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Features of Determining the Cost Indicators Through Forensic Examination During the Legal Proceedings in the Determination of the Amount of Losses

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ABSTRACT

Cost indicators have been instrumental in highlighting the damage, in the qualification of crimes (large or especially large) and imposing punishment, as well as in conflict resolution between economic entities. **The aim of the research** is to identify the problems and conduct forensic examinations to determine the cost indicators and to formulate recommendations for improving this process. The research used such **methods** as content analysis of sources, normative and legal regulation, economic and mathematical methods, and analysis. Existing differences in individual concepts and types of values require uniformity in the justice system regarding their use. The authors recommend to adopt a list of issues and clarifications (explanations) to the issues in the determination of values on the basis of which the court will determine the amount of damage. The practice of forensic expert activity (at the legislative level, approved by norm) before the appointment of a forensic examination (in terms of determining the list of issues submitted for expert examination) was suggested, another proposal include implementation seminars with the participation of an expert (expert candidate) and detail of the cost indicators. Alternatively, this type of value can be represented as the term "market value with the restriction of free circulation". It was **concluded** that there is a need to develop unification and develop uniform principles for determining the cost of financial indicators in legal proceedings to determine the amount of losses.

Keywords: evaluation activity; forensic examination; expert; property value; business valuation; determination of damage; determination of loss; lost profit; investigation; legal proceedings

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INTRODUCTION

Legal proceedings evidence in Russia is based on results of forensic examinations. they are required in criminal proceedings, civil cases of general jurisdiction, and also used in arbitration proceedings.

Courts have to determine damages, determine their amount, decide on the reasonableness of damages and determine their amount. The determination of the value of the loss requires special knowledge in the economic sphere, so that courts often resort to the prescription of forensic examinations on relevant issues [1]. Expert skills are also required in criminal proceedings [2]. It should be noted that, on the basis of the results of the forensic examination as one of the relevant types of evidence (taking into account all other evidence available in the case file), the judicial authority makes the appropriate decision (verdict) [3].

The results of forensic examination or conclusion of a specialist (in addition to the consideration of the merits of the case) can be used to determine the amount of financial claims, i.e. to determine the amount of damage [4]. In the course of the forensic examination, valuation indicators are determined, including the value of the property, reconstruction or repair works, the amount of decrease in the value of the consumer properties of the property. In the current conditions of digitalization of society, questions of determining appropriate economic indicators of social and economic relations of economic entities are relevant [5].

The scientific and practical basis of the measured values is the evaluation activity, the results of which are present in various spheres of economic relations in society [6], including for the resolution of conflicts in court proceedings. The results of forensic examinations can also be used in the performance of State control functions [7].

Current judicial practice and existing legislation contain definitions of the notion of "market value". However, often the concepts of "actual value", "real value", "fair value", "intrinsic value", "reasonable value", "equivalent value" and other similar concepts can be used as synonyms.[1] Therefore, in judicial acts, legal sources and scientific literature are found as concepts-synonyms: "market value", "real value", "fair value", etc. [8]. Development of unification of terms and concepts will improve various areas of science, as well as contribute to the development of expert activities and court proceedings [9]. Unification of the terms used in the judicial process and in the judicial expert activity can be achieved through the compilation of judicial practice and relevant documents with recommendations on their use. Such generalizations should be made under the auspices and general control of the Supreme Court of the Russian Federation.

The values determined during forensic examination may have different names, nuances and features. That is why, when appointing forensic examination, it is necessary to clearly and unequivocally put relevant questions to the expert.

The aim of the study is to identify the problems of appointment and conduct of forensic examinations to determine the cost indicators and make recommendations to improve the process.

For achieving the set foal, the author solves the following **tasks**:

- identification of the main problems of the purpose and conduct of forensic examinations to determine the cost indicators;
- development of a recommendation on standardization of terminology used in judicial and expert activities;
- recommendation a list of questions and aspects to consider when appointing a forensic examination to determine the cost indicators.

[1] Article No. 7 of the Federal Law No.135 from 29.07.1998 "On estimated activity in the Russian Federation".

RESEARCH PART

On the basis of the results of the forensic examination, cost indicators are established, on the basis of which the judicial authorities determine the amount of real damage (in value) as well as loss of profit, i.e. the amount of damages.[2]

In the course of forensic examination, the cost indicators are determined on the basis of which the court determines the amount of damages.

It should be noted, however, that the draft questions on which cost indicators will be based, which will form the basis of the court's decision, are provided by the parties to the case, but the court determines the final version of the questions for forensic examination. The analysis of judicial practice revealed that the judicial system lacks uniform principles of asking questions for forensic examination.

