

Original Paper

Qualitative Research on Double Fraud of Guaranteed Loans

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Abstract

This article focuses on the dispute over the nature of double fraud in criminal law in cases of obtaining loans by defrauding true guarantees, systematically combs the differences between the theoretical and practical circles on the form of the number of crimes and the determination of charges, and reveals that the core of legal interest infringement in such cases is the damage to the property rights and interests of the guarantor rather than the loan losses of financial institutions. By demonstrating the key points that the establishment of the security right causes the property risk of the guarantor immediately and the bank does not suffer losses in the sense of criminal law due to the validity of the guarantee, the analysis path of combining subjective and objective analysis is put forward: When the actor has the purpose of illegal possession, although double fraud between the bank and the guarantor is involved in form, the credit risk of the bank is dispersed in advance due to the guarantee system, and the property rights and interests of the guarantor are actually infringed upon, the crime of contract fraud shall be dealt with separately; For acts lacking the purpose of illegal possession, as financial institutions are not substantially damaged and the risks fall within the normal commercial scope, criminal law regulations should be excluded. The study emphasizes that the evaluation of criminal law should be based on the nature of infringement of legal interests at the time of act, so as to avoid confusion between the determination of charges and the results of civil liquidation.

Keywords

Double fraud, Legal interest infringement, Guarantor, Crime of contract fraud

1. Question Raising

Generally speaking, in loan activities, banks and other financial institutions will require borrowers to provide guarantees when granting loans, but unlike the situation of directly forging guarantees to defraud loans, in practice, many borrowers defraud loans by first defrauding guarantors to provide real guarantees for their loans. The academic community has not reached a consensus on how to evaluate the double fraud of such borrowers in defrauding loans from banks and other financial institutions after

defrauding real guarantees in criminal law, and there are heated debates on the determination of one crime or several crimes, but there are not many relevant research results; At the same time, judicial practitioners have also dealt with this problem differently. Through relevant legal databases such as the Judgment Documents Network, they have searched for cases of such acts with the key words of defrauding guarantees and loans, consulted and analyzed cases of such acts, and found that there are differences in the judgments of courts for the determination of the nature of acts, not only between courts in different regions, but also between first instance and second instance, prosecution by procuratorial organs and court judgments. Therefore, how to determine the nature of this double fraud, in which the perpetrator obtains effective guarantee through fraud and then defrauds the loan, that is, whether the borrower constitutes a contract fraud against the guarantor or a loan fraud against a bank or other financial institution, or whether both the previous and subsequent acts constitute a crime of fraud, and whether the guarantor's liability for guarantee in accordance with the contract and the compensation of the loan losses of banks and other financial institutions affect the criminal law determination of the nature of the borrower's behavior.

2. An Analysis of the Dispute over the Determination of the Nature of Double Fraud by Borrowers

2.1 Disputes in the Determination of the Number of Crimes

2.1.1 Theory of Several Crimes

This view holds that the act of defrauding guarantees and obtaining loans from financial institutions by fraudulent means constitutes the crime of loan fraud against financial institutions and the crime of contract fraud against guarantors. Although some scholars admit the establishment of several crimes, they are concerned that the combined punishment of several crimes may lead to excessive sentencing, so they tend to be punished from a felony with the theory of implicated crime (Zhang, M. K., 2021). The core reasons for supporting the theory of several crimes can be summarized as the following six aspects: First, according to the substantive individual property theory, the core purpose of financial institutions to issue loans is to recover principal and interest rather than dispose of collateral. The borrower's failure to fulfill the obligation to repay principal and interest leads to the failure of the financial institution's property disposal purpose, which constitutes a substantial property loss. Second, the essence of the realization of the security right is an expost remedy, which is only used to fill the losses that have occurred rather than to prevent the occurrence of losses in advance. The property legal interests of financial institutions have been infringed upon when lending (Jiang, D. F., 2021, pp. 1-9). Third, defrauding guarantees is a means of serving the final defrauding of loans. If only the crime of contract fraud against the guarantor is evaluated, it cannot cover the dual infringement of financial credit management order and bank capital security. Fourth, whether the guarantor actually bears the guarantee liability is subject to accidental factors such as guarantee ability (such as bankruptcy or loss of collateral). If the guarantee liability cannot be fulfilled, the loss is still borne by the financial

