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Infliction of Damage to Property by Fraud or Abuse of Trust: Aggregate of Circumstances Essential for Instituting Prosecution (Court Practice Analysis)

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The article considers the aggregate of circumstances essential for establishment of infliction of damage to property by fraud or abuse of trust: time, place, modus operandi and other circumstances of the commission of a crime. Using the results of empirical research the authors define the possible forms of criminal act and as well as specific modus operandi for each form. The results of statistical data analysis on the article 165 of the Criminal Code of the Russian Federation make it possible to note that the large number of indicated crimes are committed in the financial sphere and consumer market providing a choice of methods for calculation of damage inflicted to property.

Keywords: criminal event, ultimate fact, modus operandi, fraud, abuse of trust, damage to property, judicial economic information.

In the paragraph 1 of the first part of an article 73 of the Code of Criminal Procedure of the Russian Federation a criminal event is defined as enumeration of its elements: time, place, *modus operandi*. Theory of criminal procedure also describes a criminal act, its consequences, causation and instruments of a crime to the elements of a criminal event.

Detailed analysis of the damage inflicted to property, as a most widespread consequence of a crime stipulated by the article 165 of the Criminal Code, was carried out by N.G. Loginova, who notices that the damage to property may be inflicted in the form of criminal enrichment or

criminal economy [2, p.77-82]. With the purpose of a further explanation of the ways of calculation of the damage inflicted to property, let's arrange all possible ways and character of the damage to property in a form of a table (table 1).

As it could be seen from the table, estimating the size of damage to property requires holding of several legal expertise (for example, account, computer-technical, appraisal, technical-merchandising, etc.). With the purpose to define the character and size of damage, it is reasonable to use court-economical information while solving and investigating this category of crimes with a glance to its form and *modus operandi*.

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Table 1. Characteristics of Forms of Inflicting Damage to Property

| Forms of inflicting damage to property | Depending on touchableness of property as an object of a crime | Depending on the mechanism of inflicting damage to property | Depending on the sphere of law which norms regulate the grounds for transferring of property or for payment obligation |
|---|---|--|--|
| 1. Illegal use of property resulting in the damage to property – it is illegal, non-repayable use of property against the interests of the proprietor or other owner with a purpose of gaining property benefit. | <p>Materialized property (damage may be real, expressed in decrease of its price, and indirect – nonreceipt of tribute). Size of profit received may be either bigger or smaller than property damage inflicted.</p> <p>Non-materialized property (only indirect damage, expressed in non-receipt of tribute)</p> | <p>Criminal enrichment</p> <p>Criminal economy</p> <p>Criminal economy</p> | <p>Civil legal relationships – fraud when the perpetrator uses property under contract sequential from civil circulation (receipt of public services, communications service, etc.)</p> <p>Labour relationships – abuse of trust when the perpetrator uses his employment status given to him under work contract (for example, use of service vehicle for personal purpose, etc.)</p> |
| 2. Evasion of paying compulsory payments, when the perpetrator falsely does not give property which he is obliged to give to the proprietor or to the other owner, and as a result the perpetrator receives profit via criminal economy. | Non-materialized property (only indirect damage, expressed in non-receipt of tribute) | Criminal economy | Civil legal relationships – abuse of trust (for example, while paying notary fee, when the perpetrator enters into the agreement and decreases the price of an object of the agreement (deed of a gift, contract of sale), thus decreasing the size of fee he is obliged to pay) |
| | | | Administrative legal relations – fraud, for example, use of non-materialized property, when the perpetrator falsely does not give a payment for usage of property to the proprietor or the other owner (tax obligation, local assessment) |
| 3. Conversion of payments which were to be received from certain citizens to the proprietor or the other owner for property services (transport, medicine, social security) into the personal benefit by people not authorized to receive these payments. | Materialized property (damage could be real, expressed in depreciation of mechanisms, fuel consumption and so on, decreasing of price, and indirect – non-receipt of tribute). | <p>Criminal enrichment</p> <p>Criminal economy</p> | Labour relationships – abuse of trust (when the perpetrator uses his powers, given to him under work contract, or employment status for gaining benefits) |

Analysis of the court practice from 1997 to 2010 showed that 113 cases and 1087 sentences in the criminal proceedings [4] comprised 1417 crimes (including the episodes of crimes which were united in a one case), stipulated in an article 165 of the Criminal Code of the Russian Federation, which were:

- 1) Socially dangerous acts in the form of illegal use of property which make up 82,4 %;
- 2) In the form of evasion of compulsory payments – 1,2 %;
- 3) In the form of conversion into the personal benefit by people not authorized to receive these payments – 16,4 %.

