



## Protection of Gorontalo City Police Against Debtors Who Transfer Fiduciary Vehicles Without Recipient Consent

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**Abstract** The purpose of writing this article is to determine the efforts that can be prevented by the police against fiduciary acts in the transfer of fiduciary objects in the jurisdiction of Gorontalo City. The method used in this study is to use empirical research methods with a qualitative approach. Hasil research on this case of fiduciary receiver or 2nd party raises the issue of the possibility of a crime in the field of fiduciary. This event is where the 2nd party makes a car loan at a financing company or individual with an installment payment system by the agreement specified in the agreement and for a certain time. After the credit agreement is running, the 2nd party (fiduciary recipient) does not perform its obligations as agreed between the twelve fiduciary parties to the fiduciary recipient to pay the installments but resells the goods that are the object of fiduciary security to the 3rd party without the knowledge of the 3rd party whose vehicle is still in the installment financing 2nd (fiduciary recipient) to the First party (fiduciary giver).

**Keywords:** Legal Protection; Debtor; Fiduciary

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## 1. Introduction

Article 1 Paragraph (1) of the law of the Republic of Indonesia 1945 has concluded that Indonesia is a state of law. The state of law in question is a state that is based on the Constitution and not based on the powers of officials or government bodies. Various provisions contained in the legislation.

Economic development is part of the national development of a country in order to achieve a just and prosperous society based on Pancasila and the Constitution of the Republic of Indonesia in 1945. The needs of the community every day in the development of economic development is increasing so that people are encouraged to be more consumptive and berelevansi in berproductivity.<sup>1</sup>

Today the means of Transportation is needed to support community activities that are in facilitating business or other daily activities, not a few people who choose four-wheeled transportation to speed up the work system. From the increase in consumptive behavior in meeting the needs of the car crediting business arises independently or through non-bank financial institutions leasing as a creditor (fiduciary recipient) to the debtor (fiduciary) where the way of implementation is very easy compared to borrowing funds to financial institutions, namely banks, credit activities are given to anyone who has the ability through debt and receivable agreement.

Financial institutions may not be willing to provide loans in the form of funds in the absence of adequate guarantees from the debtor, so basically there is no credit without guarantees. The debtor is required to provide adequate material guarantees in accordance with the amount of credit provided by the financing institution.<sup>2</sup>

This is because any lending will always contain risks because there is a possibility that one day the debtor will not be able to fulfill its obligations to pay credit installments as agreed. If one day the debtor is really unable to pay the loan in full, then the collateral object must be used as an alternative means of debt repayment by selling it at auction to cover the remaining payment of the debtor.

According to the text of the draft Criminal Code that criminal liability is a very important substance along with the problem of regulating criminal acts. Criminal responsibility is the implementation of the idea of balance, among others as follows: the existence of the principle of no crime without fault (the principle of culpability/principle of geen straf zonder schlud) which is the principle of humanity as a partner of the principle of legality (principle of legality) which is the principle of society.

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<sup>1</sup> NURSIYAM RIZQI SAHPUTRA, "PERLINDUNGAN HUKUM TERHADAP KREDITUR DALAM HAL DEBITUR MENGALIHKAN OBJEK JAMINAN FIDUSIA YANG BELUM DIDAFTARKAN TANPA IZIN KREDITUR (Studi Terhadap Putusan Pengadilan Tinggi Jakarta Nomor: 275/PDT/2015/PT. DKI)" (Universitas Islam Sultan Agung, 2022).

<sup>2</sup> Cantika Eka Yulianti, "Perlindungan Hukum Perusahaan Leasing Terhadap Terjadinya Penggelapan Objek Jaminan Fidusia," *Jurnal Ilmiah Ilmu Hukum Dinamika* 25, no. 1 (2019): 1-15.

