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CONSTRUCTION OF FIDUCIARY GUARANTEE ARRANGEMENTS IN *LEASING* AGREEMENTS IN BUSINESS FINANCING

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Abstract

The construction of the Fiduciary Guarantee Arrangement in the Leasing Agreement in Business Financing aims to review; 1) How is the review in the leasing agreement mechanism on the objects encumbered by fiduciary guarantees?; 2) How is the lessor's effort in executing the leasing object encumbered with fiduciary guarantee?; 3) What is the ideal construction of the fiduciary guarantee arrangement in the leasing agreement in business financing?. The research method used is normative juridical research, which is research focused on examining the application of rules or norms in positive law. The results showed that; 1) The leasing agreement is actually similar to an ordinary lease agreement as stipulated in Article 1548 to Article 1600 of the Civil Code (Staatsblad 1847 Number 23, hereinafter referred to as the Civil Code) only the object of the lease is different. Leasing only specializes in capital goods, namely goods needed for business activities. In a lease agreement, the object is goods in general, be it goods for production or goods for consumption. 2) Various alternative ways of execution of fiduciary guarantees can be performed. The implementation of executory title provisions is a method that is often used by creditors in this case, namely leasing financing institutions if the debtor has defaulted or defaulted to execute a motor vehicle that is used as the object of fiduciary guarantee in a financing contract that has been previously made with the debtor. 3) The ideal construction of the fiduciary guarantee arrangement in the leasing agreement in business financing is that the lessor needs to seek several actions as a form of legal protection in carrying out execution. Namely, the legal protection is in the form of preventive protection and repressive protection

Keywords: Construction, Arrangement, Assurance, Fiduciary, Agreement, Leasing, Business Financing.

INTRODUCTION

Background

The function carried out as a distributor of funds to the public, the banking industry runs its business of providing credit to customers (debtors). The provision of credit by banks must basically be based on confidence in the ability and ability of debtors to pay off their debts, and must be done on the basis of the principle of providing credit that does not harm the interests of the bank, debtor customers and the depository community. This must be done, considering that the credit provided by the bank contains risks. For this reason, it is necessary to have collateral (collateral) concerning property belonging to

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debtor customers or can also belong to third parties which is an additional guarantee to secure credit settlement.[1]

In business activities require capital, both in the form of funds and goods. Funds are needed for company operations, while capital goods are needed to support company activities. Procurement for capital goods requires large funds, while the funds owned by the company are prioritized to fund other company operations. The step taken by the company to meet the needs of capital goods is to rent capital goods to finance companies. The leasing of capital goods by companies that require capital goods at a finance company is known as a leasing agreement.[2]

Leasing companies in Indonesia are better known as leasing. The main activity of leasing companies is engaged in financing for the needs of capital goods desired by customers. Financing here means if a customer needs goods or capital such as office equipment or cars by renting or buying kerdit can be obtained at a leasing company. The leasing party can finance the wishes of the customer in accordance with the agreement that has been agreed upon by both parties.[3]

The legislation on leasing in Indonesia has not been stated in the law. Meanwhile, agreements made between those interested still use the guidelines of agreements and leases contained in Indonesia's positive law. The regulation on Leasing in this case is still very simple, and the day-to-day implementation which is based on policies that do not conflict with the existing Ministerial Decree.[4]

The 1974 Decree of Three Ministers on leasing was the first regulation specifically issued for it. The decree and other regulations issued later to regulate leasing agreements and activities in Indonesia, are primarily administrative and obligatory or coercive. [5]

The leasing agreement is actually similar to an ordinary lease agreement as stipulated in Articles 1548 to Article 1600 of the Civil Code (Staatsblad 1847 Number 23, hereinafter referred to as the Civil Code) only the object of the lease is different. Leasing only specializes in capital goods, namely goods needed for business activities. In a lease agreement, the object is goods in general, be it goods for production or goods for consumption.[6]