Thus, the statistics confirms that the indicated crime may be committed in different forms and in different ways. The universality of this norm becomes apparent due to the fact that in different periods the dominancy of different forms and *modus operandi* of a crime alter and get new substance.

Basing on the research, we may concretize *modus operandi* depending on the forms of inflicting damage to property, since the proof of *modus operandi* is closely connected with the proof of an intention.

In total, during the analysis of court practice from 1997 to 2010, there were 83 ways of inflicting damage to property, the most frequent of which will be observed below.

Then, if a crime was committed in the form of illegal usage of property, we discovered following ways of inflicting of damage to property:

- 1) Not sanctioned use of the Internet via someone's account and password by fraud (abuse of trust) – 10,4 %;
- 2) Use of operator service (Internet service, calls, SMS) from someone's SIM-card (modem) by fraud – 5,2 %;
- 3) Illegal use of natural gas by fraud (abuse of trust);

- 4) Illegal use of hot-water supply by fraud – 0,8 %;
- 5) Passage by the worker of "Russian Rail Roads" Corporation by transport request (passage available due to service necessity) in personal purpose via abuse of trust – 0,8 %;
- 6) Illegal use of electricity (including damaging a meter) by fraud – 42,5 %;
- 7) Residence of citizens without registration and, accordingly, without payment for public services – 2,2 %;
- 8) Illegal getting of grants for payment of accommodation and public services – 11,2 %, etc.;

If damage to property was inflicted in the form of evasion of compulsory payment, there are following ways of inflicting damage to property:

- 1) Decreasing of coefficient "working day" when submitting documents to the tax authorities concerning unified tax on imputed earnings – 0,1 %;
- 2) Running entrepreneur activity of selling foodstuff without registration in the state organ and with non-payment of tax on imputed earnings – 0,6 %;

If the damage was inflicted in the form of conversion into the personal benefit by people not authorized to receive these payments, there are following ways of inflicting damage to property:

- 1) Ticket-free transport of passengers by the conductor in a train by abuse of trust – 12,4 %;
- 2) Moving passengers with second-class sleeping carriage ticket to a compartment by abuse of trust – 2,9 %, etc.
- 3) Transport of luggage without making required documents by a conductor of a train by abuse of trust – 2,9 % etc.;

The analysis leads us to the conclusion that the event of infliction of damage to property is carrying out of actions violating relationships

related to property and inflicting losses to the proprietor (owner) of a property (direct real damage, which is expressed in depreciation of property, and indirect – non-receipt of tribute) on the basis of civil, administrative and labor legal relations.

It also important to note that today the court and investigation practice in the Russian regions is ambiguous, some of the ways of inflicting damage to property by fraud or abuse of trust with an absence of theft factors become not topical; for instance, illegal receipt of grant via submitting of false certificate about salary (due to the changes in the mechanism of paying for public services, because payments are carried out through a bank now); other ways due to the different reasons are hardly established, for example, illegal use of electricity (including damaging of a meter) – due to the absence of effective methodology of counting illegally consumed energy, etc. The following ways are now put in the forefront: not sanctioned use of the Internet under someone's account and password by fraud (abuse of trust); use of cellular operators (Internet, calls, SMS) from someone's SIM-card (modem) by fraud or abuse of trust (including making intercity calls; ticket-free transfer of passengers by a conductor of a train by abuse of trust, and also illegal actions in the sphere of communal services and organizations' activity (more than 14,1 %) and others.

On the 7th of December, 2011 the Criminal Code was amended, namely, the part 1 of an article 165 was decriminalized. Due to this fact, parts 1 and 2 of an article 165 of the Criminal Code were stipulated in the following version:

“1. Inflicting of damage to property of a proprietor or other owner of property by fraud or abuse of trust in the absence of theft factors, committed on a large scale, ...

2. Act, stipulated in the first part of the article: a) committed by the group of persons

by previous concert or by organized group; b) Inflicted especially large scale damage...”