To the goods or objects belonging to the debtor as collateral will be made a guarantee agreement. The guarantee agreement arises because of the principal agreement in the form of a credit agreement, where the guarantee agreement can not stand alone tetapi must always follow the main agreement which means that when the principal agreement ends then the guarantee agreement also ends. The guarantee agreement is a special agreement between the debtor and the creditor who makes a pledge by binding certain objects as a guarantee of security and legal certainty for the return of credit for the implementation of the main agreement. In the fiduciary agreement that is used as the object of fiduciary security remains in the possession of the previous owner of the object and is not controlled by the debtor, with the creditor entrusting the fiduciary recipient (debtor) to still be able to use the guarantee object in accordance with its function. But although the collateral object remains in the possession of the debtor must still have a good faith to maintain the collateral object as well as possible, where the debtor is not allowed to transfer or rent to another party the fiduciary security object to a third party without the consent of the First party (creditor) as in the law on Article 23 paragraph (2) - Fiduciary Security Act No. 42 of 1999 on fiduciary security which reads:

“The fiduciary is prohibited from transferring, mortgaging, or renting to other parties objects that are the object of fiduciary security that are not inventory objects, except with the prior written consent of the fiduciary recipient, shall be punished with imprisonment of 2 (2) years and a fine of at most Rp. 50.000.000, - (fifty million) rupiah”

Fiduciary security is a material security for movable property, both tangible and intangible fiduciary security is provided by the debtor to the creditor to guarantee the repayment of the debt, fiduciary security is regulated in law No. 42 of 1999 on fiduciary Security under Article 1 Paragraph (1) and Article 1 Paragraph (2).<sup>3</sup>

The state of the modern era is now increasing needs with this demanding that people make more effort to meet their economic needs, in carrying out their economic needs must have legal relations with others, one of which is the agreement. The agreement in the Civil Code is provided for in Article 1313 of the Civil Code, which reads:

"A covenant is an act by which one or more persons bind themselves to one or more others."

By entering into an agreement, the contracting party voluntarily commits itself to surrender something, do something or not to do something for the benefit and benefit of the party to whom it has pledged or bound itself, with guarantees or obligations in the form of property owned and to be owned by the contracting party or who has bound itself. According to the subject of a covenant is an event where one to another or where two people promise each other to do something. From this event arises a

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<sup>3</sup> Budi Junaedi, Merry Tjoanda, and Teng Berlianty, "Perlindungan Hukum Pada Debitur Atas Penarikan Objek Jaminan Fidusia Melalui Parate Eksekusi," *PATTIMURA Legal Journal* 1, no. 2 (2022): 124-32.

relationship between two people called the alliance between two people who make it in the form of a covenant through a series of words that contain jani-promise or ability spoken or written.

But in the agreement is often encountered parties who break promises, where the party does not implement the rights and obligations that have been agreed for example the transfer of the object of fiduciary security by the debtor who has committed a broken promise or default. In this case, the fiduciary recipient or the 2nd party raises the issue of the possibility of a crime in the field of fiduciary. This event is where the 2nd party makes a car loan at a financing company or individual with an installment payment system in accordance with the agreement specified in the agreement and for a certain time.

In reality, after the credit agreement was running, the 2nd party (fiduciary recipient) did not carry out his obligations as agreed between the two parties to the fiduciary giver to the fiduciary recipient to pay the installments, but rather resold the goods that became the object of the fiduciary guarantee to the 3rd party without the knowledge of the 3rd party whose vehicle was still in the financing installments of the 1st party (fiduciary giver) to the 1st party (fiduciary giver).

Then the action is certainly very detrimental to the 1st party (fiduciary giver) and also the 3rd party who does not know the origin of the vehicle that was resold to him, the problem is included in a criminal offense in the field of fiduciary which must be addressed jointly by the parties concerned, within the payment period using the agreement and can be criminalized as stipulated in Article 36 of Law No. 42 of 1999 concerning fiduciary guarantees. Consequently, if there is a transfer of fiduciary goods within the payment period that has not been repaid, the creditor as a fiduciary recipient can fully criminalize the provisions of Article 372 of the Criminal Code in conjunction with Article 23 paragraph (2) of Law No. 42 of 1999.<sup>4</sup>

In accordance with the legal principle of *Lex Specialis Derogate Lex Specialis Generalis*. So that in the case of transferring a fiduciary vehicle within the payment period that has not been paid off, it can also be bound by the embezzlement article as long as the fiduciary agreement is an illegal act.

