

Characterization Study of the Fraud Crime in Trap Loan

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Abstract: In recent years, the eastern part of China has seen a high incidence of loan lending crimes and there was an explosive growth after 2017. Most of the loan crimes in the "trap" means for the victim is aware of, so does not constitute the crime of fraud. The use of false water vouchers by the perpetrator of false lawsuits can constitute triangular fraud. The perpetrator randomly identified default cases can constitute ordinary fraud. Due to the loan crime "trap set" part can not become the basis for the perpetrator to claim debts, so most of the loan crime can not constitute illegal debt collection crime but extortion, in some cases, the two crimes can be trap set to be coincidence. When it coming to fraud and coercion dual nature means of debt collection cases, the selection of specific crime could be based on the nature of the main behavior and the victim to deliver the property psychology.

Keywords: Fraud crime in trap loan, fraud, extortion, unlawful collection of debts

1. Introduction

In recent years, there has been a high incidence of trap loans in the eastern part of China, and there has been an explosive growth after 2017. In this regard, on April 9, 2019, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice issued the Opinions on Several Issues Concerning the Handling of Criminal Cases of "Trap Loan" (hereinafter referred to as the "Opinions"). As emphasized in the Opinions, trap loans are different from ordinary private lending, and the criminal process and means are extremely diverse. Specifically, its criminal mode process can be broadly divided into two parts: First, "trap set a trap" part, that is, the perpetrator and the victim signed a formal private lending contract at the same time to trap set a set of traps, such as agreeing to "cut the head interest" or require victims to cooperate with the Manufacture of false bank current, in order to provide a factual basis for future debt claims; the second is the "illegal debt collection" part, that is, the perpetrator against the victim using soft/hard violence, so as to make the victim to transfer the corresponding property or claims in excess of the original amount of the loan.

According to the "Opinions", judicial practice should, in principle, be recognized as fraud, and then based on the perpetrator's illegal means of debt collection to further determine whether it constitutes other crimes. In fact, most of the trap loan crimes do not meet the constitutive elements of the crime of fraud, because of the illegal debt collection part of violence, coercion in the nature of the law is closer to the crime of extortion. Thus, this paper will focus on the characterization of the loan crime, around the loan crime of fraud and extortion to carry out a more in-depth discussion.

2. Overview of existing research

In response to the needs of judicial practice, the criminal law community in China has also conducted active research on the characterization of the crime of trap loans. This part will further analyze the shortcomings of the existing research on the basis of an overview of the existing research on the crime of trap loans.

2.1. Overview of existing research

Throughout the existing academic research on the crime of trap loans, the center of gravity of the analysis of the unlawful substance of trap loans has been shifted from the "trap set" part to the "illegal debt collection" part.

First, studies prior to 2021 focused more on the place of the element of "trap set" in the offense. This element is also considered to be the core of the distinction between the offense and ordinary civil loan contracts. For example, it was used as a criterion to define the general loan shark and this crime [1], claiming that it "has the function of 'prop' and 'bait'" to achieve the purpose of misappropriating the victim's large amount of property [2]. Usury is characterized by an interest rate that is either close to, equal to, or higher than the profit rate. Black's Law Dictionary explains usury as "an illegally high rate of interest"[3]. Therefore, the crime of unlawful nature of the research should also through the "trap set" part of the typological study. For example, scholars believe that the act of inducing the victim to sign a contract not only provides the legitimacy of the contract, but also ensures the basis of the subsequent demand for debt, so the establishment of the debt should be a separate crime [4]. There is a view that the illegal essence of the trap loan is "trap set" in the fictitious debt behavior, it will be associated with the loan is divided into three types of behavior and analyze its property infringement, and finally concluded that only when the perpetrator successfully cheated to the victim's security right of the situation constitutes the crime of attempted fraud [5].

