

On judicial practice in frauds

Unofficial translation

Normative decision of the Supreme Court of the Republic of Kazakhstan dated June 29, 2017
No. 6.

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In connection with issues, arisen in the judicial practice, amendments of the legislation, and for the purposes of uniform application of the law, the plenary session of the Supreme Court of the Republic of Kazakhstan

hereby decrees:

1. To pay attention of the courts that a mandatory element of fraud is the existence of the guilty person's mercenary purpose, i.e. the pursuit to turn the property of others unlawfully and free of charge into their property, or the right to it in his own favor, or in favor of other persons. Fraud is committed by false pretences or breach of trust, under the influence of which the owner or other holder of the property voluntarily transfers the property or the right to it to other persons.

In describing the event of a criminal offence in the indictment and in the court sentence, the manner in which the fraud has been committed must be specified, considering the objective and subjective aspects of the act.

Footnote. Paragraph 1 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 10 of 22.12.2022 (shall be promulgated as of the date of first official publication).

2. Deceit is a way of committing fraud in order to steal someone else's property or acquire the right to another's property. Deceit may consist in deliberately misleading the owner or other holder of the property with a message of knowingly false information that does not correspond to reality, or in hiding the true facts that should have been communicated to the owner or holder of the property, creating an erroneous idea about the owner of the property or other holder the legality of the transfer of property into the possession of the guilty person and (or) other persons.

In result of deceit the owner or another holder of the property, being misled, voluntarily transfers the property to the guilty person, believing that there are grounds for it and he acts in his own interests.

3. Abuse of trust as a method of fraud lies in the fact that the guilty person uses the trust that arose between him and the owner or other person in charge of the property for the purposes of illegally obtaining someone else's property or the right to it out of mercenary motives.

The trust of the owner of the property or another person to the fraudster can be caused by various circumstances: personal acquaintance, recommendations of relatives and other persons, the official position of the guilty person, etc.

4. Deceit in fraud may be expressed both in oral and written forms.

The use of fraudulent documents during the stealing is one of the forms of fraud. A fraud committed using another forged official document, shall be fully covered by the body of the fraud and shall not require additional qualifications under article 385 of the Criminal Code of the Republic of Kazakhstan (hereinafter referred to as the CC).

5. if a person, having forged an official document entitling for rights or releasing from obligations, committed fraud, the actions committed shall be qualified in the aggregate of criminal offenses provided for in part one of article 385 of the CC and the relevant part of article 190 of the CC.

6. It should be distinguished the difference between the stealing committed by fraud, from stealing committed in other forms, but having a method of deceit, which does not condition the voluntary transfer of property by the owner of the property or by another person, but facilitates the commission of another crime (deceit for entering a house, storage, etc.).

7. In cases where the deceit is used by a person to facilitate the commission of another crime related to the stealing of another's property, during the course of which his actions are discovered by the owner or other owner of this property, but he continues to illegally, besides the owner's will, hold another's property, then the offense should be qualified as robbery (the person asks the owner of the mobile phone to make a call, and then immediately disappears with it in the owner's presence).

8. Fraud is recognized to be completed from the moment when the stolen property was seized and transferred into the illegal possession of the guilty person or other persons, and they got a real opportunity to own, use or dispose of it at their discretion as their own.

If fraud is committed in the form of acquiring the right to another's property, the crime shall be considered completed from the moment the guilty person has a legally fixed opportunity to own, use and dispose of other people's property as their own, after appropriate registration, certification or registration of this right.

Fraud committed in relation to users of information systems shall be deemed to have been committed when the victim transfers money and/or personal data to the perpetrator or at his/her instruction to other persons.

The location of the victim transferring the funds shall be regarded as the place where the information systems fraud is perpetrated.

Footnote. Paragraph 8 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 10 of 22.12.2022 (shall be enacted from the date of the first official publication).

9. The fraud committed through deceit or abuse of trust of a user of an information system should be recognized the actions of the guilty person aimed at seizure of property or the right

to property of a user of an information system committed by means of information technologies (computer, computer programs, Internet, cell phone, etc.), by placing knowingly inappropriate information or programs in the information system in order to realize his criminal intent to cheating a user through a Qiwi wallet, Internet banking, etc.