It should be noted that comments to the article 158 are not applicable to such qualifying factors, as infliction of damage to property by fraud and abuse of trust, with the absence of theft factors of part 1 “committed on a large scale” and part 2 “inflicted especially large scale damage” of the article 165. This is conditioned by discrepancy of substance of qualifying factors of a body of a crime to the substance of commentary to the article 165. That is why, in order to adjust qualifying factors in accordance with the commentary to the article 158 of the Code, we suggest stipulating the liability for inflicting “especially large scale damage” to property in the part 1 of the article 165, “on a large scale” – in the paragraph b of the part 2 of the article 165 of the Code. By the way, according to the commentary to the article 158 of the Code, damage committed on a large scale is damage exceeding 250000 rubles, especially large scale damage – exceeding 1000000 rubles. Such approach, in our opinion, will solve several problems connected with construing of qualifying factors of this norm.

Decriminalization of the part 1 of the article 165 of the Code contributed to the situation that most of *modus operandi* of this crime are now referred to administrative jurisdiction.

Due to this fact, we hold an analysis of the court practice of the Central Federal District from 2010 to 2011 (namely, researched 35 sentences and decisions) with a glance to the corrections to the article 165 of the Code referred above [3].

After the observing the result we came to the conclusion that lately crimes of this category are committed in the form of illegal usage of property, which includes the following and mostly widespread *modus operandi* of this crime:

- 1) Illegal connection and usage of the Internet services under someone's login and password – 22,9 %;

- 2) Non-fulfillment of obligations for the building materials received by installment – 2,9 %;
- 3) Illegal withdrawal of participants of the garden non-commercial partnership and subsequent admission of the new ones by the chairman of this partnership – 2,9;
- 4) Receipt of land on the lease agreement for farming from the Administration with its subsequent deceit about the presence of a building on a land for buying on the privilege basis – 22,9 %.
- 5) Illegal overstating of the quantity of the works (services) carried out by the contractor – 2,9 %;
- 6) Illegal entering into the agreements for exporting and placement of waste with subsequent appropriation of funds by the person conducting management functions in this organization – 2,9 %;
- 7) Illegal realization of counterfeit electric train tickets – 2,9 %;
- 8) Illegal usage of invalid forms of strict accounting of the insurance organization for personal purposes by the workers of this organization – 22,9;
- 9) Abuse of funds of state support for building accommodations in countryside according to the Federal Target Program “Social Development of a village until 2010” – 2,9 %;
- 10) Conducting of paid procedures with misrepresentation of information or non-registration of this procedure in documents with a purpose of misappropriation by the worker of the medical institution – 2,9 %;
- 11) Acquiring of privilege passage on the railway transport by the students via falsification of school certificates – 8,6;

- 12) Illegal usage of electric energy in collusion with the worker of the power-efficient company – 2,9 %.

According to the statistics of the Main Information Analytic Center of the Ministry of Home Affairs [1], in 2010 there were 5442 crimes stipulated in the article 165 of the Code, including:

- 1) Crimes committed on a large scale and especially large scale, inflicted large damage – 2,9 %;
- 2) Crimes committed in a group – 1,2 %;
- 3) Crimes committed by an organized criminal group and criminal community (organization) – 0,6 % (see Fig. 1).

Total number of people committed crimes stipulated in the article 165 of the Code in Russia in 2010 was 4716, 3681 of them were held criminally liable. The structure of the most widespread social status of persons, committing crimes stipulated in the article 165 of the Code from the total number of people committed crimes is presented on the Fig. 2:

Most of the crimes of this category in Russia and Siberian Federal District in 2010 are committed in the following spheres of economical activity:

- 1) sphere of privatization;
- 2) foreign economic activity;
- 3) sphere of financial activity;
- 4) sphere of consumers’ market.

Statistics concerning the total amount of damage inflicted in the result of committing of crime stipulated in the article 165 of the Code in Russia and the Siberian Federal District from 2007 to 2010 are presented in the Fig. 4.

