2019年度上海法院金融商事审判十大案例

目　　录

Ten Noteworthy Financial Cases in Shanghai Courts of 2019

证券虚假陈述民事赔偿责任的司法认定标准

——全国首例证券纠纷示范判决潘某等诉方正科技公司证券虚假陈述责任纠纷案

【裁判要旨】

1.投资者在虚假陈述行为实施日至揭露日期间存在多笔买入卖出交易的，自第一笔有效买入后，以移动加权平均法计算买入均价能够更为客观地反映实际投资成本。证券市场系统风险的扣除可以根据每个投资者的持股期间和交易记录，将同期个股跌幅均值与大盘、行业指数的跌幅同步对比，用相对比例方法确定市场风险对每个投资者损失的影响程度。

2.本案系全国首例证券纠纷示范判决。对于同一虚假陈述行为引发的投资者索赔案件，法院通过示范判决确定案件的共通事实及法律适用标准，后续案件通过委托专业调解组织参照司法裁判标准进行调解，从而公正高效化解纠纷。案件审理中，引入第三方专业机构对证券投资者损失进行核定，使判决结果更具有公信力，同时较好地解决计算难问题。

【基本事实】

被告方正科技公司系在上海证券交易所上市的公司，其公开发行的股票代码为600601。2017年5月5日，中国证监会[2017]43号《行政处罚决定书》对被告方正科技公司、及其他相关责任人作出行政处

罚：认为方正科技公司未按照规定披露关联交易，方正科技公司等具有信息披露违法行为。根据《企业会计准则》，方正科技公司与其28家经销商因受方正集团控制而存在关联关系。方正科技公司在各期年报及2015年半年报中未依法披露与经销商的重大关联交易事项。原告据此起诉被告要求承担证券虚假陈述民事赔偿责任。

本案系一审法院在投资者诉方正科技公司证券虚假陈述责任纠纷系列案件中选定的示范案件。经双方当事人共同申请，法院委托中证中小投资者服务中心对本案投资者的投资差额损失、是否存在证券市场系统风险及相应的扣除比例进行了核定。

【裁判结果】

上海金融法院于2019年5月5日作出（2018）沪74民初330号民事判决：被告方正科技公司赔偿潘某等四人268,536.5元。一审判决后，方正科技公司提出上诉。上海市高级人民法院于2019年8月7日作出（2019）沪民终263号民事判决：驳回上诉，维持原判。

【裁判理由】

法院认为，在审查上市公司是否构成证券虚假陈述侵权时并不以其在实施行为时存在欺诈、诱导等主观故意为必要条件，而审查的核心是未披露的信息是否属于“重大事件”，判断的标准应当是“信息披露是否足以影响投资者的投资决策或市场交易价格”。投资人在虚假陈述实施日及以后，至揭露日或者更正日之前买入与虚假陈述直接关联证券的行为应推定均受到了虚假陈述的诱导。投资者存在多笔买入卖出交易的，可采用自第一笔有效买入后的“移动加权平均法”确

定证券平均买入价格。此种计算方法考虑了从实施日至揭露日整个期间内投资者每次买入证券的价格和数量，同时剔除了因卖出证券导致的盈亏问题，符合《关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定》（以下简称“《虚假陈述司法解释》”）的规定精神，能够较为客观、公允地反映投资者持股成本，避免畸高畸低的计算结果，更加被市场各方接受。关于证券市场系统风险因素扣除比例，如果采用统一比例扣除，将无法真实反映不同投资者经历的市场系统风险，导致形式公平而实质不公平的结果。因此，本案根据每个投资者的持股期间和交易记录，将同期个股跌幅均值与大盘、行业指数的跌幅同步对比，用相对比例方法确定市场风险对每个投资者损失的影响程度，所得结果更为公平合理。

【裁判意义】

本案系全国首例实施证券纠纷示范判决机制的案件。本案判决生效后至 2020 年 4 月，法院通过与中证中小投资者服务中心合作，以“示范判决+专业调解+司法确认”的方式处理涉方正科技公司虚假陈述系列案件 1,300 余件，高效化解矛盾纠纷，及时维护投资者权益，取得良好效果。在案件的实体处理上，本案对近年来证券虚假陈述责任纠纷中有关行政处罚与民事侵权的关系、因果关系的认定、投资差额损失的计算方法、证券市场系统风险扣除比例等诸多法律争议问题进行了深入具体的分析论证，明确了行政处罚与民事侵权行为的关系，探索确立了既符合现有法律规定又相对公平合理的投资差额损失计算方法和科学化、精细化、个性化扣除证券市场系统风险的计算方

法。本案较好地解决了以往司法实践中在证券市场系统风险的扣除问题上只能以酌情认定统一比例的困扰，引入专业的定量数据分析和第三方专业机构损失核定机制，创造性地构建了精细化的损失计算方法，对同类案件具有较强的示范意义和引领作用。

金融机构和投资者应根据各自过错对理财产品投资损失承担相应责任

——胡某诉甲银行、乙基金公司财产损害赔偿纠纷

【裁判要旨】

金融机构向客户销售金融产品时应当遵守投资者适当性原则，如果其未全面履行风险评级、风险提示以及推介符合客户风险承受能力的金融产品等义务，造成投资者损失的，应当承担相应责任。具有一定投资经验的投资者在明知投资风险并承诺自担投资风险的情况下，自主选择超过其风险承受能力的理财产品发生亏损的，亦应自担相应投资风险。

【基本案情】

2011 年 3 月，胡某在甲银行处认购乙基金公司为管理人的 100 万元开放式基金，约定投资范围为 A 股、股指期货、基金、债券、权证等，胡某在交易凭条上签字确认，签名下方记载：“本人充分知晓投资开放式基金的风险，自愿办理甲银行代理的基金业务，自担投资风险”；胡某在交易凭条背面的《风险提示函》下方签字。胡某风险承受能力评级及适合购买的产品为稳健性。同日，胡某提交的《个人产品理财业务交易信息确认表》记载：“根据贵行为本人进行的风险评估结果显示，本人不适宜购买本产品。但本人认为，本人已经充分了解并清楚知晓本产品的风险，愿意承担相关风险，并有足够的风险

承受能力和投资分辨能力购买该产品。现特别声明此次投资的决定和实施是本人自愿选择，其投资结果引致风险由本人自行承担。”涉案合同文本后附《股指期货交易风险提示函》中资产委托人落款处为空白。另查明，胡某曾于 2010 年购买 100 万元与本案理财产品结构类似的基金并盈利，且担任某公司股东。再查明，2015 年起，胡某开始从事股权投资，投资金额较高。之后，因涉案理财产品发生亏损，胡某以甲银行主动推介高于其风险承受能力的理财产品为由，起诉要求甲银行赔偿投资损失 180,642.62 元及利息。

【裁判结果】

上海市高级人民法院于 2019 年 10 月 8 日作出（2016）沪民再 31 号民事判决：甲银行赔偿胡某损失 72,142.95 元，驳回胡某的其余诉讼请求。

【裁判理由】

法院认为，涉案理财产品的损失分担应结合双方的过错责任的大小予以综合考量。首先，根据风险评估结果，胡某系稳健性投资者，其风险承受能力高于“保护本金不受损失和保持资产的流动性为首要目标”的保守型投资者。胡某作为具备通常认知能力的自然人，在甲银行履行风险提示义务的情况下，对其从事的交易行为的风险与上述书面承诺可能的法律后果应属明知。从胡某的投资经验来看，在购买本案系争理财产品之前，其曾经购买与本案系争理财产品风险等级相当的理财产品，并获得盈利，结合胡某曾担任某公司股东及之后从事股权投资等风险较高投资行为等情形综合考量，胡某应系具备一定经

验的金融投资者，因此对系争理财产品发生亏损的风险应有所预期。在胡某书面承诺愿意自担风险，在无证据证明甲银行存在主动推介行为的情况下，按照“卖者尽责、买者自负”原则，胡某应自担涉案理财产品本金损失的主要责任。其次，甲银行在销售系争理财产品过程中风险提示手续不完备，未充分、完整地履行理财产品的风险提示义务，存在过错，应对本金损失承担相应赔偿责任，鉴于胡某本人对本金损失承担主要责任，甲银行承担的赔偿责任可以适当减轻，应承担40%的赔偿责任。

【裁判意义】

近年来，金融消费者权益保护的理念不断深化，金融消费者保护机制日趋健全，金融机构的投资者适当性管理义务受到社会的广泛关注。金融机构对于金融产品的交易模式以及金融市场风险的认知能力显著高于普通金融投资者。在理财产品销售活动中，金融机构应按照监管规定的要求，做好投资者风险等级评估，在充分了解投资者的认知水平与风险承受能力的基础上，合理引导投资者从事与其认知水平与风险承受能力相适应的金融交易。法院在审理涉及金融机构投资者适当性管理义务的民事赔偿纠纷案件中，应遵循“卖者尽责、买者自负”的裁判理念与价值取向，合理界定投资者与金融机构的权利义务边界。本案中，法院在综合考量双方过错的基础上，确立了投资者与金融机构之间应按照各自的过错程度分担损失的裁判规则，体现了司法裁判在确立金融交易规则与倡导正确投资理念上的价值引领功能。

保险人应依过错程度对承运人错投货损险赔偿损失

——甲物流公司诉乙保险公司保险合同纠纷案

【裁判要旨】

保险人在与物流运输企业缔结货物运输保险合同过程中，应基于诚实信用原则，就货物运输险和物流责任险在险种、费率、保险责任、追偿等影响投保人投保的要素事项上进行告知和说明。保险人因告知披露不充分而致物流运输企业权益受损的，应承担损失赔偿责任，赔偿范围以信赖利益为限。

【基本事实】

原告甲物流公司为运输企业，就其运输货物向被告乙保险公司进行投保，乙保险公司在保险合同缔约过程中，未就货物运输险之权利义务，特别是保险利益归属向甲物流公司进行告知和说明。乙保险公司出具的物流货物保险单载明投保人为甲物流公司，被保险人为甲物流公司之货主，条款第五条“特别约定”载明：“保险人不放弃该保单项下对于事故责任人的追偿权益，仅当甲物流公司为被保货物的实际承运人的情况除外。”后甲物流公司受货主丙公司委托，运输一批橡胶货物。甲物流公司承运过程中发生交通事故，造成货物损失。甲物流公司在向丙公司赔偿完毕后，依据保险合同请求乙保险公司承担保险责任，乙保险公司以甲物流公司并非被保险人，缺乏保险利益为由拒赔。甲物流公司遂提起诉讼，请求判令乙保险公司赔偿损失

208,672.56 元。

【裁判结果】

上海市虹口区人民法院于 2019 年 1 月 11 日作出(2018)沪 0109 民初 9552 号判决：乙保险公司赔偿甲物流公司损失 125,203.54 元。判决后，双方当事人均未上诉，判决已发生法律效力。

