刑事法学博士文库
陈忠林◎总主编

诈骗罪研究

张志勇◎著

中国检察出版社

刑事法学博士文库
陈忠林◎总主编

诈骗罪研究

张志勇◎著

中国检察出版社

图书在版编目（CIP）数据

诈骗罪研究/张志勇著．—北京：中国检察出版社，2007.10

ISBN 978-7-80185-833-7

Ⅰ．诈… Ⅱ．张… Ⅲ．诈骗—刑事犯罪—研究—中国 Ⅳ．D924.354

中国版本图书馆 CIP 数据核字（2007）第 158986 号

诈骗罪研究

张志勇 著

出 版 人：袁其国

出版发行：中国检察出版社

社　　址：北京市石景山区鲁谷西路 5 号（100040）

网　　址：中国检察出版社（www.zgjccbs.com）

电子邮箱：zgjccbs@vip.sina.com

电　　话：（010）68658769（编辑） 68650015（发行） 68650029（邮购）

经　　销：新华书店

印　　刷：北京东海印刷有限公司

开　　本：A5

印　　张：9.5 印张　插页 4

字　　数：261 千字

版　　次：2008年4月第一版　2008年4月第一次印刷

书　　号：ISBN 978-7-80185-833-7/D·1809

定　　价：25.00 元

内容摘要

本书以诈骗罪的概述与犯罪构成为逻辑起点，以诈骗罪的认定为主线，以诈骗罪的完善为终点，重点梳理、研究诈骗罪的疑难问题，以期在理论上有所突破与创新，为指导诈骗罪的司法实践、完善诈骗罪的立法，贡献绵薄之力。本书除导言外，共有八章内容，对诈骗罪进行系统研究。

导言部分，笔者阐释了诈骗罪的研究意义，介绍了诈骗罪的研究现状，论述了诈骗罪的研究方法和研究思路。本书的主要研究方法有三种：案例分析法、比较研究法与系统分析法。笔者综合运用这三种方法，对诈骗罪进行全景式的研究，系统地论述诈骗罪。

第一章诈骗罪概述，笔者就我国和外国诈骗罪的立法沿革、诈骗罪的立法模式、诈骗罪的概念等问题，作概要论述。首先介绍诈骗罪的立法沿革，总结旧中国与新中国诈骗罪立法之嬗变。其次介绍国外刑法关于诈骗罪的立法模式，总的来说有两种立法形式：一种是单一模式，即只概

括规定一种诈骗罪，以包容社会生活中的所有诈骗犯罪现象。另一种是分立模式，即在普通诈骗罪之外，还另外规定了特别诈骗罪。我国1979年刑法采取单一模式，只概括规定了一种诈骗罪；1997年刑法则采取分立模式，除规定（普通）诈骗罪之外，另外规定了金融诈骗罪、合同诈骗罪、招摇撞骗罪等特别诈骗罪。比较两种立法模式，应该说是各有利弊，没有绝对合理的，只有相对合理的。我国目前关于诈骗罪的立法模式，总体来说还是比较科学、可取的，没有必要再增设新的罪名。最后分析了关于诈骗罪的各种概念的优劣，指出诈骗罪的概念应该既科学地揭示诈骗罪的内涵与外延，又符合刑法理论和司法实践，而且容易认定，便于操作。笔者所下的定义是：诈骗罪是指以非法占有为目的，采用虚构事实或者隐瞒真相等欺骗手段，使他人陷入错误，而骗得他人财物或财产性利益，数额较大或情节严重的行为。

