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# 信托公司在通道类业务中仍应尽到合理注意义务

# ——吴某与甲信托公司财产损害赔偿纠纷案

**【裁判要旨】**

在被动管理型信托业务中，信托公司虽主要依据信托合同约定履行相应义务，但其在以自身名义独立从事信托管理事务时，仍应尽到合理注意义务。信托公司作为专业的金融机构，在明知委托资金系属私募募集资金的情况下，更应当审慎回应委托人提出的明显不合理要求。如果信托公司过错行为客观上促成了犯罪分子的集资诈骗行为，对投资者被骗受损负有一定责任，则信托公司应当根据其过错程度，承担相应的侵权损害赔偿责任。

**【基本事实】**

乙公司与被告甲信托公司签订《单一资金信托合同》（以下简称《信托合同》），约定委托人乙公司指定将信托资金2.8亿元由受托人甲信托公司管理，用于向乙公司发放贷款。嗣后，乙公司以“浙江某杭州保障房投资基金项目”为名向社会公众募集资金，募集文件中载明产品类型为“某信托联众单一资金信托贷款有限合伙基金”，原告吴某认购。其后，甲信托公司与乙公司签订《流动资金贷款合同》，甲信托公司根据《信托合同》约定将乙公司交付的信托资金（包含吴某的投资款）向乙公司发放贷款。基金到期后，乙公司未向吴某返还本金。

经查，吴某的投资款被乙公司执行事务合伙人委派代表陈某志等人用于归还案外人某置业有限公司股东的对外债务。2018年，上海市第一中级人民法院作出刑事判决，认定乙公司系由陈某志实际控制，其通过伪造乙公司承建杭州保障房项目的合同等材料，与王某使用乙公司的名义以高额利息向社会公众销售“浙江某杭州保障房投资基金项目”，而后将募集资金打款至甲信托公司，甲信托公司再贷款给乙公司。乙公司收到后用以归还某置业有限公司股东的对外债务等。

吴某起诉认为甲信托公司没有对信托项目进行有效监管，导致损失，应当全额承担赔偿责任。

**【裁判结果】**

上海市浦东新区人民法院于2019年10月31日作出（2018）沪0115民初80151号民事判决：甲信托公司对吴某根据刑事判决通过追赃程序追索不成的损失在20万元的范围内承担补充赔偿责任；驳回吴某的其余诉讼请求。

宣判后，吴某与甲信托公司均提出上诉。上海金融法院于2020年6月5日作出（2020）沪74民终29号民事判决：驳回上诉，维持原判。

**【裁判理由】**

法院认为，吴某系乙公司所设项目的投资人，与甲信托公司之间并无投资、信托等直接的合同关系，吴某系以侵权损害赔偿为由起诉要求甲信托公司承担责任。关于信托公司过错，第一，甲信托公司在开展信托业务中明知信托资金来源于社会募集，未对犯罪分子借用其金融机构背景进行资金募集的行为采取必要防控措施，也未对社会投资者作相应警示，据此认定甲信托公司在信托业务开展时对委托资金来源的审核未尽必要注意义务，对吴某等投资者投资被骗受损负有一定责任。第二，信托存续期间内，甲信托公司曾出具内容明显虚假、足以误导案外人的《项目风险排查报告》，上述行为客观上促成了犯罪分子的集资诈骗行为，对吴某等投资被骗受损负有一定责任。第三，《信托合同》约定，甲信托公司仅负有根据指定发放贷款并最终收回贷款的义务，并不负有主动管理的职责，也不承担贷款风险。因而吴某认为甲信托公司对信托财产缺乏监管，导致款项被犯罪分子转移的主张，缺乏事实依据，不予支持。

法院综合考虑认为，甲信托公司在管理案涉信托业务过程中的过错行为一定程度造成了吴某损失，而吴某同时系相关刑事判决的被害人，其民事权利可先通过刑事追赃、退赔方式得以保障，应对吴某涉案损失承担20%的补充赔偿责任，具体数额经核算确定为20万元。故判决：甲信托公司应就吴某刑事追赃程序追索不成的损失在20万元的范围内承担补充赔偿责任。

**【裁判意义】**

通道类信托业务在业务模式上偏离了信托业“受人之托，代人理财”的传统模式，权利义务设置上也有别于传统法律关系的基本结构。该案为全国首例判决信托公司在通道类业务中承担民事侵权责任的案件，入选2020年全国法院十大商事案例。该案积极回应了业界极为关注的信托公司在通道类业务中是否应当免责的问题。

该案中，法院明确信托公司虽仅负事务性管理之责，但仍应秉持审慎原则开展经营，并履行必要的注意义务。该司法观点反映了当前司法实践顺应宏观金融监管政策变化趋势，理性应对前期信托实践中的乱象和痛点，对通道业务中信托公司放任纵容违法募集、无视监管风控程序、随意出具虚假证明文件等行为严格追责，厘清了信托公司合法审慎经营的权责边界，同时也积极回应了投资者诉求，给予了受损投资者合理的经济赔偿，为解决同类金融产品兑付风险引发的纠纷提供了可行路径。

# 贷款机构未披露实际利率不得据此收取利息

# ——田某、周某诉甲信托公司金融借款纠纷案

**【裁判要旨】**

贷款机构负有明确披露贷款实际利率的义务，若以格式条款约定利率，还应采取合理方式提请借款人注意，并按照借款人的要求予以说明。若因贷款机关未明确披露导致借款人没有注意或理解借款合同的实际利率，则应视为双方未就“按照该实际利率计算利息”达成合意，贷款机构无权据此计收利息。此时，合同利率的确定应当依据合同解释原则，结合相关条款、行为的性质和目的、习惯以及诚信原则，采用一般理性人标准。贷款机构发放贷款前已经收取的还款应当从实际本金中扣除。

**【基本事实】**

2017年9月22日，田某、周某和甲信托公司签订《贷款合同》，约定贷款本金6,000,000元，期限8年，贷款利率具体以《还款计划表》为准，平均年利率11.88%，还款方式为分次还款，还款期数为96期，每期还款均包含本息，每年12期还款金额一致，每12个月递减一次还款金额。

2017年9月26日，田某、周某先向甲信托公司汇款141,000元作为第一期还款，甲信托公司于2017年9月27日向田某、周某转账支付6,000,000元。田某、周某按《还款计划表》逐月还款至2018年11月27日，后申请提前还款获准，遂于2018年12月17日向甲信托公司支付5,515,522.81元（其中本金5,505,522.81元、违约金10,000元），结清全部贷款。之后，田某、周某认为甲信托公司未披露实际利率，告知其平均年利率为11.88%，但实际执行利率却高达20%多，且实际放款前已经收取了第一期还款，该款项应从贷款本金中扣除。据此，请求判令甲信托公司返还多收取的利息并赔偿相应损失。

审理中，甲信托公司为说明《贷款合同》每期还款金额具体计算方法，提交了另一版本《还款计划表》，除载明每期应还款金额、剩余本金外，还载明每期应还款中的利息金额、本金金额、当年利率（第一年利率为21.8%，此后逐年为19.6%、17.2%、14.43%、10.01%、6.67%、3.92%、1.32%），此外在表格尾部还载明贷款本金6,000,000元，利息合计5,702,400元，本息合计11,762,400元，总利率为95.04%，年利率平均值为11.88%。经核算，前述各年利率系以当年应付息总和除以初始贷款本金额6,000,000元算得，而11.88%系前述各年利率的算术平均值。

**【裁判结果】**

上海金融法院于2021年1月4日作出（2020）沪74民终1034号民事判决，判决甲信托公司向田某、周某返还多收取的利息844,578.54元，并赔偿自提前还款日次日起至实际归还之日止按照中国人民银行公布的同期人民币存款利率计算的利息。

**【裁判理由】**

法院认为，贷款人应明确披露实际利率。本案中，《还款计划表》仅载明每期还款本息额和剩余本金额，既未载明实际利率，也未载明利息总额或其计算方式。一般人若不具备会计或金融专业知识，难以通过短时阅看而自行发现实际利率与合同首部载明利率存在差别，亦难以自行验算该实际利率。因此，《还款计划表》不足以揭示借款合同的实际利率。借款合同首部载明平均年利率11.88%，同时载明还款方式为分次还款。上述条款应当作为确定利息计算方式的主要依据，采用一般理性人的标准进行解释。借款人主张以11.88%为利率，以剩余本金为基数计算利息，符合一般理性人的通常理解，也符合交易习惯和诚信原则，应予支持。实际放款前已经收取的还款应当从贷款本金中扣除。以此计算，甲信托公司多收取的利息合计844,578.54元应予返还，同时还应向借款人赔偿相应利息损失。

**【裁判意义】**

我国零售贷款业务快速增长，然而一些贷款机构利用其与借款人在专业知识上的不对称，通过只展示较低的日利率或月利率，掩盖较高的年利率；只展示较低的表面利率，或每期支付的利息、费用，掩盖较高的实际利率；以服务费等名目收取砍头息等方式，给金融消费者带来“利率幻觉”。本案判决依据《中华人民共和国民法典》关于格式条款告知、合同解释等规定，认定贷款人在与金融消费者订立借款合同时，应当明确披露实际利率，若因贷款人未予披露导致借款人没有注意或理解该实际利率，则贷款人无权按照该实际利率计收利息。判决结果对规范贷款业务，保护金融消费者合法权益，促进金融机构落实金融服务实体经济政策要求具有积极作用。该案入选2019-2020年“全国消费维权十大典型司法案例”。

# 证券虚假陈述投资者损失可以“多因子量化模型”核定

# ——许某鑫等诉甲上市公司证券虚假陈述责任纠纷案

**【裁判要旨】**

证券虚假陈述责任纠纷中,上市公司举证证明投资者的部分或全部损失是由与虚假陈述无关的其他因素造成的前提下，对于确定相关风险因素分别对原告损失造成的影响比例问题，可借助专业机构或人员以科学方法量化确定。

**【基本事实】**

被告甲上市公司系于1993年10月至2019年5月期间在上海证券交易所上市交易的公司，于2019年5月23日被摘牌，股票终止上市。根据中国证监会调查,甲上市公司为弥补2014年度利润缺口，通过虚假贸易，虚增利润总额占甲上市公司2014年度合并财务报表利润总额的73.68%，其在2015年3月21日发布的2014年年度报告中虚假披露的行为构成证券虚假陈述行为。原告许某鑫等投资者于2015年3月21日后买入甲上市公司股票，其根据《行政处罚决定书》认定的相关事实起诉甲上市公司，要求其赔偿因信息披露违规行为所造成的损失。

本案审理过程中，上海交通大学中国金融研究院接受上海金融法院委托，于2020年2月19日出具《损失核定意见书》，对投资者因甲上市公司虚假陈述产生的投资差额损失进行了核定。

**【裁判结果】**

上海金融法院于2020年4月17日作出（2018）沪74民初1399号民事判决：被告甲上市公司分别向原告许某鑫、厉某宏、胡某、王某军支付赔偿款7,571.17元、9,406.06元、10,301.83元、54,727.19元。

宣判后，甲上市公司提出上诉。上海市高级人民法院于2020年6月11日作出（2020）沪民终294号民事判决：驳回上诉，维持原判。

**【裁判理由】**

法院认为，关于如何确定投资者损失的赔偿金额，包括采用何种计算方法，以及如何确定证券市场风险因素的影响程度及相应的扣除金额的问题。法院在经释明并征求双方当事人同意后，依职权委托上海交通大学中国金融研究院核定投资者损失。对于专业机构出具的《损失核定意见书》的证明力，法院认为应作如下认定：1.关于投资差额损失计算方式，《损失核定意见书》中采用第一笔有效买入后的移动加权平均法对于持股单价的计算更全面、客观，更能反映投资者真实的投资成本，也为司法实践所认可。2.关于证券市场系统风险等其他因素导致的损失如何计算，《损失核定意见书》的计算方式为：市场系统风险等其他因素导致的损失=投资者买入成本×模拟损益比例。关于模拟损益比例的计算，采用了多因子模型法计算实现了量化计算各种对股价产生影响作用的因素，克服了无法将虚假陈述因素与其他股价变动因素予以有效分离的弊端，更具有科学性和精确性，也更加符合虚假陈述案件中损失计算的立法本义与司法实践需求。故对本案投资者因虚假陈述导致的投资差额损失金额以《损失核定意见书》核定的金额为准。