【裁判理由】

法院认为，甲物流公司对于其承运的货物不享有货主的所有人利益，故其投保货物运输险自始不具有保险利益，与其利益匹配的应为物流责任险。乙保险公司作为专业保险机构，完全有能力区分两险种在保险利益归属及投保人利益保护上的不同，其在向投保人推介保险产品时应当进行如实告知和说明。结合物流货物保险单有关免于追偿条款的约定，法院有理由确信甲物流公司订立合同目的在于转移责任风险，而并非纯为第三人即货主利益投保。现甲物流公司在向货主赔偿完毕后，因欠缺保险利益而无法自其投保的货物运输险中得到赔偿，其损失发生与乙保险公司未尽告知和说明义务存在因果关系。现乙保险公司未举证证明其已就险种性质、区别及追偿风险进行告知和说明，法院认定其在承保过程中存在过错。甲物流公司在缔约时未审慎合理了解保险产品、履约中存在违约行为，亦应适用过失相抵原则，自担部分损失。综上，法院判令乙保险公司赔偿甲物流公司 60%的货物损失，即 125,203.54 元。

【裁判意义】

货物运输险和物流责任险在保险标的、代位追偿权和保险费率上

均有不同。实践中，两者的保险费率差距可达几倍甚至十几倍。部分运输企业出于节省保费考虑，选择投保货物运输险以规避运输责任风险，少数保险公司对该错投险种方式亦为明知，但仍予放任。事故发生后，承运人因无保险利益不能得到保险金赔偿，但全部损失由其自行承担亦有失公平合理，应当针对具体案情，根据双方在投保过程中的过错行为及与损害结果之间的因果关系等综合认定。本案的处理对于破解这一难题提出了一种衡平保护的思路，对于类案司法裁判提供了指引和向导，有助于引导物流保险市场有序良性发展。

银行对网上银行业务客户资料负有安全保障义务

——丁某诉甲银行储蓄存款合同纠纷案

【裁判要旨】

涉银行卡网络盗刷案件中，生效刑事判决确定案涉交易系犯罪分子采用新型犯罪手法盗取账户资金的非授权交易，在无证据证明持卡人有可归责事由的情况下，银行未尽安全保障义务的，应对被盗刷的款项承担赔偿责任。

【基本案情】

2011 年 4 月 24 日，原告丁某在被告甲银行处开立储蓄账户并领取储蓄卡。2015 年 9 月 16 日 7 时 29 分至 7 时 35 分，原告账户使用短信验证码转账功能共向户名为章某的他行账户转账 104,750 元，同日 7 时 49 分许原告口头挂失该卡，并至上海市公安局黄浦分局经侦支队报警。经刑事案件调查，网银账户资金系犯罪分子通过非法渠道获取大量包含公民个人信息的数据，采取“撞号”手法，利用扫号软件批量尝试登陆他人网银账户，试出正确相匹配的登录名及密码。然后通过变号软件拨打通讯运营商客服电话，为他人手机开通短信过滤、短信保管等功能，再登录其网银，输入截取的银行转账验证码将其账户中的钱款转走。原告认为被告对网上银行交易的安全保障存在严重疏漏，应对原告的资金损失承担赔偿责任。被告辩称不存在违约行为，其是在验证转账所需安全要素后才进行的划款，已尽安全保障

义务，原告违反信息保管义务，被告不应承担赔偿责任。

【裁判结果】

上海市黄浦区人民法院于2019年1月8日作出（2018）沪0101民初1312号民事判决：被告甲银行应赔偿原告丁某资金损失及相应利息损失。宣判后，被告甲银行提出上诉。上海金融法院于2019年5月17日做出（2019）沪74民终200号民事判决：驳回上诉，维持原判。

【裁判理由】

法院认为，甲银行向冒名者的付款行为不能产生清偿效果。在储蓄存款合同关系中，发卡行负有向持卡人提供安全用卡环境的义务，持卡人则负有妥善保管银行卡卡号、密码等银行卡信息的义务。即便丁某在其他网站使用了与案涉银行卡相同的用户名和密码，亦不能即得出丁某未尽到妥善保管自己银行卡信息的义务。被告未提供相应的证据证明丁某未尽到适当注意义务导致银行卡信息泄露，应承担举证不能的后果。根据《中华人民共和国商业银行法》第六条及《电子银行业务管理办法》第三十八条规定，被告作为专业金融机构，具有保障账户资金安全的法定义务。被告作为借记卡的发行者及相关技术、设备和交易平台的提供者，应对交易机具、交易场所、交易平台加强安全管理，并对各项软硬件设施及时更新升级，最大限度地防范资金交易安全漏洞。从双方利益衡量的角度，商业银行作为电子交易系统的开发、设计、维护者，也是从电子交易的风险中获得经济利益的一方，相较于持卡人而言，应当也更有能力采取更为严格的技术保障措

施，以防范有关违法犯罪行为。

【裁判意义】

不同于物理卡交易模式，网上银行业务通常是通过持卡人预留信息的一致性来核实客户身份，但如今数据信息泄露已成为互联网领域关注的焦点，金融市场交易主体在享受互联网金融高效、便捷的同时，亦应警惕其伴随的交易风险。本案正是因犯罪分子利用非法获取的个人信息数据通过“撞库”等新型犯罪手段，盗刷网银引发的储蓄存款合同纠纷案件。银行作为电子交易平台的提供者，亦是电子交易方式的获利者，有能力且有必要采取严格的技术保障措施保障账户资金安全。本案判决明确了持卡人通过刑事判决证明系争交易为非授权交易，且在无证据证明持卡人有可归责事由的情况下，银行应承担赔偿责任，有利于督促行业提高电子交易安全保障，规范金融交易行为。当然，如银行能举证证明持卡人对上述损害有过错的，可主张减免其赔偿责任。

保险代理人阻碍投保人履行如实告知义务
应视为投保人已履行如实告知义务
——丁某诉甲保险公司人身保险合同纠纷案

【裁判要旨】

签订人身保险合同过程中，保险代理人不按照投保人真实意思表示代填保险单证的，属于保险代理人阻碍投保人履行如实告知义务，应视为投保人已经履行如实告知义务，保险公司应予以理赔。

【基本事实】

2016 年 6 月 29 日，丁某经过体检发现患有右侧甲状腺结节。2016 年 8 月 21 日，张某（系丁某之配偶）作为投保人，丁某作为被保险人及受益人，向甲保险公司投保人身保险。张某投保时向保险代理人黄某出示了丁某的上述体检报告，并口头告知黄某，被保险人丁某经过体检发现有甲状腺结节。保险代理人黄某在投保书上代张某和丁某打勾，在询问事项“甲状腺或甲状旁腺疾病”位置勾选“否”。张某和丁某在《人身保险投保书》（电子版）、《人身保险（个险渠道）投保提示书》上签字。涉案保险合同于 2016 年 9 月 1 日成立并生效。投保险种中包括附加重疾险，保险期间为终身，基本保险金额为 30 万元等。

2018 年 4 月 13 日，丁某在某医院手术，确诊为右侧甲状腺恶性肿瘤。嗣后，丁某向甲保险公司申请理赔。2018 年 8 月 5 日，甲保

险公司出具《理赔决定通知书》，载明解除保险合同并不退还保费，不予理赔。甲保险公司将上述《理赔决定通知书》送达张某和丁某。丁某不同意上述通知，遂诉至法院要求甲保险公司支付保险金 30 万元。

【裁判结果】

上海市静安区人民法院于 2019 年 1 月 21 日作出（2018）沪 0106 民初 33085 号民事判决：甲保险公司支付丁某保险金 30 万元。判决后，甲保险公司提起上诉。上海金融法院于 2019 年 6 月 27 日作出（2019）沪 74 民终 373 号民事判决：驳回上诉，维持原判。

【裁判理由】

本案争议焦点在于甲保险公司能否以投保人未尽如实告知义务而解除合同并予以拒赔。

涉案《人身保险投保书》（电子版）、《人身保险（个险渠道）投保提示书》上张某和丁某的签字均系本人所签，但上述保险单证上打勾均为保险代理人黄某代为填写。涉案保险合同签订时，投保人张某向保险代理人黄某出示了丁某的体检报告，该体检报告载明丁某患有甲状腺结节。保险代理人黄某在明知丁某患有甲状腺结节的情况下，仍代张某和丁某在投保书询问事项“甲状腺或甲状旁腺疾病”中勾选“否”，该行为系属阻碍投保人履行如实告知义务，故保险代理人黄某上述代为填写的内容不能视为投保人张某的真实意思表示，应视为张某在投保时已经履行了如实告知义务，甲保险公司应当向受益人丁某支付保险金 30 万元。

【裁判意义】

保险合同的射幸性决定了保险合同的签订是双方对风险认识的博弈。由于保险人和投保人自身利益的不同，掌握信息的不对称，决定了在保险活动中诚信原则至关重要。保险代理人的诚信执业，是保险人与投保人之间沟通顺畅的重要保障。保险代理人的不规范、不诚信执业，影响了被保险人的切身利益，阻碍了整个保险行业的健康发展。人身保险合同签订过程中，多有保险代理人代填保险单证的行为，如保险代理人明知被保险人患有甲状腺结节，却仍在相应位置勾选“否”，该种不诚信执业行为系属阻碍投保人履行如实告知义务，应视为投保人已经履行了如实告知义务，保险公司应当予以理赔。本案的裁判结果从法律层面对保险代理业的诚信缺失问题进行了有效规制，维护了保险市场的诚信基石，有利于人身保险行业的持续良性发展。此外，保险代理人行为导致保险人承保“带病”保险标的发生损失的，保险人亦有权追究保险代理人的相应责任，从而遏制保险代理人不法执业的乱象。

通过网络低价招揽租车用户应认定为改变车辆用途且导致危险程度显著增加

——郑某诉甲财产保险公司财产保险合同纠纷案

【裁判要旨】

本案被保险车辆由承租人通过网络向不特定用户低价招揽用户，以致发生保险事故，符合法律关于保险人因保险标的用途改变可以拒赔的构成要件，保险人可以拒赔。

【基本案情】

某沪牌小型轿车为原告郑某所有。原告为该车向被告甲财产保险公司投保机动车综合商业保险，保险期间自 2018 年 8 月 10 日至 2019 年 8 月 9 日止；《机动车综合商业保险保险单》使用性质一栏注明“非营业个人”；重要提示一栏注明“被保险机动车因改装、加装、改变使用性质等导致危险程度显著增加，应书面通知保险人并办理变更手续。”

原告将上述车辆租赁给案外人宋某（微信名）。2018 年 12 月 23 日，宋某将该车租赁给于某，并收取租金及押金共计 3,100 元。于某将该车交由肖某驾驶。2018 年 12 月 23 日 23 时 40 分许，肖某驾驶该车时因避让动物导致车辆与山体相撞，造成车辆损坏的事故。某市公安局交警大队认定肖某负全部责任。

宋某在其微信朋友圈发布各款汽车图片，并配有相关招揽租车的

广告文字。

【裁判结果】

上海市闵行区人民法院于2020年1月24日作出(2019)沪0112民初18496号民事判决:驳回郑某的诉讼请求。判决后,双方当事人均未上诉,判决已发生法律效力。