According to the authors, it is necessary to introduce and actively use in the sphere of expert activity a mechanism of formation and preparation of questions (including clarification of the language and definition of types of value, taking into account all the different aspects of the defined cost indicators) for the purpose of the proposed forensic examination, taking into account the expert's opinion (expert candidate).

As an example, the process of developing, establishing and approving issues in the criminal proceedings No. 1.18.01700014.260176 may serve as an example for the formulation and agreement of the questions assigned for forensic examination with an expert (or candidate for expert) (was investigated by the investigation department of the Ministry of Internal Affairs of Russia in the Uzlovsky district of the Tula region on p. "b" part 2, art. 165 of the Russian Criminal Code; Uzlovsky City Court are convicted). In the course of the investigative actions before the appointment of the forensic examination by the investigative body with the candidate for judicial financial and economic examination, the relevant examinations were discussed, defined and established. Note that certain questions approved by the investigative body in cooperation with the candidate for experts have formed the basis of developed and implemented Methodical recommendations in determining the value of economic losses, arising from resource-supplying organizations during settlements of housing and communal services entities for the resources consumed [10]. In view of the above, it is advisable at the legislative level (with the introduction of appropriate additions to the legal acts governing the purpose of forensic examination) make explicit provisions for questions to be formulated before a forensic examination is appointed.

In the framework of this study, the authors analyzed the main types of cost indicators, proposed formulations of questions (detailing and clarifying cost indicators) that are advisable to make for forensic examination.

Consider the values that have the variability of the definition, taking into account the clarification and detail of the issues assigned to forensic examination.

1. What is the cost of materials and restoration of lost (damaged) property: including or excluding of physical deterioration of damaged property?

There is no unified position in judicial practice. In cases of recovery of real damage during the flooding of the apartment (compensation for repair of the apartment), repair of the vehicle after traffic accident (accident)In some cases, courts award the full market value of the repair and related materials as compensation to the injured party, in other cases — with depreciation. Depending on the questions posed to the expert by the judicial authorities, some value will be determined.

[2] Plenary Ruling of the Supreme Court of the Russian Federation No. 25 from 23.06.2015 "On Court Application of Certain Provisions of section I of the Civil Code of the Russian Federation", para. 13, 14.

2. Direct production cost, full cost or sales cost?

In determining the value of the property through a forensic examination, it is advisable for the court to specify what value the court wants to use. For trading activities, this variation may be as follows: the cost of purchase, the cost of purchase with cost of goods sold or the cost of selling the products.

It is advisable to determine the cost (purchase price) of the property when determining direct damages in criminal cases. And, in order to determine the loss of profits, it is useful to determine the market price of realization.

3. Wholesale or retail prices? If it is necessary to establish values, the court should provide appropriate clarifications on the issue of wholesale or retail prices: the difference for individual items can be very significant.

4. Price with or without VAT? Depending on the problem solved by the court, taking into account the specifics of the case, the court should indicate to the expert: with VAT or without VAT to determine the cost.

There is no unified judicial practice on this issue. There may be different questions about the value of property in criminal and arbitral proceedings, and therefore there may be variation in the question. In any case, however, the court must clarify the question: with or without VAT is taken into account, the values must be determined.

The VAT or no VAT valuation aspect should be based on the court's vision: what value (cost indicators) should be determined to resolve the substantive litigation.

5. The concept of "income" as "revenue" (excluding VAT) or "income" as "profit"?

In determining the loss of profits, it is necessary to determine the lost income that the injured person would have been able to obtain under normal conditions of civil turnover if his right had not been breached.[3]

There are a number of terms that have different interpretations in different directions of science [11]. The term "income" is one of them.

Accounting and tax legislation means revenue (without VAT).[4]

In the scientific economic literature [12] and a number of legal documents, the term "income" can be used synonymously with the term "profit": by income (profit) means the difference between revenue and cost, i.e. the profit of the entity.[5]

There are a number of different opinions that interpret in different ways the concepts of "income", "revenue", "profit". In judicial practice, there was no common understanding of what the cost of determining loss of profits should be: revenue or profit (the difference between revenue and cost).

That is why, when determining questions on valuation, the body that ordered the forensic examination should specify what was meant by income: revenue or profit?

