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Falsification of Evidence in the Civil Case (Part 1, Art. 303 of the Criminal Code of the Russian Federation)

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The article considers the objective side of the offense that is specified in Part 1, Article 303 of the Criminal Code of the Russian Federation. We analyze the term "falsification" in relation to evidence in a civil case. It is concluded that the concealment or destruction of evidence is not the method of its falsification.

Keywords: falsification, evidence, civil case.

The objective aspect of falsification of evidence in the civil case (Part 1, Art. 303 of the Criminal Code of the Russian Federation) is stated with the single word – "falsification", the essence of which can be determined by its etymological analysis. The term "falsification" comes from the Latin word «falsus» that means "false, incorrect", and in this sense it has a meaning of the substitution of something authentic and genuine with something false and sham[1]. The word that is derived from falsification is the Latin word «falsifico» that means fabrication, misrepresentation of some information[2]. We can therefore come to the conclusion that from the objective side this offense is represented both in the misrepresentation of genuine evidence in civil proceedings by its complete or partial forgery, and in the substitution of such evidence with another one that is falsified. Criminal and legal meaning of tampering with evidence is misrepresentation of the information about the facts that are necessary to establish the circumstances grounding the claims and objections of the parties that are important to the proper disposition of a civil case. As it is noted in the special literature the matter is the certain manipulation with material objects of evidential information, such as written or physical evidence[3].

Typical methods of falsification of evidence in a civil case are both the change, misrepresentation of primary evidence, and the creation (making, fabrication) of false evidence, and the combination of these methods. From this point of view one can mark out the material and intellectual forgery. Material forgery includes, for example, removal of the part of information from

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evidence by erasing, wiping, deleting of the part (sheets) from the document etc.; the change of the information contained in evidence by erasing, wiping, other deleting of available information and entering of the new information, the change of the numbers by correction, additional drawings, etc.; supplement of evidence with the information that is not contained in the original evidence by additional writing, additional typing etc.; modification of evidence by making necessary details, making false signatures, putting of fake stamps, seals, etc. It applies both to written evidence and to audio and video recordings, film and photographic materials, as well as to the informational records on other data carriers. In addition, material forgery also includes removal, addition, change of the properties of any physical evidence, or its modification.

Material forgery as the way of tampering with evidence, is given, for example, in the definition of the Supreme Court on January 11, 2006 № 66-o05-123 that notes that "falsification (forgery) means deliberate misrepresentation of presented evidence"[4].

Intellectual forgery should include compilation, production, fabrication of written or material pseudo-evidence that are not correspond to the facts, audio and video recordings, film and photo materials or other data carriers.

Since the term "falsification" according to its etymological meaning includes not only the misrepresentation, but also fabrication[5], intellectual forgery is covered by disposition of Part 1, Article 303 of the Criminal Code of the Russian Federation. This position is fairly hold by majority of researchers[6] as well as is implicitly hold by the forensic and investigative practices.

Thus, by the determination of the Volgograd Regional Court on December 30, 2002 that has been left without changes by the definition of the Judicial Division for Criminal Cases of the Armed Forces of the Russian Federation on April 17, 2003, F. was found guilty for an offense that is specified in Part 1, Article 303 of the Criminal Code of the Russian Federation and criminal case has been dismissed because of the expiration of the limitation period. F. as a representative of the Agency for International Adoption, made the fake answers of the Ministry of Education regarding children who are subject to adoption, and represented them in court as an evidence[7].

The position of the authors who take fabrication of evidence out of the objective side of falsification of evidence[8] seems to be unmotivated and erroneous.

With intellectual forgery and account taken of the unity of form and content of forensic evidence, there is no sense for the existence of corpus delicti that is specified in Part 1, Article 303 of the Criminal Code of the Russian Federation whether fabricated evidence includes authentic or false information.

In this connection, we agree with the opinion of Yu.I. Kuleshov, who believes that "falsification includes only reporting of low-quality information and does not include misrepresentation of the procedural form of evidence"[9]. It appears that proper procedural form is the most important condition for the legality of certain legal proceedings, and its compliance guarantees protection of rights, freedoms and legitimate interests of the participants in civil process, since the essence of the procedural field of law consists in compliance with certain procedures and, accordingly, procedural form. Combination of these methods may include the substitution of the part of evidence, such as single sheets, with fabricated ones.

In forensic and investigatory practice there are cases of simultaneous execution both material and intellectual forgery. In this connection, one can agree with I.A. Gaag that falsification "is aggregate of forgery and fraud when the person first makes the object that does not match the

objective reality (either by making false changes in the authentic object, or by making the initially fake object), and then uses it according to the aims that the person wants to achieve"[10]. In this regard, the following example from the judicial practice is demonstrative. By the sentence of the October district court in Novosibirsk on June 29, 2007, M. is convicted of an offense that is specified in Part 1, Article 303 of the Criminal Code of the Russian Federation, that has been committed by him under the following circumstances: "during the course of the judicial proceedings M. as a plaintiff in the case supported his claims and gave evidence about the claim and this fact misled the court about the authenticity of evidence presented to the court. After that, the court on the basis of the presented evidence ruled for M."[11]. Falsified evidence in a civil case were deliberately forged real property sales contract, property acceptance and conveyance certificate enclosed to the sales contract, power of attorney about the conclusion of respective contracts.