Thus, the civil element will automatically be canceled as a result of the criminal element being clearly fulfilled when the agreement arises, because of the default of the debtor who deliberately transferred the fiduciary vehicle without the knowledge of the first party, the criminal element has been fulfilled when viewed from Article 372 of the Criminal Code in conjunction with Article 23 paragraph 2 of Law No.42 of 1999 so that the debtor can be charged with embezzlement. The criminal element has been fulfilled when viewed from Article 372 of the Criminal Code in conjunction with

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<sup>4</sup> Bagas Erlangga Miftahul Akbar, "PENEGAKAN HUKUM TERHADAP DEBITUR PELAKU TINDAK PIDANA PENGALIHAN JAMINAN FIDUSIA DAN PERLINDUNGAN HUKUM BAGI KORBAN (Studi Kasus Putusan Nomor 825/Pid. b/2018/PN Smg)" (Universitas Islam Sultan Agung Semarang, 2021).

Article 23 paragraph 2 of Law No. 42 of 1999 so that the debtor can be charged with the embezzlement article.

Fiduciary crimes in the form of transfer of fiduciary objects have often occurred but in its development there are still many Indonesian people especially in the Gorontalo area still know little about how to resolve through legal channels most victims of vehicle transfer only resolve in a family or deliberation without seeing the total losses that have been obtained as a result of the to the creditor.<sup>5</sup>

As the data obtained from the Gorontalo City Police about fiduciary crimes committed by fiduciaries (debtors) when viewed from 2021 to 2023 there have been as many as 85 cases of fiduciary crimes initial data collection in the Gorontalo City Police environment and conducting interviews with investigators and the criminal administration said that fiduciary cases occurred in the Gorontalo City area due to internal factors on the part of consumers, namely the arrears in the cost of vehicle repayment so that it is transferred to a third party to get money and also factors of bad faith that deliberately divert fiduciary objects.

From Case data in the last 3 years 2021 to 2023, there are quite a lot of total cases and the way to solve criminal acts that have been carried out is by stages. To be used as a comparison, the prospective researcher also collected a number of data from the Gorontalo Kota Police Station with the details of the data are:

Table 1.1 number of cases of transfer of fiduciary vehicles in the Gorontalo legal territory

NO	YEAR	REPORT	COMPLETED
1	2021	45	23
2	2022	26	10
3	2023	14	5
	<b>TOTAL</b>	<b>85</b>	<b>38</b>

From the table above can be seen the development of each year to year how many fiduciary cases entered the Gorontalo City Police Station but no legal settlement was made, the creditor was only limited to reporting the case along with the losses received and waiting in good faith in the return of fiduciary security.

So this makes it difficult for the police to investigate the criminal act of transferring fiduciary vehicles because the public prefers the return of fiduciary goods and compensation money rather than sanctions that will apply to parties who knowingly violate the law.

As in Article 372 of the criminal code, namely:

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<sup>5</sup> HELENA ANGGREANI WIDIWATI, "PERLINDUNGAN HUKUM TERHADAP KREDITUR DALAM PELAKSANAAN EKSEKUSI JAMINAN FIDUSIA KENDARAAN BERMOTOR RODA EMPAT DI CIMB NIAGA AUTO FINANCE CABANG MEDAN," n.d.

“Anyone who knowingly and unlawfully possesses something wholly or partly belonging to another person, but which is in his power not because of a crime is threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah”

And in Article 23 paragraph (2) of Law No.42 of 1999 on fiduciary security which states that:

"The fiduciary is prohibited from transferring, mortgaging, or renting to other parties objects that are the object of fiduciary security that are not inventory objects, except with the prior written consent of the fiduciary recipient”

The latest article on embezzlement that can ensnare the debtor as with the previous article. Regulation on embezzlement is regulated in law No.1 of 2023 concerning the criminal code promulgated on January 2, 2023, namely Article 486 of law 1/2023, which reads as follows;

"Any person who unlawfully possesses an item that partially or wholly belongs to another person, which is in his power not for a criminal offense, shall be punished for embezzlement, with a maximum imprisonment of four years or a maximum fine of Category V”.

