A Study on Judicial Determination of Malicious Overdraft of Credit Card Fraud

Dongjun Ge

Dalian Ocean University, Dalian, Liaoning, China.

How to cite this paper: Dongjun Ge. (2024) A Study on Judicial Determination of Malicious Overdraft of Credit Card Fraud. Journal of Humanities, Arts and Social Science, 8(4), 936-939. DOI: 10.26855/jhass.2024.04.021

Received: March 30, 2024
Accepted: April 29, 2024
Published: May 27, 2024

Abstract

Among the credit card fraud crimes stipulated in Article 196 of China's Criminal Law, malicious overdraft of credit card fraud is one of the most common types, and it is crucial to impose severe punishments on the perpetrators to uphold the national financial management order. The promulgation of the relevant judicial interpretations in 2018 provided more detailed provisions on the identification criteria and sentencing for malicious overdraft credit card fraud. However, there is still some controversy surrounding this issue. In order to enhance the punishment of credit card criminal activities, this paper begins by addressing the controversy surrounding the identification of the subject of the crime. It discusses the validity of issues related to the collection of identification and proposes that the identification of malicious overdrawers should be based on the principle of subjective and objective consistency. It suggests using comprehensive evidence from multiple parties to validate the collection. This proposal aims to provide a basis for identifying credit card fraud committed by malicious overdrawers in China's judicial system, thereby safeguarding the stable development of the socialist economic order.

Keywords

Credit card fraud, Malicious overdraft, Judicial practice

1. Legislative Provisions and Judicial Interpretation of the Offense of Malicious Overdraft Credit Card Fraud

In 1997, the Criminal Law added "credit card fraud", in 2005, the Criminal Law Amendment (V) to the concept of credit card fraud malicious overdraft provisions, in 2009, the Supreme People's Court, the Supreme People's Procuratorate issued the "Interpretation of a number of issues on the specific application of the law in handling criminal cases of obstruction of credit card management" on the Malicious overdrawing type credit card fraud crime of malicious overdrawning the identification conditions, subjective state, sentencing range, the amount of determination, as well as the mitigating treatment of five aspects of the detailed provisions. With the needs of practice, in 2018, the Supreme People's Court and the Supreme People's Procuratorate focused on revising the relevant provisions on malicious overdrawning in the old judicial interpretation and issued the Interpretation on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Obstruction of Credit Card Management. In terms of incriminating standards, more detailed provisions were made on the starting time for effective collection by banks, the conditions of collection intervals and related evidence, and the standard for the amount of malicious overdrawning was increased, which raised the incriminating threshold for the crime of "malicious overdrawing-type" credit card fraud; in terms of incriminating standards, the time for restitution was further relaxed, providing that The object of full restitution includes only "the actual principal amount of the overdraft", excluding interest, which en-
courages the perpetrator of malicious overdraft to restitute the overdraft amount (Tian Hongjie, 2018).

2. Problems in the judicial determination of malicious overdraft-type credit card fraud offenses

2.1 Disputes over the identification of the subject of the crime when the registered cardholder and the actual user are not the same

According to the provisions of Article 196 of the Criminal Law of China, the subject of malicious overdraft credit card fraud is the "cardholder", but in practice, there are often credit card applicants who lend their credit cards to others, resulting in inconsistency between the credit card applicant and the actual cardholder. Therefore, to constitute a "malicious overdraft type" credit card fraud, one needs to accurately grasp the concept and determination of the main body of the "cardholder" (Li Hongyu & Wu Linsheng, 2021).

First, the cardholder knows the actual user of malicious overdraft behavior. For example, Cheng Mou borrowed from Jiang Mou, in order to guarantee the loan, the two Cheng Mou name for a credit card as a guarantee, and agreed that if Cheng Mou couldn't repay the agreed repayment, Jiang Mou could use the credit card, and not less than the amount of money should be overdrawn. In this case, assuming that Cheng is not able to return the arrears of Jiangmou, and Jiangmou uses the credit card in the amount, then Jiangmou this use behavior can be understood as a "malicious overdraft". There are views that Jiang Mou should have a "malicious overdraft" intention because Jiang Mou can foresee the existence of Cheng Mou can't repay the situation, and let the credit card as a guarantee, also can foresee the credit card overdraft can't repay the situation (Wang Guan, 2012). But some think, Jiang Mou is not the credit card holder himself, and should not be attributed to "malicious overdraft type" credit card fraud (Xie CaiNeng, 2011).