**【裁判意义】**

由于证券市场上影响股票价格形成的因素具有多样性和复杂性，甄别是否存在与上市公司虚假陈述行为共同作用导致投资者损失的证券市场系统风险和其他因素，以及如何确定该些风险因素分别对投资者损失的影响比例，长久以来始终是证券虚假陈述责任纠纷案件中难以攻克的重点和难点问题。目前，各地实践对于证券市场系统风险以及上市公司个股经营风险的认定标准和扣除方法均不统一。本案通过引入第三方专业机构的技术支持，在全国首次开创性地采用“多因子量化模型”计算方法，通过“收益率曲线同步对比法”，精准核定了每名投资者因虚假陈述行为导致的投资损失金额。作为探索推动证券民事赔偿纠纷案件科学化和精细化审理的一次有益尝试，本案确定的损失计算方法，对今后同类案件的审理具有很强的借鉴意义。

# 符合收养实质要件的养父母可认定为保险身故受益人

# ——王某某等诉甲保险公司意外伤害保险合同纠纷案

**【裁判要旨】**

涉案人身保险合同的被保险人系养女，但未与收养人即两原告在民政部门办理正式收养关系登记。保单中约定被保险人的身故受益人为继承法规定的法定继承人。保险事故发生后，被保险人无其他继承人。法院根据相关法律规定并结合被保险人投保时的主观意愿、两原告对被保险人实际抚养的事实及公序良俗原则，认定两原告构成《中华人民共和国继承法》第十四条中规定的对被继承人扶养较多的人，可以作为遗产继承人获得身故保险金。

**【基本事实】**

王某在网上投保了被告甲保险公司的《个人综合意外保障》，被保险人为其本人，意外身故保险金额为50万元，关于身故受益人栏勾选“法定受益人”。保险期间内，王某因交通事故身亡，其父王某某、其母李某向被告报案后遭拒赔。审理中查明，王某系王某某、李某于1999年抱养的弃儿，生父母不详，2001年为其办理户籍入户手续，登记为“养女”。因有关部门需要出生证才能办理收养手续，故一直未办理收养登记手续。王某接受过普通高中教育、职业技术教育，并已参加工作。被告甲保险公司以两原告未办理收养登记、与王某未构成合法收养关系为由，认为两原告并非合同约定的“法定受益人”。王某某、李某诉至法院要求甲保险公司支付意外身故保险金。

**【裁判结果】**

上海市黄浦区人民法院于2020年9月2日作出（2019）沪0101民初25558号民事判决：被告甲保险公司支付原告王某某、李某保险金500,000元。一审判决后，甲保险公司提出上诉。上海金融法院于2021年2月24日作出（2020）沪74民终1251号民事判决：驳回上诉，维持原判。

**【裁判理由】**

法院认为，首先，案涉保险为个人综合意外保障险，系被保险人因意外事故而导致身故、残疾为给付保险金条件的人身保险，其目的多在于为家庭生活预留保障。案涉保险为王某本人以自己的生命为标的投保，被保险人王某享有当然的受益人指定权。本案查明王某出生即被抱养，1岁多时户口登记为两原告的养女，亲生父母无法查找的情况。法院将其投保的保障对象认定为扶养其长大、与其共同生活的两原告，符合一般社会价值和王某投保时的真实意思。其次，本案保险合同约定的身故受益人为“法定受益人”，根据保险法的相关司法解释，应以继承法规定的法定继承人为受益人。本案被保险人王某死亡时未婚，未生育子女，亲生父母不详，在出生不久即被原告夫妇抱养。虽未办理收养手续，与两原告之间未形成法律意义上的收养关系，但从所在基层组织、户籍登记机关均认可王某系养女的事实来看，王某属于《中华人民共和国继承法》第十四条中所列的“继承人以外的对被继承人扶养较多的人”，在王某无其他继承人的情况下，两原告可以视同王某的继承人。

**【裁判意义】**

本案中，法院通过分析保险合同设立指定受益人制度的目的，并在确认《中华人民共和国收养法》规定的严格程序要件基础上，创造性地适用关于适当分配遗产权利人的条文，不仅符合《中华人民共和国继承法》的立法本意，体现了权利义务相统一原则，为两原告老年生活提供了经济保障，也符合社会普遍认同的价值观和公序良俗，实现了情、理、法的有机融合，弘扬了良好的社会风尚，是将社会主义核心价值观融入司法裁判的一件典型案例。

# 司法应审慎介入私募资管产品管理人作出的专业判断

# ——张某与甲资管公司金融委托理财合同案

**【裁判要旨】**

私募资管产品管理人应根据资管产品合同约定，恪守诚实信用、全面履行审慎管理的义务。在私募资管产品管理人根据自身专业判断作出的运作措施不违反合同约定、法律法规及金融监管部门的规定，且向投资者进行了合理解释说明时，管理人无需披露风控措施的具体内容，投资人不能任意干涉管理人基于全体投资人最大利益而正常行使管理职责。

**【基本事实】**

2016年8月31日，张某与甲资管公司签订《资管计划合同》，约定：资管计划募集资金用于认购乙有限合伙企业的有限合伙份额，乙有限合伙企业是专门为投资丙实业公司某地产项目而设立的有限合伙企业，丁基金公司为乙有限合伙企业的普通合伙人。同日，作为资产委托人的张某向《资管计划合同》指定资金募集账户支付130万元。2016年9月2日，《资管计划合同》依双方约定生效。乙有限合伙企业持有丙实业公司49%股权，并将该股权质押给甲资管公司。《资管计划合同》依约应于2018年9月2日到期，但自2018年9月10日起，甲资管公司连续发布7份临时公告、5份季度报告及2018年年度报告，披露了涉案计划延期、涉案项目的进展等相关信息。甲资管公司与丁基金公司就合伙协议履行发生诉讼。张某诉请甲资管公司披露风控文件的具体合同内容，并要求甲资管公司代表张某利益对丁基金公司、丙实业公司行使诉权并采取诉讼保全措施。

**【裁判结果】**

上海市浦东新区人民法院于2020年5月20日作出（2019）沪0115民初68308号民事判决:驳回张某的全部诉讼请求。判决后，双方均未提起上诉，判决已发生法律效力。

**【裁判理由】**

本案的主要争议焦点在于，甲资管公司作为管理人是否已经全面履行了涉案资管计划的信息披露义务，以及是否为委托人的最大利益有效履行了相关防范和控制风险的谨慎管理义务。

关于第一项争议焦点，首先，资产管理计划信息披露的内容应由双方资产管理合同约定，双方约定了管理人应披露的信息内容，但并未要求管理人披露其所应当采取风控措施的具体内容。其次，风控措施应属于资产管理人为有效防范和控制风险而应当采取的相关法律行为，一般不能直接增加委托人利益，不属于双方约定的“可能影响资产委托人利益的重大事项”。再次，若资管计划合同约定的披露内容未涉及或低于法律法规要求披露的信息内容的，应依据相关法律法规的规定予以披露；而张某未举证证明存在法律法规及金融监督管理部门的相关规定。

关于第二项争议焦点，首先，在张某没有提供证据证明如对丁基金公司等行使诉权并采取诉讼保全措施，可以使得全体资管计划委托人获得更大利益的情形下，法院应尊重甲资管公司作为专业机构的判断和选择。其次，在本案诉讼期间，甲资管公司已经对丁基金公司提起诉讼，甲资管公司亦陈述了未对丁基金公司采取诉讼保全措施的理由。再次，丙实业公司并非《资管计划合同》的相对方，甲资管公司认为涉案资管计划与丙实业公司不存在直接的法律关系，法院亦予以尊重。据此，法院对张某的诉请不予支持。

**【裁判意义】**

本案判决明确了私募资管产品管理人专业判断正当性审查的基本思路，管理人应依据资管计划合同全面履行谨慎管理义务，并如实向委托人披露其采取的措施。资管计划合同约定的内容未涉及或低于法律法规要求的，则管理人应依据相关法律法规的规定履行义务。若委托人对管理人根据自身专业判断作出的选择持有异议，管理人应作出合理解释说明。如果委托人坚持认为管理人采取的措施明显不当，则委托人应举证证明管理人的管理水平低于行业通常标准，或证明委托人提出的举措可以使得全体资管计划委托人获得更大利益。该案体现了法院尊重私募资管产品管理人在产品运作中基于自身能力作出的专业判断，避免投资者对管理人基于全体投资人最大利益而正常行使管理职责的不当干涉，有利于增强金融市场合理预期，规范和引导资产管理行业的有序发展。

# 同一标的物上浮动抵押与质押竞存时应按公示在先原则确定顺位

# ——甲银行与乙银行、第三人丙公司物权确认纠纷案

**【裁判要旨】**

认定完成登记的浮动抵押与质押的优先受偿顺位时，应当按照登记（或完成质物的转移占有等其他物权公示方式）在先原则确定。浮动抵押权自抵押合同生效时设立，采登记对抗主义，抵押财产范围自抵押财产确定之时确定。动产浮动质押中的质权自出质人交付质押财产时设立。

**【基本事实】**

2011年11月8日，乙银行与丙公司签署信贷函，约定乙银行向丙公司提供美元4,000万元或其等值人民币的非承诺性循环信贷额度。同日，双方签订《仓储物及仓单质押协议》，就质押财产和担保债务作了约定。2012年6月26日，乙银行、丙公司与案外人戊公司签署协议，指定戊公司提供担保物监管服务。2014年12月23日，丙公司与戊公司共同向乙银行出具《每日库存报表》，明确质物的具体内容。因丙公司到期未履行债务，乙银行向一中院起诉丙公司，法院依申请于2014年12月26日保全查封了位于丙公司厂区内质物，并于2015年5月27日对上述查封物变更查封（移库）。后法院作出判决，乙银行可就《每日库存报表》确定的财产在判决确定的债权金额范围内折价或者拍卖、变卖的价款优先受偿。该案经二审审理后维持原判。因丙公司未履行上述生效判决，乙银行于2015年12月8日向上海一中院申请执行。

甲银行于2011年12月15日与丙公司因银行授信业务签订《最高额动产抵押合同》，并于同年12月19日办理动产抵押登记。2014年7月7日，甲银行与丙公司再次签订《最高额动产抵押合同》，并于7月10日在工商局办理动产抵押登记，以丙公司现有及将有的存货作为抵押财产。后甲银行向烟台中院起诉丙公司，烟台中院轮候查封了系争财产。烟台中院于2016年分别作出民事判决，主要内容为甲银行就系争财产在最高额7亿元内折价或者拍卖、变卖的价款优先受偿。相关判决均认定上海一中院在相关案件中的查封时间为2015年5月27日。

审理过程中，丙公司确认系争财产现仍存放于其仓库内，乙银行主张其质权成立于2014年12月23日，甲银行主张其抵押物的特定化日期为其向烟台中院起诉之日，各方当事人对此均无异议。

2016年12月6日，甲银行向上海一中院起诉，请求确认甲银行对上海一中院查封的第三人丙公司名下的财产变价款优先于乙银行受偿。

**【裁判结果】**

2020年7月31日，上海市高级人民法院作出（2017）沪民终288号民事判决：甲银行对一审法院查封的第三人丙公司名下的财产变价款优先于乙银行受偿。

**【裁判理由】**

法院认为，动产浮动抵押允许抵押人为生产经营所需自由处分抵押物，由此决定了抵押财产在抵押权设定和抵押财产特定化两个时点并不相同。动产抵押登记是动产浮动抵押的对抗要件而非设立要件，抵押物经登记公示后，即具备对抗第三人的效力。质权是自动产交付质权人时设立，这一认定标准在流动质押中同样适用。与第三方签订监管协议进行监管，只是作为判断是否实现间接交付的其中一环，不能证明质物已经完成交付，也就不产生质权设立的效果。而关于浮动抵押权与质权的效力冲突问题，应按照两者设立并公示的先后顺序确定受偿顺位。