Thus, the acts referred to in Article 486 committed by the person who is responsible for the goods because there is an employment relationship, because of his profession, or because he gets wages for the use of the bar, shall be sentenced to a maximum of five years in prison or a maximum fine of Rp 500 million.<sup>6</sup>

## **2. Method**

This type of research is Empirical Legal Research. According to Soerjono soekanto quoted by Mukti Fajar and Yulianto Achmad, *emperis* legal research is research that uses *emperis* facts taken from human behavior, both verbal behavior obtained from interviews and real behavior carried out through direct observation.<sup>7</sup>

## **3. The Form of Legal Protection by the Gorontalo City Police against Debtors Who Transfer Fiduciary Security Objects**

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<sup>6</sup> Hamzah Abdul Gafar, “Analisis Terhadap Perbuatan Melawan Hukum Pengalihan Objek Fidusia Ke Pihak Ketiga Tanpa Persetujuan Pihak Kreditur Berdasarkan Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia” (Universitas Islam Riau, 2022).

<sup>7</sup> N. D. Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum: Normatif & Empiris* (Pustaka pelajar, 2010).

Article 1 Paragraph 1 of the Criminal Procedure Code (KUHP), the investigator is an official of the State Police of the Republic of Indonesia or certain civil servants who are given special authority by law to conduct investigations.<sup>8</sup>

Thus the investigator has a duty to deal with a crime because the investigator is one of the law enforcers who have the nature of urgency in eradicating crime, in the purpose of criminal law. Based on the provisions of Article 5 Paragraph (1) of Law No. 8 of 1981 on the law.

The criminal law in force in Indonesia today is the criminal law that has been codified, namely the largest part and the rules that have been compiled in a book of laws (wetbook). The purpose of criminal law is to protect the interests of individuals or human rights and to protect the interests of society and the state with due consideration of the crimes/despicable acts on the one hand and of the arbitrary actions of the authorities on the other. Thus protected by criminal law is not only the individual but also the state, society property belonging to individuals.<sup>9</sup>

Criminal Procedure investigators have several powers, namely: receiving reports or complaints from someone about a criminal offense, looking for information and evidence, telling to stop someone suspected and asking and checking personal identification, taking other actions according to the law. In practice, the absence of an object in the ownership of a particular guarantor can be for various reasons, for example, sold, destroyed, lost, mortgaged, leased, including confiscated by the state.

Of course, the existing kausu incident will harm the recipient of the guarantee from the repayment of his receivables, especially if the execution of the guarantee object will not get fulfillment from the repayment of his receivables.<sup>10</sup> Thus, legal protection for fiduciary recipients must be considered and cannot be ignored.

This is emphasized in the help of Article 23 paragraph (2) of the fiduciary law, regarding the transfer or transfer of property rights must still refer to the applicable legal system of guarantee, namely that the guarantor or debtor is not allowed to be the full owner of the object, meaning that the debtor's authority is only the authority entitled to the guarantee object it is only the right of ownership that is transferred while the collateral object is still controlled by the creditor.

Based on the theory of legal protection according to Satjipto Raharjo, legal protection is to provide protection for Human Rights (HAM) that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law.

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<sup>8</sup> Ricky Wahyudi, "PERLINDUNGAN HUKUM TERHADAP KREDITUR DALAM HAL TERJADI PENGALIHAN OBJEK JAMINAN FIDUSIA TANPA SEPENGETAHUAN KREDITUR" (Universitas Islam Kalimantan MAB, 2022).

<sup>9</sup> Nanin Koeswidi Astuti, "Analisa Yuridis Terhadap Tindak Pidana Pengalihan Obyek Jaminan Fidusia Tanpa Persetujuan Penerima Fidusia," *To-Ra* 3, no. 1 (2017): 493–502.