6. Determination of market or liquidation value?

With regard to the property of business entities in bankruptcy proceedings, it may be necessary to determine not the market value but the liquidation value, i.e. in the event that the disposition of property is expected to take place within the time frame of the exposure of the property to the market, which is significantly lower than typical for this type of property. This aspect also needs

[3] Plenary Ruling of the Supreme Court of the Russian Federation No.25 from 23.06.2015 "On Court Application of Certain Provisions of section I of the Civil Code of the Russian Federation", para. 14.

[4] Order of the Russian Ministry of Finance No.32 from 06.05.1999 "On approval of Provision on accounting "Income of the organization" PBU 9/99» (registered in the Ministry of Justice of Russia No.1791 from 31.05.1999), para. 4, 5; Tax Code of the Russian Federation (part two) No.117 from 05.08.2000, art. 249.

[5] Order of the Ministry of Industry and Science of the Russian Federation No.2 from 04.01.2003 "On approval of the Methodical Regulations on planning, accounting of costs for production and sale of products (works, services) and calculation of the prime cost of output (works and services) at the enterprises of the chemical complex", para. 6.2.1; Guidelines for the development of accounting policies in agricultural organizations (approved by Ministry of Agriculture of the Russian Federation from 16.05.2005) etc. para. 29.

to be taken into account in the appointment of forensic examination (in the preparation of questions).

In the framework of this question can be relevant definition collateral value of the property [13].

7. Distinctions of determining values in respect of inseparable assets (in bankruptcy or liquidation of a legal entity).

If the court session needs to determine the actual value of a stake in a company in the process of bankruptcy or liquidation, the analysis and valuation of assets of an entity should take into account separately such a category of assets as inseparable assets.

Assets inseparable from an entity — assets for which the transfer to third parties is not (prohibited) by existing legislation or the acquisition of these assets by third parties is uneconomical [14].

As an example of inseparable assets can be considered deferred tax assets, written off uniformly organizational costs for the formation of a company, licenses, membership in a professional community (self-regulated organization), etc. Appropriate valuation and financial analysis procedures should be applied to these assets.

8. Features of determining the value of assets and liabilities during bankruptcy when establishing signs of deliberate or fictitious bankruptcy [15].

In this case, the expert may have before him materials (financial information) knowingly distorted by officials of the subject being analyzed (evaluated) [16].

9. Determination of the value of property not subject to accounting (including informal assets — is the accumulated stock of value, expressed in property or other rights, capable of bringing economic benefits or a number of economic benefits, but not meeting all formal criteria, the concept of "asset" in the formation of accounting (financial) reporting [17]). In the course of disputes between business entities, it may be necessary to identify values that are not subject to accounting rules. In this case, it is reasonable to use the professional skills of a forensic expert. At the same time, the expert who determines values can be both an appraiser defined by them according to the norms imposed on appraisers, such as real estate [18], and an expert with additional knowledge, such as in the field of audit, etc.

10. Features of the valuation of contraband.

Valuation of contraband is important in the investigation of illegal actions as well as in court proceedings. The definition of the crime itself will depend on the value of the contraband products. The value of the contraband will determine the size of the amounts of contraband: large or very large. This fact will influence the definition of the crime, the gravity of the punishment and the amount of damage caused.

With regard to property subject to smuggling in circumvention of customs duties, quotas or other legally prescribed restrictions on its movement across the border, the relevant issues should be taken into account in the appointment of forensic examination:

a) valuation with or without customs duties?

b) valuation of contraband products by market analysis in the exporting country or by market analysis in the importing country?

11. Distinctions of determining of the cost indicators in relation to counterfeit products.

Analysis of the value of counterfeit products (whether contraband or manufactured domestically) should determine the following value characteristic: determination of the value of this unoriginal (uncertified) product or original production, if the products submitted for research were original (brand)?

That is why, with regard to counterfeit products, it is advisable to ask for a forensic examination with the following wording: what would the cost of the original products if the counterfeit products being investigated were original?

12. Features of the definition of cost indicators in relation to property, prohibited or restricted (narcotic and psychotropic drugs, weapons and their elements, ammunition, State awards, etc.).

In relation to such property, it is advisable to use an independent concept of "market value when restricting free circulation" [19].

At the same time, the use of information from the "black" market can be considered admissible as evidence during the examination.

Suppose a civil servant was bribed with drugs. In addition to illicit drug trafficking, it is necessary to investigate the fact of bribery.[6]

As an alternative to the use of "black" market data during forensic examination, the standard price of the main types of property, prohibited or restricted in free circulation may be provided. Information about prices of "black market" initially can be obtained during the investigation in criminal cases, in which information on the value of the prohibited property in circulation appears.