【裁判理由】

法院认为:被告应否在本案中承担赔偿责任,需要明确以下问题:1.被保险车辆的用途是否改变;2.如果被保险车辆的用途改变,是否因此导致危险程度显著增加;3.危险程度虽然增加,但是否属于保险人预见或应当预见的保险合同承保范围。

关于被保险车辆的用途是否改变的问题,原告投保时双方约定系争车辆的用途为“非营业个人”。从行业规范来看,公安部发布的《中华人民共和国公共安全行业标准机动车类型 术语和定义》中明确“非营运机动车是指个人或者单位不以获取利润为目的而使用的机动车”,该规范所附的《机动车使用性质细类表》中列明营运类机动车包括租赁。系争车辆出租于案外人宋某,宋某又将系争车辆转租于次承租人,使用性质已经不同于原、被告双方约定的“非营业个人”,而是转变为以获取租金收益为目的的商业性使用。

关于被保险车辆的用途改变是否导致危险程度显著增加且超出保险人应当预见范围的问题。本案中,系争车辆危险程度的增加体现在以下方面:首先,宋某通过网络发布广告,向不特定人员低价招揽租车用户的方式客观上大幅提高了车辆的出行频率、扩大了出行范

围，车辆在运行过程中出险的几率也相应大幅提高。其次，系争车辆用途的改变同时伴随着车辆管理人与使用人的改变。无证据证明宋某对次承租人进行风险管控。因此，系争车辆管理人的改变也足以导致危险机率的提高，而原告与宋某对危险几率的提高均采取了放任的态度。在此情况下，系争车辆危险程度的增加完全超出了保险人可预见的范围，如果由保险人来承担风险，将违反财产保险合同中对价平衡的原则，不利于保险业的健康长久稳定发展。

【裁判意义】

本案确立了对保险人能否因保险标的用途改变而拒赔的精细化的裁判标准。首先，明确了保险人在此情况下拒绝赔偿的构成要件是：1.被保险车辆的用途改变；2.被保险车辆用途的改变导致危险程度显著增加；3.增加的危险超出保险人预见或者应当预见的保险合同承保范围。其次，明确了衡量被保险车辆用途改变的方法是：对照保险合同的约定检验实际用途，并结合相关的行业规范运用法律解释学的方法，以动态发展的眼光作精细化地评判。

投资人应对其规避监管规定的“绕标”投资行为承担责任

——叶某诉甲证券公司融资融券交易纠纷案

【裁判要旨】

投资人参与两融“绕标”交易的目的系规避“融资融券交易只能针对标的证券”的监管限制而获益。证券公司对投资人从事规避监管的投资行为是否承担责任的前提应基于其是否已履行相关法定或约定义务。若证券公司在整个交易过程中已履行其法定或约定职责，则因规避监管导致交易风险增大而产生的损失应由投资人自行承担。

【基本案情】

2017 年 5 月 18 日，叶某与甲证券公司签署了《融资融券合同》，其中约定，叶某信用账户维持担保比例低于 130%时且并未在下一个交易日补充担保物或偿还融资融券负债，证券公司有权对叶某账户内资产予以强制平仓；若叶某信用账户内证券被实行风险警示，从该证券被实行风险警示之日起的第 21 个交易日开始，该证券市值折扣调整为 0%。合同签订后，叶某进行了融资融券交易并采取“绕标”方式操作投资行为。自 2017 年 10 月起，叶某通过其信用账户下达“融券卖出、融资买入”一系列交易指令的重复操作，并通过“现券还券”的方式最终实现将融券负债解冻转化为自有资金，之后再操作买入可冲抵保证金证券即 A 股票。通过该种操作方式，叶某将其信用账户内的所有资金全部买入 A 股票，同时将该股票作为其融资融券债务的担保物。该股票于 2018 年 1 月 18 日起停牌，并于 2018 年 2 月 8 日起

将被实施风险警示。甲证券公司根据合同约定自 2018 年 3 月 15 日起将该股票市值折扣调整为 0%，导致叶某信用账户维持担保比例低于平仓线 130%。甲证券公司据此依约采取强制平仓措施，因叶某逾期未还款，故甲证券公司提起诉讼，要求判令叶某偿还剩余融资本金 600 余万元以及相应的融资利息、违约金。审理中，叶某认为 A 股票系非融资融券标的证券，根据监管规定融资融券交易仅能针对标的证券进行，涉案融资融券交易过程存在“绕标”操作，违反证券监管规定，甲证券公司允许叶某进行“绕标”操作违反监管义务，故甲证券公司应承担部分损失。

【裁判结果】

上海市静安区人民法院于 2019 年 10 月 8 日作出（2018）沪 0106 民初 29128 号民事判决：叶某偿还剩余融资本金 600 余万元以及相应的融资利息、违约金。判决后，双方当事人均未上诉，判决已发生法律效力。

【裁判理由】

法院认为：双方主要争议焦点为甲证券公司是否须为“绕标”操作产生的损失承担责任。根据《证券公司融资融券业务管理办法》第十八条，客户融资买入、融券卖出的证券，不得超出证券交易所规定的范围。涉案 A 股票为非标的证券，但本案中，从叶某通过“绕标”手段购买 A 股票的具体操作方式来看，尽管叶某买入 A 股票的最初资金来源确系通过两融交易套现获得，但其一开始获取资金的过程系针对标的证券进行融资交易或融券交易，完全符合上述《证券公司融资

融券业务管理办法》第十八条规定。之后，叶某使用以“绕标”手段获取的自有资金买入A股票，而《上海证券交易所融资融券交易实施细则》和《深圳交易所融资融券交易实施细则》均规定，投资人可以在信用证券账户下用自有资金买入可充抵保证金证券。本案A股票虽系非标的证券，但在叶某购买该股票时属于甲证券公司认可的可充抵保证金证券，故此类交易模式并未违反现行监管规则的禁止性规定。从责任承担来看，证券公司对投资人的交易行为所产生的风险与损失承担责任的前提应基于其未能履行相关法定义务或约定义务。根据上述监管规定可见，甲证券公司作为证券公司并无限制投资人进行“绕标”操作的相关法定义务。而根据《融资融券合同》约定，甲证券公司亦不具有控制“绕标”的合同义务。因此，叶某采取“绕标”操作买入非标的证券后产生亏损，应由其个人承担相应的交易风险，其要求甲证券公司承担责任缺乏法律依据或合同依据。

【裁判意义】

两融绕标的交易目的系为了规避“融资融券交易只能针对标的证券”的监管限制从而获益，尽管这种规避监管的投资行为放大了交易风险，需要进一步完善规制，但现行监管法律法规并未明确规定证券公司具有限制或监管投资人进行绕标交易的法定义务。从投资者权益保护角度而言，对于投资风险应当保持足够的认识，作为合格投资者应当恪守诚信，公平交易，自担风险。当然，需要特别指出的是，证券公司亦应当通过合理的制度设计，防止投资者从事规避监管规定的交易行为，控制交易风险。

以票据转让作为债权转让方式的保理纠纷的司法处理

——甲保理公司诉乙公司等保理合同纠纷案

【裁判要旨】

在以票据背书转让作为债权转让形式的保理交易中，若交易各方未约定交付票据后原债权即消灭，则当票据到期后未能兑付时，不能视为债务人履行了付款义务。保理公司可以基于票据关系主张权利，也可以基于保理合同主张权利。

【基本事实】

2017 年 4 月 20 日，丙公司与甲保理公司签订《商业保理业务合同》，约定甲保理公司向丙公司提供最高额 2,000 万元的国内有追索权保理融资服务。同日，丙公司与甲保理公司签订了《应收账款转让协议》《应收账款转让通知书》。贺某江向甲保理公司出具《最高额担保函》，提供最高额度 2,400 万元的连带责任担保。2017 年 4 月 21 日，丙公司向甲保理公司背书转让了票据金额为 500 万元、汇票到期日为 2018 年 2 月 24 日的电子商业承兑汇票，甲保理公司发放到期日为 2018 年 3 月 6 日的 500 万元保理融资款。2017 年 4 月 27 日，丙公司向甲保理公司背书转让了票据金额均为 200 万元、汇票到期日分别为 2018 年 3 月 24 日、25 日的两张电子商业承兑汇票，甲保理公司发放了到期日分别为 2018 年 4 月 3 日、4 日的两笔 200 万元保理融资款。上述三张电子商业承兑汇票到期后，甲保理公司提示付款均

未获兑付。上述三笔保理融资款到期后，甲保理公司亦未收到乙公司、贺某江应支付的应收账款。

【裁判结果】

上海市浦东新区人民法院于 2019 年 2 月 15 日作出（2018）沪 0115 民初 53159 号判决: 一、乙公司支付甲保理公司应收账款债权本金及相应利息; 二、若乙公司届期未能足额履行上述第一项付款义务，被告丙公司应在保理融资本金及违约金范围内向甲保理公司归还乙公司未履行部分的款项; 三、贺某江对被告丙公司的付款义务承担连带清偿责任。一审判决后，丙公司提起上诉。上海金融法院于 2019 年 8 月 27 日作出（2019）沪 74 民终 418 号终审判决: 驳回上诉，维持原判。

【裁判理由】

法院认为，丙公司将涉案应收账款债权以票据背书的形式转让给甲保理公司，乙公司确认收到《应收账款转让通知书》，该债权转让行为已对债务人即乙公司生效，故乙公司应向甲保理公司履行付款义务。乙公司虽辩称其向丙公司背书转让涉案三张电子商业承兑汇票的行为应视为履行了付款义务，但因系争交易各方并未约定交付票据后原因债权即消灭，甲保理公司未实现票据付款请求权，表明其作为债权人未能获得实际完全给付，其与乙公司之间的债权债务关系并未消灭，故其有权就应收账款债权请求权与票据追索权择一行使。因此，甲保理公司要求乙公司支付应收账款债权本金 900 万元的主张，具有事实和法律依据，法院予以支持。因甲保理公司在保理融资到期后，

未足额收回应收账款，故其有权按照涉案《商业保理业务合同》的约定行使追索权。因此，甲保理公司要求丙公司归还保理融资本金900万元并支付逾期违约金的主张，法院亦予以支持。

【裁判意义】

涉票据结算保理系保理业务的一种创新形式，保理公司受让应收账款的同时受让了作为该笔应收账款结算工具的票据，保理关系与票据关系出现了交叉，存在基于票据权利及保理合同两类权利主张路径。本案对于“票据到期未能兑付，不能视为债务人履行了付款义务”的认定，厘清了两种不同的法律关系，系对保理创新业务的认可，有利于促进保理行业健康有序发展。

融资租赁出租人自行收回并处置租赁物的司法处理

——甲公司诉乙公司等融资租赁合同纠纷案

【裁判要旨】

融资租赁出租人自行收回并处置租赁物的，出租人应遵循公平原则并提供充分的证据证明其处置租赁物价格的合理性。在承租人未认可的情况下，出租人未委托有资质的专业机构对租赁车辆价值进行评估，又不能提供其他证据证明其处置车辆的价款真实体现了市场价格的，则其关于租赁物处置价格具备合理性的主张不能成立。