**【裁判意义】**

本案系一起浮动抵押与浮动质押竞存时如何确定受偿顺位的典型案件。本案判决明确:1.浮动抵押权自抵押合同生效时设立，自登记时具有对抗效力，无需考虑财产结晶，只是抵押财产范围自抵押财产确定之时确定。2.动产浮动质押中，质权自出质人交付质押财产时设立。债权人、出质人与监管人订立第三方监管协议并非质权设立方式。质物可以向质权人直接交付，也可以委托监管人依第三方监管协议间接交付，但债务人或第三人与债权人仅有设立质押的意思表示，虽形成合意，而未移交质物的，则质权不能设立。3.认定完成登记的浮动抵押与质押的优先受偿顺位时，应当按照登记（或完成质物的转移占有等其他物权公示方式）在先原则确定。本案虽生效于《民法典》颁布之前，但与最高法院有关担保的最新法律适用意见相符，依法正确把握了浮动抵押与浮动质押竞存受偿顺位规则，保护了当事人权益，有利于维护担保体系的安定性，具有较强的示范价值。

# 商业三者险免责事由中“驶离现场”应综合认定

# ——甲公交公司诉乙保险公司上海分公司财产保险合同纠纷案

**【裁判要旨】**

商业三者险项下“驾驶员事发后未依法采取措施离开事故现场”这一免责事由的成立，须具备驾驶员应当知晓事故发生、应当知晓事故发生与自身驾驶行为有关及违反《中华人民共和国道路交通安全法》相关义务等三项要件。结合具体案情，就驾驶员对其行为与事故发生关联性的主观认知判定，应着重分析公交车辆的具体违规行为、该行为是否导致相关人员危险程度明显增大及驾驶员是否应负更高程度的安全保障义务等。

**【基本事实】**

甲公交公司为其名下公交车（955路）向乙保险公司上海分公司投保机动车交强险、商业第三者责任险，保险期间自2018年8月18日0时起至2019年8月17日24时止，商业第三者责任险的保险金额为30万元。

2018年9月21日8时33分许,案外人钱某某驾驶738路公交车行驶至某公交站点,在右起第一根机动车道内停车上下客。适有甲公交公司员工邱某某驾驶955路公交车同方向行驶至738路公交车左侧,未紧靠公交站点,在第二根机动车道内停车上下客。行人吴某某、陈某某、林某某穿行于738路公交车前方时，738路公交车起步向南行驶，撞倒该三名行人，致三人倒地受伤。其中，吴某某、陈某某经抢救无效于当日死亡。上海市公安局静安分局交通警察支队出具《道路交通事故认定书》认定钱某某负事故主要责任，邱某某负事故次要责任，吴某某、陈某某、林某某不负责任。

事故发生后，吴某某、陈某某的继承人及林某某分别向甲公交公司及钱某某任职的丙公交公司提起侵权赔偿诉讼，后经法院调解，两公司分别予以赔偿。原告甲公交公司向法院起诉，请求判令被告乙保险公司上海分公司在交强险项下赔偿122,000元，商业第三者责任险按保险责任30万元扣除5%免赔额计，赔偿285,000元，合计407,000元。

**【裁判结果】**

上海市虹口区人民法院于2020年9月27日作出（2020）沪0109民初2160号民事判决：乙保险公司上海分公司支付甲公交公司保险金122,000元。一审判决已生效。

**【裁判理由】**

法院认为，本案争议焦点为原告的驾驶员驾驶车辆驶离现场是否属于免责条款规定的情形。结合双方争议，该免责条款的适用应当满足三个条件：1.驾驶人知道或应当知道发生交通事故；2.驾驶人知道或应当知道交通事故与自己的驾驶行为有关；3.驾驶人违反法定义务。

首先，事发地点紧邻955路公交车右侧，车辆前门敞开正在上下客，且事故造成两死一伤。驾驶员在驾驶室观察右侧上下车乘客开关车门时，应当能看到事故发生。事实上，驾驶员在交警支队的讯问笔录中也明确表述看到事故发生。因此，驾驶员当场已经知道交通事故发生。其次，公交车驾驶员在停靠站点时应当保障乘客上下车安全，驾驶员开关车门过程中，对上下车乘客的状况应当予以关注。原告的驾驶员未按规定停车，其停车位置致使上下车乘客须从738路公交车车头前绕行。对此,作为专业公交车司机，其对乘客在此过程中可能面临的安全风险应该有清楚的认知。三名上下车的行人被随后启动的738路公交车撞倒致死、致伤，与原告的驾驶员违规停车，疏于风险防范有直接关联。《道路交通事故认定书》亦认定该事故与驾驶员违法停车有因果关系，并判定驾驶员承担次要责任。另外，涉案事故造成两死一伤，原告的驾驶员知道发生重大交通事故，且应当知道事故与其有关，依照《中华人民共和国道路交通安全法》规定，有义务留在原地保护现场，亦有义务参与救助，及时报案。其驶离现场的行为经认定违反《中华人民共和国道路交通安全法》规定，存在过错。其驶离现场，致使事故相关事实，包括现场位置、驾驶员状态等，只能凭借现场视频、技术鉴定及后续调查等手段来认定，增加了事故调查难度，存在逃避责任追究的可能，应当承担相应的后果。基于上述认定，法院认为原告的驾驶员驶离现场，符合免责条款规定的情形。据此，被告就商业险免责的抗辩成立，仅需在交强险范围内对原告进行赔偿。

**【裁判意义】**

本案系2018年9月21日本市南京西路重大交通事故引发的一起保险理赔纠纷。本案中，前辆公交车停靠站点，后达公交车无法靠站而违停于机动车道，致使上下车乘客绕行前辆公交车时被前辆公交车撞倒致两死一伤。保险人以后达公交车随后驶离现场为由拒绝承担保险责任。本案判决深入分析“事发后驶离现场”这一免责条款的内涵与构成要件，结合事故现场环境着重对非直接碰撞的肇事车辆驾驶员关于其驾驶行为与损害后果之间关联性的主观认知加以判断，认定驾驶员驶离现场具有可归责性，并在此基础上认定保险人的抗辩理由成立。本案的裁判对于明确《中华人民共和国道路交通安全法》第七十条规定的事故现场保护、救助等义务的内涵具有积极作用，有利于警示和督促公交车辆运营企业提升驾驶人员运输规范意识，保障乘客生命财产安全。

# 欠缺融物属性的融资租赁合同应根据实质认定其法律性质

# ——甲融资租赁公司与乙置业公司等借款合同纠纷案

**【裁判要旨】**

融资租赁是融资与融物的结合，如果缺失“融物”要素，则不成其为融资租赁。如租赁物所有权未从出卖人处移转至出租人，应认定该类融资租赁合同没有融物属性，系以融资租赁之名行借贷之实，应按照借款合同的性质判断合同效力，进而确定各方当事人的权利义务。

**【基本事实】**

2011年12月26日，甲融资租赁公司与乙置业公司签订《融资租赁合同》和《购房协议》，约定甲融资租赁公司以协议价款5.50亿元购买乙置业公司在上海市闵行区某地块上开发建设的动迁安置房，并将该房产作为租赁物出租给乙置业公司。后乙置业公司法定代表人相某、丁公司、戊置业公司等共同向甲融资租赁公司出具一系列文件，明确表示为乙置业公司的债务承担共同还款责任和连带保证责任。合同履行过程中，因乙置业公司未能按约支付土地出让金，上海市闵行区规划和土地管理局向乙置业公司送达了《解除合同通知书》，收回了上海市闵行区某地块。因乙置业公司未能按约交付租赁物，其余公司亦未履行相关义务，遂涉讼。

**【裁判结果】**

上海市高级人民法院于2019年12月25日作出（2017）沪民初1号民事判决：乙置业公司应向甲融资租赁公司支付本金、利息、违约金、律师费等；相某等分别承担共同还款责任和担保责任；驳回其要求丙置业公司对乙置业公司债务承担代偿责任的请求。判决后，乙置业公司提出上诉，最高人民法院于2020年4月18日作出(2020)最高法民终359号民事裁定，按自动撤回上诉处理，一审判决生效。

**【裁判理由】**

法院认为，本案系争《融资租赁合同》系房地产售后回租业务。在《融资租赁合同》签订时，作为系争租赁物的动迁安置房尚未建成，在合同履行期间，涉案地块又被相关部门收回。甲融资租赁公司作为名义上的商品房买受人和出租人，并不实际享有也不可能享有租赁物的所有权，作为专业的融资租赁公司，其对案涉租赁物不存在应明知，故其真实意思表示并非融资租赁，而是出借款项。乙置业公司作为租赁物的所有权人，其仅是以出卖人之名从甲融资租赁公司处获得款项，并按合同约定支付利息，其真实意思表示也并非售后回租，而是借款。故案涉融资租赁交易，只有融资，没有融物，双方之间的真实意思表示名为融资租赁，实为借款法律关系。因案涉主合同性质为企业间借款合同，故应按企业间借款合同判断合同效力，进而确定各方当事人的权利义务。甲融资租赁公司虽未取得发放贷款资质，但并没有证据表明其以发放贷款为主要业务或主要利润来源。案涉企业间借款系双方的真实意思表示，且不违反法律、行政法规的禁止性规定，应为有效。相某等亦应按约承担相应的民事责任。

**【裁判意义】**

本案系典型的以房地产作为融资租赁物的案件。尽管《民法典》及相关司法解释明确了融资租赁构成一种功能性担保，但根据融资租赁的本质特征，法院在判断当事人之间是否构成融资租赁法律关系时，仍应就该交易行为是否体现融资和融物双重属性进行必要审查。融资租赁合同被认定为借贷法律关系后，该借贷行为是否有效，应当以借贷相关法律规定为依据进行判断。认定“名为融资租赁实为借贷”仅仅是法律关系性质的定性，并不能以此否定合同本身的效力，而应按企业间借款合同判断合同效力进而确定各方当事人的权利义务。同时，法律关系定性不会影响被担保债务的统一性，一般情况下，担保人不能仅以法律关系另行定性为由要求免除己方责任。本案对“名为融资租赁实为借贷”情形下，案涉保证金、留购价款等均作了相应处理。本判决对于准确界定融资租赁的法律性质，规范融资租赁市场行为具有一定的作用和价值。

# 私募基金有限合伙对赌协议不违反法律规定的应认定有效

# ——甲财富公司诉乙影视集团、赵某勇、陈某美其他合同纠纷案

**【裁判要旨】**

私募基金有限合伙企业份额转让及差额补足对赌协议在对赌主体、内容及履行方式等方面符合法律规定及合伙协议约定，无私募管理人承诺收益等违反监管规定的情形，应认定有效。对赌内容经合伙协议或者合伙人的确认可有多种意思表示方式，合伙协议关于合伙财产份额转让的一致表决程序可以被其他形式的确认意思表示替代。

**【基本事实】**

原告甲财富公司为某基金的A类财产委托人及有限合伙人。被告乙影视集团系基金的B类财产委托人及有限合伙人。2016年10月25日，甲财富公司与乙影视集团签订《无条件受让及差额付款合同》，乙影视集团承诺在合同约定的情形发生时，无条件受让甲财富公司持有的基金份额。赵某勇、陈某美为乙影视集团在《无条件受让及差额付款合同》项下所承担的义务承担连带责任保证。《无条件受让及差额付款合同》约定的受让情况包括：在基金运行期间，若自基金A类份额投资者的首期缴付资金实际到账之日起的30个月内，上市公司（指由乙影视集团实际控制的上市公司）收购标的公司（该公司由基金全资控股）未获得中国证监会或其他有权审批机关的批准，或自基金A类份额投资者的首期缴付资金实际到账之日起的30个月内上市公司还未完成收购标的公司，或其他原因导致基金未完成所持有标的公司股权的全部转让。按照《无条件受让及差额付款合同》约定的30个月时间计算，上市公司应当于2019年6月29日以前完成对标的公司的收购。截至甲财富公司起诉之日，标的公司的收购程序仍未启动。基金合伙协议约定：合伙企业财产份额转让的有效申请，需经代表全部表决权的合伙人一致表决同意；若A类资产份额的年化投资收益率低于预期最低投资收益，则根据《无条件受让及差额付款合同》《保证合同》中的具体约定，由相关义务人履行补足义务及担保义务。据此，甲财富公司诉请乙影视集团支付基金份额受让价款，赔偿因其违约所导致的损失；赵某勇、陈某美对乙影视集团上述债务承担连带保证责任。

