

# The Determination of “The Purpose of Illegal Possession” in Malicious Overdraft Type Credit Card Fraud

—Taking Avoidance of Bank’s Collection and Evasion Repayment as Example

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**Abstract:** Among credit card fraud stipulated in Article 196 of the Criminal Law of PRC, "malicious overdraft" is a special type. In judicial practice, it is difficult to determine whether the perpetrator has "the purpose of illegal possession" and "malicious overdraft" by his act of avoid bank’s collection and evading repayment. It is necessary to analyze and study the application of criminal law interpretation principle, to limit the scope of application of the crime, to distinguish the dividing line between crime and civil breach of contract, and to ensure the modesty of criminal law.

## 1. Introduction

On November 12, 2009, the Supreme People's Court and the Supreme People's Procuratorate issued the Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Impairing the Management of Credit Cards (hereinafter referred to as the "2009 Interpretation"). On Article 6, paragraph 2 event (3) and (4) there list two cases to determine "the purpose of illegal possession" by evading bank’s collection or repayment in "malicious overdraft" style of credit card fraud: "... (3) escaping and changing contact information after overdraft to evade bank’s collection; (4) withdrawing or transferring funds, concealing property to evade repayment ...The theorists have questioned and criticized whether the circumstances above can directly infer that the perpetrator has the purpose of illegal possession.

Some scholars believe that evading repayment afterwards is matter of "ex post value orientation". [1] It does not conform to the requirements of credit card fraud of forming subjective offense at the beginning or in the course which is for purpose of illegal possession. This evaluation above is reasonable. In the process of judicial presumption, we cannot directly deduce that the perpetrator has the purpose of illegal possession only by the fact that the perpetrator's certain behavior appearance conforms to the above judicial interpretation. Judicial presumption must conform to the rule of experience and social common sense, for what the relationship between the known facts and the presumption conclusion can be recognized by the public. Otherwise, it does not conform to the principle and requirement of rationality and justice for criminal law interpretation and application.

## 2. Results analysis

### 2.1 An analysis of the relationship between the act of "No repayment after bank’s collection" and "the purpose of illegal possession"

It is difficult to recognize that the relationship between the act of "No repayment after bank’s collection" and "the purpose of illegal possession" is whether the repetition of the same language in literature or parallel and juxtaposition. In judicial practice, the reason why such cases initiate criminal proceedings is reported by banks. Because the cardholders refuse to repay, the bank reports to the bureau of public security after several times of collection. However, in reality, the reasons for the actor's non repayment may be complex. Not all acts of "no repayment after bank’s collection" are guided by "the purpose of illegal possession". The cardholder may lose the ability to repay for the failure of collection after receiving the credit card at any time. If he has the purpose of illegal possession, it will inevitably lead to the result of not returning the overdraft money. However, the

fact that the overdraft money has not been returned is not a necessary condition for the purpose of illegal possession. It does not exclude that the unreturned money is caused by other legitimate reasons other than illegal possession.

In view of the above doubts, some scholars hold that the fact "malicious overdraft" identified by the judicial organ must have two elements of "no repayment after bank's collection" and "purpose of illegal possession". [2] These scholars believe that "the purpose of illegal possession" is the subjective element in malicious overdraft credit card fraud, and the objective element is "overdraft beyond the prescribed limit or time limit, and still no repayment after collection by the issuing bank and the amount is large". The two elements must be satisfied at the same time in order to prove the perpetrator commit a crime.

If the fact of proving the perpetrator's objective elements is taken as the evidence to prove the subjective intention, the requirement of the criminal law on the subjective elements of the crime will be cancelled in essence, and malicious overdraft credit card fraud will evolve from intentional crime to strictly responsible crime. In other words, as long as it is proved that the perpetrator overdraws beyond the prescribed limit or time limit, and still fails to repay after collection by the issuing bank, and the amount is large, it can be considered that the perpetrator's act belongs to malicious overdraft, thus commits credit card fraud. Such a determination undoubtedly deviates from the principle of the unity of subjectivity and objectivity, sliding to the edge of "objective imputation." [3]