【基本案情】

2016 年 8 月，原告甲公司与被告乙公司、被告谷某签订融资租赁合同及其附件，约定：被告乙公司以售后回租交易方式将自有的 3 辆东风清障车转让给原告并租回使用，被告谷某系共同承租人。同日，被告朱某向原告出具《无条件不可撤销的担保函》，就融资租赁合同项下的全部义务和责任向原告承担不可撤销的连带保证责任。

合同履行过程中，被告乙公司自 2017 年 3 月起开始拖欠租金。因乙公司违约，原告甲公司于 2017 年 6 月收回租赁车辆。案外人丙公司于 2017 年 6 月出具《鉴定评估报告》，称接受原告委托，对租赁车辆进行鉴定评估，以 2017 年 6 月为基准日，评估金额为 19 万元－20 万元。丙公司法定代表人张某以买受人身份于 2017 年 7 月出具《同意函》，以 20 万元价格向原告购买涉案融资租赁车辆。原告诉至法院，

请求判令解除合同，乙公司、谷某赔偿损失（未付租金及相应违约金扣减租赁物变卖价值等剩余的金额）、逾期违约金等，朱某承担连带保证责任。

【裁判结果】

上海市黄浦区人民法院于2019年4月3日作出（2018）沪0101民初17367号民事判决:解除合同，驳回甲公司其余诉讼请求。判决后，甲公司提出上诉。上海金融法院于2019年7月9日作出（2019）沪74民终439号判决：驳回上诉、维持原判。

【裁判理由】

法院认为，本案主要争议焦点为：原告甲公司所主张的因融资租赁合同解除而产生的损失是否具有依据。

首先，依据《最高人民法院关于审理融资租赁合同纠纷案件适用法律问题的解释》第二十二条之规定，出租人解除合同后，可主张的损失赔偿范围为承租人全部未付租金及其他费用与收回租赁物价值的差额。其次，甲公司主张收回租赁物的价值为20万元，并据此计算损失金额。鉴于融资租赁车辆的处置系由甲公司单方完成，且20万元的处置金额相较于一年四个月之前的购买价格42.6万元差距较大，故甲公司应当举证证明该处置价格的合理性。但甲公司仅提供了并无机动车鉴定评估资质的丙公司出具的《鉴定评估报告》，且根据甲公司提供的证据，租赁物的买受人即为丙公司法定代表人。在此情况下，仅依据上述《鉴定评估报告》显然不能客观反映融资租赁车辆的真实价值。再者，甲公司另称，融资租赁车辆已从乙公司名下过户

至买受人名下，据此可知承租人知晓并同意融资租赁车辆以 20 万元的价格进行处置。法院认为，根据本案融资租赁交易模式，乙公司已将融资租赁车辆所有权转移于甲公司，乙公司仅为车辆名义所有权人，在此情况下车辆过户并不代表乙公司认可车辆转让价格。事实上，上海市公安局交通警察总队提供的车辆过户资料中也并无可以证明乙公司认可车辆转让价格的相关材料。故对于甲公司该主张，法院不予采信。

综上，由于甲公司未能举证证明收回租赁车辆价值公平合理，因此不能认定甲公司收回租赁车辆后尚有损失存在，故对于甲公司提出的因融资租赁合同解除而产生的损失的主张，法院不予支持。

【裁判意义】

法律充分尊重当事人意思自治，但同时法律亦强调民事主体从事民事活动，应当遵循公平原则，合理确定各方的权利和义务。租赁物价值作为融资租赁合同融资功能的基础，往往涉及合同双方当事人之间的利益平衡问题，一旦发生纠纷，租赁物价值的确定及抵扣经常成为双方当事人的争议焦点。本案判决为司法实践中处理类案提供了新的思路，对融资租赁公司亦具有规范引导意义。融资租赁公司应完善合同条款，遵循公平原则确定当事人之间的权利和义务，提高合规意识，优先选择合法、公开、公平、合理的方式开展融资租赁业务。

人身保险投保人未履行如实告知义务的认定标准

----欧阳某某诉甲保险公司人身保险合同纠纷一案

【裁判要旨】

我国现行《保险法》第十六条未明确因投保人故意或因重大过失未履行告知义务而使保险人有权解除合同的认定标准。实践中，该认定标准应围绕危险构成要件，以保险合同载明的内容及保险人询问的内容为限。如保险人询问过于笼统的情况下，应当结合投保人的认知判断能力、就医诊疗情况等因素综合分析。投保人在投保时未认识到危险的严重性及危险发生的必然性，不应认定投保人故意或因重大过失未履行如实告知的义务。

【基本案情】

欧阳某某系某校教师。2017 年 9 月 13 日，欧阳某某一家三口分别与甲保险公司签订人身保险合同。投保时，保险公司代理人代为下载了投保软件、填具注册信息、设置密码，填具《人身保险投保书》（电子版），并询问投保人："身体状况如何？"投保人回答："身体状况好的。"此前，欧阳某某于 2017 年 4 月 23 日参加单位每年组织的体检。体检报告提示：考虑肺部炎症后遗灶可能，建议随访。欧阳某某未按上述提示看病就诊。2018 年 4 月 15 日，欧阳某某再次参加单位年度体检，查出右下肺有小结节。欧阳某某经体检中心提醒赴医院就诊，被确诊为右下肺恶性肿瘤。住院期间原告共花费 59,961.14

元。欧阳某某遂申请理赔。保险公司派员问及投保前年度体检状况，欧阳某某当即将体检报告提供给保险公司。嗣后，保险公司以欧阳某某未如实告病史为由通知解除《人身保险合同》，拒付保险金。欧阳某某遂诉至法院，请求确认保险合同有效并要求保险公司赔付合同约定的保险金额 286,914.88 元。

【裁判结果】

上海市崇明区人民法院于 2018 年 11 月 28 日作出(2018)沪 0151 民初 8478 号民事判决：确认系争保险合同有效；保险公司应赔付保险金 286,914.88 元及相应利息。一审判决后，保险公司提起上诉，并于二审审理期间撤回上诉。上海市第二中级人民法院于 2019 年 5 月 28 日作出（2019）沪 74 民终 168 号准许撤诉的裁定。

【裁判理由】

法院认为：保险制度系为各类特定事故的危险实际发生时提供损失补偿。这种危险具备或然性，表现为危险发生时间、后果的不确定性以及被保险人的非有意性。判断是否符合《保险法》第十六条所规定的投保人故意或因重大过失而未履行如实告知义务，法院应综合考量：其一，保险代理人是否在投保时进行合理的询问。本案中，保险代理人仅笼统询问身体是否好，而未依据合同逐一、专业地询问，没有尽合理询问义务。其二，被保险人对自身疾病的认知度。投保人在投保前从未就发生的重大疾病进行就诊，其他就诊记录也不频繁，可见投保人对于身体状况凭主观判断是良好的，并没有意识到体检报告上的检查结果存在异常，投保时的告知与其一般认知相符。其三，投

保时，被保险人所患重疾的状态是已确诊还是一种可能发生的危险。在本案中，重大疾病在投保时只是一种可能发生的危险，属于保险人可承保的范围。其四，关于投保时被保险人不履行告知义务的其他可能性因素。综合被保险人身份关系以及在理赔时保险人上门调查取争议体检报告时投保人当场出示等情况，可见投保人没有主观上刻意隐瞒或阻碍的情况。综上，法院认为，本案投保人履行如实告知义务时不存在故意或重大过失的过错，故保险人解除《人身保险合同》的条件不成立，应按约支付保险金。

【裁判意义】

实践中，对于我国现行《保险法》第十六条规定的投保人存在故意或者因重大过失未履行如实告知义务，缺乏明确具体的认定标准。本案以事实为基础，全面分析法条，明确了以《保险法》第十六条规定的“危险”的构成要件为依据，综合考量认定人身保险合同项下投保人是否履行了重大病症如实告知义务，为这类案件的审理提供了思路和标准。

Judicial Recognition Standard of Civil Compensation Liability for Securities False Statement

- The First Domestic Model Judgment on Securities Disputes: Pan et al. v. Founder Technology Corporation over Securities False Statement Liability Dispute

[Gist]

1. Where there were a number of buying and selling transactions during the period between the false statement date and the disclosure date, as of the first effective purchase, the average price of the purchase calculated by the moving weighted average method can more objectively reflect the actual investment cost. According to the holding period and trading records of each investor, the deduction of systematic risks in the securities market can be calculated by synchronously comparing the average decline of individual stocks with the decline of the market and the industry index at the same period. The impact of market risks on the loss of each investor can be determined by this relative proportion method.

2. This case is the first domestic model judgment on securities disputes. For cases caused by the same false statement in which investors claim compensation, the court determines the common facts and standards of applying the law through this model judgment. Subsequent cases are mediated by professional mediation organizations according to the judicial judgment standards, so as to resolve disputes fairly and efficiently. In the trial process, a third-party professional institution was

introduced to verify the losses of securities investors, which makes the judgment more credible and simultaneously solves the problem of calculation difficulty in a better way.

[Facts]

The defendant Founder Technology Company is a company listed on the Shanghai Stock Exchange, and its publicly issued stock code is 600601. On May 5, 2017, *Decision for Administrative Penalty* [2017] No.43 issued by China Securities Regulatory Commission imposed an administrative penalty on the defendant Founder Technology Company and other responsible persons. It's believed that the Founder Technology Company failed in disclosing related transaction in accordance with the relevant provisions and it had information disclosure violations. According to the *Accounting Standards for Business Enterprises*, Founder Technology Company and its 28 distributors are affiliates subject to the control of Founder Group. Founder Technology Company failed to disclose such material related transactions with distributors in its annual reports and semi-annual report in 2015. The plaintiff accordingly sued the defendant for civil liability for securities false statement.

This case is a model case selected by the court of first instance in a series of disputes about liability of false statement in securities filed by investors against Founder Technology Company. Upon the joint application of both parties, the court entrusted the ISC (China Securities Investor Service Center) to verify the investor's investment difference losses, the existence of securities market systematic risks, and the corresponding deduction ratio.

[Judgement]

On May 5, 2019, the Shanghai Financial Court rendered a civil judgement ([2018] Hu 74 Min Chu No.330), ordering the defendant Founder Technology Company to pay RMB268,536.5 to Pan and three others. After the first-instance judgment, Founder Technology Company appealed. On August 7, 2019, The Shanghai Higher People's Court rendered a civil judgement ([2019] Hu Min Zhong No.263) to dismiss the appeal and uphold the original judgment.