**【裁判结果】**

上海金融法院于2020年5月28日作出(2019)沪74民初379号民事判决：被告乙影视集团支付原告甲财富公司基金份额受让价款并赔偿违约损失（以基金份额受让价款为基数，按照日利率万分之五，计算自2019年2月2日起至实际支付日止）；被告赵某勇、被告陈某美就被告乙影视集团的上述债务承担连带保证责任。

宣判后，当事人均未提出上诉。一审判决已生效。

**【裁判理由】**

本案争议焦点为《无条件受让及差额付款合同》的性质及效力问题。本案争议的法律关系实质为私募基金有限合伙企业的有限合伙人之间因对赌协议触发有限合伙企业份额的对内转让关系。根据《中华人民共和国合伙企业法》的规定，法律并未禁止合伙人之间的合伙财产份额转让，对赌内容未违反《合伙企业法》规定的利润和亏损分配原则，也未违反《私募投资基金监督管理暂行办法》第十五条关于私募基金管理人、私募基金销售机构不得向投资者承诺投资本金不受损失或者承诺最低收益的监管规定，未存在民事法律行为无效之情形，故该合同应为有效合同。合伙协议明确该合同作为合伙协议的附件，是合伙协议的组成部分，而合伙协议已经全体合伙人签字生效，即已确认该《无条件受让及差额付款合同》对全体合伙人具有法律效力，应视为全体合伙人对此已实质形成了一致意思表示，故对本案所涉的基金份额转让不需再另行进行合伙协议约定的表决程序。

**【裁判意义】**

实践中，私募基金成立有限合伙企业，利用对赌以实现投资人的投资收益保障。《民法典》规定合伙协议可以约定合伙的利润及收益分配，并未禁止对赌的利益分配模式。对于合伙份额的转让，对内转让通知即可，对外转让则需其他合伙人一致同意。合伙协议约定的份额转让一致表决程序可以被合伙人的其他意思表示方式替代。该案虽在《民法典》颁布之前审结生效，但是判决所体现的审理思路和法理分析与《民法典》合伙合同一章相契合。本案审理为该类案件的审理厘清了思路，对规范私募基金对赌行为具有示范意义。

# 公司债券持有人有权就登记于受托管理人名下的担保物行使担保物权

# ——甲信托公司诉乙公司等公司债券交易纠纷案

**【裁判要旨】**

债券发行人未按约支付到期利息，触发《募集说明书》中提前到期条款约定的，债券持有人有权要求发行人提前履行还本付息义务，并要求发行人赔偿债券到期后因不能按约清偿本息而继续占用资金所造成的损失。在债券持有人自行起诉的情况下，其有权要求依法处置登记于受托管理人名下的担保物权，并按其持有的债券本金占担保物所担保的全部债券本金总额的比例优先受偿。

**【基本事实】**

2017年10月，被告乙公司发行“17金玛03”债券，起息日为2017年10月12日，兑付日为2021年10月12日，年利率7.3%，按年计息，不计复利，每年付息一次，到期一次还本，最后一期利随本清。第三人丙证券股份有限公司系债券受托管理人。《募集说明书》有关于提前到期条款的约定。2017年11月20日，原告从二级市场买入涉案债券。2018年10月12日（第一次兑付日日终），被告乙公司未能按约支付系争债券利息。嗣后，第三人召开债券持有人会议，通过相关议案，该期全体债券持有人授权第三人代表其行使担保权，同时说明任何债券持有人对债券受托管理人的授权，不影响其他债券持有人以自身名义采取相关行动。嗣后，第三人与被告乙公司及被告王某某签订《股权质押合同》，约定两被告为被告乙公司发行的“17金玛03”等6支债券提供股权质押担保，质权人为第三人。同时，被告王某某承诺承担连带保证责任。后被告乙公司一直未能按约支付到期利息，其余被告亦未承担相应的担保责任，故原告起诉要求解除合同，主张系争债券提前到期，要求被告乙公司支付债券本金及其利息、赔偿逾期利息损失，同时要求处置涉案质押股权，以原告持有的债券本金占被告乙公司发行的全部债券本金比例优先受偿，并要求被告王某某承担连带清偿责任。

**【裁判结果】**

上海市静安区人民法院于2019年12月4日作出（2019）沪0106民初2755号民事判决，判令被告乙公司偿还原告债券本金、利息，赔偿原告占用资金所产生的损失；依法处置登记于第三人名下的质押股权，原告有权以其持有的“17金玛03”债券本金占被告乙公司发行的6支“金玛债券”全部债券本金比例，即1.5%优先受偿；被告王某某承担连带清偿责任。一审判决后，当事人均未提起上诉，一审判决已生效。

**【裁判理由】**

法院认为，被告乙公司未能按约支付利息，构成违约，依据《募集说明书》中提前到期条款的约定，原告有权要求被告乙公司提前履行还本付息的义务。债券持有人会议通过的议案已经宣布系争债券项下全部本息自议案通过之日起立即到期，要求清偿本息。该议案是全体债券持有人共同向被告乙公司主张权利，要求构成违约的债券发行人提前履行还本付息义务，并不违反法律的规定，原告作为债券持有人之一，无需单独要求解除与被告乙公司签订的合同。在涉案债券提前到期后，对于因被告乙公司不能清偿本息而继续占用资金所造成的损失，债券持有人可以向被告乙公司主张。

按照《股权质押合同》的约定，被告乙公司未能按约偿还债券本息，作为质权人的第三人或债券持有人有权依法处分质押股权及其他派生权益，所得款项及权益用于清偿“金玛债券”持有人的债券本金、利息及其他应付款项，该约定符合法律规定。

**【裁判意义】**

本案生效于《全国法院审理债券纠纷案件座谈会纪要》及《最高人民法院关于适用<中华人民共和国民法典>有关担保制度的解释》颁布之前，但本案对于诉讼主体资格的认定及担保物权的行使两方面的审理思路及处理方式均与上述规定相吻合，充分保障了投资人的合法权益。在公司债券交易实践中，因存在债券持有人众多、登记制度不健全等情况，将担保物权登记于受托管理人名下系该行业的一种常见商业模式。本案判决对上述特殊情形下担保物权委托“代持”予以了肯定，通过给予上述商业模式必要的保护，拓宽了投资人关于增信措施的选择权，给投资人提供了更有利的保障渠道，保障了投资人的合法权益，有利于债券行业的健康稳定发展。

# TrustCompaniesShouldStillTakeReasonableCareinChannelBusiness

# - Case of Property Damage Compensation Dispute: Wu v. Trust Limited A

**[Syllabus]**

In the passive management trust business, although the trust company mainly performs the corresponding obligations based on the Trust Contract, it should still pay reasonable attention when it independently engages in the trust management affairs on behalf of itself. As a professional financial institution, trust companies should be more cautious in responding to the obvious unreasonable requirements put forward by the client in the case they know that the entrusted funds are privately raised funds. Where the trust company's fault objectively contributes to the criminal's fund-raising fraud, and makes the trust company responsible for the loss of investors, the trust company should bear the corresponding tort liability according to the degree of its fault.

**[Basic Facts]**

Company B and the defendant Trust Company A signed a *Single Fund Trust Contract* (hereinafter referred to as the "Trust Contract"), which stipulated that the trustor Company B designates the trust fund of RMB 280 million to be managed by the trustee Trust Company A and used to issue loans to Company B. After that, Company B raised funds from the public under the name of "Hangzhou Affordable Housing Investment Fund Project in Zhejiang". The product type stated in the raising document was "trust joint single fund trust loan limited partnership fund", which was subscribed by the plaintiff Wu. Then, Trust Company A and Company B signed the *Working Capital Loan Contract.* Under the *Trust Contract*, Trust Company A made the loan payment to Company B with the trust amount (including Wu's investment amount) delivered by Company B. After the fund expired, Company B did not refund the principal amount to Wu.

It is found that Wu's investment amount has been applied by Chen and other persons appointed by the Executive Partner of Company B to repay an external debt of a shareholder of X Real Estate Co., Ltd. (acting as an outsider). In 2018, Shanghai No.1 Intermediate People's Court issued a criminal judgment, which affirmed that Company B was actually controlled by Chen, and by forging the contract and other documents that Company B undertook Hangzhou Affordable Housing Project, he used the name of Company B with Wang to sell "Hangzhou Affordable Housing Investment Fund Project in Zhejiang" to the public at a high interest rate and transferred the raised fund to Trust Company A which further extended the loan to Company B. Upon receipt of the loan, Company B applied it to repay an external debt of a shareholder of X Real Estate Co., Ltd.

Wu claimed that Trust Company A caused a loss due to its failure to effectively supervise the trust project and thus should bear the full liability for compensation.

**[Result]**

Shanghai Pudong New Area People's Court issued Civil Judgment (2018) H0115MC No. 80151 dated October 31, 2019: Trust Company A should bear the additional liability for compensation to the extent of RMB 200,000 if Wu could not recover the loss through recovery procedure under the criminal judgment; and the remaining claims of Wu were rejected.

After the civil judgment was declared, both Wu and Trust Company A appealed against it. Shanghai Financial Court issued Civil Judgment (2020) H74MZ No. 29 dated June 5, 2020: The Court rejected the appeal and affirmed the original judgment.

**[Reasons]**

The Court held that Wu was an investor of the project established by Company B and had no investment, fiduciary or other direct contractual relationship with Trust Company A, so Wu claimed Trust Company A's liability for compensating for infringement damages. As the trust company's fault: I. Trust Company A, with the knowledge that the trust amount sourced from social fundraising at the time of providing the trust service, failed to take necessary measures to prevent and control the behavior that the criminal used its financial institution background to raise funds, nor did it give appropriate warning to social investors. Therefore, it was determined that Trust Company A failed to fulfill its necessary duty of care to verify the source of the trust amount when providing the trust service and thus should be liable to some extent for the losses of Wu and other investors caused by the investment cheat. II. During the existence of the trust, Trust Company A issued the *Project Risk Review Report* that was obviously false enough to mislead the outsider. This behavior objectively contributed to the criminal's fundraising fraud, and thus Trust Company A was liable to some extent for the losses of Wu and other investors caused by the investment cheat. III. According to the *Trust Contract*, Trust Company A was only obligated to extend the loan upon relevant instruction and finally take back the loan, but was not obligated to actively manage it or bear the loan risk. Thus, Wu's assertion that Trust Company A lacked duly supervision over the trust property, resulting in the trust amount being transferred by the criminal was not based on the factual ground and was not supported.

After comprehensive consideration, the Court held that Trust Company A's fault in managing the trust service concerned contributed to Wu's loss; Wu was also the victim of the criminal judgment; and his civil rights could be first protected under criminal recovery and refund procedures. Trust Company A shall bear 20% of the supplementary compensation liability for the loss of Wu, and the specific amount is determined as RMB 200,000 after accounting.Thus, the Court decided: Trust Company A should bear the additional liability for compensation to the extent of RMB 200,000 if Wu could not recover the loss through the criminal recovery procedure.

**[Significance]**

The trust business model in the channeling field is different from the traditional one that is to manage money for others upon others' commissioning. And the rights and obligations are also different from the basic structure of the traditional legal relationship. Therefore, disputes arise in legality and compliance. This case is the country's first case that orders a trust company to bear the civil liability for infringement in the channeling business and has been listed in the Ten Commercial Cases Tried by the People's Courts across the Country in 2020. The case actively responds the question of the industry's great concern that whether the exemption from liability should apply in the channeling business.

In this case, the Court clarified that although the trust company was only responsible for transactional management, it should still uphold the principle of prudence in its operations and fulfill the necessary duty of care. The juridical view reflects the general trend that current juridical practice adapts to the changes in macro-financial supervisory policies; the clutters and issues appearing in early trust practice should be addressed rationally; the connivance of illegal fundraising, negligence of regulatory risk control procedures, arbitrary issue of false certificates and other behavior among trust companies in the channel business should be accounted for strictly; the power and liability of trust companies in legal and prudent operations should be clearly defined; investors' requests should be responded actively; reasonable economic compensation should be made for affected investors; and a feasible way is provided to solve the disputes caused by the redemption risk of similar financial products.