Secondly, the research in the past two years has gradually shifted the center of gravity of the crime of trap loans to the part of "illegal debt collection". For example, professor Chen XingLiang, claims that the loan crime might include the violation of property, personal or order crime which is established in the part of the realization of the debt [6]. The "trap set" part can not be recognized as a crime, it only takes the use of the form of private lending, making the lending contract "trap". The substantive illegality of the crime should be more focused on the perpetrator of debt collection behavior, different debt collection behavior corresponding to the establishment of different types of crime [7].

When it coming to the specific offenses, the existing research focuses more on the crime of fraud. Initially, some scholars advocated the creation of a new crime related to trap loans [2,8]. Subsequently, there are views that the loan is a classify of crimes, as long as a behavior to meet the "Opinions" on the loan description of the characteristics of the loan must constitute a crime [9]. At the same time, the corresponding specific crimes would be determined according to the specific behavior of the perpetrator. Based on such opinion, there are also views emphasizing that whether the victim is caught in the mistake of law is the key to the crime of fraud, is the core of the judgment of whether the crime is established or not [10]. The research on crimes other than the crime of fraud is weaker. For example, in the 1,291 judgement instruments involving loans in 2017 on the referee network, the crime of fraud ranked first, accounting for 968 articles, and the crime of extortion accounted for the second, 595 articles. However, the number of existing studies on how to distinguish between the crime of fraud and extortion is relatively small, and the way of distinction is also relatively simple [11]. Overall, this part of the research is still missing.

2.2. Review of Research Profiles

With regard to the above state of research on the crime of trap loans, this paper considers the following points to be worthy of special attention.

Firstly, the idea is insightful, which shifts the focus of the study of the unlawful nature of the crime of loans from the "trap set" to the "illegal debt collection". As the trap loan crime to the perpetrator of the appropriation of the victim's property as the goal, and the property crime should be attempted to the perpetrator to obtain the victim's property, causing its property loss as a criterion. However, the "trap set" part does not produce a substantial transfer of property and damage consequences. Therefore, on the one hand, the loan as a specific crime regulation obviously have intervened in the crime of premature suspicion, contrary to the principle of modesty of criminal law as well. On the other hand, the loan crime could be recognized as fraud, extortion or other specific crimes, which are sufficient to evaluate the crime. As a result, separate incrimination is not necessary. In response to Professor Deng Yisheng's viewpoint, he points that the fictitious debt behavior is unlawful substance, and the viewpoint that the perpetrator only constitutes attempted fraud when he has obtained the security right is recognized. However, for the victim whether to fall into cognitive error, and based on the mistake of law of property disposal behavior should also be considered, the latter part of "illegal debt collection" is equally important. Therefore, the illegal center of gravity of the loan should be the debt collection part.

Secondly, at temporary stage of the study, it might be more reasonable to take the judgment of whether the victim has fallen into mistake of law as the basis for determining the crime of fraud. First of all, the viewpoint of advocating the use of loans as a classify of crimes and strictly judging what specific crimes is not necessary, and breaking it down into the judgment of specific crimes is more in line with the problems that may be encountered in judicial practice. Secondly, the viewpoint of focusing on the grasp of "cognitive error" should be agreed. This line of thought focuses on the establishment of the crime of fraud, emphasizing a kind of subjective mistake of law of the victim as the center to judge whether the crime of fraud is established or not, which is more appropriate.

Thirdly, the existing research on the identification of and distinction between fraud and extortion in the crime of trap loans is less involved and less in-depth. According to the general doctrine of criminal law in China, the two crimes are similar in structure while the key to differentiation lies in whether the disposition of the victim's property is based on mistake of law or fear. However, in the crime of loans, there are often perpetrators using the means of both deception and coercion, the victim has both mistake of law and fear of the situation. As a result, the study on the identification of and distinction between the two crimes should be taken a step further.

In summary, this article would focus on two points: (1) when the crime of loan sharking constitutes the crime of fraud; (2) how to define and distinguish between the crime of fraud and the crime of extortion in the case of trap loan crime.