It seems that the truth in a civil case that assumes the objective establishment of the true circumstances of the resolved case, cannot be ascertained both in the case of the initial fabrication of evidence, and in the case of making certain changes in the evidence. Since the truth is closely connected with the establishment of all the circumstances that should be proved, even the fabrication of signatures in the documents can misrepresent the court opinion about the facts that are the base for the establishment of the presence or absence of circumstances that are important for proper consideration and resolution of the case and that can result in unfair and biased judicial decision.

There is an interesting question about the qualification of actions that includes not the direct manufacture of falsified evidence, or the misrepresentation of authentic evidence, that is direct influence over the procedural form of evidence, but the influence over other objects of reality that results in further fixation in authentic means of evidence of the misrepresented information about the surrounding reality in accordance with the law. Such actions may be represented in the change of environment, environmental parameters that are subject to fixation in the deeds and protocols of the inspection, including judicial surveys, in substitution, misrepresentation or other falsification of the objects and comparative samples that are subject to the expert study, etc. Despite the fact that in these cases the procedural execution of the information is carried out in accordance with the law, there is falsification, as it is fairly pointed out by P.V. Teplyashin, of the very foundation of the recognition of an object (document) as an evidence that consists in the real reflection of certain events by the objects of material world[12].

Thus, the misrepresentation of the original information about the objective reality that is even enclosed later in the proper procedural form, is the way of tampering with evidence and is covered by the disposition of Part 1, Article 303 of the Criminal Code of the Russian Federation. In this connection, it is possible to give the following example from the forensic and investigatory practice: Minusinsk interdistrict prosecutor's office examined the issue about the institution of the criminal investigation about the fact of the movement of the object of reality (ferroconcrete hatch cover) at the place of the road traffic accident and, accordingly, the misrepresentation of the protocol of the inspection of the scene. During the hearing of a civil case on the claim of «Minkomkhoz» CJSC to M., the direct participant of the road traffic accident has filed an application for the misrepresentation on the scheme of the road traffic accident of the true circumstances of the accident that could lead to the violation of his property rights. However,

institution of a criminal case was refused due to the fact that the applicant's statements about the changing of the environment before its fixation in the procedural document have not been confirmed during the inspection[13].

In another case, by the sentence of the Melenkovskiy district court of Vladimirskiy region on August 31, 2010, K. and M. have been convicted of an offense that is specified in Part 1, Article .303 of the Criminal Code of the Russian Federation and have been committed by them under the following circumstances: they were the persons involved in a civil case, they arranged beforehand that K., using the passport of the principal – M. will get his blood tested, thereby he will falsify information about the non-involvement of M. in paternity of G., and later they implemented this arrangement. Received resolution of the molecular-biological examination was presented to the court as an evidence of the non-involvement of M. in paternity of G.[14]

The conclusion about the fact that the changing of the environment with a view to its further fixation in the proper procedural form is covered by disposition of tampering with evidence, is also arrived by I.V. Dvoryanskov during the study of such ways of committing an offense that is specified in Part 2, Article 303 of the Criminal Code of the Russian Federation as the planting or secret putting of objects and documents[15].

The study of the objective side of the falsification of evidence in a civil case indicates casuistic rather than abstract nature of the considered socially dangerous act. For this reason, legislator has rejected such formulation of the disposition of Part 1, Article 303 of the Criminal Code of the Russian Federation, such as: «Falsification of evidence in a civil case in any form by the person participating in this case or his representative». This formulation reflects very generalized and unspecific nature of modus operandi that is explained with the presence of initially established procedural forms of collection and assessment of evidence in a civil case. In this connection, we can cite the opinion of N.I. Degtyareva who notes that the concept of «evidence» is generalized and rather abstract[16]. In essence, the ways of tampering with evidence are «tied» to the procedural form of their existence. Moreover, the criminal legal norm should have a formal definition that would help to eliminate acts of its free broad interpretation and result in the absence of uniform law enforcement practice. Abstract nature of formulation of the criminal legal prohibition is justified only in those crimes, the nature of which perpetration is not directly linked to the appropriate procedural form. For example, there is formulation in Article 294 of the Criminal Code of the Russian Federation that is justified enough and conditioned by the needs of the criminal legal combat with the crimes against public justice: «Obstruction of justice and preliminary investigation», the disposition of which is formulated according to the abstract type of the description of rule of law – «Interference in any form into the activity of the court with a view to make obstruction of justice». In this case, legislator indicates the presence of a variety of ways to make obstruction of justice that for obvious reasons are impossible to formalize.

One of the typical questions during the study of the objective side of tampering with evidence is the question about the attribution to the methods of falsification of such acts as concealment and destruction of evidence.