# No Interest Should Be Charged If the Lender Does Not Release the Actual Interest Rate

# - Case of Financial Loan Dispute : Tian and Zhou v. Trust Company A

**[Syllabus]**

The lender is obligated to clearly disclose the actual loan interest rate. If the interest rate is stipulated in standard terms, the lender should draw the attention of the borrower in a reasonable way and make an explanation as required by the borrower. If the borrower fails to notice or know the actual interest rate of the loan contract as the lender does not make explicit disclosure, it should be deemed that the parties have not reached an agreement on "calculating the interest at the actual interest rate", and the lender has no right to collect the interest accordingly. In such case, the contractual interest rate should be determined under the principle of contract interpretation and according to relevant terms, the nature and purpose of relevant behaviors, usual practices and the principle of good faith, and the standards of a reasonably prudent person. The repayment received by the lender before the loan release should be deducted from the actual principal.

**[Basic Facts]**

On September 22, 2017, Tian and Zhou signed a Loan Contract with Trust Company A, agreeing a loan principal of RMB 6,000,000 with a loan term of eight years. The loan interest rate was subject to the Repayment Schedule and the average annual interest rate was 11.88%. The loan would be repaid in 96 installments, and each repayment was comprised of principal and interest. The amount of each of the 12 installments in each year was the same, and the amount of repayment decreased once every 12 months.

On September 26, 2017, Tian and Zhou transferred RMB 141,000 to Trust Company A as the first repayment, and Trust Company A transferred RMB 6,000,000 to Tian and Zhou on September 27, 2017. Tian and Zhou made the monthly repayment according to the Repayment Schedule until November 27, 2018. Then, they filed an application for advance repayment, which was approved. Therefore, they paid RMB 5,515,522.81 to Trust Company A on December 17, 2018 (including the principal of RMB 5,505,522.81 and the liquidated damages of RMB 10,000), and paid off the loan in full. Later, Tian and Zhou believed that Trust Company A did not disclose the actual interest rate and told them the average annual interest rate was 11.88%, the actual strike rate was as high as 20%, and the first repayment (which should be deducted from the loan principal) had been collected by Trust Company A before the actual loan origination. Accordingly, it is hereby requested to order Trust Company A to return the overcharged interest and compensate for the corresponding losses.

During the trial, Trust Company A submitted another version of the *Repayment Schedule* to explain the specific method for calculating the amount of each installment repayment of the Loan Contract. In addition to the amount of each installment repayment and the remaining principal, such version also stated the interest, principal and current interest rate for each installment repayment (21.8% in the first year, 19.6%, 17.2%, 14.43%, 10.01%, 6.67%, 3.92% and 1.32% in subsequent years). In addition, at the end of the form, it was stated that the loan principal was RMB 6,000,000, the total interest was RMB 5,702,400, the total principal and interest was RMB 11,762,400, the total interest rate was 95.04%, with an average annual interest rate of 11.88%. After check, the aforementioned annual interest rate was calculated by dividing the total interest payable in the current year by the initial loan principal of RMB 6,000,000, and 11.88% was the arithmetic average of the aforementioned annual interest rates.

**[Result]**

Shanghai Financial Court made a Civil Judgment (2020) H74MZ No. 1034 on January 4, 2021, ruling that Trust Company A should return the overcharged interest of RMB 844,578.54 to Tian and Zhou and compensate the interest accrued from the day after the early repayment date to the actual repayment date at the RMB deposit rate of the same period published by the People's Bank of China.

**[Reasons]**

The Court holds that lender should clearly disclose the actual interest rate. In this case, the *RepaymentSchedule* only states the amount of principal and interest of each installment repayment and the amount of remaining principal, but not the actual interest rate or the total interest amount or the calculation method. Without expertise in accounting or finance, it is difficult for an ordinary person to find out by themselves the difference between the actual interest rate and the interest rate stated in beginning of the Contract only through short-term reading, and to check and calculate the actual interest rate by themselves. Therefore, the *Repayment Schedule* is insufficient to reveal the actual interest rate of the Loan Contract. As stated in the beginning of the Loan Contract, the average annual interest rate is 11.88%, and the loan is repaid by installments. The aforesaid provisions should serve as the main basis for determining the method of calculating interest and should be interpreted in accordance with the standards of a reasonably prudent person. The claim of the borrower that the interest rate should be 11.88% and the interest should be calculated on the basis of the remaining principal is in compliance with the common understanding of a reasonably prudent person, as well as the trading habits and principles of good faith, and should be supported. The repayment received before the loan origination should be deducted from the loan principal. Based on this calculation, the interest overcharged by Trust Company A that totals RMB 844,578.54 should be returned, and the corresponding loss of interest should be compensated to the borrower.

**[Significance]**

The retail loan business has been growing rapidly in China, but some lenders have taken advantage of the asymmetry in their expertise with the borrowers to show the daily or monthly interest rate, which is lower, and hide the annual interest rate, which is higher; they hide the actual interest rate, which is higher, by showing only the flat rate, which is lower, or the interests and fees payable in each period; and, by charging "cut interests" (an amount of principal deducted when the loan is released to the borrower) in the name of service fee and so on, they create an "illusion of interest rate" to financial consumers. In the judgment of this case, which is made in accordance with the provisions on notification of standard terms and contract interpretation of the *Civil Code of the People's Republic of China*, it is affirmed that, when entering into a loan contract with a financial consumer, the lender shall clearly disclose the actual interest rate. If the borrower fails to notice or know the actual interest rate as the lender does not make explicit disclosure, the lender has no right to calculate and charge interest according to the actual interest rate. This judgment has a positive effect on regulating the lending business, protecting the legitimate rights and interests of financial consumers, and promoting financial institutions to implement the policy requirements for the real economy of financial services. This case is listed in "China's Top 10 Typical Judicial Cases of Consumers' Rights Protection" in 2019-2020.

# The Losses of Investors Caused by False Securities Statement Can Be Ratified Under "Multi-factor Quantitative Model"

# —— Case of False Securities Statement Liability Dispute: Xu, et al v. Listed Company A

**[Syllabus]**

In the securities statement liability dispute, as the Listed Company proved that part or all of the losses of investors were caused by the factors other than false statements, the individual contributions of these risk factors to the losses of the plaintiff could be quantified and determined by professional agencies or persons by scientific methods.

**[Basic Facts]**

Listed Company A (the defendant) was a listed company trading on Shanghai Stock Exchange for the period from October 1993 to May 2019 and was de-listed on May 23, 2019 from trading its stocks. According to the investigation by China Securities Regulatory Commission (CSRC), to cover the profit gap of 2014, Listed Company A inflated total profits through false transactions, and the inflated total profits accounted for 73.68% of the total profits recorded in the 2014 consolidated financial statements of Listed Company A. The false disclosure made in the 2014 annual report issued on March 21, 2015 constituted false statement as to securities. Xu and other investors (the plaintiff) bought the shares of Listed Company A after March 21, 2015, and sued Listed Company A according to the relevant facts identified in the *Administrative Punishment Decision*, demanding compensation for the losses caused by the illegal information disclosure.

In the trial of this case, China Institute of Finance, Shanghai Jiao Tong University was appointed by Shanghai Financial Court to issue the *Loss Ratification Opinion* dated February 19, 2020 to ratify the investment difference losses of the investors as a result of the false statement of Listed Company A.

**[Result]**

Shanghai Financial Court issued Civil Judgment (2018) H74MC No. 1399 dated April 17, 2020: Listed Company A (the defendant) paid the compensation amounts RMB 7,571.17 to Xu, RMB 9,406.06 to Li, RMB 10,301.83 to Hu and RMB 54,727.19 to Wang respectively.

After the judgment was declared, Listed Company A filed an appeal. Shanghai High People's Court issued Civil Judgment (2020) HMZ No. 294 dated June 11, 2020: The Court rejected the appeal and affirmed the original judgment.

**[Reasons]**

The Court considered that, as to how to determine the compensation amounts for the losses of the investors, which calculation method should be adopted, how to determine the individual contributions of risk factors in the securities market, and the specific deducted amounts, after the clarification to and the consent of the parties, China Institute of Finance, Shanghai Jiao Tong University was appointed by the Court in its capacity to conduct ratification. As to the authority of the *Loss Ratification Opinion* issued by the professional agency, the Court held that: 1. As to the method to calculate the investment difference loss, the moving weighted average method after the first effective buy-in as adopted in the *Loss Ratification Opinion* was more comprehensive and objective in calculating the unit price of shares, could better reflect the real investment costs of the investors, and was also recognized in judicial practice. 2. As to the method to calculate the losses caused by other factors, such as systematic risks in the securities market, the calculation method as adopted in the Loss Ratification Opinion was: The losses caused by other factors, such as systematic risks in the market = Buy-in costs of the investors × Simulated profit/loss ratio. For the purpose of calculating the stimulated profit/loss ratio, the **multi-factor model method** was used to realize the quantitative calculation of various factors that had an impact on stock price, and overcome the disadvantage that the false statement factor could not be effectively separated from other stock price change factors. It was more scientific, more accurate, and more suitable to the original intention of legislation on the loss calculation discussed in this false statement case and to the need of juridical practice. Thus, the amount of investment difference loss of the involved investors caused by the false statement shall be the amount ratified in the *Loss Ratification Opinion*.

**[Significance]**

As the factors that affect the formation of stock price in the securities market are diversified and complicated, the identification of systematic risks and other factors in the securities market that work together with the false statements of a listed company to cause investors' losses, and the determination of the individual contributions of these risk factors to investors' losses have always been for a long time a key problem that is difficult to overcome in the false securities statement liability dispute cases. Currently, different places exercise different criteria for determining the securities market system risks and individual stock risks of listed companies, and also use diverse methods for deduction method against such risks. This case, through the introduction of technical support from third party professional institutions, has taken the initiative to adopt the "multi-factor quantitative model" calculation method for the first time in China, and accurately verified the amount of investment loss caused by misstatement by investors through the "synchronous comparison method of yield curve". The method of calculating the losses identified in this case is meaningful for the trial of other similar cases in the future, as it is a significant attempt to hear the cases on the civil compensation dispute over securities in a scientific and accurate manner.

# AdoptiveParentsWhoMeettheMaterialElementsofAdoptionCanBeIdentifiedasBeneficiariesoftheDeathoftheInsured

# - Case of Accident Insurance Contract Dispute: Wang et al. v. Insurance Company A

**[Syllabus]**

The insured involved in the life insurance contract was an adopted daughter, but she did not register with the adopter, i.e. the two plaintiffs, in the civil affairs department. It was stipulated in the insurance policy that the beneficiary of the insured's death is the legal successor stipulated in the *Law of Succession*. The insured had no other successor upon the occurrence of the insured accident. According to the relevant laws and regulations, combined with the subjective will of the insured, the fact that the two plaintiffs actually raised the insured and the principle of public order and good customs, the Court determined that the two plaintiffs constituted the person who was largely responsible for supporting the decedent as stipulated in Article 14 of the *Law of Succession* and could obtain death insurance benefits as heirs.

**[Basic Facts]**

Wang insured the Personal Comprehensive Accident Protection of the defendant Insurance Company A online, with the insured as herself, and the amount of accidental death insurance of RMB 500,000, and she checked "legal beneficiary" in the column of death beneficiary. During the insurance period, Wang died in a traffic accident, her father Wang and her mother Li reported the case to the defendant and the defendant refused to pay compensation. It was found in the trial that Wang was an abandoned child adopted by Wang and Li in 1999, and her biological parents were unknown. Her residence registration procedure was registered in 2001, and she was registered as an "adopted daughter". As the relevant departments needed a birth certificate to go through the adoption procedures, they had not been able to go through the adoption registration procedures for her. Wang received high school education, vocational and technical education, and had already worked. The defendant Insurance Company A held that the two plaintiffs were not legal beneficiaries on the grounds that the two plaintiffs did not register for adoption and did not form a legal adoptive relationship with Wang. Wang and Li appealed to the Court to ask Insurance Company A to pay insurance for accidental death.