institution (Qian, Y. L., 2018, pp. 160-169). Fifth, the loan funds directly come from financial institutions rather than guarantors. The actor obtains the security right and the loan funds respectively through the double deception behavior, and the nature and source of the two objects are not the same (Lin, Z. Y., 2020). Sixth, if only the crime of contract fraud is identified, it cannot explain the independent establishment elements of the crime when the perpetrator obtains a loan from a financial institution in the crime of loan fraud, that is, it cannot explain the time point of the crime of fraud.

2.1.2 Theory of One Crime

The theory advocates that the act of obtaining a loan after the actor defrauds the guarantee constitutes only one crime. The core reasons are as follows: First, because the guarantee system provides equivalent economic compensation, financial institutions have obtained a security right when issuing loans (whether as property interests or property legal interests), and their property disposition behavior has a basis for consideration and does not meet the constitutive elements of property loss in the crime of fraud (Chen, S. Q., 2019, pp. 52-66). Second, the ultimate loss is the guarantor. According to the validity of the guarantee contract, even if the guarantor cannot actually perform the guarantee responsibility due to objective reasons such as bankruptcy, it is still the legal subject of debt undertaking, and the civil creditor's rights of financial institutions always point to the guarantor (Criminal Trials of the First and Second Divisions of the Supreme People's Court, 2006). Thirdly, it advocates that the "important matters" of bank lending decision-making are limited to the true effectiveness of the guarantee. The borrower's fictitious loan use, forgery of financial data and other acts only violate the contractual collateral obligation and do not constitute the fraud elements required by the crime of loan fraud in Article 193 of the "Criminal Law" (Yang, Z. Q., 2018, pp. 151-160). The first two reasons are reasonable, but the third reason is that in the process of applying for a loan from a bank after defrauding a third party's guarantee, the actor often does not simply conceal the deceptive nature of the source of the guarantee, but often accompanied by other fraudulent means expressly in accordance with Article 193 of the "Criminal Law", such as fabricating false loan uses or project backgrounds, providing forged economic contracts, issuing false supporting documents, or misleading financial institutions by inflating the value of collateral or repeating guarantees. This means that only those who deceive the guarantor to obtain the guarantee but do not implement other statutory fraud means against the bank do not meet the constituent elements of the crime of loan fraud; if the actor not only obtains the guarantee, but also implements the fraud (such as fictitious loan project, forged transaction contract, etc.) listed in the above law during the loan application stage, it is enough to establish the crime of loan fraud alone. Take "Liu Xin loan fraud case" as an example. On the one hand, the defendant fraudulently caused the guarantee company to guarantee its loans, on the other hand, the defendant forged a false land contract to pretend to be the basis of a real transaction. This behavior was directly identified by the judicial authorities as "using a false economic contract", which in turn constitutes a crime of loan fraud. This shows that the deceptions listed in the criminal law norms (such as the authenticity of loan projects, the validity of transaction contracts, etc.) directly point to the key

review matters of financial institutions lending decisions. Therefore, it is not possible to deny the fraudulent nature of the actor's implementation of financial institutions on the core issues of loans on the grounds of "the existence of true guarantees". In other words, the authenticity of the guarantee does not of course prevent other deceptive means from infringing on the freedom of property disposal of financial institutions and the order of financial management. For the judgment of the number of crimes in the two cases of fraudulent guarantee loans, the overall judgment should be based on the objective correlation between the two cheating behaviors, and the two crimes should not be evaluated in isolation. The two acts before and after have the generality of criminal intention, have close connection, and only lead to a damage result in the end, so it is reasonable to be identified as a crime (Zhou, D. J., 2014, pp. 27-30).