Other scholars believe that "no repayment after bank's collection" is not a necessary element for credit card fraud. They consider that the reason why the criminal law stipulates this condition is mainly to identify the purpose of illegal possession of the cardholder, because it is difficult to determine the purpose of illegal possession of this type of credit card fraud. In order to correctly distinguish between crime and non-crime, this condition must be supplemented. However, when the cardholder absconded with money or the overdraft amount was very large, which obviously exceeded his actual repayment ability, the purpose of illegal possession was very clear. Once the bank found out, the case could be reported, and the judicial authority could convict and punish the perpetrator once confirmed. On the contrary, if it is necessary to collect money through the bank, the perpetrator may have disappeared or has no ability to pay, which will be very harmful to fight the crime of seriously endangering the credit card management order and the bank's property rights.

By analyzing the first paragraph of Article 6 of the 2009 Interpretation above, we can see that "and" is used in the article. It can be seen that the original intention of the legislation is to support the determination of malicious overdraft when two conditions are both satisfied at the same time. In other words, if the cardholder only ignores the bank's collection and has no subjective purpose of illegal possession, it is overdraft in goodwill rather than malicious. On the contrary, if the cardholder has the purpose of illegal occupation, but is shaken by the bank's collection, and fulfills the repayment obligation as agreed within 3 months after the collection twice, or the bank has not made effective collection at all, then the perpetrator's overdraft should not be regarded as malicious overdraft. It is reasonable to worry about scholars who hold the second view. However, in market economy, as the main body of the market, banks have incomparable advantages compared with the ordinary people. They can effectively avoid the criminal forms that scholars worry about from the aspects of information acquisition, credit evaluation, risk prevention and control. We can believe that it is unlikely for a bank to issue large or even huge consumer loans to a natural person who does not have a regular job, a fixed house, friends and family, or a ordinary person with a low credit rating.

Compared with other forms of credit card fraud, malicious overdraft credit card fraud has less social harm, and the boundary between crime and non-crime is more blurred. Overdraft function is one of the use value of credit card. The consumption overdraft of cardholder is based on the credit agreement reached between the cardholder and the bank. The behavior of using credit card according to contract has civil consumption attribute. It is the result of civil breach of contract that "borrowing money without repay", which leads to the review of the legality of previous credit card consumption behavior. In other words, if there is no specific result, it will not review the malice or

goodwill of the behavior when swiping the card, even if the cardholder seriously breaches the contract. The information and credit line of the cardholder are mastered by the bank. In order to avoid its own risk, the card issuing bank can restrain and restrict the cardholder's "improper" card swiping without the help of public power. Therefore, the subjective malignant and social harmfulness of malicious overdraft type credit card fraud is smaller than ordinary credit card fraud so as to naturally set stricter threshold of incrimination. Therefore, the author believes that there is a parallel relationship between the two elements of "purpose for illegal possession" and "no payment after bank's collection". To identify the perpetrator's act as malicious overdraft, we must include one of the six situations listed in the interpretation, and at the same time, we must also determine that the perpetrator has the act of "no repayment after collection". Based on one of the six cases of "purpose of illegal possession" or the single fact of "no repayment after collection", it can be concluded that the behavior of swiping card is malicious overdraft, which can protect the rights and interests of banks and maintain financial stability in a short time. But in the long run, it will affect the normal credit consumption, which is not conducive to the formation of a healthy financial market.

In the case of "purpose for illegal possession" of "2009 Interpretation", both item (3) "escaping and hiding after overdraft, changing contact information and evading bank's collection" and item (4) "withdrawing and transferring funds, concealing property and evading repayment" are presumed to have the purpose of illegal possession through the perpetrator's evasion of collection or repayment after overdraft. We should analyze the above presumption in combination with the specific situations.

## **2.2 The identification of "escaping and hiding after overdraft, changing contact information and evading bank collection" and "the purpose of illegal possession"**

First of all, we should make clear the causality among "escaping and hiding, changing contact information", "evading bank's collection" and evading repayment. We should conform the purpose of the perpetrator's escaping and hiding and changing contact information is to avoid bank's collection and finally evade repayment. If the perpetrator puts forward the disproof and really escapes and changes the contact information for other legitimate reasons, which makes it impossible for the bank to fulfil the collection, it should not be recognized that the perpetrator has purpose of illegal possession, so it cannot be recognized as credit card fraud.

