



## **Juridical Analysis of Law No. 42/1999 with Constitutional Court Decision No. 18/PUU-XVII/2019 on Motor Vehicle Withdrawal by Defaulting Debtors**

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### **ABSTRACT**

*Motor vehicles are often confiscated by people who do not repay debts, and are occasionally subjected to violence or threats from debt collectors. Meanwhile, Law No. 42/1999 Article 15 stipulates that the withdrawal can be self executed. However, Constitutional Court Decision No. 18/PUU-XVII/2019 states that execution must go through the courts, which leads to differences in interpretations. Some interpreted the withdrawal to require a judicial process, while others argued that it could be done on their own, which led to forced withdrawals by debt collectors. Therefore, this research is conducted to analyze the juridical implications of Law No. 42/1999 on Fiduciary Guarantee regarding the Constitutional Court Decision No. 18/PUU-XVII/2019, which specifically discusses motor vehicle withdrawals by creditors against defaulting debtors. A normative juridical approach with qualitative analysis was chosen to obtain an in-depth and accurate understanding of the legal issues discussed. The approaches used in this research are statute approach and case approach. The result of this research is in Decision No. 18/PUU-XVII/2019, the Constitutional Court reviewed and reinterpreted Article 15 Paragraphs (2) and (3) of Law No. 42/1999 on Fiduciary Guarantee. The Court found that the law allowed for arbitrary actions by creditors, causing injustice to debtors. The decision mandated that the execution of collateral, such as the withdrawal of a motor vehicle, must be done through a District Court decision rather than unilaterally by the creditor.*

**Keywords:** *Debtor Default, Unilateral Execution, Vehicles Withdrawal*

## INTRODUCTION

In general, fiduciary guarantee is one of the forms of collateral in credit agreements that is often used by financial institutions in the Indonesian legal system. Law No. 42/1999 on Fiduciary Guarantees stipulates the provision of fiduciary guarantees that entitle the party receiving the fiduciary guarantee to settle its debts from the proceeds of its execution on the object of the fiduciary guarantee. However, the exercise of this right often leads to various legal problems, especially related to the withdrawal of motor vehicles by creditors against debtors who are declared in default.

The Indonesian Constitutional Court issued Decision Number 18/PUU-XVII/2019 in 2019, which provides a new interpretation regarding the execution of fiduciary guarantees. This decision provides a significant change in the perspective of the execution of fiduciary security objects, especially regarding the procedure for withdrawing motor vehicles by creditors. The Constitutional Court's decision emphasizes that the execution of fiduciary guarantees cannot be carried out unilaterally by the creditor, but should proceed through a court process, unless the debtor has submitted the object of the guarantee voluntarily.<sup>1</sup>

There are many incidents of forced withdrawal of vehicles by debt collectors or leasing companies that we often find in the community. It causes anxiety for people who want to buy vehicles on credit. Withdrawal of fiduciary security objects is often conducted by debt collectors. Debt collectors are tasked with collecting fiduciary collateral from debtors who default or disobey. The existence of debt collectors often disturbs the public because they often use physical and psychological violence, intimidation and threats against debtors.<sup>2</sup>

Based on the Fiduciary Guarantee Law No. 42/1999 Article 15, there are different interpretations on the process of withdrawing fiduciary guarantees of motor vehicles when credit is delinquent. Some argue that withdrawal must go through the court, while others argue that withdrawal can be conducted on its own based on the authority of the Fiduciary Guarantee Law. This difference has led to forced vehicle withdrawals by debt collectors in the community.

This research aims to analyze the juridical aspects of Law No. 42/1999 on Fiduciary Guarantee in relation to the Constitutional Court Decision No. 18/PUU-XVII/2019. This analysis is important to understand the legal implications of the decision on motor vehicle withdrawal practices by creditors as and legal protection for debtors. Thus, this research is expected to contribute to the development of fiduciary guarantee law in Indonesia and provide

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<sup>1</sup> Dicky Bagus Sanjaya and Tamsil, "Analisis Yuridis Terhadap Putusan Mahkamah Konstitusi 2/PUU-XIX/2021 Bagi Penerima Jaminan Fidusia (Kreditur)," *Jurnal Novum* (2022).