Secondly, the cardholder is unaware of the situation where the actual user has overdrawn the credit card in bad faith. For example, the registered cardholder violated the Credit Card Business Management Measures by delivering the credit card applied for in his name to the actual user for safekeeping and legal overdraft consumption, but the actual user, in the process of using the card, maliciously overdraw a large amount of money for the purpose of illegal appropriation, and the registered cardholder, upon learning of this, immediately contacted the actual cardholder and has been urging the actual user to repay the overdrawn amount to the bank quickly. The registered cardholder reported the case to the public security authorities after repeatedly urging the actual user to pay back the money to no avail. Although the registered cardholder violated the bank's credit card management regulations to their own names to others to use the credit card, to some extent, for the actual use of the card to implement the malicious overdraft behavior to provide convenience. However, the registered cardholder does not have the purpose of illegal possession, and criminal intent, does not constitute the crime, but the actual user of the behavior should be how to qualify there are different views (Zhu Lixin, 2015).

2.2 Lack of uniform criteria for determining the effectiveness of a collection

According to the provisions of the judicial interpretation, overdrafts that exceed the prescribed limit or prescribed period and are not returned for more than three months after two reminders from the card-issuing bank shall be recognized as a refusal to repay. Usually, in order to urge the perpetrator to repay the loan, the bank will make multiple reminders by calling the phone number reserved for the perpetrator, sending an SMS, and mailing a reminder letter to the address reserved for the perpetrator, and at the same time provide a grace period of 3 months to give the overdrawn person sufficient time to prepare. However, at this time the bank used to determine the effective record of collection, just formally fulfilling the obligation to notify, as to whether the actually effective, the bank is not responsible. Therefore, in judicial practice, the perpetrator will often be on the grounds that he did not receive the notice of collection, the validity of the collection objection. Different banks in the collection process lack of uniform standards and norms, also affects the effectiveness of collection. So the lack of uniform standards for the determination of the validity of the collection will affect the judicial process. In addition, in judicial practice, due to malicious overdrafts for large overdrafts from the beginning do not have the will to repay, and the overdraft amount is often far more than its actual ability to pay, so the provision of a three-month grace period whether the substantive significance is also to be considered (Yang Shihua, Sun Yingchun, & Wang Ping, 2017).

2.3 Controversy exists over the determination of criminal amounts in installment payments

The convenience of credit cards has led to more and more cardholders exceeding their repayment ability and over-
drawing heavily. When cardholders are unable to repay all their debts in a timely manner, they often sign installment payment agreements with the issuing bank. The installment payment agreement, as a civil agreement, is signed between the cardholder and the issuing bank on an equal basis. On the one hand, it allows the cardholder to repay in small amounts and in batches, avoiding criminal prosecution. On the other hand, it requires the cardholder to give the issuing bank a certain amount of interest, which is an additional income for the issuing bank. However, in judicial practice, it is not guaranteed that the cardholder can repay the principal and interest on time every month by signing this agreement. Therefore, if the cardholder is overdue for repayment after entering into an installment payment agreement, should the unpaid amount be included in the criminal amount? At the same time, considering whether to include it in the amount will also affect the starting point of the crime, which will inevitably lead to controversy (He Ronggong, 2020).

Some argue that since an installment payment agreement is signed, the agreement is protected by law, and the unexpired portion cannot be recognized as a criminal amount. Another view is that installment payment agreements are signed when the cardholder fails to repay on time, so they should be included in the criminal amount regardless of whether they are due or not.

