. However, because it has been carefully prepared beforehand, standard agreements almost always contain provisions on the transfer of obligations of the business actor. Usually this provision is intended to limit, or even completely eliminate the responsibility that should be borne by the Business Actor, so that there is an imbalance in the bargaining position between business actors and consumers. It is this transfer of responsibility that makes many standard agreements illegal.

The Standard Agreement states that the consumer authorizes the business actor to take all actions related to the guarantee object. Based on the power of the consumer in

the standard agreement stated in the underhand agreement, the business actor makes a notary deed unilaterally, so that the consumer does not hold a copy of the notary deed because the consumer does not appear before the notary, but is authorized to the business actor.

If the notary receives the power of attorney from the business actor with the contents stating that the consumer has authorized the business actor to impose a mortgage, lien, or security right on goods purchased by consumers in installments. When this happens, the business actor has committed irregularities and violations in article 18 of the Consumer Protection Law, and the power of attorney becomes null and void by law.

That in this case, it has fulfilled the elements listed in Article 18 paragraph (1) letter h of the Consumer Protection Law, among others:

1. A letter of agreement prepared by a business actor with a standard clause.
2. Explain in the agreement letter that the consumer authorizes the business actor to impose guarantee rights on goods purchased by consumers in installments.
3. Purchase of goods purchased by consumers on an installment basis or credited.

The application of sanctions based on Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection Article 62 paragraph (1) explains that every business actor who is proven to have committed an offense as prohibited in Article 18 will be sentenced to imprisonment of 5 (five) years. or a maximum fine of Rp. 2,000,000,000 (two billion rupiah).

Therefore, if there is a Notary who makes a deed based on the power of attorney (power of attorney to make a decision before a Notary Public) whose power of attorney has been null and void, then the legal consequence is that the notary deed is considered invalid and does not have binding legal force or is deemed never been made.

For this reason, notaries must pay attention to the principle of prudence in carrying out their offices, so that they do not make mistakes or avoid risks that will later arise, if problems occur by the parties.

Notaries in providing services to the public, especially for making fiduciary deeds, are things that must be done so that no parties are harmed and the deed can provide protection and legal certainty.

1. The parties come face to face with the Notary.¹¹

Based on the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Act No. 30 of 2014 concerning the Position of Notary Public, in making

¹¹ Adjie, Habib. (2016). *Kompilasi Persoalan Hukum dalam Praktek Notaris dan PPAT (Kapita Selektta Notaris & PPAT)* (1). Surabaya.

a Notary Deed, it must be presented before a Notary according to the form and procedure stipulated by the Law.

Article 16 paragraph (1) letter m. explained, in carrying out his office, the Notary is obliged to read the Deed in front of the audience in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for the making of the will under hand, and signed at that time by the tappers, witnesses and notaries means that the notary must be physically present and sign the deed before the audience and witnesses.

The legal consequence is that if the procedure for drawing up a fiduciary deed is not fulfilled then it is in accordance with Article 16 paragraph (9) If one of the requirements as referred to in paragraph (1) letter m and paragraph (7) is not fulfilled, the Deed concerned only has the power of proof as an underhand deed.

2. Refused to make the deed.

Power of attorney that is contrary to Article 18 paragraph (1) letter h. Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection, which states that the power of attorney is an integral part of the standard agreement prepared by the fiduciary recipient.

A solution or way so as not to violate these provisions and the Notary can provide Deed making services and the wishes of the parties can be achieved, then things that must be prepared are:

- a. Entering into a credit agreement or financing agreement between the fiduciary and the fiduciary to buy by installments or credit.
- b. Make a special power of attorney.

Based on Article 1795 of the Civil Code, it is explained that the granting of power of attorney can be carried out specifically, namely regarding only one or more specific interests, or in general, namely covering all the interests of the grantor of power.

Power of attorney with the contents of the fiduciary giving authorization to the fiduciary recipient to appear before, make and sign the deed before a Notary, because in the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantee Article 8 explains that Fiduciary Guarantee can be given to more than one Fiduciary the attorney or representative of the Fiduciary Recipient, so it does not require the debtor to be present in the making of the fiduciary deed.

4. Closing

4.1 Conclusion

The role of the notary in providing services to the public or consumers, especially for making fiduciary deeds, matters that must be done so that no parties are harmed and the deed can provide protection and legal certainty. The parties come face to face with the Notary. Based on the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Act No. 30 of 2014 concerning the Position of Notary, in

making a Notary Deed, must be before a Notary according to the form and procedure stipulated by the Law, and refuse to make a deed, if the power of attorney contradicts Article 18 paragraph (1) letter h. Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection.

4.2 Suggestion

As a consumer, recognize and understand your rights. Dare yourself to ask for clarification, even ask for renegotiations, if you are not in a position to renegotiate, at least be familiar with your rights and obligations thoroughly.

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