Analysis of the introduction of a litigation trust system for representative actions in civil securities disputes

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Abstract. The introduction of a litigation trust system into special representative actions for civil disputes over securities is an institutional innovation. Litigation trust is a trust system and a form of litigation party in which the principal transfers the substantive rights such as claims and the corresponding litigation rights to the trustee, who conducts litigation as a litigation party for the realization of the substantive interests, and the resulting litigation benefits accrue to the beneficiary. In this article, after distinguishing representative actions and litigation trusts in civil securities disputes, we explain this institutional innovation from the perspectives of necessity and rationality.

Keywords: Securities; Civil Disputes; Litigation Trust System.

1. Explanation of the concept of litigation trust

1.1 Definition

A litigation trust is a special type of trust that has the general characteristics of a trust, but essentially has the purpose of anticipating possible litigation to achieve substantive rights. A litigation trust is one in which the trustor takes the necessary steps to preserve the trust property, and the trust enjoys the property rights of the trustee and can litigate in the position of the rights holder (i.e., in the name of the trustee).

The term litigation trust is defined in various ways, because the discussion in this paper is specifically for group litigation, and refers to private litigation trust, in this reference to Professor Xu Wei's views, including public interest litigation trust and private litigation trust, and both litigation trusts meet the theoretical conditions of the expansion of the parties' eligibility, the specific meaning of the litigation purpose of the parties to the litigation rights and substantive rights to the trust The trustee is able to conduct the litigation as a party to the lawsuit, and the proceeds generated will go to the beneficiaries. This article focuses specifically on the private benefit trust in civil disputes over securities torts.

1.2 Features and operation mechanism

First, a litigation trust meets the basic elements of a trust, and upholds the same concept as a trust. The structure of the parties to a trust consists of a principal, a trustee and a beneficiary, and the elements and main forms of a litigation trust are the same as those of a trust. However, in a trust, the principal can only transfer the right to use the property to the trustee, while in a litigation trust, the principal transfers all the substantive and litigation rights of the property to the principal, so that the principal can exercise the right to litigate through the property.

Second, the litigation trust is a manifestation of the expansion of the parties' eligibility. In the traditional Chinese party litigation system, only qualified parties, i.e., parties with close interests in the case, have the opportunity to intervene in the case, and this traditional system can effectively control the number of cases and avoid the waste of judicial resources. With the development of the Internet and other information technology, the number of social disputes has increased significantly, and there is a wide range, large scale, new types of characteristics, so that the traditional party dispute mechanism lags behind the actual needs of people, in order to deal with new social disputes, the

expansion of party eligibility to meet the requirements of objective social development, litigation trust by virtue of the flexibility and adaptability of the trust mechanism was born.

Third, litigation trusts expand to the field of private interests. In judicial practice, the mechanism setting of litigation trust mostly focuses on environmental governance, consumer rights protection and copyright protection, facing group disputes, in order to protect the public interest of society. However, due to the emergence of new types of disputes, the litigation trust system can also be well applied to the private interest field, the so-called private interest litigation trust system refers to the civil litigation purpose of the parties can transfer the case interest or substantive rights to the trustee, the trustee can also carry out civil litigation as a party to the case, the profits generated also belong to the beneficiaries of a system, in the securities field. A private interest litigation trust can be applied.

1.3 Comparison with extraterritorial systems

Unlike civil law countries, which generally restrict litigation trusts, the trust system in the United States is very developed, and trusts are used in all areas of life, and it generally adopts a policy of encouraging the use of trusts and the development of trust products, just like China in the field of contract "to encourage the validity of contracts". Under this policy, since the law does not explicitly provide that litigation trusts are invalid, the establishment of such trusts by the parties is naturally valid.

Judicial Practice. Litigation trust has penetrated into the judicial system of the United States, Germany and other countries, especially after the ratification of the Hague Trust Convention, trust transcends traditional national boundaries. Common law countries have entered the research stage of trust litigation specific problem solving, facing such issues as bankruptcy trust litigation, Z-trust litigation, etc. Insolvency trusts, whether trusts are suitable to be incorporated into the arbitration system by the litigation system are also hot issues at this stage. In terms of type update, Oliver Passmore (2020) in his article "Insolvent trusts-the Z Trusts litigation" mentions that the Z Trust litigation in Jersey represents the first time that the court considered what happens when a trust becomes "insolvent What happens when a trust becomes "insolvent". At this point, dealing with this situation should address everything from the duties of the trustee, to the procedures for creditor claims, to the issue of priority among creditors. In terms of procedural construction, some US scholars such as Tina Westman (2018) also argue that the development of litigation trusts has matured and the privacy and confidentiality of arbitration has made trust arbitration possible.

