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LEGAL ANALYSIS OF FRAUD IN THE REAL ESTATE SECTOR

The active globalization processes observed in the sphere of economic and political activity have negatively affected the qualitative and quantitative indicators of mercenary crime in the real estate sector. The complication of forms of criminal activity due to the combination of criminal and legal mechanisms of real estate turnover actually leveled the role of previous preventive measures and caused the need to develop new mechanisms of legal influence on mercenary crime adapted to modern criminal challenges, which would be based on a deep systematic analysis of modern fraud in the real estate sector.

The construction business in the Republic of Kazakhstan has a large turnover of investment and budget funds and is an extremely attractive area for criminals.

Various types of transactions are concluded in the real estate market, and the turnover of funds in the construction sector alone amounts to billions of US dollars.

The analysis of scientific research of modern Kazakh science shows the absence of such, whereas a comprehensive study of the legal and criminological nature of fraud in real estate, taking into account the peculiarities of criminalization of the act in question, is necessary.

The article analyzes the specifics of real estate as an object of fraud, examines the main types of such fraud and analyzes the measures that are carried out and should be carried out in order to avoid such illegal actions.

Key words: crime, real estate, fraud, real estate fraud, criminology.

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Правовой анализ мошенничества в сфере недвижимости

Экономикалық және саяси қызмет саласында байқалған белсенді жаһандану процестері жылжымайтын мүлік саласындағы өзіншіл қылмыстың сапалық және сандық көрсеткіштеріне теріс әсер етті. Жылжымайтын мүлік айналымының қылмыстық және заңды тетіктерін ұштастыру есебінен қылмыстық іс-әрекет нысандарының күрделенуі іс жүзінде бұрынғы алдын алу шараларының рөлін нивелирледі және қазіргі заманғы қылмыстық сын-қатерлерге бейімделген, қазіргі заманғы жылжымайтын мүлік саласындағы алаяқтықты терең жүйелі талдауға негізделген өзіншіл қылмысқа құқықтық ықпал ету тетіктерін өзірлеу қажеттілігін туындатты.

Қазақстан Республикасындағы құрылыс бизнесі инвестициялық және бюджет қаражатының үлкен айналымына ие қылмыскерлер үшін өте тартымды сала болып табылады.

Жылжымайтын мүлік нарығында мәмілелердің әртүрлі түрлері бар және тек құрылыс саласындағы ақша айналымы миллиардтаған АҚШ долларын құрайды.

Қазіргі заманғы қазақстандық ғылымның ғылыми зерттеулерін талдау ондайлардың жоқтығын көрсетеді, ал жылжымайтын мүлік саласындағы алаяқтықтың құқықтық және криминологиялық сипатын қарастырылып отырған іс-әрекетті криминализациялау ерекшеліктерін ескере отырып кешенді зерттеу қажет.

Мақалада жылжымайтын мүліктің алаяқтық объектісі ретіндегі ерекшелігіне талдау жасалады, мұндай алаяқтықтың негізгі түрлері зерттеледі және мұндай заңсыз әрекеттерді болдырмау үшін жүргізілетін және жүргізілетін шараларға талдау жасалады.

Түйін сөздер: қылмыс, жылжымайтын мүлік, алаяқтық, жылжымайтын мүлікке қатысты алаяқтық, криминология.

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Жылжымайтын мүлік саласындағы алаяқтықтың ерекшелігін талдау

Активные глобализационные процессы, наблюдаемые в сфере экономической и политической деятельности, негативно отразились на качественных и количественных показателях корыстной преступности в сфере недвижимости. Усложнение форм преступной деятельности за счет сочетания преступных и легальных механизмов оборота недвижимости фактически нивелировало роль прежних профилактических мер и обусловило потребность в разработке новых, адаптированных под современные криминальные вызовы механизмов правового воздействия на корыстную преступность, которые были бы основаны на глубоком системном анализе современного мошенничества в сфере недвижимости.

Строительный бизнес в Республике Казахстан обладает большим оборотом инвестиционных и бюджетных средств является чрезвычайно привлекательной сферой для преступников.