第二章诈骗罪的犯罪构成，论述诈骗罪的犯罪客体、诈骗罪的犯罪客观方面、诈骗罪的犯罪主体、诈骗罪的犯罪主观方面四个要件。首先，对传统的诈骗罪侵犯的客体——公私财物所有权，应作广义上的理解。它不仅包括公私财物，而且包括财产性利益。诈骗罪侵犯的客体，既可以是简单客体，又可以是复杂客体。犯罪客体实质上就是刑法上的法益，即犯罪客体的内容应当是刑法所保护的利益（法益），而不宜表述为社会关系。诈骗罪侵犯的法益是财产所有权及其他本权，以及需要通过法定程序恢复应有状态的占有。诈骗罪的对象非常广泛，包括一切有价值的财物和财产性利益。财产性利益是诈骗罪的对象，具有合目的性与具体的妥当性；将财产性利益解释为财物，符合罪刑法定原则。其次，诈骗罪（既遂）

在客观上必须表现为一个特定的行为发展过程：行为人实施欺骗行为——受骗人（被害人）陷入或者继续维持认识错误——受骗人基于认识错误处分（或交付）财产——行为人取得或者使第三者取得财产——被害人遭受财产损失。欺骗行为的对象（受骗人），必须是具有在事实上或法律上处分该财产的权利或地位的人。欺骗的实质就是使受骗人陷入或继续维持处分财产的认识错误并进而处分财产。欺骗的内容可以分为两类：一类是就事实进行欺骗；另一类是就价值判断进行欺骗。欺骗行为既可以是语言、文字的陈述，也可以是举动的虚假表示；举动的虚假表示又可以分为明示的举动欺骗与默示的举动欺骗（默示的表示）。诈骗罪中的欺骗行为可以由不作为构成。根据受骗人事先是否存在认识错误，可以将欺骗类型分为两种：一种是在他人没有任何认识错误的情况下，行为人使用欺骗的手段使他人陷入处分财产的认识错误；另一种是在他人已经由于某种原因陷入认识错误的情况下，行为人通过欺骗行为使他人继续维持处分财产的认识错误。不管是作为还是不作为，都存在这两种类型。欺骗必须达到一定程度。行为人实施欺骗行为是要让受骗人陷入错误然后交付财产。受骗人的错误与行为人的欺诈行为之间必须有因果关系。只有人才会陷入错误，机器不会陷入错误，也不可能成为诈骗的对象。处分行为，是指受骗人基于认识错误将财产转移给行为人或者第三者的行为。财产处分者必须是受骗人；如果处分不是基于认识错误，则不属于诈骗罪中的处分行为。受骗人处分财产，是指受骗人基于认识错误将财产转移给行为人或第三者占有。财产处分行为不限于法律行为，也包括事实行为。处分行为包括处分意思；处分行为是客观与主观的统一。处分行为的客观

面是转移财产的占有，主观面是转移财产占有的意识。总体来说，应当从客观面与主观面两个方面判断受骗人有无处分行为。欺骗行为使对方处分财产后，行为人便获得财产，从而使被害人（受骗人）的财产受到损害。所谓行为人获得财产，包括两种情况：一是积极财产的增加；二是消极财产的减少。受骗人处分（或交付）财产的结果往往就会带来财产的损害。财产损害是构成诈骗罪必不可少的要件；对作为诈骗罪成立要件的财产损害，应该理解为是整体的或实质的财产损害，不能视为个别财产的损害。再次，法人（或单位）不可以成为诈骗罪的主体。最后，诈骗罪犯罪的故意包含认识和意志二要素，间接故意也可以构成诈骗罪。非法占有目的是诈骗罪的必备要素。非法占有目的，是指排除权利人，将他人的财物作为自己的所有物进行支配，并遵从财物的用途进行利用、处分的意思。非法占有目的由“排除意思”与“利用意思”构成，前者重视的是法的侧面，后者重视的是经济的侧面，两者的机能不同。前者的机能主要在于使诈骗罪、盗窃罪与一时使用他人财物的不可罚的骗用行为、盗用行为相区别；后者的机能主要在于使诈骗罪、盗窃罪与故意毁坏财物罪相区别。