<sup>10</sup> M. Hadhri Nur, Elly Sudarti, and Dheny Wahyudhi, "Faktor Penyebab Dan Upaya Penanggulangan Tindak Pidana Pengalihan Objek Jaminan Fidusia," *PAMPAS: Journal Of Criminal* 1, no. 3 (2020): 106–19.

Thus there are some 2 forms of legal protection of the police against the transfer of fiduciary vehicle in the case of the field as follows:<sup>11</sup>

### 1. Forms Of Preventive Protection

- 1) The Gorontalo City Police always play a role in protecting the transfer of fiduciary objects. The form of protection is by inviting the parties of consumer financing companies and providing socialization in collaboration with the financial pursuit Authority (OJK) and the Ministry of Justice Regional Office to register fiduciary security objects in order to receive legal protection if a criminal offense occurs
- 2) Notice of any action against the collateral object in writing, such as the legal act of renting and lending the collateral object .
- 3) Prohibition on the transfer of the object of guarantee during the credit period and negligence on the part of the debtor, whether arising due to contractual relations or arising from unlawful acts, in connection with the use and transfer of the object that is the object of fiduciary security

### 2. Forms Of Repressive Protection

This form of repressive protection by the police is the last effort made to prevent and act on the transfer of fiduciary vehicles. If the debtor commits a criminal offense of transferring a fiduciary object guarantee vehicle, the Gorontalo City Police law enforcement officers will provide several actions, namely;

- 1) Through a humanistic approach first so that both parties benefit from each other, but if the debtor does not show a cooperative attitude, the law enforcement authorities will give a warning letter 1 to 3 times in making a subpoena.<sup>12</sup>

If within one month the debtor does not show bad faith, then the execution will be carried out according to the fiduciary security deed, but if the object of the guarantee is lost, the leasing party will take it to criminal law by reporting it to the police with a case of embezzlement unit. So that the enactment of Article 372 of the Criminal Code against the perpetrator (debtor) who deliberately neglects the contractual agreement as promised in the fiduciary security deed

In general, to complete an action that can harm another person, where in the act there is a criminal offense. Maka can be resolved in two ways, namely by way of deliberation and retributive justice (retributive justice) in other words the settlement of the applicable legal process. If the distinction between the two settlements is found in the two processes, among others, if the settlement in court is hereby a form of repressive countermeasures by the law enforcement authorities themselves. Considering the case of embezzlement in the Gorontalo

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<sup>11</sup> Fadillah Hanum and Ayu Trisna Dewi, "PERLINDUNGAN HUKUM TERHADAP PEMBERI FIDUSIA DALAM PELAKSANAAN EKSEKUSI JAMINAN FIDUSIA KENDARAAN BERMOTOR RODA EMPAT (Studi Di BCA Multifinance Ringroad Medan)," *Law Jurnal* 3, no. 1 (2022): 27-41.

<sup>12</sup> Ariyanto Ariyanto, Raffles Raffles, and Rosmidah Rosmidah, "Pengalihan Objek Jaminan Fidusia Oleh Debitur Dalam Perjanjian Pembiayaan Konsumen," *Zaaken: Journal of Civil and Business Law* 1, no. 3 (2020): 452-73.



City area, the reporting party wants the case to be processed according to applicable law.<sup>13</sup>

The police can apply legal sanctions to the perpetrator (debtor), in accordance with applicable articles that bind both parties contractually, namely sanctions under Article 36 of the fiduciary law as referred to in Article 23 paragraph (2) which are carried out without the prior written consent of the fiduciary recipient and or Article 372 Criminal code on embezzlement. With a maximum imprisonment of 2 (two) years and a maximum fine of Rp. 50,000,000 (fifty million rupiah).