Although there are differences in the object of the lease, there are similarities between leasing and ordinary rent, namely in the position of the tenant and the lessee, which are both users of the goods rented, not the owners of the goods they rent. In the leasing agreement, the party who leases capital goods is called the lessor, while the lessee of capital goods is called the lessee. If the lessor is the owner of the capital goods, why is it often in practice that the lessor binds the lessee with a fiduciary guarantee. [7]

In the opinion of PA Stein, the benefits of a fiduciary agreement in writing are as follows: The creditor of the fiduciary in his or her interest will demand the easiest way to prove the surrender of the security to the debtor. The most important thing to anticipate the possibility of things happening beyond our wishes such as the debtor dies before the creditor can exercise his rights. Without a valid deed it will be difficult for the creditor to

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prove his rights against the debtor's heirs. With the deed will be able to include special promises between debtors and creditors that regulate the legal relationship between them.[8]

Problem Statement

1. What is the review in the leasing agreement mechanism on objects encumbered by fiduciary guarantees?;
2. How is the lessor's effort in executing the leasing object encumbered with fiduciary guarantee?;
3. What is the ideal construction of fiduciary guarantee arrangements in leasing agreements in business financing?

THEORETICAL FRAMEWORK

Law enforcement is the process of making efforts to uphold or function legal norms in a real way as a guide for behavior or legal relations in public and state life.[9] Viewed from the point of view of the subject, law enforcement can be carried out by a broad subject and can also be interpreted as law enforcement efforts by the subject in a limited or narrow sense. In a broad sense, the law enforcement process involves all legal subjects in every legal relationship. Anyone who carries out normative rules or does something or does not do something based on the norms of the applicable rule of law, means that he is exercising or enforcing the rule of law. In a narrow sense, in terms of its subject, law enforcement is only interpreted as the effort of certain law enforcement officials to guarantee and ensure that a rule of law runs as it should. In ensuring the enforcement of the law, if necessary, the law enforcement apparatus is allowed to use coercive force.[10]

The definition of law enforcement can also be viewed from the point of view of its object, namely in terms of the law. In this case, the understanding also includes broad and narrow meanings. In a broad sense, law enforcement also includes the values of justice contained in the sound of formal rules and the values of justice that live in society. However, in a narrow sense, law enforcement only involves the enforcement of formal and written regulations.[11]

Law Enforcement Theory, in general, law enforcement must meet certain criteria as stated by Soerjono Soekanto (1982: 20). There are five factors that affect law enforcement, namely: 1) The legal factor itself; 2) Law enforcement factors, namely those who form or apply the law; 3) Factors of facilities and facilities that support law enforcement; 4) Community factors, namely the environment in which the law applies or is applied; 5) Cultural factors, namely as the result of work, creation and taste based on human charities in the association of life. The five factors mentioned above are interrelated with each other, because they are the essence of law enforcement and are also a benchmark rather than the effectiveness of law enforcement.[12]

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Problems in law enforcement make the evaluation of the need for legal reform, where law development has the aim of rallying the lives of Indonesian people who are humane and just. The stage of legal reform begins with conceptual review of legal principles.[13] So as to formulate the right method in dealing with problems regarding the law of police authority using law enforcement theory.

RESEARCH METHODOLOGY

This research was prepared using a type of normative juridical research, which is research focused on examining the application of rules or norms in positive law.[14] Normative Juridical, which is an approach that uses a positivist legis conception. This concept views law as identical to written norms created and promulgated by authorized institutions or officials. This conception views law as a normative system that is independent, closed and independent of real community life.[15] In legal research there are several approaches, the approaches used in legal research are the statute approach, *case* approach, historical approach, comparative *approach,* and conceptual approach.[16]

Data sources in this study are divided into two parts, namely primary data sources and secondary data sources. A primary data source is a data source that directly provides data to the data collector; while secondary data sources are data sources obtained by reading, studying and understanding through other media sourced from literature, books, and documents[17].