3. Relationship between the trap loan crime and a crime of fraud

According to the "Opinions", the crime of trap loan constitutes, in principle, the crime of fraud. Moreover, depending on the specific circumstances, it may constitute combined punishment for several crimes or be punished as a felony. However, in reality, the circumstances of most cases of fraudulent loans do not satisfy the elements of the crime of fraud, so the principle of recognizing fraudulent loans as a crime of fraud might be questioned. As a result, it would be discussed below.

3.1. Trap means and fraud behavior

Fraud behavior, as the first ring of the constitutive elements of the crime of fraud, it should be examined first to observe whether the perpetrator has deceptive behavior. The Japanese scholar

Noriyuki Nishida pointed out that: "In the so-called deception, the perpetrator must have fabricated a material fact, in other words, if the counterparty to the transaction had known the true situation, he would not have carried out the act of disposing of the property [12]. In fact, the majority of cases of loans in the use of the perpetrator of the set of acts does not establish deception, and thus also negate the possibility of the establishment of the crime of fraud.

The establishment of deception in the crime of fraud requires the fulfillment of two conditions: first, the form constitutes a fictionalization or concealment of the truth; second, the substance reaches the level of putting the victim into a cognitive error in the disposal of property [13].

First of all, most trap means in trap loan crimes do not meet the formal conditions, such as cutting the head interest, the manufacture of false bank current, malicious base high borrowing and luring lending and other means, which in the process of implementation has been known to the victim, no longer meeting the requirements of concealment of the truth or fictitious facts. What's more, there is a need of special discussion in the situation of luring lending-- the perpetrator in order to lure the victim lending, lending contract for "fast lending" "no collateral" "low interest" and other fictional description. In this analysis, first, the purpose of the fictional description of the perpetrator is to be able to quickly lend money to the victim, not illegal possession purpose. Second, the means of inducing lending usually occurs in the preparatory publicity stage of trap loan, which does not lead to the actual infringement of the victim's property, having no effect on the victim's eventual disposition of property. As a result, it couldn't be considered as the implementation of the crime of fraud. Therefore, it is meaningless to judge whether the luring means of borrowing constitutes an act of deception and whether the subsequent victim has a mistake of law based on it [13].

Secondly, some of these means only satisfy the formal requirements, but in substance they fail to cause the victim to fall into mistake of law. The most typical means is "loan for loan" "interest to capital". When the victim is unable to repay, the perpetrator introduces a third-party lending company or creditor to the victim to provide new loans to settle the old debt, by changing the name of the lender, making the illegal high interest into the principal debt that can be supported by the court. Although the perpetrator conceals the truth about his complicity with the new third-party lender or creditor, the victim is usually forced to apply for a loan from the third-party lender or borrower because of his severe financial distress due to the lack of a conventional short-term solution to a quick financial problem. Therefore, the perpetrator only took advantage of the victim's unequal position in terms of financial distress and lack of judgment in a crisis situation [14]. Hence, it is not the reason that the victim is caught in mistake of law, leading to the completion of the scheme. Consequently, the means could not be characterized as an act of deception.

3.2. Patterns of fraudulent lending offences

After excluding the above circumstances, there are two other cases of loans that might constitute fraud that are worth focusing on: false lawsuits filed by the perpetrator using false bank statements or loan debit notes, and the perpetrator's reckless determination of breach of contract.

Analysis of the circumstances in which the perpetrator used the false water voucher to file a false lawsuit. First of all, the perpetrator obtains the consent of the victim to create false water vouchers with his cooperation, and then uses the vouchers to file false lawsuits against the court's behavior -- a deceptive act against the court. In this case, the defrauded person is not the victim's court party, leading to a consideration of the success or failure of the triangular fraud. Secondly, mistake of law means that the defrauded person falls into or continuously maintains a mistake of knowledge of the disposition of property based on the perpetrator's deception. As mentioned before, the court, as the deceived person, mistakenly believe that the false water vouchers provided by the perpetrator is true and effective, fall into and continue to maintain the false vouchers for mistake of law. Finally, the analysis of the elements of the disposition of property. Triangular fraud requires the defrauded person

has the authority to dispose of the victim's property. The court, as a public authority, has the authority to enforce the disposition of the victim's property. The perpetrator filed a false lawsuit, the court as a defrauded person, based on the perpetrator to provide false vouchers of mistake of law, to support the perpetrator of the judgment in favor of the perpetrator, and enforcement of the victim's property will be transferred to the perpetrator, constituting a triangular fraud.