[Reasoning]

The court held that, when reviewing whether a listed company constituted securities false statement tort or not, the existence of subjective intention, such as fraud and inducement at the time of conduct, is not essential. The core of the review is whether the undisclosed information is a "material event", and the criterion for judgment should be "whether the information disclosure will be sufficient to affect investors' investment decisions or market trading prices." The act of buying securities directly related to the false statement is construed to be induced by the false statement on or after the false statement date, until the disclosure date or the correction date. If there are multiple buying and selling transactions of investors, after the first effective purchase, the "moving weighted average method" can be used to determine the average purchase price of securities. This calculation method takes into account the price and quantity of securities purchased by investors every time during the period from the implementation date to the disclosure date, and at the same time eliminates the profit and loss problems caused by selling

securities, which is in line with the spirit of the *Several Provisions Concerning the Trial of Civil Compensation Cases of False statement in the Security Market* (hereinafter referred to as *Judicial Interpretation of False statement*) and can more objectively and fairly reflect the shareholding costs of investors. This avoids abnormally high and low calculation results and is more accepted by all parties in the market. Regarding the proportion of the risk factors of the securities market system, if a uniform proportional deduction is adopted, it will not be able to truly reflect the market system risks experienced by different investors, and will lead to fairness in form but not in substance. Therefore, in this case, based on the holding period and trading records of each investor, the average stock decline during the same period was synchronously compared with the decline of the market and the industry index, and the relative proportion method was used to determine the impact of market risk on the loss of each investor. The result is fairer and more reasonable.

[Significance]

This case is the first case in China to implement a model judgment mechanism of securities disputes. In this case, from effective date of the judgment to April 2020, the court, through the cooperation with the ISC (China Securities Investor Service Center), dealt with more than 1,300 false statement cases involving Founder Technology Company in the form of "model judgment + professional mediation + judicial confirmation", thus effectively resolved conflicts and disputes, timely safeguarded investors' rights and interests, and achieved good results. In terms of the substantive handling of the case, this case makes in-depth and concrete analysis and discussion on legal disputes, such as the

relationship between administrative penalty and civil torts, the determination of causation, the calculation method of investment difference losses, and the proportion of systematic risk deduction in the securities market in recent years, clarifying the relationship between administrative penalty and civil torts, exploring and establishing the calculation method of investment difference loss which is not only in accordance with the existing law but also relatively fair and reasonable, and exploring and establishing a scientific, refined and personalized calculation method for deducting the securities market systematic risk. This case solved the problem of the past judicial practice, where the systematic risk deduction of the securities market could only be determined by the uniform proportion, introducing the professional quantitative data analysis and a third-party professional institution's loss verification mechanism, and creatively constructing the refined loss calculation method. Therefore, this case is of strong demonstration and guiding significance for similar cases.

Financial Institutions and Investors Should Bear Corresponding Liabilities for Investment Losses in Financial Products According to the Degree of Fault

- Hu v. Bank A, Fund Company B on Disputes over Property Damage Compensation

[Gist]

Financial institutions should abide by the Investors Suitability Doctrine when selling financial products to clients. If they fail to fully fulfill their obligations, such as risk ratings, risk warnings, and recommending financial products that meet the customer's risk tolerance, and cause losses to investors, they should bear corresponding liabilities. Investors with certain investment experience, knowing the investment risks and committing to assume the investment risks themselves, should also bear the corresponding investment risks if they choose financial products that exceed their risk tolerance and suffer losses.

[Facts]

In March 2011, Hu subscribed for an open-end fund of 1 million yuan from Bank A with Fund Company B as the manager, and agreed to invest in A shares, stock index futures, funds, bonds, share warrants, etc. Hu signed on the transaction receipt and stated below his signature that, "I am fully aware of the risks in investing open-end funds, voluntarily handling the fund business represented by Bank A, and bearing the investment risk"; Hu signed the *Risk Reminder Letter* on the back of the transaction receipt. Hu's risk tolerance rating and suitability for

purchasing products is moderate. On the same day, Hu submitted the *Personal Product Financial Business Transaction Information Confirmation Form*, which records "According to your risk assessment for me, I am not suitable to buy this product. However, I believe that I fully understand and clearly know the risks of this product, so I am willing to bear the relevant risks, and have adequate risk tolerance and investment resolution to purchase this product. I hereby specifically declare that the decision and implementation of this investment is my voluntary choice, and the risks arising from investment results shall be borne by myself." Attached to the contract involved is the *Stock Index Futures Trading Risk Reminder Letter*, where the asset trustee's deposit is blank. It was also found that Hu had brought RMB 1,000,000 worth of funds with a similar structure of financial products of this case in 2010 and made a profit, and he was once a shareholder of a company. It was further ascertained that since 2015, Hu began to engage in equity investment, and the investment amount was relatively high. Afterwards, due to the loss of the financial products involved in the case, Hu sued Bank A for compensation for investment losses of RMB 180,642.62 and interest on the grounds that Bank A actively promoted financial products higher than his risk tolerance.

[Judgement]

On October 8, 2019, the Shanghai High People's Court rendered a Civil Retrial Judgment ([2016] Hu Min Zai No.31), awarding Hu damages of RMB 72,142.95 to be paid by Bank A and rejecting other claims of Hu.

[Reasoning]

The court held that the loss-sharing of the financial products involved in the case should be comprehensively considered on the basis of both parties' fault liability. First of all, according to the outcome of the risk assessment, Hu is a moderate investor whose risk tolerance is higher than the conservative investor who "protects principal from loss and maintains the liquidity of assets as the primary goal." As a natural person with ordinary cognitive abilities, Hu should be aware of the risks of the transactions he engaged in and the possible legal consequences of the above written commitments when Bank A fulfilled its risk warning obligations. From Hu's investment experience, before buying the disputed wealth management product in this case, he once bought a wealth management product with the same risk level as the disputed wealth management product in this case, and made a profit. Considering the situation that Hu once served as a shareholder of a company and later engaged in risky investment such as equity investment, Hu should be a financial investor with certain experience, so the risk of loss of financial products should be expected. In the case that Hu promised in writing that he was willing to bear the risk and there was no evidence to prove that Bank A had taken active actions to recommend, Hu should bear the main responsibility for the principal loss of the financial products involved in accordance with the principle of "caveat vendor first and then caveat emptor". Secondly, In the process of selling financial products in dispute, Bank A does not complete the procedures of risk warning, thus the risk warning obligations of financial products have not been fully and completely fulfilled. Bank A is at fault and it shall bear corresponding

compensation liability for the principal loss. In view of Hu's main responsibility for the principal loss, Bank A's liability for compensation can be appropriately reduced, and it should bear 40% of the liability.

[Significance]

In recent years, the concept of protecting the rights and interests of financial consumers has been continuously deepened, the financial consumer protection mechanism has been gradually improved, and the investor suitability management obligation of financial institutions has been widely concerned by the society. Financial institutions have significantly higher cognitive abilities on the trading patterns of financial products and risks in financial markets than ordinary financial investors. In the sales of financial products, financial institutions should evaluate investors' risk levels in accordance with the regulatory requirements, and reasonably guide investors to engage in financial transactions that are appropriate to their cognitive level and risk tolerance on the basis of fully understanding their cognitive level and risk tolerance. The court should follow the judgment idea and value orientation of "caveat vendor first and then caveat emptor", and reasonably define the boundary of rights and obligations between the investor and the financial institution. In this case, on the basis of comprehensive consideration of the fault of both parties, the court established the judgment rule that investors and financial institutions should share losses according to their fault, which reflected the value guiding function of judicial judgment in establishing financial transaction rules and advocating correct investment ideas.

The Insurer Shall Compensate the Carrier for the Cargo Damage According to the Degree of Fault

- Logistics Company A v. Insurance Company B on Dispute over Insurance Contract

[Gist]

In the process of concluding a cargo transportation insurance contract with a logistics enterprise, the insurer shall inform and explain the factors that affect the policyholder to insure, such as the types of insurance, rates, insurance liabilities, recovery of cargo transportation insurance and logistics liability insurance based on the principle of good faith. The insurer shall be liable for damages due to insufficient disclosure resulting in damage to the rights and interests of the logistics enterprise, and the scope of compensation shall be limited to reliance interests.

[Facts]

The plaintiff，logistics company A was a transportation company, which insured its transportation cargo with the defendant，insurance company B. During the signing of insurance contract, the insurance company failed to inform and explain to the logistics company A of the rights and obligations of the cargo transportation insurance, especially the ownership of insurance benefits. The insurance policy for logistics goods issued by Insurance Company B stated that applicant was logistics company A and the insured was the owner of the logistics company A's goods. Article 5 "Special Agreement" stated: "The insurer shall not waive

the recovery of equity of the person responsible for the accident under this policy, except when the logistics company A is the actual carrier of the insured goods." Later， the logistics company A was entrusted by the cargo owner C to transport a batch of rubber goods. Logistics company A was caught in a traffic accident during the transportation process, causing loss of goods. After paying compensation to the company C, logistics company A requested the insurance company B to bear the insurance liability according to the insurance contract. The insurance company B refused the compensation on the ground that the logistics company A was not the insured and lacked insurance interests. The logistics company A then filed a lawsuit, requesting that the insurance company B be ordered to compensate the loss of RMB 208,672.56.

[Judgement]

On January11, 2019, the Shanghai Hongkou District People's Court delivered a judgment ([2018]Hu 0109 Min Chu No.9552) : Insurance Company B should compensate Logistics Company A for the loss of RMB 125,203.54. Neither party appealed, and the judgment has become into force.

[Reasoning]

The court held that the logistics company A did not enjoy the owner's interest in the goods which it carried, so its cargo transportation insurance did not have insurable interest from the beginning, and the logistics liability insurance should be matched with its interests. As a professional insurance institution, Insurance Company B is fully capable of distinguishing the differences in the ownership of insurance interests

and the protection of the interests of policyholders, and it should inform and explain truthfully when introducing insurance products to policyholders. Combined with the agreement on the exemption of recovery clause in the logistics cargo insurance policy, the court has reason to believe that the purpose of the contract entered by the logistics company A is to transfer the risk of liability, and not to insure the interests of the third party, that is, the owner of the cargo. Now, after the compensation to the cargo owner, the logistics company A is unable to get compensation from the cargo transportation insurance it has insured due to lack of insurance benefits, and there is a causal relationship between that loss and the failure of the insurance company B to inform and explain the obligation. Now Insurance Company B has not provided evidence to prove that it has informed and explained the nature, difference and recovery risk of the insurance types, so the court held that it was at fault during the underwriting process. When logistics company A did not carefully and reasonably understand the insurance products and breach of contract in the performance of the contract, it should also apply the principle of negligence offset and bear part of its owner losses. To sum up, the court ordered the insurance company B to compensate the logistics company A for 60% of the cargo losses, i.e, 125,203.54 RMB.

[Significance]

There are some differences in subject matter, subrogation right and premium rate between cargo transportation insurance and logistics liability insurance. In practice, one premium rate may be several times or even more than ten times higher than the other. In consideration of saving premiums, some transportation companies choose to insure cargo

transportation insurance to avoid the risk of transportation liability, and some insurance companies simply turn a blind eye to this although they are aware of the differences involved here. After the accident, the carrier cannot receive insurance compensation because there is no insurance benefits, but it is also unfair and unreasonable for the carrier to bear all the losses by itself. It should be comprehensively determined according to the fault behaviors of both parties in the insurance process and the causal relationship in the damage results in specific case. The handling of this case not only put forward an idea of equitable protection for solving this problem and provided guidance for judicial judgments of similar cases but also promoted the orderly and sound development of the logistics insurance market.