3. Malicious overdraft type credit card fraud judicial determination of the perfect way

3.1 Malicious defaulters should be recognized on the basis of the principle of subjective and objective consistency

The legitimate cardholder is according to the provisions of the card issuer, the production of a real and effective identity card, by the card issuer, agreed to grant a certain credit limit to people (Liu Xianquan, 2017). However, in judicial practice, one can not avoid the cardholder being used for credit card rental, lending to others, and other behaviors, in such a situation, this paper's point of view should be based on the subjective and objective consistency of the principle of determining malicious overdrawer. First of all, the registered cardholder knows or recognizes the actual cardholder to carry out a malicious overdraft situation, the establishment of this crime requires the main body to have a special identity, the registered cardholder and the actual cardholder with a common criminal intent, the two acts should be recognized as a joint crime, according to the accomplice (Zhang Mingkai, 2018). Secondly, the registered cardholder does not know when lending the actual user with malicious overdraft behavior, although the registered cardholder subjectively agreed to the actual cardholder to use the credit card for general consumption of the commitment, but with the credit card malicious overdraft behavior beyond the scope of the commitment, so at this time can not be applied to the theory of the victim's commitment to rule out the illegality of the actual user's behavior; and the actual cardholder's Criminal behavior actually violated the property of the card issuer, the legal cardholder also does not have the authority to commit to the property damage. At this point, the criminal act committed by the actual cardholder satisfies the constituent elements of the crime of fraudulent use of credit cards, and thus the provisions of this crime do not apply (Zhang Mingkai, 2019).

3.2 Effectiveness of collection should be determined by a combination of evidence

“Failure to repay” is a necessary condition for the determination of malicious overdraft. Due to the practice of the bank side of the collection is mostly some procedural collection, and lacks effectiveness, so there is a need to further refine the collection of evidence of the effectiveness of collection and review. The view of this paper is that the evidence should be synthesized, from the substantive grasp of the determination of effective collection. First of all, in addition to reviewing the collection records of the card-issuing bank, but also to collect evidence of effective collection of telephone recordings, text message screenshots, cardholders, or family members of the signing of the record, a comprehensive determination. For the replacement of contact information did not inform the bank, the overdraft can not be contacted because of the escape, etc., at this time the bank's collection behavior has been unable to achieve the effect of urging the perpetrator to repay on time, the collection of the validity of the standard can be appropriate variation. Secondly, there should be strict bank collection work, the credit card collection process, and a way to refine and unify norms (Yang Shihua, Sun Yingchun, & Wang Ping, 2017).

3.3 The unexpired portion of installment payments should not be included in the criminal amount

The relevant laws and judicial interpretations have not regulated the amount of crime in installment payments, so
there are two different views in the theoretical community. The first type believes that it should be included, while the second type believes that it should not be recognized as a criminal amount.

This article further supports that the unexpired portion of installment payments should not be included in the criminal amount. Firstly, if a cardholder constitutes this crime, they must overdraw for the purpose of illegal possession. For the portion of the installment payment that has not yet matured, according to the principle of no suspicion of crime, the cardholder should not be deemed to have the purpose of illegal possession. Even if there is the purpose of illegal possession, overdraft behavior cannot be carried out. Based on the principle of subjective and objective consistency, it cannot be determined that the cardholder constitutes a crime. Secondly, there is no possibility for cardholders to recognize the unexpired amount, and it does not meet the requirement of not returning the overdue amount beyond the prescribed deadline. It is clearly unfair for cardholders to include the unexpired amount in the criminal amount (Xu Mingxun & Li Peng, 2017).

As long as the agreement has legal effect, it has a suspensive effect, which grants the cardholder the right to temporarily withhold repayment of outstanding amounts. That is, the issuing bank can only collect the portion that has already expired, which also reflects the equal rights and obligations of the cardholder and the issuing bank. Therefore, the outstanding amount in installment payments should not be included in the criminal amount.

References


Xie Caieng. (2011). How to identify the subject of credit card fraud when the registered cardholder is different from the actual cardholder. People's Procuratorate, (13), 38-40.