笔者用三章的篇幅，系统论述诈骗罪的认定。它们分别是第三章诈骗罪与非罪的区分、第四章诈骗罪与特殊诈骗罪的界限、第五章诈骗罪与相关犯罪的界限。诈骗罪与非罪的区分是诈骗罪认定的基本点，诈骗罪此罪与彼罪的认定是诈骗罪研究的重点和难点。总结诈骗罪的认定，归纳如下：

一、影响诈骗罪定罪的主要要素是数额和情节。骗取公私财物或财产性利益必须达到数额较大或者情节严重的，才能构成诈骗

罪。否则不构成诈骗罪，只能构成普通的民事欺诈行为。因此，是否达到一定数额，是区别诈骗罪与非罪的重要标准；情节严重也是认定诈骗罪的标准之一。诈骗与欺诈的概念，有本质上的区别。区分诈骗罪与经济纠纷的界限，主要看行为人有无非法占有公私财物或者财产性利益的目的。

二、诈骗罪与金融诈骗罪、合同诈骗罪、骗取出口退税罪的关系，是一般与特殊的关系，是普通法条与特别法条的关系，是包容竞合的法条竞合关系，完全适用金融诈骗罪、合同诈骗罪、骗取出口退税罪定罪处罚。诈骗罪与金融诈骗罪的区别主要表现在诈骗对象和诈骗手段上。金融诈骗罪的诈骗对象和诈骗手段都是法定的，而诈骗罪的诈骗对象和诈骗手段是概括式的。掌握金融诈骗罪侵害的对象和诈骗手段，就能区分诈骗罪与金融诈骗罪。区分诈骗罪与合同诈骗罪的关键在于诈骗行为是否发生在签订、履行合同过程中，利用合同的形式骗取公私财物或者财产性利益。或者说，是否是以合同这种交易的形式为名进行的。正确地认识和把握“合同”，诈骗罪与合同诈骗罪之间的界限就明晰可辨了。合同诈骗罪中的“合同”，应限定为符合合同法意义上的“合同”。但是，区分合同诈骗罪与诈骗罪时，不能简单地以有无合同为唯一标准。

三、诈骗罪与招摇撞骗罪、冒充军人招摇撞骗罪的关系，是一般与特殊的关系，是普通法条与特别法条的关系，是交叉竞合的法条竞合关系。冒充国家机关工作人员或冒充军人骗取职务、信任、政治荣誉、政治待遇，或者骗吃骗喝，或者骗取“爱情”等不包括财物或者财产性利益的非法利益时，按照刑法第279条、第372条的规定处罚。当冒充国家机关工作人员或冒充军人骗取公私财物

或者财产性利益数额较大时，招摇撞骗罪、冒充军人招摇撞骗罪与诈骗罪之间存在法条竞合的关系，应按照重法优于轻法的原则处理。行为人冒充国家机关工作人员或冒充军人既骗取非法利益，又骗取公私财物或者财产性利益，数额较大或者情节严重的，构成招摇撞骗罪或冒充军人招摇撞骗罪与诈骗罪，数罪并罚。冒充人民警察招摇撞骗，骗取他人财物或财产性利益，按照诈骗罪处罚，不再从重处罚。

四、抢劫罪、盗窃罪是违背被害人意思夺取财物，而诈骗罪则是欺骗被害人（受骗人），使其产生瑕疵意思骗取其财物。诈骗罪与敲诈勒索罪虽然都是利用被害人的瑕疵意思而取得财物，但被害人产生瑕疵意思的原因不同：前者是因为受骗，后者则是由于受胁迫。诈骗罪与侵占罪的区别在于：诈骗罪是骗取他人占有之下的财物，存在夺取占有的问题；而侵占罪的财物是在行为人的占有之下，不存在夺取占有的问题。赌博诈骗，是指形似赌博的行为，输赢原本没有偶然性，但行为人伪装具有偶然性，诱使对方参加赌博，从而不法取得对方财物的行为。这种行为同样成立诈骗罪。发布广告的主体不符合虚假广告罪的主体条件，则不可能成为虚假广告罪的主体。在这种情况下，如果行为人骗取他人数额较大的财物或者财产性利益，应以诈骗罪论处；对于一些貌似虚假广告，而无推销商品或者提供服务可言，只是利用虚假广告的手段骗取财物的行为，应当以诈骗罪论处。诈骗罪与贪污罪的区别主要在于是否利用职务之便和侵犯的对象不同。贪污罪是指国家工作人员利用职务上的便利，侵吞、窃取、骗取或者以其他手段非法占有公共财物的行为。而诈骗罪不存在利用职务便利的问题，所骗取的财物不仅包