Banks are Obliged to Ensure the Safety of Customer Information in Online Banking Business

- Ding v. Bank A on Savings Deposit Contract Disputes

[Gist]

In the case of bank card embezzlement online, the effective criminal judgment confirmed that the transaction involved is an unauthorized one in which criminals used new criminal methods to steal account funds. In the absence of evidence to prove that the cardholder has attributable reasons, if the bank fails to fulfill its security obligations, it shall be liable for compensation for the stolen funds.

[Facts]

On April 24, 2011, plaintiff Ding opened a savings account and received a savings card at defendant A's bank. From 7:29 to 7:35 on September 16, 2015, the plaintiff's account transferred RMB 104,750 to a bank account from another bank with the user name of Zhang through the SMS verification code transfer function. Later at 7:49, the plaintiff was allowed to report the loss of the card orally and report to the economic investigation detachment of Huangpu Branch of the Shanghai Municipal Public Security Bureau. According to the investigation of criminal cases, criminals obtained a large amount of data containing citizens' personal information through illegal channels. By combining this data randomly, they tried to log in to other people's online banking accounts in batches using number scanning software and tried out the correct matching login

name and password. Using the number-changing software to call the customer service of the communication operator, they opened SMS filtering and SMS storage function for others' mobile phones, and logged in to the online banking, then entered the intercepted bank transfer verification code to transfer the money. The plaintiff claimed that the defendant had serious negligence in the security of online banking transactions, and shall be liable for compensating the plaintiff's financial losses. The defendant argued that there was no breach of contract. It was a transfer made after verifying the required security elements. The defendant had fulfilled the security obligations. The plaintiff violated the obligation of information safekeeping and the defendant should not be liable for compensation.

[Judgement]

On January 1, 2019, the Shanghai Huangpu District People's Court delivered a civil judgement ([2018]) Hu 0101 Min Chu No.1312) ordering Defendant Bank A shall compensate plaintiff Ding for capital and corresponding interest losses. The defendant Bank A appealed afterwards. On May 17, 2019, the Shanghai Financial Court delivered the final Judgement ([2019]) Hu74 Min Zhong No. 200) to dismiss the appeal and uphold the original judgment.

[Reasoning]

The court held that Bank A's payment to the imposter did not have an effect of settlement. In the relationship of savings and deposit contracts, the issuing bank is obliged to provide a safe environment for card using, while the cardholder has the obligation to properly keep bank

card information such as bank card numbers and passwords. Even if Ding used the same user-name and password as the bank card involved in the case on other websites, it cannot be concluded that Ding did not fulfill his obligation to properly keep his bank card information. The defendant failed to provide corresponding evidence to prove that Ding's failure to fulfill due diligence obligations resulted in the disclosure of bank card information, and should bear the consequences of failure to provide evidence. According to Article 6 of *the Commercial Bank Law of the People's Republic of China* and Article 38 of t*he Administrative Measures for Electronic Banking Business*, the defendant, as a professional financial institution, has the legal obligation to guarantee the safety of account funds. The defendant, as the issuer of the debit card and the provider of related technology, equipment and trading platform, should strengthen the security management of the trading equipment, places and platform, and update and upgrade the various hardware and software facilities timely to prevent the security breach in capital transactions to the greatest possible extent. From the perspective of the interests of both parties, commercial banks are the parties that obtain economic benefits from the risks of electronic transactions as the developers, designers, and maintainers of electronic transaction systems. Compared with cardholders, they should also be more capable of taking more strict technical safeguard measures to prevent related illegal and criminal acts.

[Significance]

Different from the physical card transaction model, online banking business usually verifies the identity of customers through the consistency of the cardholder's reserved information. But now disclosure

of data information has become the focus in the Internet field. While enjoying the high efficiency and convenience of Internet finance, the transaction subjects in the financial market should also be alert to the accompanying transaction risks. This case is about the savings deposit contract dispute caused by criminals using illegally obtained personal information data to steal funds in online banking through new criminal means such as “hitting the database”. As a provider of electronic trading platforms and a profitee of electronic trading methods, banks are capable and necessary to take strict technical safeguards to ensure the safety of account funds. The judgment in this case has made it clear that the cardholder should prove the disputed transaction to be unauthorized through criminal judgement, and if there is no evidence to prove that the cardholder has a cause of liability, the bank should bear the liability for compensation. This is conducive to urging the industry to improve the security of electronic transactions and standardize financial transactions. Of course, if the bank can provide evidence to prove that the cardholder is at fault for the above-mentioned damages, it can claim relief from its liability for compensation.

If an Insurance Agent Hinders the Policyholder from Making Honest Disclosure, It Shall Be Deemed that Such Honest Disclosure Has Been Completed

- Ding V. Insurance Company A over Life Insurance Contract Dispute

[Case Summary]

During the execution of life insurance contract, if the insurance agent does not fill in the insurance policy according to the policyholder's intent it shall be deemed that the policyholder has made honest disclosure and the insurance company shall pay accordingly.

[Facts]

On June 29, 2016, Ding was found to have a right thyroid nodule after health examination. On August 21, 2016, Zhang, Ding's spouse, who was the policyholder, and Ding as the insured and the beneficiary, bought a life insurance from Huang, who was an insurance company agent. When signing the insurance contract, the policyholder showed the agent a health examination report and told that the insured was found to have thyroid nodules. On behalf of the policyholder and the beneficiary, the agent ticked a "No" for "thyroid or parathyroid diseases" in the insurance policy's disclosure checklist. They then signed on the *Life Insurance Policy (electronic version)* and *Reminders for Life Insurance (through personal insurance channels)*. The insurance contract involved in the case was established and came into force on September 1, 2016. This insurance policy also covers an additional critical illness insurance,

provides life-long coverage and insures a total amount of RMB300, 000.

On April 13, 2018, the beneficiary received a surgery in a hospital and was diagnosed with thyroid cancer in the right side. Later, the beneficiary filed insurance claims. On August 5, 2018, the insurance company issued a *Decision of Insurance Claims Payment*, stating that they would terminate the insurance contract and not refund the premium or pay the claims. It delivered the *Decision of Insurance Claims Payment* to both the policyholder and the beneficiary. But the beneficiary refused to accept the decision and then filed this lawsuit, asking the insurance company to pay the insured RMB300,000.

[Judgement]

On January 21, 2019, Shanghai Jing'an District People's Court delivered a civil judgement (No. 33085, First Instance Civil [2018], Jing'an [0106], Shanghai) which ordered the insurance company to pay RMB 300,000 to the beneficiary. The insurance company appealed. On June 27, 2019, the Shanghai Financial Court delivered the final judgement (No.373 Final Civil Case [2019], Financial Court (74), Shanghai) to dismiss the appeal and uphold the original judgment.

[Reasoning]

The central issue of this case lies in whether the insurance company could terminate the contract and refuse to pay compensation on the condition that the policyholder does not make honest disclosure.

The signatures of the policyholder and the beneficiary in the *Life Insurance Policy* and the *Reminder for Life Insurance* involved in this case were all made by themselves, but the ticking of items on the insurance policy was completed by the agent. When executing the

insurance contract, the policyholder offered a health report to the agent, which indicated that beneficiary had a thyroid nodule. Even if informed, the agent still ticked “No” on the questionnaire checklist on their behalf. The agent’s behavior prevented the policyholder from making honest disclosure, so what was ticked in the policy was not the policyholder’s intention. It should be deemed that the policyholder has already made honest disclosure. Therefore, the insurance company should pay 300,000 RMB to the beneficiary.

[Significance]

As a kind of aleatory contract, the insurance policy is a gambling of the two parties on the understanding of risks. Good faith is essentially important for insurance because the insurer and the insured have different expectations for interests and their information are asymmetric. Meanwhile, the agent’s honesty is an important guarantee for the smooth communication between both parties. The dishonesty and unregulated activities of insurance agents affect the vital interests of the insured and hinders the healthy development of the entire insurance industry. In executing a life insurance policy, the agents tend to fill in the policy on the parties’ behalf, which also gives rise to many dishonest behaviors as is shown in this case. The judgment of this case will help address the dishonesty issues in the insurance agency sector, preserve honesty as the cornerstone of the insurance market, and promote the healthy development of the life insurance industry. The insurance company also has the right to hold the agents accountable for the losses caused by "sick" insurance, which will help curb the illegal practices of the insurance agents.

Soliciting Rental Car Users at a Low Price Through the Network Shall Be Deemed to Have Changed Vehicle Use and Cause Significant Increase in the Risk

-Zheng A v. Property Insurance Company A on Dispute over Property Insurance Contract

[Gist]

In this case, the lessee of the insured vehicle solicited users at a low price from unspecified users through the network, resulting in an insurance accident, which complies with the constitutive elements of the law that the insurer can refuse to pay compensation due to the change of the use of the interests insured, and the insurer may refuse to pay compensation.

[Facts]

A small car of Shanghai license plate is owned by the plaintiff Zheng A. The plaintiff insured the motor vehicle comprehensive commercial insurance with the defendant Property Insurance Company A, covering the period from August 10, 2018 to August 9, 2019. The column of use character of *Motor Vehicle Comprehensive Commercial Insurance Policy* indicates "non-business personal". The column of important notice indicates that "if the risk level of the insured motor vehicle increases significantly due to modification, retrofitting, change of use character, etc., the policyholder shall inform the insurer in writing and apply for a change."

The plaintiff leased the aforesaid vehicle to a third party, a person other than those directly involved in the case, named Song A (WeChat

name). On December 23, 2018, Song leased the car to Yu A and collected the rent and deposit totaling CNY 3,100 yuan. Then Xiao A drove off in the car. At about 11:40p.m. on December 23, 2018, the vehicle collided with the side of a hill in an attempt to to avoid animals, resulting in an accident of damage to the vehicle. The traffic police brigade of a city public security bureau held Xiao fully liable.

Song posted pictures of various cars in his WeChat Moments, along with relevant advertising words for soliciting rental cars users.

[Judgement]

On January 24, 2020, Shanghai Minhang District People's Court rendered a civil judgement ([2019] Hu 0112 Min Chu No. 18496) rejecting the claim of Zheng A. Neither party appealed, and the Judgement has come into force.

[Reasoning]

The Court held that, to determine whether the defendant shall bear the liability for compensation in this case, the following issues need to be clarified: 1. Whether the use of the insured vehicle has been changed; 2. If the use of the insured vehicle has been changed, whether it results in a significant increase of the risk; 3. Although the risk increases, whether it is covered by the insurance contract that the insurer foresees or shall have foreseen.

Regarding whether the use of the insured vehicle has been changed, the parties agreed that the use of the disputed vehicle shall be "non-business individual" at the time of insurance. From the perspective of industry standards, *The People's Republic of China Public Safety Industry Standard for Types of Motor Vehicle - Terms and Definitions*

issued by the Ministry of Public Security clearly states that "non-business motor vehicles" refer to the motor vehicles that individuals or units do not use for obtaining profits", the *Detailed List of Motor Vehicle Utility Nature* attached to the specification specifies that the operating motor vehicles include rental. The dispute vehicle was rented to the outsider Song, who subleased the dispute vehicle to the sublessee. The utility nature of the vehicle changed from the "non-business individual" agreed by the plaintiff and the defendant into commercial use to obtain rental income.