At the same time, we note that for certain types of property limited or prohibited in circulation, there are legal acts that can serve as an information base for the determination of values.

In determining the values for animal products listed in the Red Book of the Russian Federation, the values indicated in the relevant document can be used.[7]

The values for firearms and ammunition can be determined on the basis of ransom (value compensation) norms for the population of arms and ammunition. Separate legal acts provide for the "reimbursement of the value of weapons and ammunition voluntarily surrendered by citizens of the Russian Federation, foreign citizens and stateless persons to the internal affairs bodies of the Russian Federation…".[8]

However, most of the instruments regulating the limited circulation of property (narcotics,[9] State awards[10] and other property) do not include any valuation.

According to the authors, the valuation of state awards cannot be adequate and fair, as many State awards are made of bronze or brass. The value of the metal from which they are made cannot be proportional to the fair value of the respective awards [19].

In order to carry out the investigative process, legal proceedings regarding various types of property, prohibited or restricted in circulation, the authors recommend the establishment of directories (price lists, regulations, etc.), which will indicate the value of the equipment concerned.

Another way to solve this problem may be to consolidate tools of property valuation, limited in circulation, for investigative and judicial purposes by including in the methodology of expert study right to use the value of non-expendable property according to data "black" market.

In doing so, the relevant clause on the principles of valuation, objectives of valuation and other relevant qualifications should be included in the methodological tools and expert studies undertaken.

CONCLUSION

Summing up the research, the author recommends:

[6] Order of Rosprirodnadzor No.317 from 30.06.2017 "On the approval of the List of Information Materials Required for Posting on the Information Stands "Anti-Corruption" in the Territorial Bodies of Rosprirodnadzor and Federal State Budgetary Institutions subordinate to Rosprirodnadzor".

[7] Order of the Russian Ministry of Natural Resources No. 107 from 28.04.2008 "On the approval of Method of calculating the amount of damage caused by animals listed in the Red Book of the Russian Federation, as well as other animals, not related to objects of hunting and fishing and their habitat" (registered in the Ministry of Justice of Russia No. 11775 from 29.05.2008).

[8] Federal Law No. 469 from 29.12.2014 "On the specific details of weapons in the Republic of Crimea and the Federal City of Sevastopol". Para. 10, art. 2.

[9] Resolution of the Government of the Russian Federation No. 681 from 30.06.1998 "On approval of the list of narcotic drugs, psychotropic substances and precursor, subject to control in the Russian Federation".

[10] Decree of the President of the Russian Federation No. 1099 from 07.09.2010 "On measures to improve the state award system of the Russian Federation".

I. To elaborate a list of questions and clarifications (explanations) to the questions on the determination of values on the basis of which the court will determine the amount of damage.

During the examination, it is necessary to clarify a number of aspects and nuances: the cost of restoration work with or without the deterioration of the facility itself; cost or value; wholesale or retail prices; with or without VAT etc.

The specifics of the questions and their clarifications are present when the experts are appointed to establish the value of contraband property, counterfeit products, property, limited and prohibited in circulation, as well as in relation to the company's assets, in liquidation or bankruptcy.

Competent authorities need to develop recommendations or rules for judicial and investigative authorities, expert organizations and other interested persons, which clearly indicate those values that should be determined during the determination of damages.

II. Given that the values determined by the forensic examination have many nuances, features and different interpretations, it is advisable to introduce into the practice of forensic expert work (at the level of a legislatively approved norm) prior to the appointment of the forensic examination (as part of the determination of the list of issues to be submitted for expert examination) to hold discussions with the expert (expert candidate) and refine the wording of the questions, detailing the cost indicators to be determined.

That was partly due to a lack of understanding among experts of what values (taking into account nuances, aspects and inconsistencies) should be determined, could lead to distorted and unreliable forensic examination.

The legal consequences of this fact may be an erroneous determination of the type and amount of punishment of the perpetrator in the course of an act in which the value of the damage is directly relevant, the value of the damage awarded to the victim may also be distorted.

That is why setting a clear task is so important when assigning examination.

III. At the legislative level, develop and establish guides (price lists, standards, etc.), which will indicate the value of property limited or prohibited in circulation. As an option, this type of value can be fixed in the form of the term "market value under restriction of free circulation".

An alternative solution to this problem can be the development of methodical recommendations for determining the market value when restricting the free circulation by providing the evaluator expert the right to use information on the value of the property according to "black" market.

There are still many outstanding issues and challenges in the expert activities [20]. Targeted steps to improve expert activity will contribute to the formation of a more civilized society of law, as well as the development of the judicial system in our country.

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