However, if the creditor does not make a guarantee deed or fiduciary certificate as stipulated in Article 11 of the fiduciary law, then the debtor controls the object not from the proceeds of crime but from an agreement. Thus realizing for the protection of the law by the police should every agreement related to fiduciary security must be registered.<sup>14</sup>

So by analogy all legal acts without the knowledge of the creditor cannot be recognized by the creditor. So that the promises (achievements) between the creditor and the debtor still refer to the credit agreement that has been signed at the beginning of the credit search. All forms of liability for repayment of credit to creditors can not be transferred under the hand.

The debtor remains responsible for the repayment of the credit facility. If the debtor is not willing to fulfill these responsibilities, the creditor has the right to carry out legal efforts in collecting, both against the collateral object and all of the debtor's property. This is because after the implementation of the transfer under the hand is obtained.

The possibility that the debtor does not control the collateral object, under such conditions, the creditor has the right to confiscate the collateral through a lawsuit in the District Court. Legal protection against the transfer of fiduciary goods in the Gorontalo City Police Area can be seen from the actions of actors who transfer fiduciary security without the written consent of the fiduciary recipient is set forth in the Criminal Code and special law, namely Law No. 42 of 1999 on fiduciary security.

In criminal law the concept of liability or "responsibility" is a central concept known as the doctrine of guilt (*mens rea*). An act does not make a person guilty unless the person's thoughts are evil. Then the burden of responsibility is imposed on the perpetrators of criminal offenses related to the basis for imposing criminal sanctions. A person has the nature of criminal responsibility if a thing or action he does is against the law, but a person can lose the nature

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<sup>13</sup> Jatmiko Winarno, "Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia," *Jurnal Independent* 1, no. 1 (2013): 44-55.

<sup>14</sup> TENTANG JAMINAN FIDUSIA and TEKNOLOGI DAN PENDIDIKAN TINGGI, "SANKSI PIDANA TERHADAP DEBITUR YANG MENGALIHKAN KENDARAAN RODA EMPAT (MOBIL) TERHADAP PIHAK KETIGA TANPA PERSETUJUAN PT. SINARMAS MULTIFINANCE (PASAL 36 UU NO 42 TAHUN 1999," n.d.

of responsibility if in him there is an element that causes the loss of ability to take responsibility or a sanction and thus they are not capable of committing a crime.<sup>15</sup>

There are three types of criminal liability without fault, namely: absolute criminal liability (strict liability), vicarious liability, and corporate criminal liability. In the case of transfer of fiduciary goods without the written consent of the First party of the fiduciary recipient (creditor), the fiduciary perpetrator (debtor) who intentionally committed the crime adheres to a strict liability system where law enforcement officers no longer need to prove the element of guilt enough to usnur actus reus (acts that violate the law- law) that is, transferring, mortgaging, or renting an object that is the object of fiduciary security without the prior written consent of the fiduciary recipient so that the suspect can be immediately sentenced to a crime.<sup>16</sup>

## 5. Conclusion

The form of legal protection, against the case of transfer of vehicles fiduciary objects such as preventive protection, namely the police in cooperation with institutions that have binding work authority such as (OJK) and the Regional Office of the Ministry of Justice in minimizing the space for the transfer of vehicles that become the object of fiduciary. And repressive protection is the last resort where law enforcement officers who have a large enough share by taking a humanistic approach by giving a warning letter up to 3 times, but if the warning is not done cooperatively law enforcement officers can bring the case to criminal justice in accordance with the agreed guarantee deed.

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<sup>15</sup> Joyce Karina, "Perlindungan Hukum Bagi Kreditur Dalam Hal Debitur Mengalihkan Objek Jaminan Fidusia Yang Belum Didaftarkan Tanpa Persetujuan Kreditur (Studi Putusan Mahkamah Agung Nomor 1271 K/Pdt/2016)," *Indonesian Notary* 2, no. 1 (n.d.): 27.

<sup>16</sup> Rahmat Wiguna, Benny Irawan, and Rena Yulia, "PENERAPAN SANKSI PIDANA TERHADAP PERBUATAN PENGALIHAN BARANG JAMINAN FIDUSIA (STUDI KASUS PADA POLRES SERANG KOTA)," *Jurnal Hukum & Pembangunan* 51, no. 4 (2022): 1123-39.

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