На рынке недвижимости заключаются различные виды сделок, а оборот денежных средств только в строительной сфере составляет миллиарды долларов США.

Анализ научных исследований современной казахстанской науки показывает отсутствие таковы, тогда как комплексное исследование правовой и криминологической природы мошенничества в сфере недвижимости с учетом особенностей криминализации рассматриваемого деяния необходим.

В статье проводится анализ специфики недвижимости как объекта мошенничества, исследуются основные виды такого мошенничества и проводится анализ мер, которые проводятся и должны проводиться во избежание таковых противоправных действий.

Ключевые слова: преступление, недвижимость, мошенничество, мошенничество в сфере недвижимости, криминология.

Introduction

Despite the adoption of a number of regulatory legal acts, the development of competition, contractual relations, there is a tendency to increase criminal encroachments, and only the structure and nature of crime, as well as its state and dynamics, are subject to negative changes.

In modern conditions, the issue of real estate as a subject of theft is more controversial and complex than ever.

Crimes committed in the field of real estate, primarily fraud, pose a serious public danger, encroaching not only on the economic security of the state, but also on the constitutional rights of citizens (the right to private property, the right to housing), contribute to an increase in the level of corruption of public servants, discredit public authorities and local governments, law enforcement agencies, judicial the system, first of all in the eyes of ordinary citizens, creates a myth about the permissiveness of those in power.

The damage caused by fraud hinders the development of housing and commercial construction in the country. Real estate is characterized by a high market value. And therefore, most of the crimes

considered in the work are committed on a large and especially large scale. The amount of damage caused is estimated in multibillion-dollar amounts.

The purpose of the study is a criminal-legal and criminological study of fraud in the real estate sector and the preparation of scientifically based recommendations for its criminal-legal prevention.

The main part

The specifics of the genesis of the institution of criminal liability for fraud in the real estate sector is that in various historical periods there were no special criminal law norms regulating liability for fraud in the real estate sector.

Real estate fraud is a complex socio-legal and criminological phenomenon with stable properties and characteristics (high level of professional training, close connection with corruption and economic crimes, high latency and a large amount of criminal income), which translates real estate fraud into the category of real threats to the economic and criminological security of the state and causes the need for development of systemic preventive measures.

According to A.A. Yuzhin, with whom one can agree, “the allocation of the right to someone else’s

property as an independent subject of fraud is conditioned not only to indicate the moment of the end of the crime, although it is postponed to an earlier date compared to theft, but also to indicate the range of objects of civil rights that can be the subject of fraud in general for example, real estate” (Южин, 2016: 92).

Fraud, the subject of which is real estate, meets the requirements outlined above, and therefore its systematic analysis is not only possible, but also necessary.

A number of circumstances indicate the systemic nature of fraud in the real estate sector

1) the integrity of the forming objective elements – the acts in question are united by a common orientation, a specific object of protection – social relations in the sphere of turnover of immovable property;

2) the structurality of objective and subjective features: all elements of the compositions of the crimes under consideration have a qualitative originality and are united by intra-system connections;

3) hierarchy of compositions: fraud in real estate is included in the system of crimes in the field of economics;

4) a single determinational complex and similarity of criminological parameters of the compositions: as a rule, the basis for the commission of crimes are common causes and conditions, a single motivational complex and a close similarity of criminological characteristics of criminals.

The analysis of crimes in the field of real estate in the perspective of a systematic study allows us to solve a whole range of important theoretical and practical problems:

- consider the features of real estate as a subject of fraud;

- to determine the legal nature of such acts;

- to propose a number of scientifically sound recommendations for improving the current legislation. But first of all, a systematic assessment of fraud in real estate involves establishing the legal status of real estate as an object of civil turnover and the subject of criminal encroachment.

In the structure of real estate fraud, the following types of criminal acts can be distinguished:

1) fraud in the field of non-commercial real estate (fraud in construction and fraud in the secondary residential real estate market, or “household” fraud);

2) fraud in the field of commercial real estate: fraud with land transactions and fraud related to unfriendly takeover of enterprises.