2.2 Disputes in the Determination of Crimes

There is a controversy in the theoretical and practical circles about what kind of crime is used to identify the double fraudulent secured loan behavior implemented by the borrower. At present, most of the existing research on double fraud behavior starts directly from judicial practice cases and analyzes qualitative in specific cases. In judicial practice, the judicial organ's criminal law characterization of the act shows a clear phenomenon of "different judgments in the same case". There are three different views in the theoretical circle of criminal law on the characterization of the behavior of the actor to defraud the loan of financial institutions by defrauding the guarantor to obtain the guarantee. The first view holds that the fraud committed by the actor against the guarantor constitutes the crime of contract fraud (the object is the property interest), and the fraud against the financial institutions constitutes the crime of loan fraud (the object is the loan). The two are independent criminal constitutions and should be punished with several crimes (Zhang Mingkai Criminal Law (Fifth Edition), 2016); The second view advocates that the two frauds overlap at the core fact level and should be identified as imaginative concurrence or implicated relationship, and then be punished from a felony; the third view is based on the actual subject of the damage result. Specifically, if the consequences of damage are borne in full by a third party such as a guarantor, the perpetrator constitutes a crime of fraud; if banks and other financial institutions actually bear or partially bear the loss, they should be characterized by the crime of loan fraud (Wang, C., 2004, pp. 118-124).

The author does not agree with the logical path of the above third view. This view regards the actual transfer of loss as the core evaluation factor of crime constitution, which is essentially biased towards the single dimension of result without value, while ignoring the dual judgment requirements of act without value and result without value in criminal law. In particular, it is necessary to question the premise of its preset argument, that is, the act of defrauding guarantee itself can independently constitute the crime of fraud. When the actor's fictitious performance ability defrauds the guarantee, although the guarantor makes a guarantee intention due to fraud, the occurrence of its property loss is still in a contingent state (on the premise that the financial institution claims the guarantee responsibility). At this time, there is no direct and inevitable causal relationship between the

guarantor's "property disposal behavior" and "actual loss result". More importantly, the essence of the guarantee system is to disperse financial risks. The guarantor's guarantee itself means its subjective acceptance of the default risk of the main debt. The voluntariness of this risk burden may hinder the determination of the criminal punishability of fraud. Therefore, in the judgment of criminal illegality, we should strictly follow the principle of unity of subjectivity and objectivity, carefully distinguish the boundary between civil fraud and criminal fraud, and avoid excessive intervention of criminal law in the guarantee legal relationship that should be adjusted by civil law.

3. Reasons for Difficulties in Determining the Nature of Double Fraud Guarantee Loans

3.1 The Act and Legal Relationship are Complex

The actor committed a double deception: first obtaining the guarantee of the guarantor by deception, and then defrauding the bank loan by virtue of the real guarantee. In this case, the provisions of Article 193 (4) of the Criminal Law on false guarantees or repeated guarantees cannot be directly applied to determine the crime of loan fraud, because it is necessary to consider the fraud of the guarantor by the perpetrator and the role of the real guarantee in the process of obtaining the loan. At the same time, since the description of the crime in Article 193 does not include the formal defects of the guarantee, according to the similar interpretation rules, the "other methods" clause in Article 5 of this article is also difficult to directly apply to the use of fraudulent real guarantees to obtain loans. Different from the general cases of defrauding loans or loan fraud, such cases involve the legal relationship between the borrower, the lender and the guarantor, including both the loan contract and the guarantee contract. Since the real guarantee is provided, involving the establishment and exercise of the security right, the criminal and civil legal relations are intertwined in the legal relationship caused by the two fraudulent acts. For these two deceptions, whether one of them constitutes a crime or both of them constitutes a crime is controversial in itself.

3.2 The Assumption of Losses is Uncertain

Because the guarantor provides the real guarantee for the actor's loan, there is a guarantee legal relationship with the bank. Since the guarantor provides a real and effective guarantee to the bank, according to the guarantee legal relationship, when the borrower cannot repay the loan, the bank has the right to require the guarantor to bear the responsibility, and the loss is borne by the guarantor. However, if the guarantor cannot fully perform the guarantee liability for its own reasons (such as bankruptcy or loss of collateral), the remaining losses are still borne by the bank. This dynamic relationship between the guarantee liability and the bank's creditor's rights leads to the objective uncertainty of which party ultimately bears the actual loss. In judicial practice, this uncertainty directly affects the identification of crimes: if the loss is ultimately borne by the guarantor, it may be identified as the crime of contract fraud; if the loss is borne by the bank, it may be identified as a loan fraud. This way of reversing the crime by the actual loss result essentially links the nature of the criminal act with the accidental result of civil settlement, resulting in the difference in the determination of the crime in

the same type of case due to the different performance ability of the guarantor. This not only violates the principle that the criminal law should be convicted based on the nature of the act itself, but also causes the inconsistency of judicial evaluation standards.