<sup>2</sup> Vera Rimbawani Sushanty, "Tinjauan Yuridis Terhadap Debt Collector Dan Leasing Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Gorontalo Law Review* 3, no. 1 (April 30, 2020): 59, <http://jurnal.unigo.ac.id/index.php/golrev/article/view/896>.

recommendations for related parties in implementing their rights and obligations in appropriate with applicable legal provisions.

This research will examine various legal aspects related to the execution of fiduciary guarantees, including the legal principles underlying the Fiduciary Guarantee Law, the execution procedure under the Law, as well as the changes brought about by the Constitutional Court Decision No. 18/PUU-XVII/2019. In addition, this research will also evaluate the impact of the decision on banking practices and financing institutions in Indonesia as well as legal protection for debtors. Thus, this research is expected to provide a comprehensive overview of the execution of fiduciary guarantees in Indonesia after the Constitutional Court's decision.

## LITERATURE REVIEW

### Fiduciary under Law No. 42/1999

Fiduciary is defined as the process of the owner transferring the property to a fiduciary (usually the creditor), while the property is maintained by the owner (the debtor).<sup>3</sup> According to Law No. 42/1999 on Fiduciary Guarantee, fiduciary is the transmission of ownership rights of an object on the basis of trust, in this case the owner of the object whose ownership rights are being transmitted still owns the object. This law regulates the use of objects as collateral for debt repayment, where the object remains in the control of the fiduciary.<sup>4</sup> The object of a fiduciary guarantee can be a movable or immovable object that cannot be encumbered with a mortgage, mortgage, or pledge. Objects that become fiduciary objects can be tangible or intangible objects, such as debts.<sup>5</sup> The law requires that every fiduciary agreement must be registered at the Fiduciary Registration Office. This registration gives the fiduciary agreement executorial power, allowing the fiduciary beneficiary to execute the fiduciary guarantee if the debtor defaults.

A fiduciary security certificate issued after registration has the same authority as a court decision that has been legally enforceable. It means that if the debtor defaults, the fiduciary beneficiary can directly execute it without going through court proceedings first.<sup>6</sup> The law also regulates administrative and criminal sanctions for parties who violate the provisions of the fiduciary

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<sup>3</sup> Rachmadi Usman, "Makna Pengalihan Hak Kepemilikan Benda Objek Jaminan Fidusia Atas Dasar Kepercayaan," *Jurnal Hukum Ius Quia Iustum* 28, no. 1 (January 1, 2021), <https://journal.uin.ac.id/IUSTUM/article/view/16161>.

<sup>4</sup> Pemerintah Pusat Indonesia, *Undang-Undang (UU) Nomor 42 Tahun 1999 Tentang Jaminan Fidusia* (Jakarta, 1999).

<sup>5</sup> Reni Budi Setianingrum, "Mekanisme Penentuan Nilai Appraisal Dan Pengikatan Hak Cipta Sebagai Objek Jaminan Fidusia," *Jurnal Media Hukum* 23, no. 2 (2017), <http://journal.umy.ac.id/index.php/jmh/article/view/1998>.

<sup>6</sup> Shavira Ramadhanneswari and Hendro Saptono R. Suharto, "Penarikan Kendaraan Bermotor Oleh Perusahaan Pembiayaan Terhadap Debitur Yang Mengalami Kredit Macet (Wanprestasi) Dengan Jaminan Fidusia Ditinjau Dari Aspek Yuridis," *Diponegoro Law Journal* 6, no. 2 (2017): 1–14.

agreement, including the withdrawal of collateral objects without legal procedures. Law No. 42/1999 aims to provide legal certainty and protection for creditors and debtors in fiduciary transactions, and to prevent abuse in the process of withdrawing or executing collateral.