Secondly, we should correctly grasp the relationship between "evading collection" and "no repay after being collected by the issuing bank". In article 196 of Criminal Law it is clearly put forward the restrictive condition of "not returning after being collected by the issuing bank" in the constitutive requirements of "malicious overdraft". In article 6 of the 2009 Interpretation it is specified the restrictive condition that "not returning more than three months after collection twice by the card issuing bank". Then, if the issuing bank fails to fulfill the collection due to the perpetrator's "escaping and hiding, changing contact information", can we still confirm the perpetrator still not repaying card issuing bank after collection", and further determine whether the perpetrator belongs to "malicious overdraft"?

The Reply of the Research Office of the Supreme People's Court on Several Issues concerning the application of law to credit card crimes (hereinafter referred to as "the Reply") requires that collection "shall be made in two or more forms, such as telephone, letter and door-to-door collection", and stipulates that "the collection" of the issuing bank shall be proved by "telephone recording, signature of the cardholder or his family members, etc. " It is precisely in order to strictly limit the card issuing bank's performance of collection obligations to accurately identify the fact that the perpetrator "does not return after being collected by the issuing bank" in order to raise the threshold of conviction. Although the cardholder has escaped, changed his contact information and evaded the bank's collection, in order to identify the cardholder's malicious overdraft, two conditions should be met at the same time: the issuing bank performs the collection obligation and the cardholder has not returned the repayment items. If the card issuing bank fails to perform the collection obligation according to law, it does not meet the legal condition of "not returning after

being collected by the issuing bank". If the perpetrator does not receive the bill and collection document of the issuing bank due to objective reasons such as relocation, it cannot be proved that the act is for the purpose of illegal possession. Therefore, in these two cases, the perpetrator can take the failure to receiving the collection notice as the plea of innocence.

In judicial practice, the judgment has found that, because the issuing bank has not provided sufficient evidence to prove having fulfilled the collection obligation according to law, although the perpetrator has the situation of "hiding, changing contact information and evading bank collection", it does not conform to the legal constitutive requirements of "no repaying after collection by the card issuing bank", so the act of credit card overdraft is not convicted credit card fraud.

However, if the issuing bank can provide evidence that it has fulfilled the collection obligations in strict accordance with the provisions of the reply letter, it should be considered that the perpetrator has the purpose of illegal possession and "no repaying after being collected by the card issuing bank". The reason is that: Firstly, from the literal sense, the meaning of "not repaying after being collected by the card issuing bank" does not include the condition that the declaration of collection intention must reach the perpetrator himself, nor does the restriction of the letter of reply on the card issuing bank's collection obligation. There is no contradiction and conflict between the provisions of the Reply and Article 196 of Criminal Law and Article 6 of 2009 Interpretation of that "no repaying after being collected by the card issuing bank". Secondly, from the scope of contractual obligations, according to the provisions of Article 54 of the Administrative Measures for Bank Card Business, the cardholder should provide the issuing bank with true application materials, and shall timely notify the issuing bank in writing of any change in correspondence address or occupation. After the cardholder changes the correspondence address unilaterally, as long as the issuing bank strictly performs the collection obligation, the legal consequences of failure to collect shall be borne by the cardholder. After overdraft, knowing that the bank will demand repayment, the perpetrator intentionally "escapes and changes the contact information" in order to avoid bank's collection, which indicates that he has the intention of "not returning" the loan, and voluntarily giving up the right of repayment after receiving the demand from the issuing bank. In general, it should be considered that the perpetrator has the purpose of illegal possession and "does not return after being collected by the issuing bank", and further be determined as credit card fraud.