In cases the mentioned actions are associated with unauthorized access to the information system or telecommunication network, the actions committed shall be subject to qualification aggregate of criminal infractions under articles 190 and 205 of the CC, или 190 и 206 of the CC, if as a result of unauthorized access to computer information, destruction and modification, disruption of the operation of the computer, the computer system or their network occurred.

10. To distinguish fraud from civil law relations, it should be borne in mind that in fraud, the intent to steal or acquire the right to another person's property by deceit or abuse of trust arises for the guilty person before and (or) at the time of conclusion of a contract providing for the receipt of someone else's property or rights to it.

In such cases, the deceitful actions of the guilty person must be causally connected with the fact of the acquisition by the guilty person of the property or the acquisition of the right to property, i.e., the deceitful actions must precede the transfer of this property or the acquisition of the right to it.

11. The courts should take into account that the presence of intent aimed at seizure by fraud under contractual obligations may be evidenced by a combination of such circumstances as the person's deliberate lack of real financial and other material capabilities (material and technical equipment, labor collective, etc.) to fulfill the obligation, or the necessary license, permission to carry out activities aimed at fulfilling obligations under the contract, the use by a person of false constituent documents or letters of guarantee, concealment of information on the presence of debts or pledges on property, conclusion of knowingly unenforceable contracts and others.

In cases where the contract between the parties is concluded with the mutual intentions of the parties to fulfill the corresponding obligations, but after its conclusion and obtaining material benefits, one of the parties has objective circumstances that impede the fulfillment of the obligations undertaken, the actions committed may not be qualified as fraud.

12. The unlawful receipt of social payments and benefits, money transfers, bank deposits or other property for personal gain on the basis of other people's personal or other documents (for example, a pension certificate, birth certificate of a child, a bank savings book, which indicates the name of its owner, or another personal security, etc.), forms the composition of fraud.

If the guilty person has preliminarily stolen the mentioned documents, then his actions must be additionally qualified under part three of article 384 of the CC.

Actions consisting in receiving social payments and benefits, other cash payments or other property by submitting to the authorized body that takes the relevant decisions,

knowingly false information about the existence of circumstances, the occurrence of which in accordance with the law, by-laws and (or) the contract is a condition for receiving the relevant payments or other property, as well as by default on the termination of the grounds for receiving the specified payments should be qualified as stealing of property of another person by deceit.

13. A person's gratuitous appropriation of funds held in bank accounts in his own favor or in favor of other persons, committed with the mercenary purpose of deceiving or abuse the trust of a bank employee with the submission of false payment orders or other people's personal and other documents to the bank shall be qualified as fraud.

Receipt by a person of a grant or loan without the intention of returning it for the purpose of appropriation by deceit with the provision of knowingly false information about the financial situation or collateral, or about other circumstances that are essential for obtaining a loan or subsidy, shall constitute the body of the fraud.

14. From the moment of crediting money to a bank account as a result of fraud, a person has the opportunity to dispose of it, and the crime should be considered completed from the moment of crediting these funds to his account.

15. Stealing other people's money through an ATM by using a previously stolen or false credit (settlement) card, bearer securities (bond, bill, share, etc.) shall not constitute fraud. In this case, the actions committed should be qualified as stealing of other people's property.

The actions associated with the stealing other people's money held in a bank account by using a stolen or false credit or settlement card should be qualified as fraud only in cases when a person misled an authorized bank employee by deceit or abuse of trust.

16. Fraud in the field of public procurement is understood as the actions of the guilty person (supplier), which include the submission of knowingly inaccurate information (about the financial or economic situation, the availability of workers, technical equipment, etc.), with the aim of deception, which deliberately mislead the customer or organizer of public procurement in order to turn in their favor or in favor of third parties budgetary funds, as a result of which the supplier, without delivering the goods or without completing the work, or without rendering a service, appropriates the allocated funds.

In cases where the authorized person of the customer deliberately draws up a fictitious act of acceptance of goods or work performed, or services rendered, after which the supplier receives funds that the supplier turns into his property and disposes of them at his discretion, then such actions of the supplier do not constitute the fraud. Depending on the established circumstances, these actions (of the authorized representatives of the customer or supplier) may be qualified as abuse of official position or stealing of other people's entrusted property by appropriation or embezzlement.