### **Constitutional Court Decision 18/PUU-XVII/2019 in Motor Vehicle Execution**

Constitutional Court Decision No. 18/PUU-XVII/2019 has changed the method of execution of fiduciary guarantees, which previously could be done quickly, to have to go through court proceedings. This weakens the creditor's right to conduct parate execution on its own. This change occurs because the determination of a breach of promise or default can no longer be made by the creditor on its own.<sup>7</sup>

After the Constitutional Court Decision No. 18/PUU-XVII/2019, a breach of promise or default, according to Article 15 Paragraph (3) of the Fiduciary Guarantee Law No. 42/1999, must be pre-approved by both parties.. The fiduciary must voluntarily surrender the object of collateral, only then can execution be carried out. If the debtor cannot pay the installments, he/she is considered a defaulter and is obliged to surrender the object of collateral. If the debtor refuses, the creditor has the right to take the collateral object, even with the help of a third party or debt collector.<sup>8</sup>

However, after Constitutional Court Decision No. 18/PUU-XVII/2019, a default must be agreed upon. This makes it difficult for creditors to collect debtor obligations because unscrupulous debtors can evade by taking refuge in the decision.

### **Default Determination in Constitutional Court Decision No. 18/PUU-XVII/2019**

The Constitutional Court Decision No. 18/PUU-XVII/2019 has led to changes in the way fiduciary guarantees are executed. While this process could previously be done quickly, it now has to go through the courts, thus weakening the substance of parate execution and the creditor's position. This change relates to the regulation of default.

After the Constitutional Court Decision No. 18/PUU-XVII/2019, creditors can no longer unilaterally determine the existence of a breach of promise or default based on Article 15 Paragraph (3) of the Fiduciary Guarantee Law No. 42/1999. Therefore, there must be an agreement between the grantor and the

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<sup>7</sup> Sri Elmi Vonny, "Eksekusi Jaminan Fisusia Pasca Putusan Mahkamah Konstitusi Nomor 2/PUU-XIX/2021 (Studi Pada PT Pegadaian Cabang Tarandam Kota Padang)" (Universitas Andalas, 2022).

<sup>8</sup> Robert Bouzen and Ashibly Ashibly, "Pelaksanaan Eksekusi Jaminan Fidusia Terhadap Debitur Yang Wanprestasi Setelah Keluarnya Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Jurnal Gagasan Hukum* 3, no. 2 (2021): 137–148.

fiduciary regarding the existence of a breach of promise or default. In addition, the fiduciary must voluntarily surrender the object of the fiduciary guarantee, then parate execution can be carried out.

When it comes to fiduciary guarantees, debtors who cannot pay their installments are included in the category of breach of promise or default. In such a situation, the debtor must surrender the object of collateral. If the debtor refuses, the creditor has the right to take the collateral object and if necessary, ask for the help of a third party or debt collector.

However, after the Constitutional Court Decision No. 18/PUU-XVII/2019, breach of promise must be pre-approved by both parties. This makes it difficult for creditors to obtain their rights when collecting obligations from debtors, because non-compliant debtors can evade by protecting behind the Constitutional Court Decision.

## **RESEARCH METHODOLOGY**

The research method used in this research is designed to provide a comprehensive and in-depth analysis regarding the impact of the Constitutional Court Decision No. 18/PUU-XVII/2019 on the withdrawal practice of motor vehicles in Indonesia based on Law No. 42/1999 on Fiduciary Guarantee. A normative juridical approach with qualitative analysis was chosen to obtain an in-depth and accurate understanding of the legal issues discussed. According Soerjono Soekanto, normative juridical research was chosen because a research aims to analyze the legal aspects contained in related regulations and decisions.<sup>9</sup> The approaches used in this research are statute approach and case approach. The statute approach is used to analyze the provisions in Law No. 42/1999 on Fiduciary Guarantee, while the case approach is used to analyze the Constitutional Court decision No. 18/PUU-XVII/2019. The legal source of this research is divided into three kinds, such as (1) primary legal sources, example Law No. 42/1999 on Fiduciary Guarantee and the Constitutional Court decision No. 18/PUU-XVII/2019; (2) secondary legal sources, example legal literature, legal journals, and legal expert commentaries relevant to the research topic; (3) tertiary legal sources, example legal encyclopedias, legal dictionaries, and other sources that provide additional information to support the analysis. Furthermore, consultation with legal experts was conducted to ensure proper interpretation of regulations and court decisions.

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<sup>9</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2015).

