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Заң ғылымдарының кандидаты, қауымдастырылған профессор, Қазақстан Республикасы Жоғары Сот Кеңесі жанындағы Сот төрелігі академиясының қылмыстық-құқықтық пәндер ғылыми-білім беру орталығының профессоры

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АҚША-КРЕДИТ ҚАТЫНАСТАРЫ САЛАСЫНДА ЖАСАЛҒАН АЛАЯҚТЫҚТАҒЫ ЗАЛАЛДЫҢ МӨЛШЕРІН АЙҚЫНДАУ ТӘСІЛДЕМЕЛЕРІ

Аннотация. *Мақала сот-тергеу практикасы үшін өзекті болып табылатын кредиттеу саласындағы алаяқтықтағы залалдың мөлшерін анықтау проблемасына арналған. Жымқыру құрамдарындағы залалды түсіну тәсілдемелерінің әртүрлілігін авторлар «залал» терминінің екі мағынасын шатастырудың салдары деп түсіндіреді: құрамның белгісі ретіндегі залал және қылмыстық құқық бұзушылық жасау нәтижесінде жәбірленушіге келтірілген залал (шығын) ретіндегі залал, бұлардың алғашқысы әрекетті саралауға, ал екіншісі – жәбірленушінің пайдасына өндіріп алудыңсомасынаәсер етеді. Кредиттеу саласындағы алаяқтықтың өзіндік ерекшеліктерін ескере отырып, авторлар саралау мақсаттары үшін залал деп банктік қарыз шарты бойынша негізгі берешек сомасына теңқылмыстық құқық бұзушылықпен келтірілген нақты залалды түсінуді ұсынады, бұл ретте банкке тиесілі сыйақы (айрылып қалған пайда) есепке алынбауға тиіс.*

Түйін сөздер: *жымқыру, алаяқтық, кредиттеу саласындағы алаяқтық, кредитті заңсыз алу, залал, нақты залал, шығындар, айрылып қалған пайда, зиянды өтеу, өтемақы.*

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ПОДХОДЫ К ОПРЕДЕЛЕНИЮ РАЗМЕРА УЩЕРБА В МОШЕННИЧЕСТВЕ, СОВЕРШЕННОМ В СФЕРЕ ДЕНЕЖНО-КРЕДИТНЫХ ОТНОШЕНИЙ

Аннотация. *Статья посвящена актуальной для судебно-следственной практики проблеме определения размера ущерба в мошенничестве в сфере кредитования. Многообразие подходов к пониманию ущерба в составах хищения авторы объясняют имеющим место смешением двух значений термина «ущерб»: ущерб как признак состава и ущерб как вред (убытки), причиненный*

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потерпевшему в результате совершения уголовного правонарушения, где первый влияет на квалификацию содеянного, а второй – на сумму взыскания в пользу потерпевшего. С учетом специфических особенностей мошенничества в сфере кредитования авторы предлагают понимать под ущербом для целей квалификации реальный ущерб, причиненный уголовным правонарушением, равный сумме основного долга по договору банковского займа, при этом причитающееся банку вознаграждение (упущенная выгода) во внимание браться не должно.

Ключевые слова: *хищение, мошенничество, мошенничество в сфере кредитования, незаконное получение кредита, ущерб, реальный ущерб, убытки, упущенная выгода, возмещение вреда, компенсация.*

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APPROACHES TO DETERMINING THE AMOUNT OF DAMAGE IN FRAUD COMMITTED IN THE SPHERE OF MONETARY AND CREDIT RELATIONS

Abstract. *The article is devoted to the problem of determining the amount of damage in fraud in the field of lending, which is relevant for judicial and investigative practice. The authors explain the variety of approaches to understanding damage in the elements of theft by the confusion of two meanings of the term «damage»: damage as a sign of the crime and damage as harm (losses) caused to the victim as a result of committing a criminal offense, where the first affects the qualification of the act, and the second - the amount of recovery in favor of the victim. Taking into account the specific features of fraud in the field of lending, the authors propose to understand damage for the purposes of qualification as real damage caused by a criminal offense equal to the amount of the principal debt under the bank loan agreement, while the remuneration due to the bank (lost profits) should not be taken into account.*

Keywords: *theft, fraud, fraud in the field of lending, illegal receipt of a loan, damage, real damage, losses, lost profits, compensation for harm, compensation.*

Introduction

A criminal offense can cause socially dangerous consequences in objective reality that are diverse in their qualitative content: physical, property, moral, organizational, political, environmental, etc.