The research technique in this study is descriptive analytical, where the analysis is carried out critically. The data collected in this study will be analyzed descriptively with a *qualitative approach*, namely by providing a thorough and in-depth explanation and explanation (*holistic* / *verstelen*).[18]

RESEARCH RESULTS

Mechanism of Leasing Agreement against Objects Encumbered by Fiduciary Guarantees

Credit is a solution for people who want to own an item without having to pay in cash but can be paid in installments periodically. The high public interest in making this credit is the basis for many emerging finance companies or can be called leasing. This finance or leasing company is an institution that provides financing or funding for the purchase of goods or businesses whose payments can be made periodically or in installments.[19]

The leasing agreement is actually similar to an ordinary lease agreement as stipulated in Article 1548 to Article 1600 of the Civil Code (*Staatsblad* 1847 Number 23, hereinafter referred to as the Civil Code) only the object of the lease is different. Leasing only specializes in capital goods, namely goods needed for business activities. In a lease agreement, the object is goods in general, be it goods for production or goods for consumption.[20]

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The law governing *leasing* in Indonesia does not yet exist. The provisions governing this issue are still in the form of decrees of the Minister of Finance and other regulations. In 1974 a Joint Decree of three Ministers, namely the Minister of Finance, Minister of Industry and Minister of Trade and Cooperatives Number Kep-122 / MK / IV / 1/1974, Number 32 / M / SK / 2 / 1974 and Number 30 / Kpb / I / 1974, dated February 7, 1974, between in article 1 given the following definition of leasing: [21]

"Every company's financing activity in the form of providing capital goods for use by a company, for a certain period of time, based on periodic payments accompanied by the right of choice (*optie*) for the company to purchase the capital goods concerned or extend the leasing period based on the mutually agreed residual value."

Currently, many finance institutions and banks (commercial and credit banks) provide consumer *finance*, leasing, factoring. They generally use treaty procedures that include the existence of a fiduciary guarantee for the object of the fiduciary guarantee. In practice, financing institutions provide movable goods requested by consumers (such as motorcycles or industrial machinery) then on behalf of consumers as debtors (recipients of credit / loans). Consequently the debtor hands over to the creditor (creditor) on a fiduciary basis. This means that the debtor as the owner on behalf of the goods becomes a fiduciary to the creditor who is in the position of fiduciary beneficiary. A simple practice in fiduciary guarantees is that the debtor/party who owns the goods submits financing to creditors, then both parties agree to use fiduciary guarantees on the debtor's property and a notarial deed is made and then registered with the Fiduciary Registration Office. The creditor as the fiduciary beneficiary will receive a fiduciary certificate, and a copy is provided to the debtor. By obtaining a fiduciary guarantee certificate, the creditor / fiduciary recipient immediately has the right of direct execution (parate execution), as occurs in lending and borrowing in banking. The legal force of the certificate is the same as a court decision that already has permanent legal force. [22]

The provision of fiduciary guarantee is an *accessoir* agreement to a principal agreement as mentioned in the explanation to Article 6letter b of Law Number 42 of 1999 concerning Fiduciary Guarantee and must be made by a notarial deed called the Fiduciary Guarantee deed. However, according to Article 11 letter b of Law Number 42 of 1999 concerning Fiduciary Guarantee, it is explained that with a fiduciary agreement by notarial deed is not enough, but must be registered, to the Fiduciary Registration Office.[23]

Fiduciary guarantee is a security right to movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with the right of liability as referred to in Law Number 4 of 1996 concerning the Right of Liability on Land and Objects Related to Land (State Gazette of the Republic of Indonesia of 1996 Number 42, Supplement to the State Gazette of the Republic of Indonesia Number 3632) which remains in the control of the Fiduciary, as collateral for the repayment of certain debts, which gives the Fiduciary a preferred position over other creditors. The limitation of fiduciary guarantees is affirmed in Article 1 number 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999

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Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889; hereinafter referred to as Law No. 42/1999). This fiduciary guarantee binding is usually done in consumer financing agreements and sale and purchase agreements in installments. In both types of agreements, property rights have been transferred along with the delivery of goods from the seller (creditor) to the buyer (debtor). The rest of the unpaid price is considered debt. Thus, it is very reasonable for consumer financing agreements and sale and purchase agreements with installments to be bound by fiduciary guarantees, because the goods already belong to the debtor.[24]

The Lessor's Efforts in Executing the Leasing Object are encumbered with Fiduciary Guarantees

Fiduciary guarantees based on a trust by related parties, the debtor transfers the ownership rights of an object to the creditor, but the physical form of the object is still on the debtor. The existence of a form of transfer of ownership rights to the property, does not mean that the creditor of the fiduciary guarantee is the actual owner of the fiduciary collateral object, but the creditor as the recipient of the fiduciary guarantee has the right to sell the fiduciary security object as if the creditor becomes the owner of the thing if the debtor defaults[25].