**[Result]**

On September 2, 2020, Shanghai Huangpu Primary People's Court made a Civil Judgment (2019) H0101MC No. 25558, ruling that: The defendant Insurance Company A shall pay the plaintiff Wang and Li an insurance premium of RMB 500,000. After the first-instance judgment, Insurance Company A filed an appeal. Shanghai Financial Court issued Civil Judgment (2020) H74MZ No. 1251 dated February 24, 2021, ruling that: The Court rejected the appeal and affirmed the original judgment.

**[Reasons]**

The Court held that, first of all, the insurance involved in the case is personal comprehensive accident insurance, which is the personal insurance for the insured's death and disability caused by an accident. Its purpose is to reserve protection for family life. The insurance involved in the case was for Wang to take her own life as the subject of insurance, and the insured Wang had the right to designate the beneficiary. In this case, it was found out that Wang was adopted when she was born, and she was registered as the adopted daughter of the two plaintiffs when she was more than one year old, and her biological parents were unknown. The Court identified the insured object as the two plaintiffs who supported her growing up and lived with her, which was in line with the general social value and Wang's real meaning when she insured. Secondly, the death beneficiary stipulated in the insurance contract was the "legal beneficiary", according to the relevant judicial interpretation of the Insurance Law, the legal successor stipulated in the *Law of Succession* should be the beneficiary. In this case, the insured Wang was unmarried at the time of her death, had no children, and her biological parents were unknown. She was adopted by the plaintiffs shortly after her birth. She did not apply for the adoption procedures, and did not form a legal relationship with the two plaintiffs. However, from the fact that Wang was an adopted daughter was recognized by the grassroots organizations and registered residence agencies, Wang belonged to "the person who was largely responsible for supporting the decedent" listed in Article 14 of the *Law of Succession of the People's Republic of China*. In the case that Wang had no other successor, the two plaintiffs could be regarded as Wang's successor.

**[Significance]**

In this case, by analyzing the purpose of establishing the designated beneficiary system in the insurance contract, and on the basis of confirming the strict procedural elements stipulated in the *Adoption Law*, the Court creatively applied the provisions on the appropriate distribution of estate obligees, which not only conforms to the legislative intent of the *Law of Succession*, but also embodies the principle of the unity of rights and obligations, and provides economic protection for the elderly life of the two plaintiffs. It is also in line with the values generally recognized by the society and public order and good customs, realizes the organic integration of reason and law, promotes good social customs, and is a typical case of integrating socialist core values into judicial adjudication.

# JudicialInterventionShouldBeCautiousintheProfessionalJudgmentMadebyManagersofPrivateEquityManagementProducts

# - Case of Financial Institution Entrusted for Wealth Management Contract: Zhang v. Asset Management Company A

**[Syllabus]**

The manager of private equity management products shall strictly abide by good faith and fully perform the obligation of prudent review following the contract of private equity management products. In case of the operation measures made by the managers of private equity management products based on their professional judgment do not violate the provisions of the contract, laws and regulations and financial regulatory authorities, and make reasonable explanations to the investors, the managers do not need to disclose the specific contents of the risk control measures, and the investors cannot arbitrarily interfere with the management duties normally performed by the managers based on the best interests of all investors.

**[Basic Facts]**

On August 31, 2016, Zhang signed the *Asset Management Plan Contrac*t with Asset Management Company A, stipulating that the fund raised by the asset management plan will be used to subscribe for the limited partnership shares of Limited Partnership B who is a limited partnership specially established for investment in a real estate project of Industrial Company C, and Fund Company D is the general partner of Limited Partnership B. On the same day, Zhang, as the asset client, paid RMB 1.3 million to the fund raising account specified in the *Asset Management Plan Contract*. On September 2, 2016, the *Asset Management Plan Contract* came into effect as agreed by the Parties. Limited Partnership B held 49% of the equity of Industrial Company C, and should pledge the equity to Asset Management Company A. According to the Contract, the *Asset Management Plan Contract* should have expired on September 2, 2018. However, since September 10, 2018, Asset Management Company A had successively issued seven interim announcements, five quarterly reports, and the 2018 Annual Report, disclosing relevant information such as the extension of the plan involved and the progress of the projects involved. Other courts had accepted the case of dispute over partnership agreement between Asset Management Company A and Fund Company D. Zhang appealed to Asset Management Company A to disclose the specific contract contents of risk control documents, and required Asset Management Company A to exercise the right of action on behalf of Zhang to Fund Company D and Industrial Company C and take litigation preservation measures.

**[Result]**

Shanghai Pudong New Area People's Court issued Civil Judgment (2019) H0115MC No. 68308 dated May 20, 2020, ruling that: The Court rejected all claims of Zhang. After the Civil Judgment, none of the parties have appealed, and the Judgment has come into force.

**[Reasons]**

The main focus of dispute in this case is whether Asset Management Company A, as the manager, has fully fulfilled the information disclosure obligation of the asset management plan involved in the case, and whether it has effectively fulfilled the prudent management obligation of risk prevention and control for the best interests of the client.

As for the first focus of dispute, first of all, the content of information disclosure of asset management plan should be agreed by the Parties in the asset management contract. The Parties agreed on the information content that managers should disclose, but did not require managers to disclose the specific content of risk control measures they should take. Secondly, risk control measures should belong to the relevant legal acts that asset managers should take to effectively prevent and control risks. Generally, they cannot directly increase the interests of the client, and should not belong to the "major issues that may affect the interests of the client" agreed by the Parties. Thirdly, where the disclosure content stipulated in the asset management plan contract does not involve or is lower than that required by laws and regulations, it should be disclosed under relevant laws and regulations; however, Zhang did not provide evidence to prove the existence of laws and regulations and the relevant provisions of the financial regulatory authorities.

As for the second focus of dispute, first of all, the Court should respect the judgment and choice of Asset Management Company A as a professional organization in the case that Zhang did not provide evidence to prove that all asset management plan clients can obtain greater benefits by exercising the right of action against Fund Company D and taking litigation preservation measures. Second, during the litigation period of this case, Asset Management Company A had filed a lawsuit against Fund Company D, and Asset Management Company A had also stated the reasons for not taking litigation preservation measures against Fund Company D. Third, Industrial Company C was not the counterpart of the *Asset Management Plan Contract*. Asset Management Company A considered that there was no direct legal relationship between the asset management plan involved in the case and Industrial Company C, which was also respected by the court. Accordingly, the Court did not support Zhang's claim.

**[Significance]**

The judgment of this case clarifies the basic idea of reviewing the legitimacy of professional judgment of managers of private equity products. The manager shall fully perform the duty of prudent management under the asset management plan contract, and if the manager truthfully discloses to the client the measures it has taken, and the contents agreed in the asset management plan contract are not involved or lower than the requirements of laws and regulations, the manager shall perform the duty following the provisions of relevant laws and regulations. If the client disagrees with the choice made by the manager according to his professional judgment, the manager should give a reasonable explanation to explain that if the client insists that the measures taken by the manager are improper, the client is required to prove that the measures taken by the manager are lower than ordinary people's judgment choice and the industry's usual practice, or to prove that the measures proposed by the client can make all the clients of asset management plan obtain greater benefits. The case shows that the Court respects the professional judgment made by the manager of private equity management products based on his ability in the operation of the products, avoids the interference of investors in the normal exercise of management responsibilities by the manager based on the best interests of all investors, and is conducive to enhancing the reasonable expectation of the financial market and standardizing and guiding the orderly development of the asset management industry.

# When a Floating Charge and Pledge Competitively Coexist on the Same Subject Matter, the Rank Order Should Be Determined According to The Principle of "Whichever Publicized First".

# ——Case of Disputes over Property Right Confirmation: Bank A v. Bank B and Company C as the Third Person

**[Syllabus]**

When the priority order of compensation for the registered floating charge and pledge is to be determined, the principle of "whichever is registered earliest" (or any other method for publicizing property rights such as the completed transfer and occupancy of the collateral) should be followed. The floating charge right is established when the mortgage contract comes into effect and is backed up by the registration antagonism, and the scope of mortgaged property is recognized when the mortgaged property is determined. The pledge right in the floating pledge of chattel is established when the Pledgor delivers the pledged property.

**[Basic Facts]**

Bank B signed a letter of credit with Company C on November 8, 2011, under which Bank B would provide the Company C with a non-committed revolving credit line of 40 million US dollars or its equivalent amount of RMB. On the same day, both parties signed the *Pledge Agreement on Warehousing Goods and Warehouse Receipt*, which contains the provisions with regard to the pledged property and secured debt. On June 26, 2012, Bank B and Company C signed an agreement with an outsider Company E to provide the security supervision services. On December 23, 2014, Company C and Company E jointly issued a *Daily Inventory Statement* to Bank B to clarify the specific contents of the collateral. As a result of failure of Company C to fulfill its debts, Bank B filed a lawsuit with Shanghai No. 1 Intermediate People's Court against Company C, and the Court, upon the request, seized the collateral located in the factory area of Company C through preservation on December 26, 2014, and changed the seizure (relocation to another warehouse) on May 27, 2015. After that, the Court made a judgment, according to which Bank B may, in respect of the property determined in the *Daily Inventory Statement*, get preferential compensation to the extent of the claims set out in the judgment or the price of auction or sale. The original sentence of this case was upheld after the second trial. As Company C failed to fulfill the above effective judgment, Bank B applied to Shanghai No. 1 Intermediate People's Court for enforcement on December 8, 2015.

Bank A signed the *Contract on Chattel Mortgage of Highest Amount* with Company C on December 15, 2011 for the bank credit, and handled the registration of mortgage of the chattel on December 19. On July 7, 2014, Bank A signed another *Contract on Chattel Mortgage of Highest Amount* with Company C, and registered the mortgage of chattel with the Administration for Industry and Commerce on July 10, taking the present and future inventory of Company C as the mortgaged property. Later, Bank A sued Company C to Yantai Intermediate People's Court, and the Court seized the disputed property in its turn. Yantai Intermediate People's Court made civil judgments in 2016, mainly on the priority of Bank A to get paid from the discounted or from the price of auction and sale of the disputed property in the maximum amount of RMB 700 million. All of the relevant judgments confirmed that the seizure by Shanghai No. 1 Intermediate People's Court in the relevant case was done on May 27, 2015.

During the trial, Company C confirmed that the disputed property was still in its warehouse, Bank B claimed that its pledge right was established on December 23, 2014, and Bank A claimed that its collateral was specifically created on the date of its prosecution to Yantai Intermediate People's Court, and no objection was raised by any of the parties.

On December 6, 2016, Bank A brought a lawsuit to Shanghai No. 1 Intermediate People's Court, requesting to affirm that the sale or disposal cost of the third person Company C's property which was seized by Shanghai No. 1 Intermediate People's Court should be preferentially paid to Bank A as compensation over Bank B.

**[Result]**

 On June 29,2017,Shanghai No. 1 Intermediate People's Court made the Judgment(2016)H01MC No.1168: ruling that: The Court rejected all claims of Bank A.After the civil judgment was declared, Bank A appealed against it..

On July 31, 2020, Shanghai High People's Court made the Civil Judgment (2017) HMZ No.288: Bank A should be entitled to the prior compensation over Bank B from the sales and otherwise disposal of the property which was owned by the third person Company C and was seized by the Court of first instance.

**[Reasons]**

The Court held that under the floating charge of chattel, the Chargor is allowed to dispose of the collateral freely for the purpose of production and operation, which means that the collateral was different at two moments, i.e. when the charge right was established and when the collateral was concretized. The chattel mortgage registration is the counter condition of chattel floating charge, instead of the establishment condition. After the registration and publicity of the mortgaged property, the collateral gains the power to counter the third person automatically. The pledge right is established when the Pledgee delivers the chattel, which is also applicable to the floating pledge. Since signing a supervision agreement with a third party Supervisor is only part of the judgment over the success of indirect delivery, it is not in a position to prove that the collateral has been delivered, and no pledge right will be established accordingly. The order of compensation should depend on the chronological order of the creation and publicity of the floating charge right or pledge right, if a conflict arises on the effect of the two.