In certain provisions of the criminal law, the consequences are indicated as a constructive sign of the composition of a criminal offense. Sometimes the quantitative expression of consequences is used by the legislator as a means of differentiating criminal liability, for example, liability for theft depends on the amount of damage caused to the owner or other legitimate owner of the property, which may be insignificant, large, especially large.

In accordance with Article 113 of the CPC of the Republic of Kazakhstan, the signs of the composition of a criminal offense provided for by the criminal law relate to the circumstances to be proved in a criminal case. This means that in cases of embezzlement, where the consequences are a mandatory feature of the composition of a criminal offense, without accurately determining the amount of damage, it is impossible to correctly qualify the act and, ultimately, to correctly resolve the issue of the presence or absence of grounds for criminal liability. The correct

determination of the amount of damage also contributes to the timeliness and completeness of procedural activities to ensure compensation for damage caused by a criminal offense.

Materials and methods

In the process of working on the topic inspired by judicial and investigative practice, the norms of the current criminal legislation of the Republic of Kazakhstan on liability for embezzlement in the form of fraud and related criminal offenses in the field of economic activity, Normative Decisions of the Supreme Court of the Republic of Kazakhstan explaining the relevant provisions of the criminal law, as well as approaches found in science to determining the amount of damage in embezzlement were studied someone else's property. The authors, based on the conceptual and categorical apparatus of the science of criminal law, mainly relied on formal dogmatic and systemic structural methods of cognition of legal reality.

Results, discussion

Since damage to the owner or other owner of property is indicated as a mandatory feature in the normative definition of theft (paragraph 17) of Article 3 of the Criminal Code), as well as the law specifies the amount of damage indicating the units of its calculation in relation to specific forms of theft (paragraphs 3), 10), 38) of Article 3 of the Criminal Code), there is a need to clarify its contents.

Scientists who have studied this issue point to the existence in forensic investigative practice of various approaches to understanding damage in the composition of theft:

- damage as direct losses equal to the value of stolen property;
- damage as direct losses and costs of property restoration;
- damage as direct losses and non-receipt of due [1, p.15].

Meanwhile, in the theory of criminal law, it is considered axiomatic that damage in the composition of theft should be understood as consequences in the form of a real decrease in the available property of the owner or other legitimate owner, when «direct property damage (shortage) occurs on the side of the owner, and adequate criminal enrichment occurs on the side of the perpetrator» [2, p.244].

Here it is appropriate to refer to the provisions of civil legislation, according to which losses mean expenses that are incurred or should be incurred by a person whose right has been violated, loss or damage to his property (real damage), as well as lost income that this person would have received under normal conditions of turnover if his right had not been violated (lost profits) (Article 9 of the Civil Code of the Republic of Kazakhstan).

So, in cases of theft, damage, as a constructive feature of the composition, is determined only by the value of the property seized by the perpetrator (real damage) and does not include lost profits. The explanation contained in paragraph 15 of the Normative Decision of the Supreme Court of the Republic of Kazakhstan dated July 11, 2003 No. 8 «On judicial practice in cases of theft», indirectly confirms that the highest court of our country similarly interprets damage in the composition of theft: «When determining the value of property that has become the subject of a criminal offense, one should proceed, depending on the circumstances of its acquisition by the owner from retail, market or commission prices that were in effect at the time of the commission of the criminal offense, confirmed by relevant documents» [1].