括公共财物，也包括个人所有财物。区分诈骗罪与受贿罪的关键在于把握行为人的主观意图。如果行为人的主观目的是想利用职务之便为他人谋取利益，只是由于意志以外的原因而未达到这一目的，属于受贿；如果行为人的目的是骗取财物，并无为他人谋取利益的意图，其答应为他人谋取利益也只是虚假的谎言，则属于诈骗。如果行为人索取或收受他人财物而答应他人提出的自己根本不可能也不打算实现的要求，也属于诈骗。

五、行为人实施诈骗行为时，如果被害人与受骗人不具有同一性，属于三角诈骗。三角诈骗既具备诈骗罪的本质特征，又完全符合诈骗罪的构成要件。区别三角诈骗与盗窃罪（间接正犯）的关键在于：受骗人事实上是否具有处分被害人财产的权限或者是否处于可以处分被害人财产的地位。因此，正确理解和认定“处分行为”，是区分盗窃罪与诈骗罪的关键。诉讼诈骗是典型的三角诈骗，构成诈骗罪，应该按照诈骗罪定罪处罚。行为人盗窃、拾取他人的存折、储蓄卡、汇款单等债权凭证后，使用欺骗手段通过银行、邮电局等机构的职员取得财产，导致他人遭受财产损失的，属于三角诈骗，成立诈骗罪。但是，利用盗窃或者拾取的债权凭证通过自动取款机提取现金的，应当认定为盗窃罪。人是有意识的，人可以成为诈骗罪的对象；机器是无意识的，不能成为诈骗罪的对象。骗机器从而窃取财物的，只能构成盗窃罪。

第六章诈骗罪的犯罪形态，分别论述诈骗罪的停止形态、共犯形态和罪数形态。诈骗罪存在未遂形态、预备形态和中止形态。区分诈骗罪的既遂与未遂形态的标准，控制说比较科学、合理；诈骗罪既遂与未遂的区分，应以是否符合诈骗罪犯罪构成为标准。按照

犯罪总额说的主张，应以共同犯罪的财物总额作为确定各共同犯罪人刑事责任的标准。按照主犯决定说，在诈骗罪共同犯罪中，以诈骗罪主犯的身份来定罪量刑。诈骗罪的牵连犯应该从一重罪处罚。诈骗罪的竞合犯指法条竞合，诈骗罪的法条竞合包括包容竞合与交叉竞合两种情况。对于每个诈骗行为都构成诈骗罪的是连续犯，在认定上只定一个诈骗罪，诈骗的次数和多次行骗的累计数额可以作为量刑的从重情节。诈骗罪的转化犯，既包括别的犯罪转化为诈骗罪，也包括诈骗罪转化为别的犯罪；既有刑法条文明文规定的诈骗罪转化犯，也有司法解释规定的诈骗罪转化犯。对于诈骗行为同时构成数罪的，应该数罪并罚。

第七章诈骗罪的刑事处罚，分别论述决定诈骗罪刑罚的因素和量刑。决定诈骗罪刑罚的因素，关键在于诈骗罪的数额和情节。关于个人诈骗罪的数额，笔者赞同“双重标准说”；关于共同诈骗罪的数额，笔者赞同“综合责任说”。犯罪成本不应计算在诈骗罪的数额内。我们可以参照最高人民法院的司法解释，认定诈骗罪的“情节严重”或者“情节特别严重”。诈骗罪的量刑，首先，要准确适用三个量刑幅度；其次，要正确适用罚金刑和没收财产刑；最后，对于诈骗罪，有必要增设资格刑。