The change in the use of the insured vehicle caused a significant increase in the risk and exceeded what insurer should have foreseen. In this case, the additional risk of the disputed vehicle has been reflected in the following aspects: Firstly, Song advertised through the network to solicit car rental users at a low price towards general people which has objectively and significantly increased the driving frequency and expanded the range, as a result, the probability of a vehicle in risk during operation was also greatly increased. Secondly, as the vehicle use changed, the custodian and operator also changed. No evidence prove that Song has ever done the risk control on the sublessee. Therefore, the change of the disputed vehicle custodian is enough to lead to the increase in the risk, and both the plaintiff and Song treated the increase of the risk in a laissez-faire way. Under this circumstance, the increase in the risk of the disputed vehicle completely goes beyond the provision of the insurer. To let the insurer bear the risk will violate the principle of balance of consideration in property insurance contract, which is not conducive for the insurance industry to develop healthily for a long time.

[Significance]

This case sets the detailed standard of judgement for whether the insurer can refuse compensation for the change of the use of the subject-matter insured. Firstly, it clarifies the factor of liability about insurer's refusal for compensation under such a circumstance: 1. Insured vehicles are used for a different purpose; 2. Danger level of the insured vehicle significantly increased due to the change of its use; 3. The additional risk goes beyond the coverage of the insurance contract that the insurer foresees or shall foresee. Secondly, it clarifies the method of assessing the change of the use of insured vehicles: check the practical use according to the provisions in the insurance contract, and use legal hermeneutics in the light of relevant industry norms to assess in detail from the perspective of dynamic development.

Investors Shall Be Held Liable for Their "Bypassing the Underlying Securities" Investment Behavior that Circumvents Regulatory Provisions

- Ye A v. Securities Company A on Dispute over Margin Financing and Securities Lending Business

[Gist]

The purpose of investors participating in the "bypassing the underlying securities" transaction of margin financing and securities lending business is to get benefits from circumvention of the regulatory restriction that "margin financing and securities lending business can only target at the underlying securities". The premise of whether a securities company is liable for an investor's investment in circumventing supervision shall be based on whether it has fulfilled relevant legal or agreed obligations. If the securities company has fulfilled its legal or agreed responsibilities during the entire trading process, the loss arising from the increased trading risk due to circumvention of supervision shall be borne by the investor.

[Facts]

On May 18, 2017, Ye A and Securities Company A signed *the Margin Financing and Securities Lending Contract*, which stipulated that when Ye's credit account maintains the guarantee ratio below 130% and no collateral is supplemented or margin financing and securities lending business liabilities are repaid on the next trading day, the securities company has the right to compulsorily close the position of the assets in Ye's account. If securities in Ye's credit account are given a risk warning,

the market value discount of the securities shall be adjusted to 0% from the 21st trading day after the risk warning is given. After the signing of the contract, Ye conducted margin financing and securities lending business and adopted the method of “bypassing the underlying securities” to operate the investment behavior. Since October 2017, Ye has repeatedly issued a series of trading orders of “margin selling and financing buying” through his credit account, and finally realized the unfreezing of margin financing and securities lending business liabilities into his own funds through “repayment of bonds”, and then operated to buy offset margin securities, i.e. A shares. Through this mode of operation, Ye bought all the funds in his credit account into A shares, and at the same time used the shares as the collateral for his debt of margin financing and securities lending business. The stock was suspended from trading on January 18, 2018, and will be subject to risk warning from February 8, 2018. According to the contract, Securities Company A adjusted the market value discount of the stock to 0% from March 15, 2018, resulting in the maintenance guarantee ratio of Ye’s credit account lower than 130% of the closing line. According to the agreement, Securities Company A took compulsory measures to close the position. Securities Company A filed a lawsuit due to Ye’s overdue payment, requesting Ye to repay the remaining financing principal of more than RMB 6 million and the corresponding financing interest and liquidated damages. During the trial, Ye believed that A shares are not the subject-matter securities of margin financing and securities lending business. According to the regulatory provisions, margin financing and securities lending business can only be conducted against the

subject-matter securities. In the process of margin financing and securities lending business involved in this case, there was a "bypassing the underlying securities" operation, which violated the securities regulatory provisions. Securities Company A allowed Ye to conduct the "bypassing the underlying securities" in violation of the regulatory obligations, therefore, Securities Company A shall bear part of the losses.

[Judgement]

On October 8, 2019, Shanghai Jing'an District People's Court delivered a civil judgement ([2018] Hu 0106 Min Chu No. 29128): Ye repaid the remaining financing principal of more than 6 million yuan and the corresponding financing interest and liquidated damages. Neither party appealed, and the Judgement has come into force.

[Reasoning]

The court held that the main focus of dispute between the two parties was whether Securities Company A shall be liable for the losses caused by the "Bypassing the underlying securities" operation. According to Article 18 of *Administrative Measures on Margin Financing and Securities Lending by Securities Companies*, Securities bought by clients under margin financing and securities sold by clients under securities lending shall not exceed the scope stipulated by the stock exchange. The A shares involved are non-underlying securities. However, in this case, according to the specific operations of Ye's purchase of A shares through "bypassing the underlying securities", although the original source of funds for Ye's purchase of A shares was indeed obtained through cash out of margin financing and securities lending business, the initial process of obtaining funds involved short selling or margin trading against the

underlying securities, which fully complied with the aforesaid Article 18 of *Administrative Measures on Margin Financing and Securities Lending by Securities Companies*. Afterwards, Ye used his own funds obtained by means of "bypassing the underlying securities" to buy A shares, while the *SSE Detailed Rules for Margin Financing and Securities Lending Business* and the *SZSE Detailed Rules for Margin Financing and Securities Lending Business* both stipulate that investors may use their own funds to buy securities which may be used as collateral in place of security deposit under the credit securities account. Although the A shares in this case were non-underlying securities, they were securities which may be used as collateral in place of security deposit and be recognized by Securities Company A when Ye purchased them. Therefore, such trading mode did not violate the prohibitions of the current regulatory rules. From the perspective of burden of liability, the premise for a securities company to assume liability for the risks and losses caused by investors' trading behavior shall be based on its failure to perform relevant statutory or contractual obligations. According to the above regulatory provisions, as a securities company, Securities Company A has no statutory obligations to restrict investors from operating "bypassing the underlying securities". According to *Margin Financing and Securities Lending Contract* Securities Company A does not have the contractual obligation to control "bypassing the underlying securities" operation. Therefore, if Ye takes the "bypassing the underlying securities" operation to buy non-underlying securities and causes losses, he shall bear the corresponding trading risk. His requirement for Securities Company A to bear the liability is without legal basis or contractual basis.

[Significance]

The purpose of “bypassing the underlying securities” of margin financing and securities lending business is to get benefits from circumventing the regulatory restriction that “margin trading can only target at the underlying securities”. Although this investment behavior of circumventing supervision amplifies the trading risk and needs to be further improved, the current regulatory laws and regulations do not clearly stipulate that the securities companies have the statutory obligation to restrict or supervise the investors to carry out “bypassing the underlying securities” trading. From the perspective of protecting investor’s rights and interests, we shall maintain sufficient awareness of investment risks. A qualified investor shall strictly abide by good faith, carry out fair trading, and bear his own risks. Definitely, what needs to be specially pointed out is that securities companies shall also adopt reasonable system design to prevent investors from engaging in trading behaviors that circumvent regulatory regulations to control trading risks.

Judicial Settlement on Factoring Disputes over Using Bill Transfer as the Transfer of Creditor's Rights

- Commercial Factoring Company A v. Company B on Dispute over Factoring Agreement

[Gist]

In factoring transactions based on the endorsement of bills is used as a form of the credit assignment, if the parties to the transaction do not agree that the original claims will be eliminated after the delivery of the bills. When the bills are not redeemed after the maturity, the debtor shall not be deemed to have fulfilled the obligation of payment. The factoring company will claim rights based on the bill relationship or the factoring agreement.

[Facts]

On April 20, 2017, Company C and Factoring Company A signed an *Agreement on Commercial Factoring*, agreeing Company A would provide Company C with domestic recourse factoring financing services with a maximum amount of 20 million yuan. On the same day, company C and Factoring Company A signed *Agreement on the Transfer of Accounts Receivable* and *Notice of Transfer of Accounts Receivable*. Man He issued a *Maximum Guarantee Letter to Factoring Company A*, providing a joint liability guarantee with a maximum amount of 24 million yuan. On April 21, 2017, Company C endorsed to factoring company A the electronic commerce acceptance bill of 5 million yuan with the maturity date of February 24, 2018, and factoring Company A issued financing fund of 5 million yuan with the maturity date of March 6,

2018. On April 27, 2017, Company C endorsed to factoring company A two electronic commerce acceptance bills with the maturity date of March 24 and 25, 2018, respectively. and factoring Company A issued two factoring financing funds worth of RMB 2 million with the maturity date of April 3 and 4, 2018, respectively. After the expiration of the three electronic commercial acceptance bills mentioned above, factoring company A reminded that the payment was not redeemed. After the expiration of the three factoring financing funds above, Factoring Company A also did not receive the accounts receivable due from Company B and Man He.

[Judgement]

On February 15, 2019, Shanghai Pudong New Area People's Court delivered the Judgement of (2018) Hu 0115 Min Chu No 53159, holding that: 1. Company B paid the principal and related interest of the account receivable of Factoring Company A; 2. If Company B failed to perform the first payment obligation mentioned above in full, Defendant C should return the outstanding amount of Company B to Factoring Company A within the scope of factoring financing principal and liquidated damages; 3. Man He is jointly and severally liable for the payment obligation of defendant C. After delivery the judgment, Company C appealed. On August 27, 2019, the Shanghai Financial Court entered a final judgment ([2019] Hu 74Min Zhong No. 418) to dismiss the appeals and uphold the original judgment.

[Reasoning]

The court held that Company C transferred the claims of the account receivable to Factoring Company A in the form of bill endorsement, and

Company B confirmed that it received the *Account Receivable Transfer Notice*. Therefore, Company B should perform payment obligations to Factoring Company A. Although Company B argued that its endorsement of the transfer of the three electronic commercial acceptance bills involved in the case to Company C should be deemed to have fulfilled the payment obligations, in light of the parties to the disputed transaction did not agree to the delivery of the bill, the creditor's right was eliminated. The Factoring Company A failed to fulfill the right to request bill payment, indicating that it failed to obtain actual full payment as a creditor, and its relationship with the rights and debts of company's creditor has not been eliminated, therefore, it has the right to exercise one of the right of accounts receivable and recourse. Therefore, the claim of Factoring Company A to require Company B to pay the principal of 9 million yuan in the debt receivables has facts and legal basis, and the court supports it. Since factoring company A did not receive the full amount of receivables after factoring financing fund expired, it was entitled to exercise the right of recourse in accordance with the *Commercial Factoring Business Contract* involved in the case. Therefore, the claim of Company A to require Company C to return the factoring financing principal of 9 million yuan and to pay overdue liquidated damages was also supported by the court.