In practice, there are socially dangerous acts of economic and corruption orientation, associated with fraud in the field of real estate, not provided for by the Criminal Code of the Republic of Kazakhstan, but at the same time causing significant damage to regional and local budgets, economic entities, for example, such as raiding, illegal construction of residential and non-residential premises.

Immovable property (real estate) is land plots, buildings, structures and other property that is firmly connected to the land, that is, objects that cannot be moved without disproportionate damage to their purpose. Real estate includes everything that is firmly connected with a certain location – land plots, buildings and structures (https://adilet.zan.kz/rus/docs/K940001000_). At the same time, real estate is divided into two categories – primary and secondary objects. Primary objects include buildings and structures of functional purpose, objects important for urban planning, and secondary objects – objects of individual (separate) ownership (apartments, built-in premises, shops, offices that are part of the primary object).

The Law of the Republic of Kazakhstan dated July 26, 2007 No. 310-III “On State registration of rights to immovable property” establishes that the state registration in the legal Cadastre is subject to the emergence, modification and termination of rights (encumbrance of rights) to immovable property, as well as legal claims. Neither transfer, nor encumbrance, nor modification or termination of the right to immovable property may be registered in the legal Cadastre until such right is registered in accordance with the procedure established by this Law. Other rights may be registered at the request of the copyright holders (https://online.zakon.kz/Document/?doc_id=30118294&pos=76;-56#pos=76;-56).

At the same time, 27 criminal cases on fraud committed during shared-equity construction are currently being investigated in Astana. According to the criminal cases, we recognized 305 people as victims. Material damage in the amount of over 3.2 billion tenge was caused. In the Mangystau region, one criminal case is being investigated during the construction of the residential complex “Mahabbat”. 21 shareholders were recognized as victims, the damage amounted to over 252 million tenge, etc. (<https://qamqor.gov.kz/crimestat/statistics>).

The specifics of fraudulent actions with real estate is that “a mandatory sign of fraud is the presence of a selfish purpose in the guilty person, that is, the desire to illegally and gratuitously turn someone

else's property into their own property, or the right to it in their favor, or in favor of other persons. Fraud is committed by deception or abuse of trust, under the influence of which the owner or other owner of the property voluntarily transfers the property or the right to it to other persons" <https://adilet.zan.kz/rus/docs/P170000006S>).

Deception is a way of committing fraud for the purpose of stealing someone else's property or acquiring the right to someone else's property. Deception may consist in intentionally misleading the owner or other owner of the property by a message, knowingly false, untrue information or in concealing the true facts that should have been reported to the owner or owner of the property, creating an erroneous idea in the owner of the property or another person about the legality of the transfer of property into the possession of the guilty person and (or) other persons.

As a result of deception, the owner or other owner of the property, being misled, voluntarily transfers the property to the guilty person, believing that there are grounds for this, and he acts in his own interests.

Abuse of trust as a method of fraud consists in the fact that the perpetrator uses the trust that has arisen between him and the owner or other person in charge of which the property is located, in order to illegally obtain someone else's property or the right to it for selfish reasons.

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, official position of the perpetrator, etc. In case of fraud, deception can be expressed both orally and in writing.

The use of forged documents in the theft is one of the forms of deception. Fraud committed using a forged official document made by another person is fully covered by the fraud and does not require additional qualification under Article 385 of the Criminal Code of the Republic of Kazakhstan (<https://adilet.zan.kz/rus/docs/K140000022>). Fraud is recognized as completed from the moment when the stolen property is seized and has passed into the illegal possession of the perpetrator or other persons, and they have received 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 someone else's property, the crime is considered completed from the moment the perpetrator has a legally fixed opportunity to own, use and dispose of

someone else's property as his own, after appropriate registration, certification or registration of this right.

Fraud committed against users of information systems is recognized as completed from the moment the victim transfers funds and (or) personal data to the perpetrator or at his direction to other persons. The place of committing fraud using information systems should be considered the location of the victim who transfers funds.

Fraud committed by deception or abuse of the trust of the user of the information system should be recognized as the actions of the culprit aimed at seizing the property or the right to the property of the user of the information system, committed through information technology (computer, computer programs, Internet, cell phone, etc.), by placing in the information system knowingly false information or programs, with the purpose of the implementation of his criminal intent to deceive the user through a Qiwi wallet, Internet banking, etc.