The situation is different when it is necessary to determine the amount of damage to be compensated for criminal offenses of this category. In this case, the victim, presenting a civil claim,

[1] «O sudebnoj praktike po delam o hishhenijah» Normativnoe postanovlenie Verhovnogo Suda Respubliki Kazahstan ot 11 ijulja 2003 goda № 8. – [Jelektronnyj resurs]. – Rezhim dostupa: https://adilet.zan.kz/rus/docs/P03000008S

in addition to the actual damage caused by a criminal offense, has the right to demand compensation for lost profits from the perpetrator.

The errors encountered in judicial and investigative practice related to determining the amount of damage, in our opinion, are the result of mixing the above two meanings of the term «damage»: damage as a sign of composition and damage as harm (loss) caused to the victim as a result of committing a criminal offense. In the first case, the damage affects the qualification of the deed, and in the second – the amount (amount) of the penalty in favor of the victim.

In practice, the greatest difficulties arise when determining the amount of damage in cases of such a form of embezzlement as fraud committed in the field of lending.

A bank loan is a form of financial relationship between a lender and a borrower, in which one person (lender) provides another (borrower) with a certain amount of money for use on the terms of repayment, urgency, payment (art. 727 of the Civil Code of the Republic of Kazakhstan). The economic essence of this kind of relationship lies in the fact that the funds released from one entity, if they are not directed to a new reproductive cycle, thanks to the loan passes from the entity that does not use them (the lender) to another entity that needs additional funds (the borrower) [3, p.240].

In the relationship between the lender and the borrower, various financial instruments (monetary financing, letters of credit, guarantees, etc.) and currencies are used as loans, for which different interest rates apply. By purpose, loans are divided into investment loans (for example, for the construction or purchase of real estate, the purchase of fixed assets, machinery, equipment for further use by the borrower) and loans to finance trade operations (payment for the supply of goods and raw materials for production needs, for further sale to consumers). Investment loans are usually characterized by a long maturity (usually several years), they are non-renewable and have a uniform repayment schedule for principal and interest, since they are used to finance construction or purchase solid assets. The return of money invested in such assets occurs due to their use in activities, at the expense of the profit being extracted. Loans for financing trade operations, on the contrary, are short-term (6-12 months), renewable, since they are repaid together with interest upon completion of trade and are received again to pay for the next delivery.

When making loans, credit agreements are drawn up and signed for the opening of a credit line – framework documents regulating the general parameters of the loans provided (loan currency, available financing instruments, term, renewability, availability period, general limit, etc.). Loans under the credit line are issued on the basis of bank loan agreements (documents on the basis of which the loan is made loan issuance). To ensure the fulfillment of obligations under bank loan agreements, pledge agreements are drawn up and signed (the object of the pledge, the collateral value, which obligations are covered, etc.). As a rule, if the object of collateral is a real estate object or other solid assets (equipment, vehicles, rolling stock, special equipment), these assets are evaluated by an independent appraisal company, the results of which, at the request of the bank, may be discounted (reduced) by 30-50% when determining the value of these assets in pledge agreements and used by the parties in in case of non-repayment of the loan as a basis for offsetting loan claims. Loans are secured in whole or in part by collateral. Guarantees of third parties may also act as collateral for loans.

In accordance with paragraph 2 of Part 1 of Article 179 of the Criminal Procedure Code of the Republic of Kazakhstan, paragraph 12 Rules for accepting and registering applications, messages or reports on criminal offenses, as well as maintaining a Unified Register of pre-trial investigations, approved by Order of the Prosecutor General of the Republic of Kazakhstan No. 89 dated September 19, 2014, as well as the Instruction of the Prosecutor General of the Republic of Kazakhstan dated September 2, 2022 No. 1u/15 «Regarding the commencement of pre-trial investigations in relation to business entities», The investigating authorities must decide on the

initiation of a pre-trial investigation in cases of non-fulfillment or improper execution of civil law transactions, including obligations under bank loan agreements, only after providing an independent body's opinion on the existence of damage, as well as providing information on the Bank's taking comprehensive measures to recover the debt in a civil manner.