From the analysis referred above the following summary could be made: firstly, for this category of cases it is typical:

- 1) Committing of a crime in a group, in large and especially large scale (with inflicting large scale damage);

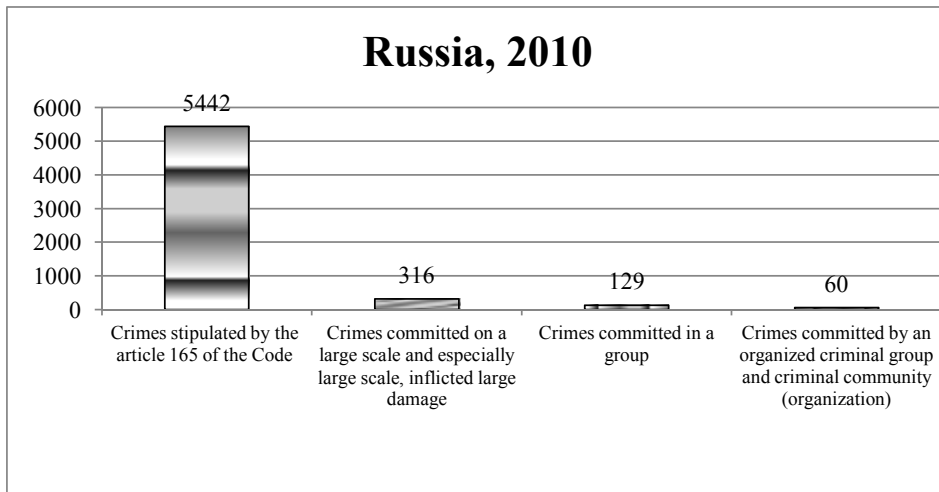


Fig. 1. Crimes committed in Russia, article 165 of the Code, 2010

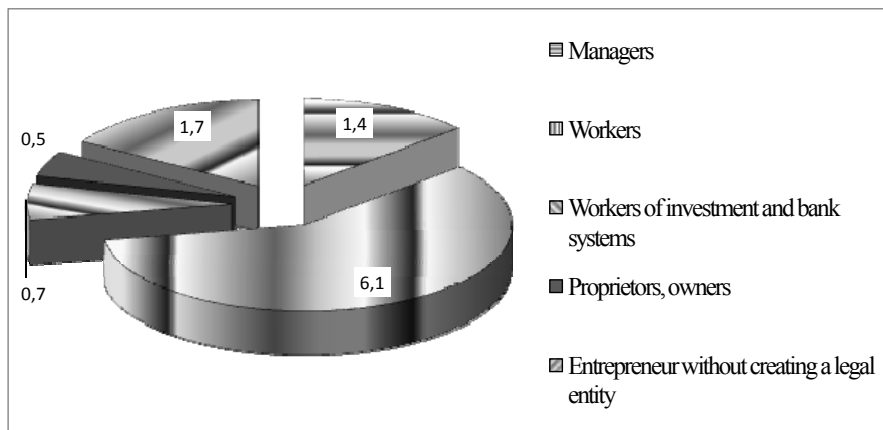


Fig. 2. Structure of the most widespread social status of persons committing crimes stipulated in the article 165 of the Code from the total number of people committed crimes in 2010.

- 2) Persons committing a crime stipulated in the article 165 are usually workers;
- 3) Most of the crimes of this type are usually committed in the financial sphere and consumers' market;
- 4) The dynamics of the damage inflicted has no visually expressed tendencies. The reason for that is that in different periods different forms and *modus operandi* of crime dominate, which is supported by the analysis of the court practice referred

above, *modus operandi* change, getting new substance, which call forth the necessity for scientific reasoning of the ways of calculating damage inflicted to property. The absence of the methodology of calculating complicates the process and lowers its effectiveness.

To sum up, we discovered the aggregate of circumstances sufficient for the establishment of the crime event – infliction of damage to property by fraud or abuse of trust with the absence of theft