In cases where these acts involve unlawful access to an information system or a telecommunications network, the deed is subject to qualification for a set of criminal offenses under Articles 190 and 205 of the Criminal Code, or 190 and 206 of the Criminal Code, if as a result of unlawful access to computer information, destruction and modification, disruption of the operation of computers, computer systems or their networks occurred. To distinguish fraud from civil law relations, it should be borne in mind that in fraud, intent aimed at stealing someone else's property or acquiring the right to someone else's property by deception or abuse of trust arises from the guilty person before and (or) at the time of conclusion of the contract providing for the receipt of someone else's property or the right to it.

In such cases, the deceptive actions of the guilty person must be causally related to the fact that the guilty person received property or acquired the right to property, i.e. deceptive actions must precede the transfer of this property or the acquisition of the right to it.

Criminological analysis of crime in real estate confirms the position that the dynamics of fraud in real estate and related crimes of economic orientation is cyclical, but does not directly depend on the economic situation in the real estate market, may simultaneously tend to increase and decrease during both a favorable economic situation and an economic crisis. At the same time, there is a tendency to a constant transformation of the type of crimes under consideration, the growth of organized crime.

Qualitative indicators of crime are changing: budget funds, state enterprises, municipal land plots are often the object of criminal encroachments.

Based on the studied data on the state of crime in the field of real estate, criminological features of individual encroachments and their share in the overall structure of crimes in the field of illegal circulation of someone else's real estate, it is advisable to identify the following types of acts:

1) fraud in the field of non-commercial real estate (fraud in the construction market and fraud in the "secondary market" or "household" fraud);

2) fraud in the field of commercial real estate: with land transactions and fraud related to an unfriendly takeover of an enterprise.

The identification of these types of crimes is mainly focused on the identification of stable criminological signs of individual crimes associated with the circulation of someone else's real estate in order to develop special preventive measures (Низаева, 2017).

As for fraud in the construction sector, we note that the main factors contributing to the commission of fraud in the construction market include the following:

- a long process of approval of permits for construction (requiring, as a rule, the receipt and approval of about 80 documents), obtaining technical conditions for connection to networks, solving various land and property issues, which takes about two years;

- high cadastral value of land plots (increased tax base, payments under land lease agreements, the city's share in the implementation of investment projects in the construction sector);

- the presence of a large number of unregistered construction companies, private teams from among illegal migrants;

- a lot of fictitious construction firms ("one-day firms") that do not conduct business activities, are engaged in cashing out funds for the purpose of tax evasion;

- gross violations of the law during the resettlement of citizens by construction companies, including under state programs; – imperfection of legislation in the field of urban development in the field of construction (registration of real estate rights, accounting of taxpayer enterprises, etc.).

A comparative study of foreign legislation (continental, common law systems, CIS countries) has shown that in most foreign countries there is no special composition or a group of compositions united by a common generic object providing for liability

for illegal real estate trafficking. In most cases, criminal liability occurs according to more general norms. As a rule, encroachment on the legitimate interests of the owner of real estate is considered as both the main and additional object, which often requires the qualification of theft in the field of real estate in aggregate.

Comparative legal analysis allows us to identify four main legal mechanisms for strengthening criminal liability for fraud in the sphere of real estate turnover:

1) in some states there is a special qualified sign indicating real estate as an object of criminal encroachment (Spain, Russia) (Левшиц, 2007);

2) in others, a more general qualified feature is provided in the form of major economic damage (Austria, Liechtenstein, Ukraine, Belarus) (Art. 40.05);

3) thirdly, the general part of the Criminal Code contains a circumstance that aggravates guilt, criminal liability or punishment in a similar or similar way (this model has a theoretical character, but we cannot exclude that it is used in certain legal systems) (Цанова, 1998);

4) fourthly, there is neither the above-mentioned qualified attribute nor the aggravating circumstance considered, however, granting the judge discretion when imposing punishment, considering the lower limit of the sanction, suggests that he will be able to impose a more severe punishment on the person who committed the crime in question in a particular case (Switzerland). As we can see, in the first and second cases, encroachment on real estate constructs the *corpus delicti*, and in the third and fourth – there is only a differentiation of responsibility for the commission of this criminally punishable act.