In cases where banks do not seek repayment of debt through civil law mechanisms and still apply to the criminal prosecution authorities, the main problem in qualifying fraud in the field of monetary relations boils down to the question «what to include in the damage»?

- only the amount of the principal debt under the bank loan agreement;
- the amount of the principal debt and the amount of remuneration for the use of money (interest).

Guided by the previously stated theoretical layout of two interrelated, but not identical meanings of the term «damage», it can be unequivocally stated that in cases of fraud in the monetary sphere, damage, as a mandatory feature of the composition, should be understood only the amount of the principal debt under the bank loan agreement. And when calculating the amount of damage caused to the bank, both the loan debt (real damage) and remuneration for its use (lost profits) can be recovered from the culprit.

Let's demonstrate what has been said on a conditionally taken example, according to which in 2023 the Borrower, a legal entity represented by its head, fraudulently received a loan in the amount of 3 million 500 thousand tenge from the Bank without the intention of returning it. The interest rate under the bank loan agreement was 10%.

The amount of damage for the purposes of qualification, equal to the value of the stolen property, according to this fact of fraud will amount to 3 million 500 thousand tenge. Since this amount exceeds one thousand MCI at the time of the commission of the crime, the actions of the perpetrator should be qualified under paragraph 1) part 3 of Article 190 of the Criminal Code of the Republic of Kazakhstan as fraud on a large scale.

The amount of damage to be recovered in a civil procedure in favor of the Bank will amount to 3 million 850 thousand tenge. At the same time, all payments already made to the Bank, including interest paid for the entire period of credit relations, as well as the cost of collateral transferred to the bank, according to the pledge agreement, other collateral (guarantees) and other available property of the Borrower, are subject to deduction from the amount of recovery.

If we assume that in our conditional example, the Borrower has already paid the Bank a certain part of the principal debt and interest on it in the amount of 300 thousand tenge, then the amount of damage to be recovered in favor of the Bank will amount to 3 million 550 thousand tenge.

The presence of executed settlements between the Borrower and the Bank in the amount of 300 thousand tenge does not affect the amount of damage established for qualification purposes: fraud is still recognized as committed on a large scale.

For comparison, let's take as an example another crime in the field of monetary relations, provided for in Part 1 of Article 219 of the Criminal Code, the objective side of which involves obtaining a loan fraudulently if a bank or other creditor has suffered major damage. The objective signs of this crime are closely related to fraud. However, as explained by the Supreme Court of the Republic of Kazakhstan, the damage in illegally obtaining a loan «should be understood as the amount of credit funds received and the bank's remuneration» [1]. It turns out that in relation to art.

[1] «O nekotoryh voprosah primenenija sudami zakonodatel'stva po delam ob ugolovnyh pravonarushenijah v sfere jekonomicheskoj dejatel'nosti» Normativnoe postanovlenie Verhovnogo Suda Respubliki Kazahstan ot 24 janvarja 2020 goda № 3. – [Jelektronnyj resurs]. – Rezhim dostupa: https://adilet.zan.kz/rus/docs/P200000003S

219 of the Criminal Code, damage is understood as debt on a loan and remuneration for its use. Thus, in this case, the term «damage» is used in a civil sense and covers real damage and lost profits. Accordingly, as part of the illegal receipt of a loan, the amount of damage for qualification purposes and the amount of damage to be recovered in civil law in favor of the Bank coincide.

Conclusions

We believe that disputes arising in judicial and investigative practice regarding approaches to determining the amount of damage in cases of fraud in the field of monetary relations require the intervention of the Supreme Court of the Republic of Kazakhstan. We propose to supplement paragraph 24 of the Normative Decision of the Supreme Court of the Republic of Kazakhstan dated June 29, 2017 No. 6 «On judicial practice in frauds» [1] with a new paragraph as follows:

«When qualifying cases of fraud in the field of lending on the grounds of «in a small amount», «on a large scale» or «on an especially large scale», one should proceed from the real damage caused by a criminal offense, which is equal to the amount of the principal debt under the bank loan agreement. The amount of remuneration due to the bank (lost profits) should not be taken into account when imputing these features».

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