Since the description of the objective side of the investigated corpus delicti is expressed with the united term «falsification» that means the substitution with something false or sham, it is inadmissible to have its broad interpretation and labeling as a crime that is not directly specified in the Special Part of the Criminal Code of the Russian Federation. This fact, in

turn, does not mean the cancellation of the need to make changes in the current version of Part 1, Article 303 of the Criminal Code of the Russian Federation.

Due to the critic of the position of the broad explanation of the objective side of tampering with evidence, V.L. Lobanova was forced to announce an occurred misunderstanding and the fact that in the criticized paper she claimed just the opposite and made the proposal about the reform of Article 303 of the Criminal Code of the Russian Federation[17]. Indeed, in this paper there was the author's position about the fact that the term «falsification» does not include such way of the changing of the totality of actual data, as the destruction or confiscation of evidence, however, there was indication of the public danger of such actions and the need for the establishment in Article 303 of the Criminal Code of the Russian Federation of the responsibility for the use of methods of influence on the content and form of evidence that are not covered by the term «falsification of evidence»[18].

Question about the need to establish criminal liability for the concealment or destruction of evidence in civil proceedings should be considered through the prism of legal obligation. Unlike criminal proceedings, the responsibility for the falsification of evidence in which is established by Part 2, Article 303 of the Criminal Code of the Russian Federation, where the investigator is responsible to collect and attachment to the case of all relevant evidence – both damning and justified, civil process, including legal proof in a civil proceeding, is based on the principles of optionality and adversarial character. Persons involved in the case at their discretion deal with their rights including the right to submit or not to submit certain evidence. The clauses of Article 56 of the Code of Civil Procedure of the Russian Federation and Article 65 of the Arbitrage Procedure Code of the Russian Federation about the fact that every person involved in the case should prove the circumstances to which this person refers to as the basis of his claims and objections, are not the legal obligation, but the rule of distribution of the burden of evidence of the factual background between the parties, and at the same time, the form of manifestation of the right to present evidence to the court. In this connection, «non-proof» of certain circumstances cannot entail legal responsibility, its consequence is the court recognition of this circumstance as unidentified and making of the decision on the base of other circumstances that are established by the court or in accordance with the presumptions. Thus, in particular, during the challenge to acts, administrative dereliction or inaction of officials, citizen is obliged to prove just the fact of the violation or restriction of his rights, freedoms or legitimate interests. The responsibility to prove legality and validity of decisions, actions or inaction is borne by the state structure or official. In the case non-proof of this circumstance by the public authority or official, the court should make a decision about the satisfaction of the citizen claims.

Therefore, establishment of the criminal liability for non-submission of evidence in civil proceedings by persons involved in the case (in any form, including non-disclosure, concealment or destruction of evidence) conflicts with the fundamental principles of civil procedure and would have been also absurd, as well as the establishment of the criminal liability of defendant, the accused for the concealment of evidence catching him in the crime.

The situation is different with the evidence that is already attached to materials of the case. Elimination of some evidence from the existing body of evidence in civil proceedings is subject to certain rules that must be fulfilled by all persons involved in the case and the court itself. Thus, the removal of evidence from a civil case with

the result of violation of the established rules, for example, by removal or destruction, is the unlawful behaviour for which should be, in our opinion, the establishment of criminal liability. In terms of public danger, unlawful confiscation of evidence violates the overall balance of the total volume of evidence that in accordance with Article 67 of the Code of Civil Procedure of the Russian Federation and Article 71 of the Arbitrage Procedure Code of the Russian Federation should be evaluated in its unity, and it is not less dangerous than the falsification of evidence, especially in the case of destruction of evidence of the only one confirmative circumstance that is important for the case.

For example, in one case about the recovery of debt that has been considered by the Krasnoyarsk regional court in the cassation (until January 1, 2012) order, after familiarization with the case by the defendant there was disappearance of the original bill of a debt from the case. Conduct of the official check eliminated other possible options of its loss. Contacting the police was unpromising just because of the fact that the content of Part 1, Article 303 of the Criminal Code of the Russian Federation does not cover such method as the destruction of evidence. Therefore, in our opinion, it is necessary to modify the disposition of Part 1, Article 303 of the Criminal Code of the Russian Federation in order to put under the criminal law protection the safety of evidence in a civil case since the moment of its attaching to the materials of the case file during the whole period of its storage.

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1 See, Словарь современного русского литературного языка. – М.-Л., 1984. Т. 12. – С. 1110; Т. 16. С. 1225.

2 Энциклопедический словарь. – М., 1982. – С. 1391.

3 See, Чучаев А., Дворянсков И. [A. Chuchaev, I. Dvoryanskov] Фальсификация доказательств // Уголовное право. – 2001. – № 2. – С. 46.

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Проблемы определения объективной стороны фальсификации доказательств по гражданскому делу (ч. 1 ст. 303 УК РФ)

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В статье рассматривается объективная сторона преступления, предусмотренного ч. 1 ст. 303 УК РФ. Анализируется термин «фальсификация» применительно к доказательствам по гражданскому делу. Делается вывод, что сокрытие или уничтожение доказательств не является способом их фальсификации.

Ключевые слова: фальсификация, доказательство, гражданское дело.