To improve the prevention of fraud in the field of real estate and related crimes, it is advisable to use the following measures:

- development of a set of measures and recommendations aimed at countering economic crimes in the field of real estate, first of all, wide informing of the population by public authorities about the basic legal regulation of urban development activities, the procedure for state registration of rights to real estate and transactions with it, as well as law enforcement agencies about fraudulent schemes of property seizure existing on the market today;

- improving the work of law enforcement agencies – development on the basis of generalization of the experience of operational, investigative, judicial and expert work of specialized data banks on similar crimes, standard information models of the type of

crime under consideration for use as analogues in the investigation of crimes, conducting control and supervisory (cumulative) cases by employees in order to systematize information on the results of the activities of the divisions of the Ministry of Internal Affairs of the Republic of Kazakhstan on combating fraud in the real estate sector, which will eliminate the shortage of up-to-date information on these crimes;

- improving the level of professional training and legal qualifications of employees of the Ministry of Internal Affairs of the Republic of Kazakhstan, organization by the head of the department of periodic training seminars for employees with the involvement of specialists and experts in the field of construction, real estate in order to exchange experience, discuss problematic issues and trends in the industry;

- qualitative improvement of the material and technical base;

- the establishment of interaction between the departments of the Ministry of Internal Affairs of the Republic of Kazakhstan, as the leading service for combating fraud in the real estate sector, with other structural divisions of the Ministry of Internal Affairs of the Republic of Kazakhstan, as well as the National Security Committee of the Republic of Kazakhstan and the Agency of the Republic of Kazakhstan for Combating Corruption, other law enforcement agencies will qualitatively improve the mechanism of interaction of the Department of Internal Affairs with other subjects of crime prevention;

increasing the level of information support for law enforcement agencies is the introduction of new information technologies that will allow more quickly obtaining the necessary information on objects of interest from public authorities, rather than wasting time on writing requests by operational staff and their subsequent development, which takes considerable time. Such software will allow you to quickly analyze large amounts of information (databases, information retrieval systems).

It is necessary to develop new mechanisms for the protection of property rights through the State Register:

- verification of the legal capacity of citizens by the registering authority during the state registration of real estate transactions or the introduction of mandatory notarization of residential real estate transactions;

- the establishment of a ban on carrying out any registration actions in relation to a real estate object without the personal participation of the owner (residential premises);

- the introduction of a centralized information accounting system (for example, together with the executive authorities of the subject to use information about the presence of possible obstacles to planning on state registration), notification of the owner of the property about all planned registration actions in relation to his property.

Conclusions

The analysis of the state of crime in real estate, construction confirms the position that the dynamics of fraud in real estate and related crimes of economic orientation is cyclical, but does not directly depend on the economic situation in the real estate market, may tend to both increase and decrease during the period of both favorable economic situation in the country and and the economic crisis.

At the same time, there is a tendency towards a constant transformation of the type of crimes under consideration, the growth of organized crime in the considered priority area of economic activity – construction, qualitative indicators of crime are changing: budget funds, state enterprises, municipal land plots often become the object of criminal encroachments. This conclusion is confirmed by a survey of law enforcement officers responsible for countering fraud and related crimes.

The conducted research has shown that the most important of the complex of determinants of crime (economic, political, social, ideological) are economic determinants, for example, a steady increase in the market value of real estate over the past 10 years.

The legal reasons for crime in the real estate sector are the imperfection of the current legislation. So, today in Kazakhstan there is still no proper legislative regulation of real estate activity. Now these services are provided on the basis of the Civil Code of the Republic of Kazakhstan and other legal and by-laws. But a single law in this area was not adopted.

This allows us to conclude that the causes and conditions of fraud in the sphere of real estate turnover differ depending on the type of real estate that is the subject of turnover.

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Previously sent (in English): November 11, 2023.

Re-registered (in English): February 12, 2024.

Accepted: March 20, 2024.