## RESULT AND DISCUSSION

### **Default Provisions under Law No. 42/1999 on Fiduciary Guarantee with Constitutional Court Decision No. 18/PUU-XVII/2019**

Default is a situation where a person does not comply with their obligations in accordance with the agreed contract.<sup>10</sup> According to the Civil Code, the decision to determine whether a person has made a default refers to Article 1238 of the Civil Code. Default has important consequences, so it must first be established whether the debtor is in default or not. If the debtor denies, this must be proven before a judge. Determining whether someone has defaulted is not always easy, as it is often not stated exactly when the obligation must be performed.<sup>11</sup> In the context of fiduciary guarantees, default is the basis for creditors to conduct independent execution or *parate* execution. This is regulated in Article 29 of Law No. 42/1999 on Fiduciary Guarantee. Self-execution by the creditor aims to assist the creditor in the debt collection process by directly executing the fiduciary security object.<sup>12</sup>

The creditor can self-execute against fiduciary security objects, but the conditions stipulated in Article 29 must be fulfilled. These conditions are that the debtor or fiduciary has defaulted (not fulfilling promises). Default according to Article 29 of Law No. 42/1999 can be defined as the debtor not paying when billed or not fulfilling other agreed promises, either in the main agreement or the collateral agreement, even though the debt is not overdue. In this situation, the creditor can execute the fiduciary guarantee. This provision was in effect prior to the Constitutional Court Decision No. 18/PUU-XVII/2019 which changed the position of Article 29 of Law No. 42/1999.

According to Article 29 of the Fiduciary Guarantee Law No. 42/1999, the creditor may execute the object of fiduciary guarantee without the assistance of the Chairman or bailiff of the District Court. This provision is created to fulfill the interests of the parties to the fiduciary agreement. Unfortunately, the Constitutional Court Decision No. 18/PUU-XVII/2019 has changed the definition of default, which was formerly decided by the creditor. According to this decision, default may not be determined by the creditor alone based on Article 15 Paragraph (3) of Fiduciary Guarantee Law No. 42/1999.

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<sup>10</sup> Dr. Yahman, *Cara Mudah Memahami Wanprestasi & Penipuan Dalam Hubungan Kontrak Komersial* (Kencana, 2019).

<sup>11</sup> Dr. Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan Yang Lahir Dari Hubungan Kontraktual* (Kencana, 2014).

<sup>12</sup> Rachmadi Usman, *Hukum Jaminan Keperdataan* (Jakarta: Sinar Grafika, 2008).



There are two possible ways to determine default after this decision, such following below:

1. The default agreement is created when the principal agreement and the fiduciary guarantee agreement are created in the first instance.
2. The District Court determines default so that the enforcement of the fiduciary guarantee can be conducted.

Legal certainty is a guarantee of justice in law. According to Gustav Radbruch, the importance of justice and legal certainty is an integral part of the legal system. Safety and discipline must be sustained by maintaining the rule of law. Unfortunately, the Constitutional Court Decision No. 18/PUU-XVII/2019 does not provide legal certainty on the execution of fiduciary security objects. This disadvantages the creditor's position because there is no clear direction and mechanism for the execution of fiduciary guarantees.

### **Legal Consequences of Motor Vehicle Withdrawal**

Leasing companies are not specifically stipulated in the Civil Code and Commercial Code. However, a leasing company has a legal basis based on the principle of freedom of contract as stipulated in Article 1338 of the Civil Code. This article states that everyone is free to make agreements as long as they fulfill the legal requirements in accordance with Article 1320 of the Civil Code. If these conditions are met, the leasing company applies and the provisions of the agreement in the third book of the Civil Code also apply to it.<sup>13</sup> If not stipulated in the agreement, Minister of Finance Regulation No. 130/PMK.010/2012 applies, which prohibits leasing companies from forcibly withdrawing vehicles from customers in arrears. The regulation states that a finance company may not withdraw a motor vehicle before the Fiduciary Registration Office issues a fiduciary guarantee certificate and hands it over to the finance company. However, in a motor vehicle credit agreement through a financing institution, if the debtor defaults on the installments, the agreement is terminated and the debtor must pay all arrears along with interest and other costs. The debtor is given the opportunity to find a buyer for the object of the agreement within a certain time. The creditor can also take over the object of the agreement and find a buyer based on the agreement contract, power of sale, and fiduciary. However, execution is not easy to do because it must go through the court with the usual procedures that are time-consuming and costly, given the large number of bad credit cases.