第八章诈骗罪的立法完善。我国刑法第266条尚不够完善，存在缺陷，主要表现在定罪标准、罪状表述和法定刑三个方面。应该从这三个方面加以完善：对诈骗罪的定罪标准进行重新界定，除突出犯罪数额在诈骗罪定罪中的重要作用外，其他影响诈骗罪定罪的情节也应当有所体现。具体可以采用“数额较大或者严重情节的”、“数额巨大或者有其他严重情节的”和“数额特别巨大或者

有其他特别严重情节的”的规定方式。将诈骗罪的犯罪对象规定为“财物及财产性利益”。“诈骗”的罪状表述应修改为“以非法占有为目的，采用虚构事实或者隐瞒真相等欺骗手段，使他人陷入错误，而骗得财物或财产性利益”。突出诈骗罪的行为手段、主观目的，使其更具有操作性。完善诈骗罪的法定刑，将罚金刑明确为倍比制或者限额制罚金刑，增设剥夺从事一定的职业或营业的权利、剥夺从事一定活动的权利以及禁止从业等资格刑。

Abstract

Crime of swindling is an old and new kind of crime. Crime of swindling exits in ancient age, develop to modern life, its criminal means always change, and its social harmfulness become more and more severity. Beat, punish and prevent is an emergency task in the field of practice and theoretic department. In the theoretic field, crime of swindling exits many disputes, especially about the concept of crime, the constitution of crime, the four element of the constitution of crime. The disputes also exit in the suspended situation of the intentional crime, joint crimes and the form of quantity of crime. Especially in the judicatory field, cognizance of crime of swindling or not, the difference of crime of swindling from other crimes, such as crime of financial fraud, crime of contractual fraud, crime of stealing property, crime of misappropriation, crime of extortion, and so on, argue endless, influence the conviction and condemn of crime of swindling. So, the significance of research of crime of swindling is very important both in the theory and practice. The aim of the dissertation try to resolve the difficult and complicated issues of crime of swind-

ling.

Except for the introduction, the dissertation includes eight chapters, expatiate the crime of swindling systematically.

In the introduction, the author discusses the significance of research of crime of swindling, recommend the actually study of crime of swindling, explain the research method and thinking of crime of swindling. The dissertation uses three methods, including the method of analysis of cases, the method of comparatively research, and the method of systems analysis. The author colligate the above three methods, try his best to research the crime of swindling.

The first chapter, the author summarizes the whole of crime of swindling. Firstly, the author introduces the history of the legislation of crime of swindling, sum up the legislative transform of crime of swindling between the old china and new china. Secondly, the author introduce the legislative mode about crime of swindling of foreign countries, it include two modes : single mode and separate mode. The old criminal code in 1979 is single mode, it only include one crime of swindling. However, the new criminal code in 1997 is separate mode, except for the crime of swindling, it includes crime of financial fraud, crime of contractual fraud, and so on. Secondly, we compare the two modes of crime of swindling, each has his strong point, there is no absolutely right or wrong. Comparatively, the criminal code about crime of swindling in 1997 is reasonable, it is no need to add new accusation of crime of swindling. Finally, the author analyze the advantages and disadvantages of all sorts of conceptions of crime of swindling, pointing the conception of crime of swindling must disclose the connotation and extension of conceptions of crime of swindling exactly. The author define the conceptions of crime of swindling in his owns words.