Analysis of situations in which the perpetrator randomly determines a default of contract. This type of case means that the perpetrator objectively creates the fact that the victim is unable to repay the loan, for example, by shutting down the repayment system on the repayment date or by intentionally making it impossible for the victim to contact the perpetrator, so as to achieve the purpose of the victim's assumption of the damaging results of a high default. First, the perpetrator, by using the method of maliciously creating obstacles to repayment, fictionalizes the fact that the victim needs to repay a debt with high interest in excess of that stipulated in the original lending contract, which is an act of deception in the crime of fraud. Secondly, due to the fact that in reality most of the victims lacked legal knowledge/awareness, or due to judgmental bias led to the mistaken belief that they had the obligation to pay off the loan. Therefore, when the victim is told by the perpetrator default and the need to bear a high amount of liquidated damages, the victim would have cognitive bias on the fictitious debt, subjectively caught in their own repayment of mistake of law. Furthermore, based on the mistake of law, victim would be "voluntary" /initiative to transfer the possession of property in order to liquidate the debt, which makes perpetrator obtains the the victim's property. Finally, even if the perpetrator in the process of soliciting debts with violence and coercion, but as long as the victim delivery of property is out of the repayment obligation of the subjective psychology of misperception, could be recognized as fraud.

4. Determination of the crime of extortion and blackmail in cases of trap loans

In the "illegal debt collection" stage of trap loans, the perpetrator uses both hard and soft means to make the victim transfer property in order to achieve the ultimate goal of unlawfully appropriating the victim's property. The means of debt collection created an imminent danger to the legal interests of the victim's property. As a result, it might generate the effect of the "unlawful substance" of the crime of trap loan being moved back to the illegal debt collection stage. When the perpetrator uses hard or soft violence to collect debt from the victim, it may establish the crime of extortion and blackmail. The following would discuss the establishment of the crime of extortion and blackmail.

4.1. The majority of trap loan crimes that use coercion to collect debts

As mentioned above, under the situation of trap loan establishing crime of extortion and blackmail, the perpetrator of the crime of extortion on the victim to implement the coercive or violent nature of the means of solicitation of debt, requiring the disposal of property. Specifically, violent means can be divided into hard violence and soft violence. Hard violence is shown as a violation of the victim's personal legal benefits of direct violence, such as assault, illegal detention, violent means of injury to the person, etc.; soft violence is mostly manifested in the victim's psychological infringement, such as tracking, harassment of the victim or his family members and other behaviors. If the perpetrator has implemented the above means to the victim to demand debt and make the victim fear, to the victim based on the fear of the ultimate delivery of their property, that is, the establishment of extortion and blackmail.

Another issue should be considered is the crime of illegal debt collection. This is because the perpetrators of both crimes use violent and coercive acts of debt collection in order to realize the infringement of property. Therefore, it is also necessary to distinguish between the crime of extortion and blackmail and the crime of unlawful debt collection.

First of all, the crime of illegal debt collection is premised on a real and legal borrowing and lending contract, while the crime of extortion is the crime of demanding property without consideration [6]. Hence, if the perpetrator's violent debt collection behavior lacks a real borrowing and lending contract as a premise, it should be considered as the crime of extortion and blackmail. Based on this, most cases of trap loans cannot constitute the crime of illegal debt collection. This is because the "trap set" part could not be thought as the basis of the perpetrator of debt collection, the perpetrator and the victim in this part to enter into a contract under the lack of real claims, such as the aforementioned inflated debt, maliciously high debt and other means.