### **2.3 Identification of "withdrawing and transferring funds, concealing property, evading repayment" and "the purpose of illegal possession"**

In judicial practice, in order to recognize that the perpetrator has "the purpose of illegal possession" by "withdrawing and transferring funds, concealing property and evading repayment". It is also necessary to accurately grasp the causal relationship between the behavior of "withdrawing, transferring funds, concealing property" and "evasion of repayment". At first, it must be proved that the perpetrator's act of withdrawing, transferring funds and hiding property is to evade repayment, rather than based on other legitimate reasons. Meanwhile, it is normal for the cardholder's property to change. In order to prevent the scope of conviction and punishment from being too wide, it is necessary to carefully determine whether the perpetrator has the purpose of illegal possession according to the "rules of purpose judgment at the time of action", combined with the evidence and facts of the case, and through a series of behaviors of perpetrator. For example, the perpetrator changes of property after overdraft credit card is not based on real objective reasons, but a means or way to avoid repayment and should be identified as purpose for illegal possession. It's the general rule. However, if the perpetrator can provide the disproof that he did not have the purpose of illegal possession when overdraft, and the subsequent property change behavior is not to evade repayment, but based on the real objective reasons, then according to the law, it should not be determined the purpose of illegal possession. If the perpetrator has reached an agreement on property transfer with others before the implementation of overdraft. And the agreement is not related to overdraft behavior. After overdraft, if the perpetrator transfers property based on the agreement, it cannot be identified as the behavior of "withdrawing, transferring funds, concealing property, evading repayment". Of course, it cannot be identified as the purpose for illegal possession.

In the existing judicial precedents, there are few cases in which the perpetrator directly determined to possess the purpose of illegal possession just because he has the behavior of "withdrawing, transferring funds and hiding property" after overdraft. The reason is that if we do not comprehensively consider the specific situation of the perpetrator overdraft credit card and after overdraft, and only infer the purpose of overdraft based on the behavior of property change after overdraft, we may fall into the trap of "ex post purpose" presumption, thus violating the principle of subjective and objective unity. [4]

### **3. Conclusions: the determination rules of "the purpose of illegal possession"**

#### **3.1 Rule of judging the purpose of action**

The principle of simultaneous action and responsibility is an important principle of criminal law. The purpose of illegal possession arises before or at the time of overdraft, not after the act. [5] The purpose of crime is the result that the perpetrator hopes to achieve through his own behavior subjectively. The existence of the purpose and the specific content can only be judged by the time of the act. The psychological intention of the perpetrator after the implementation of the act cannot reflect the purpose of the act. Therefore, the theory of "ex post purpose" violates the principle of simultaneous existence of act and responsibility and lacks logical self-consistency. If the perpetrator does not have the purpose of illegal possession before or at the time of overdraft, then his overdraft behavior does not belong to "malicious overdraft".

#### **3.2 Rule of admission on disproof**

It's the special rule to exclude the purpose of illegal possession, which allows the accused and his defenders to deny the purpose of illegal possession through evidence and facts. In many cases, the perpetrator will not admit that he has the purpose of illegal possession, so the purpose of illegal possession can only be determined by presumption. In this case, whether the perpetrator has the purpose of illegal possession is not proved by direct evidence, but by the connection between the basic facts and the facts to be proved, and using reasonable judgment and logical reasoning to draw a conclusion. Because the conclusion of presumption is probable. Only by fully protecting the right of refutation of the defendant and criminal suspect, we can avoid the occurrence of judicial errors to the greatest extent. Therefore, for the judgment of the facts to be proved, the perpetrator should be allowed to bring forward the disproof to overturn it. The proof degree of disproof does not need to reach the standard of "authenticity and sufficiency", but only needs to reach the "reasonable doubt", which is required to overturn the original presumption basis or method. Although the defendant does not have the obligation to prove his innocence, when the defendant presents the evidence of innocence, the judicial office should conduct an objective review and make a fair determination and judgment.

#### **3.3 Rule of combining specific identification and comprehensive judgment**

According to the specific situation of the case, with the evidence and facts, we can comprehensively judge whether the perpetrator has the purpose of "illegal possession". In judicial practice, there are many different cases. If we mechanically copy the provisions of judicial interpretation without considering the special circumstances of crime, we may make a wrong judgment.

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