As a special material guarantee, fiduciary guarantees have special characteristics, namely the implementation of the execution of objects that are used as easy collateral if the debtor experiences a state of default or default. This execution is a form of fulfillment of achievements that have been agreed before. In this regard, the fiduciary guarantee law has outlined the form of execution by creditors if the debtor experiences or has been proven to be in default or default as contained in Article 29 paragraph (1) states that "If the debtor or Fiduciary defaults, the execution of the Object that is the object of the Fiduciary Guarantee can be carried out by:

a. Execution with the execution of executory titles as in article 15 paragraphs (2) and (3),
b. Carrying out the sale of objects by the creditor's own power through public auction and taking repayment of his receivables,
c. Make underhand sales based on the agreement of the debtor and creditor to obtain the highest price that benefits both parties."[26]

Various alternative ways of execution of fiduciary guarantees can be performed. The implementation of executory title provisions is a method that is often used by creditors in this case, namely leasing financing institutions if the debtor has defaulted or defaulted to execute a motor vehicle that is used as the object of fiduciary guarantee in a financing contract that has been previously made with the debtor.

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Article 15 of the Fiduciary Guarantee Act states the provisions of the executory title contained in the fiduciary guarantee certificate, as follows:

a. "The Certificate of Fiduciary Guarantee bears the words "FOR THE SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD",
b. A Certificate of Fiduciary Guarantee has the same executory power as a court decision that has acquired permanent legal force,
c. If the debtor defaults, the fiduciary beneficiary has the right to sell the thing that is the object of the fiduciary guarantee in his own power."[27]

The provisions of the above article provide an advantage to the fiduciary beneficiary, namely the creditor, to carry out execution actions if faced with a debtor who has defaulted. The executory title listed in the fiduciary guarantee certificate is one of the principles of material guarantee, namely the ease of the execution process. The fiduciary guarantee certificate owned by the creditor has the same force as a court decision that has permanent legal force, in addition to the fiduciary guarantee certificate, the creditor has protection from the law and free will to execute if the debtor defaults or defaults.

Court decisions that have been issued by judges do have a binding nature for litigants, but it is not meaningful enough if there is no realization or not implemented, therefore the existence of executory power in a decision can expressly stipulate that what is the judge's determination in the decision that has been issued must be implemented for litigants[28]. Indirectly, the creditor in this case the lessor who already has a fiduciary guarantee certificate with an executory title in it has the same position as a person who wins a case in court and no legal remedy can be taken.

The Fiduciary Guarantee Law has outlined the provisions of article 15 paragraph (2) that with the executory title in a fiduciary guarantee certificate, the execution of the object that is the fiduciary guarantee can be carried out without the need for court proceedings first. Furthermore, in the explanation of the provisions of article 15 paragraph (3) explains that this executory title also gives the right of parate execution to the creditor, and this can be exercised if the debtor has suffered a default.

According to article 4 of the fiduciary guarantee law, it states that a fiduciary guarantee is a follow-up agreement or accesoir of a main or principal agreement in which there are obligations of the parties to carry out or fulfill the agreed performance. This indicates that the fiduciary guarantee agreement has a dependence on the principal agreement and cannot stand alone. If it is related to the debtor's default, the meaning of default contained in article 15 paragraph (3) of the fiduciary guarantee law is the debtor's default on the principal agreement that has been made before, not against the follow-up agreement[29].