Many finance companies using debt collectors because of the difficulty of execution. However, debt collectors often create new problems between creditors and debtors because they use intimidation or violence when collecting fiduciary collateral on the street. This causes the debtor to fight back. The police provided a

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<sup>13</sup> Marhaeni Ria Siombo, *Lembaga Pembiayaan Dalam Perspektif Hukum* (Jakarta: Universitas Katolik Indonesia Atma Jaya, 2019).

solution by issuing Regulation of the Chief of the National Police of Indonesia No. 8/2011 on Securing the Execution of Fiduciary Guarantees to avoid prolonged disputes between creditors and debtors and to maintain the safety and comfort of both parties. The purpose is to ensure that the execution of fiduciary guarantees can be conducted safely, orderly, smoothly, and accountably, as well as to protect the safety and security of creditors, debtors, and the public from property losses and life safety. The police is a state instrument tasked with preserving public security and interest, upholding the law, and protecting, caring for, and assisting the public. Fiduciary guarantees include tangible movable goods, intangible movable goods, and immovable goods such as buildings that cannot be pledged with a mortgage. These collateral items must be or have been registered at the fiduciary registration center.

The Fiduciary Guarantee Law stipulates that the fiduciary must submit the object of the fiduciary guarantee voluntarily when the fiduciary receiver decides to execute the item. The Constitutional Court argued that Fiduciary Guarantee Law is partial to the fiduciary beneficiary, which is the company. Since there were many different interpretations of Article 15 Paragraph (2), the Constitutional Court examined the petitions submitted and stated in Constitutional Court Decision Number 18/PUU-XVII/2019 that the phrases “executorial power” and “equal to a court decision with permanent legal force” in Article 15 Paragraph (3) of the Fiduciary Guarantee Law are contrary to the 1945 Constitution and have no binding legal force. This applies if there is no agreement on default and the debtor does not voluntarily surrender the fiduciary security object. In this situation, the execution of the fiduciary security certificate must be carried out in accordance with legal procedures such as the execution of a court decision that has permanent legal force. This Constitutional Court decision states that in order to equate a fiduciary certificate with a court decision with permanent legal force, there must first be an agreement between the grantor and the fiduciary regarding the default, and the fiduciary must surrender the object of the guarantee voluntarily. If these two things are not agreeable, execution must be conducted in accordance with applicable legal provisions.

Courts that have the authority to execute are only assigned to Courts of first instance, which are District Courts, as stated in Article 195 Paragraph (1) and Article 206 Paragraph (1) RBg. The High Court or Supreme Court does not have the authority to execute, regardless of whether the executed judgment originates from the High Court or Supreme Court. Execution can only be conducted if the fiduciary has obtained a writ of execution from the District Court. This letter is a *beschikking* (always individual and concrete), and in the letter instructs the registrar or bailiff of the District Court to execute according to the execution request. This execution is called executorial seizure, which is confiscation based on the executorial title. This confiscation is made by court registrars or their appointees, supported by two prosecution witnesses who sign the Execution



Confiscation Report. Because execution seizure is enforced, the bailiff may request police assistance to secure the seizure process. The third decision in Constitutional Court Decision No. 18/PUU-XVII/2019 states that Article 15 Paragraph (3) of Law No. 42/1999 on Fiduciary Guarantee, the provision on “breach of promise” is not in accordance with the 1945 Constitution and is not legally binding, unless it is interpreted that “breach of promise” must be agreed by both the creditor and the debtor, or regulated in a court decision.