17. When distinguishing fraud from causing property damage by fraud or abuse of trust in the absence of attributes of stealing, the courts should take into account that committing fraud or abuse of trust without attributes of stealing, the guilty person does not withdraw property

from the legal possession of the owner of the property or another person, or does not acquire the right to it. In this case, the guilty person, using the property for free or the right to it or the services provided by the owner of the property or another person for payment, by fraud or abuse of trust, receives unlawful benefits and causes real damage to the victim or other owner of the property.

Such actions may be expressed in the use of property of a state body or enterprise, private or legal entity or paid services rendered by them without payment (by providing fake documents exempting from payment of statutory payments or from payment for public utility services, for rental housing, equipment, in unauthorized connecting to energy networks, water and gas pipelines, creating the possibility of unaccounted for the consumption of electricity, water, gas or personal use entrusted to it to the person of transport (free ride by trainmen and ticket inspectors, etc.).

18. When qualifying the actions of the guilty person under paragraph 1 of part four of article 190 of the CC as fraud committed by a criminal group, it is necessary to be guided by explanations specified in paragraphs 23, 24, 25, 33, 34, 35 and 36 of article 3 of the CC.

19. Persons using their official position when committing fraud provided for in paragraph 3 of part two of article 190 of the CC, should be understood as employees or officials who are not subject to provisions of the Law of the Republic of Kazakhstan dated November 23, 2015 № 416-V "On the public service".

20. Actions of the guilty person should be qualified under paragraph 2 of part three of article 190 of the CC, if he, being the person authorized to perform state functions an equal person, or an official or a person holding a responsible state office, committed deliberate actions for the purposes of stealing the property or acquisition of right to it by deceit or abuse of trust of the owner of the property using his official position.

21. Upon receipt of cash or other valuables by a person authorized to perform public functions, or by an equivalent person, or an official, or by a person holding a responsible public office for the commission of an action (inaction), which he actually cannot perform due to lack of official of authority or inability to use one's official position, should be qualified, if there is intent to seize these values, as fraud.

If this person is detained at the crime scene when receiving money, securities and other material assets, the deed should be qualified as an attempted fraud.

When qualifying the actions of the guilty person under paragraph 2 of part three of 190 of the CC the courts should be guided by paragraphs 16, 26, 27 and 28 of article 3 of the CC.

22. There is no fraud with the use of official position in case of assignment or embezzlement by a person of property that was entrusted to him on the basis of a civil law contract (lease, contract, commission, transportation, storage, etc., or an employment contract), these actions shall be covered by article 189 of the CC.

23. The actions of the organizers, instigators and accomplices of fraud known to have been committed by a person using his official position, or by a person authorized to perform

public functions or an equivalent person, or an official, or a person holding a responsible public position, if it involves using official position shall be qualified under the relevant part of article 28 of the CC and under part two or three of article 190 of the CC. Paragraph 20 has been amended in accordance with Regulatory Resolution of the Supreme Court of RK dated 21.04.11 № 1 (see earlier revision)

24. The issue of existence in actions of the guilty persons of the qualifying attribute of fraud on a large or especially large scale should be resolved in accordance with paragraphs 3 or 38 article 3 of the CC.

When deciding on the qualification of the actions of persons who committed fraud in a group of persons by prior conspiracy or as part of a criminal group, on the basis of “on a large scale” or “on an especially large scale”, one should proceed from the total value of the property stolen by all participants in the crime.

25. The courts should distinguish the continued fraud from repeated by the fact that in case of the continued fraud the guilty person by repeated seizure of the other person’s property from one source implements a single intend aimed at seizure of property, achieving a predetermined goal.

26. To distinguish the qualifying attribute of duplicity of fraud from the commission of fraud in respect of two or more persons, it should be borne in mind that the latter is committed at the same time by the same criminal act (deceit in relation to participants in shared construction, users of an information system, etc.). If there is an attribute of duplicity, the specified action is committed at different times, and property is stolen from different sources.

27. To recognize invalid paragraphs 19 and 20 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated July 11, 2003 № 8 "On judicial practice in cases of embezzlement".

28. According to article 4 of the Constitution of the Republic of Kazakhstan, this Regulatory Resolution shall be included in the existing law, shall be generally binding and shall come into force from the date of its first official publication

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