The Ideal Construction of Fiduciary Guarantee Arrangements in Leasing Agreements in Business Financing

The existence of the Constitutional Court decision Number 18 / PUU-XVII / 2019, has an influence related to the meaning of the executory power of the fiduciary guarantee

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certificate and the implementation of the execution of fiduciary guarantees as contained in article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantee. Although the constitutional court gives a different meaning related to the substance of article *a quo*, the fiduciary guarantee law still remains a reference to the parties concerned when entering into an agreement in which there is a guarantee of an object with fiduciary guarantee.

The constitutional court's decision *a quo* explains that creditors in carrying out the execution of the object of fiduciary guarantee through an application submitted to the district court for binding legal force. According to the author's analysis, the execution of the fiduciary guarantee object through filing an application with the district court in advance is not an obligation for creditors, but only an alternative nature, because the special nature possessed by the fiduciary guarantee itself, namely the ease of execution, does not necessarily disappear due to this decision. Some important points that become problems in this case are first: regarding the meaning of the executory power of the fiduciary guarantee certificate, second: parate execution carried out by the creditor, third: the problem of determining the debtor's default, fourth: the mechanism for executing the object of fiduciary guarantee.

As previously known, a fiduciary agreement is not a stand-alone agreement but is an accessoir agreement of a principal agreement, based on this the determination of the agreement clauses in the main agreement is very important for the continuity of the actions of the debtor and creditor, besides that both parties are required to know and understand the contents of the agreement made, as done between the lessor as the creditor, with consumers, namely as debtors in financing agreements that use motor vehicles as fiduciary collateral. Often leasing finance companies use standard clauses listed in an agreement made, but are not understood by the debtor as a whole which causes the debtor to be stuck with the rules of this standard clause.

The constitutional court decision number 18/PUU-XVII/2019 which provides changes to the basic mechanism related to the provisions for the execution of fiduciary guarantee objects as stipulated in the Fiduciary Guarantee Law certainly has the aim of creating a balance of rights owned by each party, both creditors and debtors. After the constitutional court decision *a quo*, there is one new right owned by the debtor, namely the right to obtain self-protection at the time of execution of fiduciary guarantees, the form of these rights in the form of filing objections to the debtor's default and the debtor's voluntariness in handing over fiduciary security objects to creditors for execution. The existence of this right, on the other hand, poses its own problems for the process of execution of fiduciary security objects by creditors who can no longer carry out the execution of fiduciary security objects directly if the debtor does not admit that he has defaulted, and does not deliver the objects. Therefore, the lessor needs to seek several actions as a form of legal protection in carrying out execution. The legal protection is in the form of preventive protection and repressive protection.

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A. Preventive Legal Protection

Preventive legal protection in credit agreements with fiduciary guarantees carried out by the lessor is needed to minimize the occurrence of disputes that arise during the implementation of the agreement. The agreement process begins with the making of an agreement between the creditor and the debtor with the decision of the constitutional court *a quo* must pay attention to the clauses regarding the debtor's state of default and the settlement mechanism that can be taken. Arrangements regarding a debtor's default event do require special attention in an agreement including: [30]

a. The imposition of a default event must refer to the designation of risk imposition from each party

b. The creditor has an interest in obtaining certain remedies if the debtor defaults without having to terminate the agreement, these efforts can be in the form of recalling the goods that become collateral until the debtor fulfills its obligations.

A credit agreement in which there is a fiduciary guarantee agreement, must be made in the form of an authentic deed before a notary as the authorized party. The use of this authentic deed has a function as a perfect proof tool and has binding evidentiary power. The making of an authentic deed by an authorized official is also a perfect formal proof of the subject matter and other things mentioned in the deed, besides that the lessor as a creditor can use this authentic deed to maintain things that will arise. The Fiduciary Guarantee Act has provided for the provision of encumbrance of objects with fiduciary guarantees and the registration of fiduciary guarantee deeds that have been made. The process of encumbrance of an object by a fiduciary guarantee is made in the form of an authentic deed or notarial deed that uses Indonesian and is a fiduciary guarantee deed. The fiduciary guarantee deed at least contains the provisions as stated in article 4 of Law Number 42 of 1999 concerning Fiduciary Guarantee. The fiduciary guarantee deed that has been made must then be registered with the competent authority, namely the Fiduciary Guarantee Registration Office, as expressly stated in article 11. In civil law, the process of recording and registration is the right of the parties involved and can be carried out by the will of these parties. The registration process can be carried out by the parties if the legal relationship they create wants to be known by the other party with the aim of protecting the rights owned by each party, but the conditions for recording and registration in the field of treaty law are not required.[31]