**[Significance]**

This case is a typical case about how to determine the order of compensation when floating charge and floating pledge coexist in a competitive manner. The Judgment has clarified the following facts: 1. The floating charge right is established when the mortgage contract comes into effect, and bears the opposing effect since registration, without considering the determination of the collateral, except that the coverage of the collateral is recognized at the time when the collateral is determined. 2. In the floating pledge of chattel, the pledge right is established when the Pledgor delivers the collateral. The signing of a supervision agreement between the Creditor, Pledgor and Supervisor did not constitute the creation of the pledge right. The pledged property may be directly delivered to the Pledgee, or indirectly delivered by entrusting a Supervisor through the third party supervision agreement, provided that the debtor or the third person and the creditor only have the intention to establish a pledge. If such an intention is expressed but the pledged property is not delivered, the pledge cannot be created. 3. When the priority order of compensation for the registered floating charge and pledge is to be determined, the principle of "whichever is registered earliest" (or any other method for publicizing property rights such as the completed transfer and occupancy of the collateral) should be followed. Although this case happened before the promulgation of the *Civil Law*, it is in line with the opinions of the Supreme Court on the latest application of laws to security disputes, correctly and lawfully follows the rule of the order of compensation when the floating charge and floating pledge coexist competitively, protects the legitimate rights and interests of the parties, upholds the stability of the guarantee system, and serves as a model for the subsequent similar cases.

# The Exemption for "Driving Away from the Scene" under the Commercial Third Party Liability Insurance Should Be Identified from A Comprehensive Perspective

# - Case of Property Insurance Contract Dispute: Bus Company A v. Shanghai Branch of Insurance Company B

**[Syllabus]**

The exemption for "the driver left the scene of accident without taking any legal measures" under the commercial third party liability insurance shall only be granted if the three major elements below are satisfied: the driver should have known the occurrence of the accident and that the accident is related to his/her driving behavior and his/her behavior violated relevant obligations under the *Road Traffic Safety Law of the People's Republic of China*. Based on the case facts, in terms of the driver's subjective cognition of the correlation between the his/her behavior and the accident, emphasis should be laid on the analysis of the specific violations by bus vehicles, whether or not such behavior significantly increases the risk to the person concerned and whether or not the driver should bear a higher degree of safety guarantee obligation.

**[Basic Facts]**

Bus Company A purchased a compulsory insurance for vehicle traffic accident liability and a commercial third party liability insurance for the Bus 955 under its name from Shanghai Branch of Insurance Company B for period of insurance from 0:00 of August 18, 2018 to 24:00 of August 17, 2019. The insured amount of the commercial third party liability insurance was RMB 300,000.

At around 8:33 of September 21, 2018 , an outsider, Qian, drove a Bus 738 to a bus stop and stopped in the first motorway from the right for passengers getting on and off. Qiu, an employee of Bus Company A, drove a Bus 955 in the same direction to the left of the Bus 738, not close to the bus stop, and stopped in the second motorway for passengers getting on and off. While the pedestrians, Wu, Chen, and Lin, were walking in front of the Bus 738, the Bus 738 started to drive south and hit the three pedestrians, causing them to fall to the ground and get injured. Wu and Chen died on the same day despite the rescue efforts. The Traffic Police Detachment of Jing'an Branch of Shanghai Public Security Bureau issued the *Road Traffic Accident Certificate*, confirming that Qian should bear the main liability for the accident, Qiu should bear the secondary liability for the accident, Wu, Chen and Lin should bear no liability.

After the accident, the heirs of Wu and Chen as well as Lin respectively filed an infringement lawsuit against Bus Company A and Bus Company C where Qian worked in. Through mediation by the court, the two companies paid the compensation separately. The plaintiff, Bus Company A, sued to the court, requesting for an order that the defendant, Shanghai Branch of Insurance Company B, made a compensation of RMB 122,000 under the compulsory insurance for vehicle traffic accident liability and a compensation of RMB 285,000 under the commercial third party liability insurance after deduction of the 5% deductibles based on the insurance amount of RMB 300,000. Therefore, the total compensation amount is RMB 407,000.

**[Result]**

On September 27, 2020, Shanghai HongkouPrimary People's Court made a Civil Judgment (2020) H0109MC No. 2160, ruling that: Shanghai Branch of Insurance Company B shall pay Bus Company A the insurance premium of RMB 122,000. The judgment of first instance has come into effect.

**[Reasons]**

The Court holds that the disputed focus of this case is whether or not the plaintiff's driver driving away from the scene falls within the circumstances stipulated in the exemption clause. According to the dispute between the two parties, the exemption clause should only be applied if three conditions below are satisfied: 1. The driver knows or should have known the occurrence of the traffic accident; 2. The driver knows or should have known that the traffic accident is related to his/her driving behavior; 3. The driver has violated the statutory obligations.

First of all, the scene of the accident is close to the right side of the Bus 955, the front door of the Bus is open for passengers getting on and off, and the accident causes two deaths and one injury. The driver should have been able to see the accident as the passengers are getting on and off the Bus from the door on the right side. In fact, it is clearly stated in the interrogation record in the Traffic Police Detachment that the driver could have seen the occurrence of the accident. As a result, the driver witnesses the occurrence of the accident on the spot. Secondly, the bus driver should ensure the safety of passengers on and off the bus when stopping at the bus stop, and the driver should pay attention to the condition of passengers on and off the bus when opening and closing the door. The plaintiff's driver fails to park the bus as required and passengers have to make a detour in front of Bus 738 due to the parking position. In this regard, as a professional bus driver, he/she should have a clear understanding of the safety risks that passengers may face in this process. Three passengers getting on and off the bus are hit to death and injury by Bus 738. This is directly related to illegal parking lack of risk prevention by the plaintiff's driver. It is also confirmed in the *Road Traffic Accident Certificate* that the accident has a causal relationship with the driver's illegal parking, and the driver should be sentenced to bear secondary liability. In addition, the accident involved causes two deaths and one injury. The plaintiff's driver knows the occurrence of the major traffic accident and should have known the correlation between such accident and his/her behavior. Pursuant to the *Road Traffic Safety Law of the People's Republic of China*, the driver is obligated to stay in place to protect the scene, participate in the rescue and report the accident to the security authorities in a timely manner. The behavior of driving away from the scene is confirmed to have violated the *Road Traffic Safety Law*, and constitutes a fault. As the facts related to the accident caused by the driver driving away from the scene, including without limitation the location of the scene and the status of the driver, could only be affirmed by such methods as on-site video, technical appraisal and follow-up investigation, the accident investigation is rendered more difficult. Therefore, there is the possibility of evading responsibility, and the driver should bear the corresponding consequences. Based on the findings above, the Court holds that the fact that the plaintiff's driver drives away from the scene falls within the circumstances specified in the exemption clause. Accordingly, the defense raised by the defendant with respect to exemptions under the commercial insurance should be supported, and the defendant may only compensate the plaintiff to the extent specified by the compulsory insurance for vehicle traffic accident liability.

**[Significance]**

In recent years, there have been frequent safety accidents in public transport. This case is about an insurance claim dispute caused by a major traffic accident at Nanjing West Road on September 21, 2018. In this case, the former bus stopped at the station, while the latter bus could not stop at the station and illegally stopped in the motorway, resulting in the passengers getting on and off the bus being knocked down by the former bus when they were bypassing the former bus, resulting in two deaths and one injury. The insurer refused to bear the insurance liability on the ground that the bus arrived later left the scene later. The judgment of this case deeply analyzed the connotation and constituent elements of the exemption clause of "driving away from the scene after the accident". Combined with the environment of the accident scene, the judgment focused on the subjective cognition of the driver of the accident vehicle who was not in a direct collision about the correlation between his driving behavior and the damage consequences, and concluded that the driver's driving away from the scene was attributable, and on this basis, it determined that the insurer's defense is valid. The judgment intention of this case plays a positive role in enriching and filling the connotation of the obligations of accident scene protection and rescue stipulated in Article 70 of the *Road Traffic Safety Law of the People's Republic of China*, and has a certain value in alerting and urging the bus operation enterprises to enhance the drivers' awareness of transportation standards and ensure the safety of passengers in passenger transport.

# The Legal Nature of Financial Leasing Contract That Lacks Property-raising Attribute Should Be Affirmed According to Its Essence

# —— Case of Loan Contract Dispute: Financial Leasing Company A v. Real Estate Company B, et al.

**[Syllabus]**

Financing leasing is combination of fund-raising and property-raising. If the property-raising attribute is lacked, no financing leasing can be established. If the ownership of the leased property is not transferred by the seller to the leaser, it is affirmed that the financial leasing contract lacks the property-raising attribute, and the loan relationship is established in the name of financial leasing. Thus, the contract validity should be judged according to the nature of the loan contract, to define the rights and obligations of the parties to the contract.

**[Basic Facts]**

On December 26, 2011, Financial Leasing Company A and Real Estate Company B signed the *Financial Leasing Contract* and the *Property Purchase Agreement*, under which Financial Leasing Company A should purchase from Real Estate Company B at the agreed price of RMB 550 million, the relocation and resettlement property, as built on a land plot in Minhang District, Shanghai City, and rent it Real Estate Company B as the leased property. Later, Xiang (legal representative of Real Estate Company B), Company D, Real Estate Company E and other parties jointly issued to Financial Leasing Company A a series of documents, clearly stating the joint repayment responsibility and joint guarantee responsibility for the debt of Real Estate Company B. During the performance of the contract, as Real Estate Company B failed to pay the agreed land transfer fee, Minhang District Planning and Land Administration of Shanghai delivered to Real Estate Company B the *Notice of Contract Termination* and withdrew the land plot in Minhang District, Shanghai City. As Real Estate Company B failed to deliver the leased property according to the agreement and other companies concerned failed to perform their relevant obligations, they were involved in this case.

**[Result]**

Shanghai High People's Court issued Civil Judgment (2017) HMC No. 1 dated December 25, 2019: Ordering Real Estate Company B to pay the principal, interests, liquidated damages, attorney's fees, etc. to Financial Leasing Company A; Ordering Xiang and others to bear the joint repayment responsibility and joint guarantee responsibility; Rejecting its claim that Real Estate Company C should bear the compensation liability for the debt of Real Estate Company B. After the judgment is declared, Real Estate Company B appealed against it. The Supreme People’s Court issued Civil Ruling (2020) ZGFMZ No. 359 dated April 18, 2020 that affirmed the automatic rejection of the appeal and the validation of the first-instance judgment.

**[Reasons]**

The Court held that the *Financial Leasing Contract* disputed in this case referred to the real estate sale and leaseback business. At the signing date of the *Financial Leasing Contract*, the relocation and resettlement property (as the leased property disputed in this case) had not been completed. During the performance of the contract, the land involved was withdrawn by competent authority, so Financial Leasing Company A, as the nominal buyer and lessor of the commercial property, did not actually own and could not own the leased property. As a professional financial leasing company, it should have known that the leased property did not exist, so its real intention was lending, other than financial leasing; Real Estate Company B, as the owner of the leased property, only received the amount from Financial Leasing Company A in the name of the seller and paid the interests according to the contract, so its real intention was borrowing, other than sale and leaseback. So, this case involved leasing transaction where there was fund-raising and there was not property-raising, and the real intention between the parties was the legal relationship of borrowing and lending but in the name of financial leasing. As the nature of the main contract involved was a loan contract between enterprises, it should be decided as a valid loan contract between enterprises to define the rights and obligations of the parties thereto. Although Financial Leasing Company A had not obtained the loan lending license, there was no evidence that its main business or main profit source included the loan lending. The involved loan between enterprises was the real intention and did not violate any prohibition of applicable laws and administrative regulations, so it should be verified. Xiang and others should bear the civil liabilities according to the agreement.