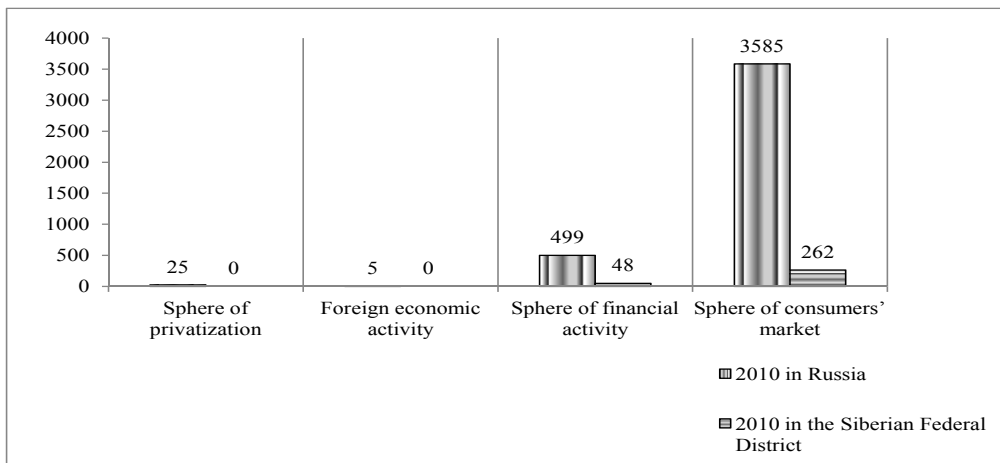


Fig. 3. Spheres of economical activity where the crime stipulated in the article 165 is mostly widespread

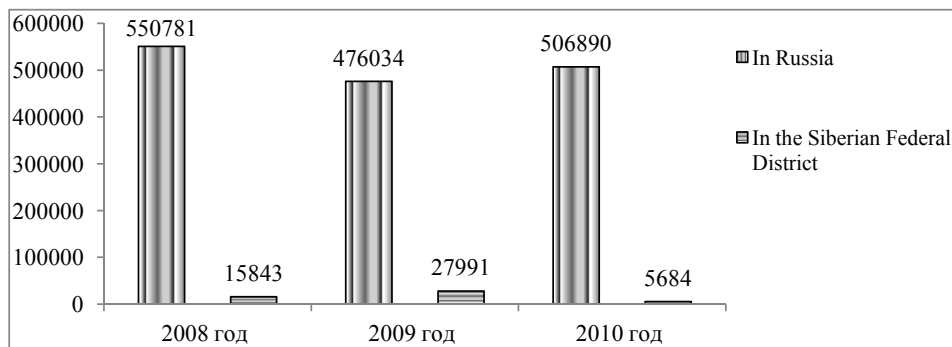


Fig. 4. Damage to property inflicted (thousand rubles) in Russia and the Siberian Federal District in the article 165 of the Code from 2008 to 2010.

factors, all of which without exceptions have to be established at the beginning of the investigation of a crime. As a result of the empirical research and the analysis of statistics on the article 165 of the Criminal Code, we noted possible forms of criminal acts, indicating *modus operandi*, and also the characteristics of social status of people committing these crimes, spheres, in which these crimes are mostly widespread. Moreover, the proposal was made for regulating unified

construing of the amount of damage inflicted to property.

The absence of the methodology of calculating damage inflicted to property complicates the process of investigating of this category of cases. Thereupon the recommendations to investigators have to discover all essential circumstances for the event of a crime. Usage of such recommendations in investigator's practice will be directed at the improvement of investigation of this crime.

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Materials are received: on request from the courts of 7 subjects of the Russian Federation; from official site of “SAS RF (State Automated System of Russian Federation)” “Pravosudije” <http://www.sudrf.ru/> on 58 subjects of the Russian Federation; as a result of examination of archival criminal cases in courts of 3 subjects of the Russian Federation.

Причинение имущественного ущерба путем обмана или злоупотребления доверием: совокупность обстоятельств, существенных для решения вопроса о возбуждении уголовного дела (анализ судебной практики)

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В статье рассматривается совокупность обстоятельств, существенных для установления события причинения имущественного ущерба путем обмана или злоупотребления доверием: время, место, способ и другие обстоятельства совершения преступления. По результатам эмпирического исследования автором определяются возможные формы преступного деяния, а также характерные для каждой формы способы совершения преступлений. По результатам анализа статистических данных по ст. 165 УК РФ отмечается, что большинство указанных преступлений совершаются в сфере финансовой деятельности и потребительского рынка, что обуславливает выбор методик исчисления имущественного ущерба.

Ключевые слова: событие преступления, предмет доказывания, способ совершения преступления, обман, злоупотребление доверием, имущественный ущерб, судебно-экономическая информация.