[Significance]

Note settlement factoring is an innovative form of factoring business. The factoring company transfers accounts receivable and at the same time transfers the bill as a settlement tool for the account receivable. Factoring relationship and bill relationship intersect and two types of claims based

on bill rights and factoring agreements appear. In this case, the decision that “the bill is not redeemed due and cannot be regarded as the debtor fulfilling the payment obligation” has clarified two different legal relationships, which is the recognition of the factoring innovation business and is conducive to promoting the healthy and orderly development of the factoring industry.

Judicial Settlement on Financial Lease Lessor to Recover and Dispose the Leased Assets Without Notice

- Company A v. Company B on Dispute over Financial Lease Contract

[Gist]

If the financial lease lessor recovers and disposes the leased property at its discretion, the lessor shall follow the principle of fairness and provide sufficient evidence to prove the reasonableness of the price of its disposal of the leased property. Without the lessee's approval, if the lessor did not entrust a qualified professional agency to evaluate the value of the leased vehicle, and could not provide other evidence to prove that the price of the vehicle for its disposal truly reflects the market price, then its claim that the disposal price of the leased goods is reasonable could not be established.

[Facts]

In August 2016, plaintiff A signed a financial lease contract and its annex with defendant B and defendant Gu, stipulating that: defendant B transferred its own 3 Dongfeng wreckers to the plaintiff and leased it through a sale and leaseback transaction back to use, the defendant Gu was a co-lessee. On the same day, the defendant Zhu issued an *unconditional irrevocable guarantee letter* to the plaintiff, and assumed irrevocable joint and several guarantee obligations to the plaintiff for all obligations and liabilities under the financial lease contract.

During the performance of the contract, defendant B began to default on rent since March 2017. Due to the breach of contract by

Company B, plaintiff A recovered the leased vehicle in June 2017. The outsider C company issued the *Appraisal and Evaluation Report* in June 2017, saying that it accepted the plaintiff's commission to appraise and evaluate the leased vehicle. Based on June 2017, the evaluation amount was 190,000 to 200,000 yuan. The legal representative of Company C, Zhang, issued a *Consent Letter* in July 2017 as a buyer to purchase the financial lease vehicle from the plaintiff at a price of 200,000 yuan. The plaintiff filed a lawsuit to the court, requesting an order to terminate the contract. Company B and Gu compensated for the loss (unpaid rent and corresponding liquidated damages minus the remaining value of the sale value of the leased property) and overdue liquidated damages. And Zhu assumed joint and several liability for guarantee.

[Judgement]

On April 3, 2019, the Shanghai Pudong New Area People's Court delivered a civil judgement ([2018] Hu 0101 Min Chu No.17367) rejecting the petition of Company A's other requests. After delivery the judgment, Company A appealed. On July 9, 2019, the Shanghai Financial Court entered a final judgment ([2019] Hu 74 Min Zhong No. 439) to dismiss the appeals and uphold the original judgment.

[Reasoning]

The court held that the main focus of the dispute in this case was: whether the loss caused by the termination of the financial lease contract claimed by Plaintiff A is justifiable.

Firstly, in accordance with Article 22 of the *Interpretations of the Supreme People's Court on Several Issues Concerning the Trial of Financial Lease Contract Cases*, after the lessor terminates the contract,

the scope of compensation for losses covers the difference between all outstanding rental of the lessee(and other expenses) and the value of the lease item taken back. Secondly, Company A claimed to recover the value of the leased property at 200,000 yuan, and calculated the loss accordingly. In view of the fact that the disposal of finance leased vehicles was completed by Company A unilaterally, and the disposition amount of 200,000 yuan was larger than the purchase price of 426,000 yuan a year and four months ago, therefore, Company A should provide evidence to prove the reasonableness of the disposal price. However, Company A only provided the *Appraisal and Evaluation Report* issued by Company C without the qualification of motor vehicle appraisal and evaluation, and in accordance with the evidence provided by Company A, the buyer of the leased goods was the legal representative of Company C. Under this circumstance, it is obviously impossible to objectively reflect the true value of finance leased vehicles based on the above *Appraisal and Evaluation Report*. In addition, Company A also stated that the financial lease vehicle has been transferred from the name of Company B to the name of the buyer, which shows that the lessee knows and agrees to dispose of the financial lease vehicle at a price of 200,000 yuan. The court held that, in accordance with the financial leasing transaction model in this case, Company B had transferred the ownership of the finance lease vehicle to Company A, and Company B was only the nominal owner of the vehicle. In this case, the transfer of the vehicle does not mean Company B’s approval of the vehicle transfer price. In fact, the vehicle transfer data provided by the Shanghai Municipal Public Security Bureau Traffic Police Corps also does not contain relevant materials that

can prove Company B's approval of the vehicle transfer price. Therefore, the court did not accept the claim of Company A.

In conclusion, because Company A failed to provide evidence to prove that the value of the recovered leased vehicle was fair and reasonable, it could not be determined that there was a loss after the recovery of the leased vehicle by Company A. Therefore, the claim made by Company A for the loss caused by the termination of the financial lease contract are not supported by the court.

[Significance]

The law fully respects the autonomy of the parties concerned, but at the same time the law also emphasizes that civil subjects engaging in civil activities shall define their rights and obligations in accordance with the principle of fairness. The value of the leased property as the basis of the financing function of the financial lease contract often involves the balance of interests between the parties to the contract. Once a dispute occurs, the determination of the value of the leased object and the deduction are often the focus of dispute between the parties. The judgment in this case provides new ideas for handling cases in judicial practice, and it also has a standard guiding significance for financial leasing companies. The financial leasing company shall improve the contract terms, follow the principle of fairness to determine the rights and obligations between the parties, increase the awareness of compliance, and give priority to the legal, open, fair and reasonable way to carry out the financial leasing business.

Criteria for Recognition of Life Insurance Insured's Unfulfilled Duty of Disclosure Criteria of Ascertaining Personal Insurance Applicants' Unfulfilled Duty of Full and Accurate Disclosure

- Ouyang v. Insurance Company A on Dispute over Personal Insurance Contract

[Gist]

Article 16 of China's current *Insurance Law* does not specify the criteria of ascertaining the insurer's right to terminate the contract due to the insurance applicant's intentional or gross negligence of failing to perform the obligation of full and accurate disclosure. In practice, the criteria of ascertaining shall focus on the elements of the risk, and be limited to the content stated in the insurance contract and the content inquired by the insurer. If the insurer's inquiry is too general, the case shall be analyzed in terms of the insurance applicant's cognitive judgment, medical treatment and other factors. If the insurance applicant fails to recognize the severity and inevitability of the risk, it shall not be decided that the insurance applicant has failed to perform the duty of disclosure intentionally or out of gross negligence.

[Facts]

Ouyang is a teacher of a school. On September 13, 2017, a family of three in Ouyang signed personal insurance contracts with Insurance Company A respectively. At the time of insurance application, the agent of the insurance company downloaded the insurance software, filled in

the registration information, set the password, filled in the *Personal Insurance Application* (electronic version), and asked the insurance applicant Ouyang, “What is your health status?” The insurance applicant answered: “I am in good physical condition.” Earlier, Ouyang took part in the annual physical examination organized by the unit on April 23, 2017. the physical examination report said, “Considering the possibility of sequelae of lung inflammation, a follow-up test was suggested”. Ouyang did not follow the above instructions and didn’t see a doctor. On April 15, 2018, Ouyang took part in the unit's annual physical examination again and a small nodule was found in the lower right lung. According to the suggestion of the medical examination center, Ouyang went to a hospital, where he was diagnosed with a malignant tumor of the lower right lung. The plaintiff Ouyang spent a total of 59,961.14 yuan during hospitalization. Ouyang then applied for a claim. The insurance company sent staff to inquire about the information of the annual physical examination before the insurance application, and Ouyang provided the annual physical examination report to the insurance company immediately. Afterwards, the insurance company notified the termination of the *Personal Insurance Contract* on the grounds that Ouyang had failed to truthfully report the medical history and refused to pay the insurance. Ouyang then took a legal action, requesting confirmation of the validity of the insurance contract and asking the insurance company to pay the insurance amount agreed in the contract of 286,914.88 yuan.

[Judgement]

On November 28, 2018, People’s Court of Chongming District of Shanghai made a civil judgement ([2018] Hu 0151 Min Chu No.8478)

which ruled that the disputed insurance contract is valid; the insurance company shall pay the insurance amount of 286,914.88 yuan and corresponding interest. After the first instance judgment, the insurance company filed an appeal, and withdrew the appeal during the second instance. On May 28, 2019, the Shanghai No. 2 Intermediate People's Court made the decision ([2019] Hu 74 Min Zhong No.168) to approve the withdrawal of the case.

[Reasoning]

The court held that the insurance system is to provide compensation for the loss of various types of specific accidents when they actually occur. This risk is probabilistic which manifested as the uncertainty of the time of occurrence of the risk and the consequences and the unintentional nature of the insurance applicant. To determine whether it meets the policyholder's intentional or gross negligence and fails to fulfill the duty of disclosure as stipulated in Article 16 of the *Insurance Law*, the court shall take a comprehensive consideration: First, whether the insurance agent will make reasonable inquiries when the insurance applicant applies for insurance. In this case, the insurance agent only asked in general whether the applicant was in good health, but did not professionally inquire literally in accordance with the contract, and failed to fulfill his duty of reasonable inquiry. Second, the insurance applicant's awareness of his/her illness. The insurance applicant had never had a critical disease before the insurance, and other medical records were infrequent. It can be seen that the insurance applicant assumed his physical condition was good based on subjective judgment, and he was not aware of the abnormality of the examination results on the physical examination report.

The disclosure is consistent with his general cognition. Third, at the time of insurance application, it should be determined whether the insurance applicant's critical disease is diagnosed or a possible risk. In this case, the insurance applicant's critical disease was only a possible risk when insured, and it was covered by the insurer. Fourth, other possible factors for the insurance applicant to fail to perform the duty of disclosure when applying for insurance. Based on the status of the insurance applicant and the fact that the insurance applicant provided the physical examination report immediately when the insurer came to the door to investigate, it can be confirmed that the insurance applicant has not subjectively concealed or obstructed. In conclusion, the court held that there was no intentional or gross negligence and the insurance applicant fulfilled the duty of disclosure. Therefore, the conditions for the insurer to terminate the *Personal Insurance Contract* were not established, and the insurance shall be paid as agreed.

[Significance]

In practice, there is a lack of clear and specific criteria of ascertaining the insurance applicant's unfulfilled duty of full and accurate disclosure due to intentional or gross negligence under Article 16 of China's current *Insurance Law*. This case is based on facts and a comprehensive analysis of the laws and regulations. It clarifies the factors for consideration to judge whether the insurance applicant under the comprehensive personal insurance contract has performed the duty to inform the critical diseases based on the "risk" element specified in Article 16 of the *Insurance Law*, and provides practical criteria of ascertaining in the judicial practice of similar cases.