**[Significance]**

This case is a representative one that real estate property is taken as the leased property for fundraising. Although the *Civil Code* states that financial leasing is a functional guarantee, according to the essential characteristics of financial leasing, when deciding whether there is the legal relationship of financial leasing between the parties, the Court should still make necessary examination on whether the transaction behavior reflects the dual attributes of fund-raising and property-raising. After the financial leasing contract is affirmed as the legal relationship of lending and borrowing, whether the lending and borrowing behavior is effective or not should be judged on the basis of relevant laws and regulations on lending and borrowing. The affirmation of "real lending and borrowing in the name of financial leasing" is the determination of legal relationship only, and may not be relied on to deny the validity of the contract itself. The loan contract between enterprises should be relied on to judge the validity of the contract, so as to define the rights and obligations of the parties thereto. At the same time, the determination of legal relationship will not affect the unification of the secured debts. In general, the guarantor can't ask for exemption from its own liability just because the legal relationship is determined separately. With respect to the real lending and borrowing in the name of financial leasing, the involved deposit and remaining purchase price were processed accordingly in this case. This judgment plays a role in accurately defining the legal nature of financial leasing and standardizing the behavior of financial leasing market.

# ValuationAdjustmentMechanismofPrivateFundLimitedPartnershipThatDoesNotViolatetheLawShouldBeRecognizedasValid

# - Case of Other Contract Disputes: Fortune Company A v. Media Group B, Zhao and Chen

**[Syllabus]**

The valuation adjustment mechanism of share transfer and balance compensation of private fund limited partnership was in line with the legal provisions and the partnership agreement in terms of the subject, content and performance of the valuation adjustment, and there was no violation of the regulatory provisions such as the promise of income by the private fund manager, which should be recognized as valid. The content of valuation adjustment could be expressed in many ways through the confirmation of the partnership agreement or partners. The unanimous voting procedure on the transfer of partnership property shares in the partnership agreement could be replaced by other forms of confirmation.

**[Basic Facts]**

Plaintiff Fortune Company A is a class A property trustee and limited partner of a fund. Defendant Media Group B is the class B property trustee and limited partner of the fund. On October 25, 2016, Fortune Company A and Media Group B signed the *Unconditional Acceptance and Deficiency Payment Contract,* stipulating that Media Group B would act as the unconditional transferee and promise to unconditionally accept the fund shares held by Fortune Company A when the circumstances agreed in the Contract occur. On the same day, Fortune Company A, Zhao and Chen also signed two *Guarantee Contracts* respectively, stipulating that Zhao and Chen shall undertake joint and several liability guarantees for the obligations undertaken by Media Group B under the *Unconditional Acceptance and Deficiency Payment Contract*. The acceptance conditions stipulated in the *Unconditional Acceptance and Deficiency Payment Contract* include: during the operation period of the fund, if the acquisition of the target company (wholly-owned by the fund) by the listed company (the listed company controlled by Media Group B) is not approved by the CSRC or other competent examination and approval authorities within 30 months from the date of the actual arrival of the down payment of the fund's class A share investors; or the listed company has not completed the acquisition of the target company within 30 months from the date of the actual arrival of the down payment of the fund's class A share investors; or the fund fails to completed all the transfer of the shares held by the target company due to other reasons. According to the 30 months stipulated in the *Unconditional Acceptance and Deficiency Payment Contract*, the listed company should complete the acquisition of the target company before June 29, 2019. As of the date of the lawsuit filed by Fortune Company A, the acquisition process of the target company had not yet started. In addition, the Fund Partnership Agreement stipulated that the effective application for the transfer of the partnership's share of property shall be unanimously approved by the partners representing all the voting rights. The Partnership Agreement also stipulated that the partners may modify this Agreement or supplement the matters not covered by this Agreement by signing a supplementary agreement upon consensus, and also stipulated that the Annex, as an integral part of this Agreement, has the same legal effect as this Agreement. At the same time, the Partnership Agreement also stipulated that if the annual return on investment of Class A asset shares is lower than the expected minimum return on investment, the relevant obligors shall perform the supplementary and guarantee obligations as specified in the *Unconditional Acceptance and Deficiency Payment Contract* and the *Guarantee Contract*. Therefore, Fortune Company A sued Media Group B to pay the fund share transfer price and compensate for the loss caused by its breach of contract; and Zhao and Chen were sued to undertake joint and several liabilities for the above debts of Media Group B.

**[Result]**

Shanghai Financial Court issued Civil Judgment (2019) H74MC No. 379 dated May 28, 2020, ruling that: The defendant Media Group B shall pay the transfer price of the fund shares of the plaintiff Fortune Company A and compensate for the losses of breach of contract (calculated from February 2, 2019 to the actual payment date based on the daily interest rate of 0.05%, taking the transfer price of fund units as the base); and the defendants Zhao and Chen shall be jointly and severally liable for the above debts of the defendant Media Group B.

After the civil judgment, none of the parties appealed. The judgment of first instance has come into effect.

**[Reasons]**

The focus of dispute in this case is the nature and validity of the *Unconditional Acceptance and Deficiency Payment Contract*. The essence of the legal relationship, in this case, is the internal transfer of the shares of the limited partnership triggered by the Valuation Adjustment Mechanism between the limited partners of the private fund limited partnership. According to the *Partnership Enterprise Law of the People's Republic of China*, the law does not prohibit the transfer of shares of partnership property between partners, and the content of the Valuation Adjustment Mechanism does not violate the principle of profit and loss distribution stipulated in the *Partnership Enterprise Law*, it also does not violate the regulatory provisions of Article 15 of the *Interim Measures for the Supervision and Administration of Privately Offered Investment Funds* that private equity fund managers and private equity fund sales agencies shall not promise investors that the investment principal will not be lost or that the minimum income will be promised, moreover, there is no case that the civil juristic act is invalid, so the contract should be valid. The Partnership Agreement specifies that the Contract, as an Annex to the Partnership Agreement, is an integral part of the Partnership Agreement. Moreover, the Partnership Agreement has been signed by all partners, that is, it has been confirmed that the *Unconditional Acceptance and Deficiency Payment Contract* has a legal effect on all partners. It should be deemed that all partners have substantially formed a consensus on this. Therefore, it is not necessary to carry out the voting procedure stipulated in the Partnership Agreement for the transfer of fund units involved in this case.

**[Significance]**

In practice, private equity funds set up limited partnerships to protect investors' investment income with the Valuation Adjustment Mechanism. The *Civil Code of the People's Republic of China* stipulates that the Partnership Agreement can stipulate the profit and income distribution of the partnership, and does not prohibit the profit distribution mode with the Valuation Adjustment Mechanism. For the transfer of partnership shares, the notice of internal transfer is sufficient, and the consent of other partners is required for external transfer. The unanimous voting procedure for share transfer agreed in the Partnership Agreement can be replaced by other expressions of will of partners. Although the case came into effect before the promulgation of the *Civil Code*, the trial ideas and legal analysis presented in the judgment are consistent with the Chapter of Partnership Contract in the *Civil Code*. The trial of this case clarifies the thinking for the trial of such cases and has exemplary significance for the regulation of the Valuation Adjustment Mechanism by private equity funds.

# Holders of Corporate Bond Entitled to Exercise Security Right in the Secured Property Registered in The Name of the Trustee

# ——Case of Corporate Bond Transaction Disputes:Trust Company A v. Company B et al.

**[Syllabus]**

If the Bond Issuer fails to pay the due interest as agreed, which triggers the provisions of early maturity set out in the *Prospectus*, the Bondholder reserves the right to request the early debt servicing against the Issuer, and claim the compensation of any loss arising from the continued occupancy of funds due to the Issuer's failure to pay off the principal and interest as agreed upon after the bond expires. When the Bondholder files a lawsuit himself, he is entitled to request the disposal of the security right registered in the name of the Trustee according to law, and should get paid in priority according to the proportion of the bond principal held by him to the total principal of all the bonds guaranteed by the secured property.

**[Basic Facts]**

In October 2017, the Defendant Company B issued "17 Jinma 03" bonds, with the interest date of October 12, 2017 and date of honoring of October 12, 2021. The annual interest rate is 7.3%, and the interest is calculated on an annual basis, without compound interest. Interests should be paid once a year, the principal should be paid up at the maturity, and final tranche of interest should be paid up together with the principal settlement. The third person, Securities Co., Ltd. C, is the Trustee of bonds. The *Prospectus* contains provisions on early maturity. The Plaintiff bought the involved bonds from the secondary market on November 20, 2017. On October 12, 2018 (the end of the first payment date), the Defendant Company B failed to pay the interest on the disputed bonds as agreed. Later, the third person held a meeting of bondholders to adopt relevant proposals, and all bondholders of the period authorized the third person to exercise the security rights on their behalf. Meanwhile, it is also stated that the authorization by any bondholder to the Trustee of bonds does not constitute a waiver of other bondholders to take relevant actions in their own name. Afterwards, the third person signed the *Equity Pledge Contract* with the Defendant Company B and the Defendant Wang, which specified that the two defendants should provide the security for the equity pledge for six bonds (including "17 Jinma 03") issued by the Defendant Company B with a third person as the Pledgee. At the same time, the Defendant Wang undertook to bear the joint and several liabilities. After that, the Defendant Company B has failed to pay the due interest as agreed, and the other defendants have not assumed corresponding security responsibilities. Therefore, the Plaintiff sued for the cancellation of the contract, claiming that the disputed bonds should expire in advance, and requesting the Defendant Company B to pay the principal and interest of the bonds and compensate for the loss of overdue interest. The Plaintiff also requested to dispose of the involved pledge equity, claimed that it should get paid preferentially according to the proportion of the principal of the bonds held by the Plaintiff to the principal of all bonds issued by the Defendant Company B, and required the Defendant Wang to bear joint and several liabilities for repayment.

**[Result]**

Jing'an Primary People's Court of Shanghai made a Civil Judgment (2010) H0106MZ No.2755 on December 4, 2019, and ordered the Defendant Company B to repay the Plaintiff principal and interest of the bonds and compensate the Plaintiff for the losses caused by the occupancy of funds, and dispose of the pledge equity registered in the name of the third person according to law. The Plaintiff is entitled to get paid preferentially based on the principal of its share of "17 Jinma 03" bonds to the aggregate principal of six "Jinma bonds" issued by the Defendant Company B, which is 1.5%. The Court also ordered that Defendant Wang should be jointly and severally liable for repayment and settlement. After the first instance, none of the parties has appealed, and the Judgment of first instance has come into force.

**[Reasons]**

The Court held that the Defendant Company B failed to pay interest as agreed, which constituted a breach of contract. According to the provisions of the *Prospectus* on the early maturity, the Plaintiff reserves the right to require the Defendant Company B to perform the obligation of debt servicing ahead of schedule. The proposal adopted at the bondholders' meeting has announced that all principals and interests under the disputed bonds should expire immediately from the date of the proposal, and required the debt servicing. In this proposal, all bondholders jointly claimed rights against the Defendant Company B, and required the defaulting Bond Issuer to perform the obligation of repaying the principal and interest in advance, which does not violate the law. As one of the bondholders, the Plaintiff does not necessarily request to cancel the contract signed with the Defendant Company B separately. After the involved bond became due ahead of schedule, the bondholders may claim against the Defendant Company B for the losses caused by the continued occupancy of funds due to the Defendant Company B's inability to pay off the principal and interest.

According to the provisions of the *Equity Pledge Contract*, if the Defendant Company B fails to repay the principal and interest of the bonds as agreed, the Pledgee (the third person or the bondholder) should have the right to dispose of the pledged equity and other derivative interests according to law, and the resultant proceeds and interests should be used to pay off the bond principal and interest as well as other payables of the bondholders of the "Jinma Bond". Such provisions conform to the law.

**[Significance]**

This case occurred before the *Minutes of Meeting of the Workshop of Chinese Courts on Hearing of Bond Dispute Cases* and before the promulgation of the *Interpretation of Supreme People's Court of the Relevant Security System Applicable to the Civil Code of the People's Republic of China*, but this case has fully safeguarded investors' lawful rights, as its trial ideas and methods in two aspects, i.e. the qualification of the litigant and the exercise of the security right, are in line with the above provisions.

In the practice of corporate bond trading, it is a common business model to register the security right in the name of Trustee because of the numerous bondholders and inadequate registration system. The judgment in this case affirmed the commissioned "nominal holding" of the security right, which gave investors more options for credit enhancement, provided them with more favorable means of protection, safeguarded their lawful rights and helped the sound and stable development of the bond industry, through necessary protection of the above business model. The judgment of this case has set up a model for future similar cases, paved a judicial way for seeking the legitimate rights and interests of the majority of bondholders, and was conducive to the sound and healthy development of the bond market.