This decision indicates that a breach of contract (*wanprestasi*) must be determined based on the agreement between the involved parties. This means that the clause regarding breach of contract must be discussed in detail between the fiduciary giver and receiver. This clause must be included in the main agreement, and the notary creating the fiduciary security deed must ensure that both parties understand the breach of contract clause outlined in the agreement. The fiduciary security deed only includes the identities of the involved parties, data of the main agreement regarding the type of agreement and the debt guaranteed by the fiduciary, a description of the object serving as the fiduciary collateral, the amount of the guarantee, and the value of the object. However, if the clause regarding breach of contract is unclear and not agreed upon by both parties, its resolution can be prosecuted by legal action. Legal recourse is essential to ensure legal certainty, as without it, the resolution process becomes uncertain. Legal recourse is necessary to determine whether the fiduciary giver has breached the contract in the loan agreement between the parties. According to Constitutional Court Decision No 18/PUU-XVII/2019, Article 15 Paragraph (2) of Law No. 42/1999 on Fiduciary Security, which states that the phrases “executory power” and “equivalent to a final and binding court decision” are should not be interpreted for fiduciary guarantees where there is no agreement on default and if the debtor refuses to surrender the fiduciary guarantee voluntarily, legal proceedings in executing the Fiduciary Guarantee Certificate shall be conducted and treated in a manner equivalent to the execution of a court judgment that has been legally enforceable, in accordance with the 1945 Constitution. Additionally, Article 15 Paragraph (3) of Law No. 42/1999 also states that the term “breach of contract” is not in accordance with the 1945 Constitution and has no legal binding force unless it is defined that breach of contract is not only determined by the creditor, but through an agreement between the creditor and the debtor or through legitimate.

According to the Explanation of Article 15 Paragraph (2) of the Fiduciary Law No. 42/1999, the phrase “executorial power” is in conflict with the 1945 Constitution and does not have binding legal force unless. It is considered that in a fiduciary guarantee, there is no agreement to prejudice other parties, and the debtor refuses to submit the object of the fiduciary guarantee voluntarily, the execution of the Fiduciary Guarantee Certificate must follow the same legal mechanisms and procedures as the implementation of a final court decision.

Therefore, the execution of motor vehicles under fiduciary guarantees cannot be carried out if there is no consensus on contract breach between the debtor and the creditor, and if the debtor objects to voluntarily handing over the guarantee object. The determination of default must not be made unilaterally. Hence, the seizure or execution of motor vehicles under fiduciary guarantees need to pass a court application for a security seizure.

The forced seizure of motor vehicles under fiduciary guarantees by collectors or debt collectors constitutes a criminal act if there are elements of violence or coercion in its implementation. This is based on the Constitutional Court's decision stating that the provisions of Article 15 Paragraphs 2 and 3 of Fiduciary Law No. 42/1999 do not have binding legal force if the debtor objects to provide motorized vehicles and the determination of default is made unilaterally.<sup>14</sup>

The Criminal Code Article 368 states that anyone who unlawfully with intent to obtain an illegal benefit, forces another person with violence or threats to hand over any property belonging to him/her or to someone else, or to create or extinguish a debt, shall be sentenced for extortion with a maximum imprisonment of 9 months. This provision can be applied to collectors or debt collectors who forcefully seize motor vehicles with violence or threats of violence. If the vehicle owner hands over the vehicle due to force or threats, the collector or debt collector can be subjected to Article 368 of the Criminal Code.

## CONCLUSION

In Decision No. 18/PUU-XVII/2019, the Constitutional Court decided a judicial review case towards Article 15 Paragraphs (2) and (3) of Law No. 42/1999 on Fiduciary Guarantee. The consideration was that there was a legal gap in the law that could lead to arbitrary actions by one party in a fiduciary guarantee agreement. This action creates injustice for certain parties. Therefore, the Constitutional Court decided to reinterpret Article 15 Paragraph (2) and Paragraph (3). The procedure for withdrawing a motor vehicle by a creditor if the debtor defaults or breaches a promise, in accordance with Law No. 42/1999 on Fiduciary Guarantee, evaluates the fiduciary certificate to have the legal force of a court decision. However, Constitutional Court Decision No. 18/PUU-XVII/2019 states that the execution of collateral cannot be conducted by the creditor without any consent, but must be confirmed by the District Court.

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<sup>14</sup> Prika Handayani and Teddy Asmara, "Pertanggungjawaban Pidana Debt Collector Yang Melakukan Tindak Pidana Perampasan Dalam Kredit Bermasalah," *Hukum Responsif* 10, no. 2 (2019): 55–66.

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