3.3 The Criminal Intent is General

In the case where the actor defrauds the guarantee, the actor knows that the guarantor may bear the corresponding responsibility because it cannot repay the loan, so its subjective purpose is often difficult to clearly define whether it is for the guarantor or the loan bank. The criminal intent is usually characterized by generality. The actor does not pay special attention to who bears the final loss, and the bearer of the actual loss result is often not controlled or pursued by the actor. Therefore, in such cases, it is difficult to accurately define the nature of criminal acts by relying on subjective purpose elements, and the screening function of purpose elements is obviously weakened. It can be seen that such behavior of defrauding guarantees and obtaining loans cannot be simply understood as the actor only has the purpose of illegally occupying the loan, while ignoring its subjective intention of illegally occupying the guarantor's property. The actor has implemented two deceptions of guarantee and loan at the same time. However, due to the generality of his subjective intention, the stereotyped function of the purpose element in the crime identification is weakened (Liu, R., 2017, pp. 109-117).

4. Nature of Guarantee and Determination of Victim's Losses

Through the previous analysis of the disputes and dilemmas in the identification of the nature of the behavior of defrauding guarantees and thus obtaining loans. The core controversy of criminal law evaluation on the act of obtaining loans by defrauding guarantees lies in how to define the legal attributes of guarantees and the criteria for victim identification. The key is to clarify whether the establishment of a security right constitutes property damage in the sense of criminal law, to judge the time when the loss occurs, and to distinguish the actual victim. Although the guarantor is provided by the deceived party, because the guarantee itself is true and effective, the case characterization needs to focus on the legal effect of the establishment of the guarantee and the impact on the property interests of all parties. The constitution of the crime of fraud must take the infringement of legal interests as the core, and the determination of the role of the victim should be based on the change of rights and interests at the time of behavior, rather than the final result of civil liability.

With regard to the nature of security in criminal law, no matter what kind of controversy exists in the theoretical circle about whether the security interest belongs to "property" or "property interest", it does not affect its eligibility as the object of fraud. The guarantor makes the guarantee behavior based on the wrong understanding. Although the specific property has not been transferred immediately, its property interests have fallen into a real dangerous state due to the establishment of the guarantee obligation. There is a view that the loss can be identified only when the guarantor is actually compensated, but this understanding confuses the performance of civil liability and the identification standard of criminal law infringement. The loss of property interests does not need to be based on the

premise of actual property impairment. As long as the actor deceives the guarantor's property in a dangerous situation that can be recovered at any time, it constitutes an infringement of property legal interests. At this time, the crime of contract fraud has been accomplished. The establishment of the security right itself has led to the transfer of property interests, and the exercise of the right of relief after the event cannot replace the criminal evaluation of the property risk at the time of the act.

There are opposing views on whether the bank constitutes a victim of property loss. The substantive individual property theory holds that if the bank fails to achieve the purpose of recovering principal and interest after lending, there will be property losses. However, this paper argues that the bank has obtained the security right as the consideration when issuing the loan, and its disposition of the loan is essentially the exchange of funds for security interests, without causing property damage in the sense of criminal law. The core purpose of the guarantee required by the bank is not to be repaid by the borrower himself, but to ensure the diversity of the realization path of the creditor's rights. Therefore, the compensation by the guarantor after the borrower defaults is a pre-allocation of contract risk, which does not constitute a failure of purpose. The establishment of a security right has enabled the bank to obtain equivalent rights at the point of action. Whether the subsequent guarantee is fully realized is a civil enforcement issue and has nothing to do with criminal property losses.