The second chapter is the constitution of crime of swindling. The author discuss the difficult and complicated issues of the object of crime, the objective aspects of crime, the subject of crime, the subjective aspects of crime of swindling. Firstly, the author think we should comprehend the object of crime of swindling abroad. It include not only all kinds of property, but also the interest of property. The legal interest of crime of swindling should contain ownership, other real rights in civil law, possession which need recover its original status. Secondly, the situation of the accomplishment of crime of swindling should contain five basic elements: the doer carry out fraudulent acts, the fool (or the victim) get into or keeping on hold error of cognition, the fool disposes property, the doer or other acquire property, the victim suffers the loss of property. The object of fraudulent acts, who must hold the right to disposal or has the status in law or in fact. The essential of fraud is causing the fool getting into or keeping on hold error of cognition and disposal the property. The content of fraud can divide two categories, one is fact, the other is value judgment. While studying the fraudulent acts, we should investigate the legal phenomena comprehensively. The following aspects should be taken into consideration, such as the essence, content, means, expression and necessary extent of fraudulent acts. Fraudulent acts contain action and inaction. There is causality between the fraudulent acts and disposal property. The act of disposal property do not limit the act of law, it also include the act of facts. The act of disposal property contains the means of disposal property, and it contains the subject and object of disposal property. The doer acquires the property contains two aspects: one is the increase of active property, the other is the loss of passive property. The result of the fool disposes must lead to the damage of property or the interest property. The damage of

property is absolutely necessarily element of crime of swindling, it should be comprehended the whole loss, not part loss. Thirdly, the subject of crime of swindling should be individual, not unit. Finally, The criminal intent of crime for the subjective aspect of crime of swindling include two aspect : the factor of knowing and purpose. Indirect intention can make up of crime of swindling. The illegal possession purpose contain the criminal purpose of removing and the criminal purpose of utility. The former emphasize the aspect of law, the latter emphasize the aspect of economy. Then, they can distinguish crime of swindling and crime of theft, the crime of destroying property.

Following the three chapter is the cognizance of crime of swindling. The chapter is the emphasize of the dissertation, cognizance crime of swindling or not, distinguish crime of swindling from other crimes is the difficult and complicated issues. Following is the author sum up cognizance crime of swindling.

The third chapter is the cognizance crime of swindling or not. The amount and plot of crime of swindling is the basic factor for conviction crime of swindling or not. The author dissertate the amount and plot of crime of swindling. About the individual amount of crime of swindling, the author agree with the theory of Double Standards. About the joint crime amount of crime of swindling, the author agree with the theory of General Responsibility. We should deduct the cost of crime. Cognizance the severe plots of crime of swindling, we should reference the judicatory interpretation of the Supreme People's Court of the People's Republic of China and theoretically interpretation.

If the criminal amount of crime of swindling is much enough, the act can make up of crime of swindling. Otherwise, it only constitute commonly civil fraud. Therefore the criminal amount and the criminal

plot is the most important standard of distinguishing crime of swindling or not.

The chapter includes the cognizance of the tripartite fraud and the criminal of transform of crime of swindling. As to a swindling act, if the swindled, i. e. the person who has the right to dispose the property in question, and the victims are not the same, the act belongs to the tripartite fraud. With the essence of the crime of swindling, tripartite fraud meets also all the other constitutive requirements of the crime. The key difference between tripartite fraud and the crime of theft lies in that, whether the swindled actually has the right to dispose the property in question or stays in a position enabled to dispose the victims' property. Fraud by lawsuit is a kind of typical tripartite fraud, which should be regarded as the crime of swindling. The act of using others' documents of obligation to acquire property illegally, however, should be properly distinguished between the tripartite fraud and other crimes. Person has consciousness, they can be cheated, so they can become the subject of crime of swindling. But the machinery is unconsciousness, they can not be cheated, so they can not become the subject of crime of swindling. Acquiring property by using machinery could be sentenced crime of stealing property.

Crime of swindling is fundamental different from civil fraud, the limit of crime of swindling from economical dispute lies on the criminal purpose of illegal possess property or the interest of property. If the new sort of swindling appears, we should convict these acts crime of swindling.

The fourth chapter is the cognizance of overlap of enactments of crime of swindling. The relationship of crime of swindling with crime of financial fraud and crime of contractual fraud and crime of obtaining ex-