B. Repressive Legal Protection

Repressive legal protection is used if in the implementation of an agreement between the lessor and the lease in which there is a fiduciary guarantee experiences a lease condition that cannot pay the agreed pretation. The existence of this condition, the creditor, namely the lessor, has the right to execute the fiduciary collateral. The issue regarding the implementation of collateral execution by the lessor as a creditor has actually been reaffirmed in the Financial Services Authority of the Republic of Indonesia Regulation

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Number 35 / POJK.05 / 2018 concerning the Operation of Finance Company Business in Article 50 paragraph (1) which reads "The execution of collateral by the Finance Company must meet the following conditions:

a. The debtor is proven to be in default;
b. The debtor has been given a warning letter; and
c. The Finance Company has a fiduciary guarantee certificate, a certificate of liability, and/or a mortgage certificate"[32]

The execution of fiduciary collateral by creditors is a form of legal protection to guarantee the creditor's right to obtain repayment from debtors who experience default or default. After the issuance of the constitutional court decision number 18/PUU-XVII/2019, the execution of fiduciary guarantees by creditors cannot necessarily be carried out directly without regard to the requirements regarding the debtor's default agreement and the delivery of fiduciary security objects based on the debtor's voluntariness. The debtor has suffered a default, and the lessor as a creditor has sent a warning letter in the form of a summons to the debtor, and from the debtor has admitted that he is in default, the execution process can be carried out by the lessor itself directly using the executory title through auction or underhand sales. The problem that arises is if the debtor itself does not admit that he is in default. The existence of this situation the lessor can use several efforts both through non-litigation and litigation means.

Non-litigation means can be used by the debtor and creditor, in this case the lessor by renegotiating the agreement that has been made previously to calculate or adjust the interests between each party, the lessor as a creditor can show evidence stating that the debtor has not fulfilled the performance that should be paid, and ask the debtor to deliver the object guaranteed by fiduciary guarantee for execution. If in the negotiation the debtor has agreed that he is in default and has voluntarily delivered the fiduciary security object, the lessor can carry out the execution process of the fiduciary security object as using the method specified in article 29 of the Fiduciary Guarantee Law.

However, litigation facilities can be taken by the lessor if the negotiations that have been carried out do not result in an agreement by submitting an execution application to the district court. The lessor can file a lawsuit in the district court that the debtor has suffered a default or default, and apply to confiscate the execution of collateral from the debtor's hands for collateral execution. The filing of a lawsuit to the district court is a form of protection to the lessor as a creditor for the debtor's default, this is useful to strengthen the position and provide legal certainty of the leasing institution in carrying out the execution of fiduciary guarantees, because after the constitutional court decision *a quo* The lessor cannot withdraw the fiduciary security object unilaterally for execution if the debtor does not agree with the situation that he has defaulted and does not want to deliver the fiduciary security object to the lessor.

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CONCLUSION

Based on the results of research and discussion, several things can be concluded as follows:

1. The leasing agreement is actually similar to an ordinary lease agreement as stipulated in Article 1548 to Article 1600 of the Civil Code (*Staatsblad* 1847 Number 23, hereinafter referred to as the Civil Code) only the object of the lease is different. Leasing only specializes in capital goods, namely goods needed for business activities. In a lease agreement, the object is goods in general, be it goods for production or goods for consumption.
2. Various alternative ways of execution of fiduciary guarantees can be performed. The implementation of executory title provisions is a method that is often used by creditors in this case, namely leasing financing institutions if the debtor has defaulted or defaulted to execute a motor vehicle that is used as the object of fiduciary guarantee in a financing contract that has been previously made with the debtor.
3. The lessor needs to seek several actions as a form of legal protection in carrying out execution. Namely, the legal protection is in the form of preventive protection and repressive protection.

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