In addition, the validity of the contract is characterized by the criminal-civilian cross-influence behavior. If the validity of the main contract is directly denied because the borrower constitutes a crime, the guarantee contract will be invalid, and the victim status of the guarantor will be excluded. However, the validity of the main contract should be judged independently: as long as it does not violate the mandatory provisions of validity or public order and good customs, criminal offences do not necessarily lead to invalid contracts. As a subordinate contract, the validity of the guarantee contract depends on the civil evaluation of the main contract rather than the criminal characterization. As long as the main contract is valid, the guarantor has a compensatory obligation, and the property risk borne by the guarantor due to fraud exists independently, which does not affect the criminal law's determination of the crime of contract fraud. The boundary between criminal evaluation and contract validity judgment should be maintained to avoid replacing the independent judgment of legal interest infringement at the time point of behavior with civil results.

5. Criminal Law Qualitative Analysis of Borrowers' Double Fraud of Guaranteed Loans

5.1 Double Fraud Committed for the Purpose of Illegal Possession

As pointed out in the previous analysis of the nature of the guarantee and the loss of the victim, in the case where the actor obtains the loan by defrauding the real guarantee, even if the guarantor cannot pay off the loan in full afterwards, it is also a normal business risk. The creditor-debtor relationship between the bank and the guarantor based on the guarantee is still valid, and the bank has not suffered actual losses in the sense of criminal law. Therefore, the behavior of the perpetrator only constitutes the crime of contract fraud, the object of infringement is the guarantor, not the bank, should not be

identified as the crime of loan fraud. For the subsequent possible fraud of the perpetrator, the evaluation should be limited to the field of civil law, and should not be included in the scope of criminal law. Therefore, in the case of the perpetrator with the purpose of illegal possession, it should be determined that his behavior constitutes the crime of contract fraud. Even if banks and other financial institutions eventually suffer losses, it should not be determined that the perpetrator constitutes a crime of loan fraud.

In secured loans, the core concern of the bank is the authenticity and effectiveness of the guarantee, rather than the borrower's own repayment ability, because the legal and effective guarantee essentially transfers the repayment responsibility to the guarantor. Even if the borrower obtains the guarantee by deception, as long as the guarantee is verified to be true by the bank's review, the bank recognizes the value and effectiveness of the guarantee based on its own risk control standards. At this time, the borrower's behavior only constitutes civil-level fraud and does not fall into the category of criminal fraud. The reason is that the bank has obtained the property rights corresponding to the loan amount by accepting the real guarantee, and its creditor's rights have not suffered substantial losses due to the borrower's deception. As for whether the guarantor provides a guarantee due to fraud, it belongs to the civil legal relationship between the guarantor and the borrower, and is not the scope of the bank's need to determine or assume responsibility in the loan review. Therefore, under the premise that the authenticity of the guarantee is flawless, even if there is a case of fraudulent guarantee, the act is still outside the legal regulation boundary of the crime of loan fraud and should be adjusted by civil law.

The act of issuing loans by banks does not conform to the disposition of property based on wrong understanding in the crime of fraud. The establishment of the crime of fraud must be based on the premise that the perpetrator causes the victim to fall into a wrong understanding through deception and disposes of the property based on the wrong understanding. However, in the secured loan scenario, the core decision-making basis for banks to issue loans is not derived from the substantive trust in the borrower's application materials, but from the professional evaluation of the authenticity and adequacy of the guarantee measures. Even if the borrower has fraudulent behaviors such as fabricating false materials and fictitious loan uses, as long as it provides a real and effective guarantee recognized by the bank, the bank's lending decision is essentially a business judgment centered on the risk coverage ability of the encumbered assets, rather than the property disposition after the wrong understanding due to deception (Chen, X. L., 2016, pp. 39-51). At this time, the fraud of the borrower's forged materials is only an instrumental means to meet the requirements of the bank's formal review. These frauds do not touch the core conditions for the bank to decide whether to lend. The bank's lending behavior is a commercial behavior based on the balance of risk and income, rather than the "misconception-property disposition" causality in the fraud crime. Therefore, under the premise of the authenticity of the guarantee, even if there is fraud in the loan declaration link, the act does not constitute the crime of loan fraud due to the lack of the core causal relationship in the constitutive elements of the crime of fraud.