Secondly, the subjective purpose of the perpetrator in the two crimes is different. In the extortion and blackmail crime, the perpetrator subjectively present illegal possession purpose-- the inner pursuit of illegal appropriation of the victim's property; However, in the crime of illegal debt collection, the subjective purpose of the perpetrator is to collect debt-- the perpetrator is only the pursuit of collection to the previous debt owed by the victim. In the crime of trap loans, the perpetrator clearly has the subjective purpose of illegal possession.

Lastly, there are cases of dual criminality in the crime of trap loan. For example, the perpetrator of the crime of loans by violence and coercion to demand debts, the debt demanded includes both the illegal issuance of usurious debts, but also includes the illegal possession of the purpose of the imaginary debt to realize. In this case, the perpetrator for different debt objects in the same criminal intent to implement the same violent debt collection behavior, a behavior at the same time to trigger the two crimes, it is recognized as the two crimes of the imaginative concurrence is more appropriate.

4.2. Claims of a dual nature of fraud and coercion

In some of the crimes of extortion, the perpetrator employs means of a dual nature of coercion and deception during the debt collection phase. In such cases, the crimes of fraud and extortion may be crime of imaginative concurrence, and the choice of crime should therefore be discussed.

Firstly, the corresponding crime should be selected on the basis of the nature of the main act, while the nature of the means of debt collection can be determined by the main act of the perpetrator objectively committing the act. If the main act is coercion, it may be established as extortion and blackmail; on the contrary, it should be recognized as fraud. For the determination of the main behavior of the means of debt collection, if the perpetrator in the early stage of the "trap set" deliberately create and accumulate a large number of false "evidence", which might intend to make the victim to produce the mistake of law of debt repayment. Even if the use of coercion and deception, the main behavior should still be recognized as deception [12]. On the opposite, if the victim did not create too much evidence in the early stage, but simply the pursuit of the victim's claim is constantly high after the effect of coercion to deliver the property, then the main act should be coercion, excluding the deception.

Secondly, the subjective state of the victim when delivering the property should be based on whether it is a mistake of law or a fearful state of mind for the selection of the crime, with the former establishing the crime of fraud and the latter establishing the crime of extortion and blackmail. For example, under the condition of perpetrator randomly identified default, the victim subjectively falls into the mistake of law for the fictitious debt with the need to settle the liquidated damages. Furthermore, even if the perpetrator in the process of demanding the delivery of the high amount of liquidated damages used coercion, violence and other means, the victim to make the transfer of property is out of a voluntary initiative of the psychological. However, for "loan for loan" and other "snowball" means of false increase in claims, the perpetrator in the demand for victims to repay the debt, the victim in the subjective knowledge of its irrationality, only in the perpetrator of the means of claiming the debt produced fear, against the will of the helpless Transfer of property possession.

In summary, in the case of overlap between the crimes of fraud and extortion, the key to the selection of the specific crime lies in two points. First, the examination of the means of debt collection whether the actor has coercion and thus established coercion; second, whether the victim delivery of property out of fear. If the loan crime has the coercive behavior of the perpetrator and the victim's fear, that is, the establishment of extortion and blackmail.

5. Conclusion

Throughout the existing research, the loan crime focus on fraud as the center of gravity of the discussion, for fraud and extortion to differentiate between the identification of the crime research is relatively weak and there are misunderstandings.

Most trap loan crimes cannot constitute the crime of fraud, as the "trap" means are known to the victim and no subjective error of perception occurs. Two situations can constitute the crime of fraud: the perpetrator uses a false flow of water to file a false lawsuit with the court, which constitutes a triangular fraud; the perpetrator randomly determines that the breach of contract to the victim to demand a high amount of liquidated damages.

The majority of the trap loan crime does not have a real debt contract, so it can not be recognized as a crime of illegal debt collection but the extortion and extortion. In a few cases, it could be imaginative concurrence. For the use of fraud and coercion dual nature of debt collection means of the situation, fraud and extortion crime competition, need to be based on two points for the choice of crime: the perpetrator objectively implement the behavior of the main behavior and the victim to deliver the property when the psychological.

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