When the borrower, for the purpose of illegal possession, induces the guarantor to provide real and effective guarantee by means of fabricating facts or concealing the truth, and thus obtains bank loans, his behavior constitutes the accomplished form of the crime of contract fraud, and should be separately convicted of the crime. Specifically, the key node of crime accomplishment occurs when the guarantor signs a guarantee contract due to deception. Although the borrower finally obtains the loan funds through the bank, the actual repayment responsibility of the funds has been transferred to the guarantor. In essence, the guarantor's property rights and interests are the object of infringement. The bank can be regarded as a criminal tool for the actor to achieve the purpose. By transforming the security interest provided by the guarantor into loan funds and delivering them to the borrower, the indirect transfer of the guarantor's property to the actor can be realized. The actor has a clear understanding of the fact that he cannot repay the loan, and his subjective intention directly points to the embezzlement of other people's property by using the guarantor to bear the repayment responsibility, while the bank's fund issuance behavior is only an instrumental link to achieve the purpose of illegal possession. Based on the principle of unity of subjectivity and objectivity, this kind of behavior mode of "defrauding guarantee-obtaining loan" should be identified as the crime of contract fraud because the core damage object is the guarantor's property rights and interests, and the criminal behavior is completed through the guarantee contract fraud.

5.2 Double Fraud Committed without the Purpose of Illegal Possession

In the case that the actor obtains the guarantee by deception but has no purpose of illegal possession, the guarantor does not constitute the crime of contract fraud even if it eventually compensates the loan for objective reasons. The establishment of the crime of contract fraud is based on the subjective intention of the actor to illegally occupy the property of others. In this case, the actor has neither the intention of encroaching on the property of the guarantor nor directly obtaining the property of the guarantor through fraudulent means. Its fraudulent behavior only contributes to the establishment of the guarantee relationship. When the guarantor provides guarantee, there is still a reasonable expectation of the borrower's repayment ability. Even if the guarantee liability is caused by objective reasons, it should be adjusted by civil legal relationship.

According to the amendment of the "Criminal Law Amendment (11)", the conviction standard of the crime of defrauding loans is based on the necessary premise of "causing significant losses to financial institutions". If the actor has provided a real and effective guarantee, the bank has obtained the property rights protection equivalent to the loan amount through the guarantee measures. Even if the loan is not recovered for objective reasons, the bank is not actually damaged due to the risk of guarantee coverage. Even if the loan principal and interest are not fully recovered due to objective factors, it is also a foreseeable commercial risk for financial institutions, and there is no direct causal relationship in criminal law between fraudulent loan behavior. In this kind of "double fraud", because the bank has not suffered legal "significant losses" and the security of funds has not been substantially damaged, the deceptive means of the perpetrator only involve the formal defects of loan review, which does not

constitute the crime of defrauding loans, and should be attributed to the scope of civil dispute adjustment. Therefore, the double fraud without the purpose of illegal possession does not constitute a crime for the guarantor and the bank, and it belongs to the civil legal relationship to adjust the recovery.

6. Conclusions

In determining the nature of the criminal law for obtaining loans by defrauding guarantees, it is necessary to make a unified judgment of types to avoid the uncertainty of different judgments and charges in the same case. The nature of the guarantee needs to be clarified. For the determination of losses and the judgment of infringement of legal interests, the provision of true guarantees is the key factor affecting the crime and the foothold of legal relations. As for the post-payment of the guarantor, the determination of the nature of the act shall not be affected. Even if the bank ultimately suffers losses due to the guarantor's failure to pay off in full, it is not equal to the victim's losses in the loan crime. The time node for judging the property loss suffered by the victim lies in the time when the actor has completed the act of controlling the property, because the actor has the purpose of illegal possession, when the guarantor establishes a guarantee for the actor's loan, he has already faced the situation that the guarantee provided cannot be recovered, which constitutes the completion of the crime of contract fraud. However, because of the existence of true guarantee, the actor's acquisition of control over the loan does not mean that the bank has suffered losses on the loan at this time, and the second fraud should be recognized as civil fraud rather than fraud. If the perpetrator does not have the purpose of illegal possession and only commits fraud, the double fraud guarantee loan does not constitute a crime and belongs to the adjustment of civil legal relations.

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