As for institutional updates. First, the scope of application of litigation trusts is being expanded. From the earliest private interest litigation trusts, they are gradually being expanded to public interest litigation trusts, such as Juliana v. United States, which sparked discussion of atmospheric public interest litigation trusts, a global movement called Atmospheric Trust Litigation (ATL) launched back in 2012.ATL proposes a macro litigation approach to the climate crisis that focuses on treating the atmosphere as a whole asset. As trustees, all states have a primary fiduciary obligation to their citizen beneficiaries to restore the health of the atmosphere. Second, the areas of application of litigation trusts are constantly being updated. One of the more interesting areas is the probate litigation trust, where some scholars such as Professor Molly from Oxford University argue that humanitarian concerns should be added to the probate litigation trust, meaning that we cannot require the trustee to simply mechanically comply with the requirements of the deceased principal to preserve the actual value of the capital, and that we should give the judge discretion in this regard in the design of the system. Finally, there is a more in-depth institutional exploration of the interests of the principal trustee, for example, Kate Davenport, QC's article "In depth Recoverability of Trustee Litigation Costs" published in Trusts & Trustees explores the trustee's interest in For example, Kate Davenport, QC, in her article "In Depth Recoverability of Trustee Litigation Costs" in Trusts & Trustees, explores the right of trustees to be reasonably compensated for costs "properly incurred" and "within reason", and how this system of compensation can balance the interests of trustees and beneficiaries.[1]

Court proceedings. Because a litigation trust is essentially a fiduciary model, the rules set forth with respect to court proceedings apply equally to litigation trusts. First, the trustee's discretion is not

absolutely unlimited, although, as the language of the U.S. Uniform Trust Code claims to grant broad discretion, the trustee must act fairly in equity in making decisions that affect different classes of beneficiaries differently. Second, trustees are subject to non-fiduciary duties in addition to their fiduciary duties, what we commonly refer to as the duty of care, but the duty of care here should be distinguished from the duty of loyalty, such as that referred to by Lord Walker of England in the House of Lords case of Hilton v. Barker Booth & Eastwood (2015), where "if a solicitor in investigating a title or drafting a lease carelessly, he may be liable to pay damages for breach of his professional duties, but this is not a breach of the fiduciary duty of loyalty; it is only a breach of the duty of care". Judges should make decisions appropriate to the different duties when hearing a case.

2. The vast differences between litigation trusts and special representative actions

2.1 Different permissions

In a litigation trust, except for special provisions in the trust instrument or special provisions in the legislation, as long as the trustee conducts litigation trust activities, he has all the civil litigation rights necessary to achieve the substantive rights and interests of the principal, and neither the principal nor the beneficiary may interfere with the prosecution activities as long as the principal is prudent and honest in doing so. However, in the special representative litigation, the representative can only engage in litigation activities and corresponding litigation acts within the scope of the parties' authorization, and cannot exceed the authority to do so arbitrarily, the representative changes or waives the litigation request or acknowledges the opposing party's litigation request, and the settlement must be agreed by the represented party, even if the litigation act is in the interests of the represented party.

2.2 Different internal legal relationships

In a litigation trust, the principal, the trustee and the beneficiary are primarily included. Although the trust essentially involves a contractual relationship, the judicial connection between all three of these relevant parties is contractual. In contrast, in the special representative civil system, the parties are both the representative and the defendant party, and the legal relationship between the two is one of appointment.

3. Need for litigation trust

3.1 The doctrinal value of litigation trust

First, a litigation trust is economically reasonable and feasible. For the subject of the dispute, litigation trust, like trust, is a feasible remedy after being caught in a securities infringement dispute. In the litigation trust, the parties can appropriately provide legal service fees, use the trust mechanism, improve the efficiency of litigation, reduce the burden of litigation, and enhance the predictive power of litigation disputes. In modern society, new types of litigation are emerging, and the inevitable lag in the development of substantive law has caused a lack of standing for such litigants, and litigation trusts provide a practical way for parties to enter litigation, which largely protects the public interest.

Second, litigation trusts increase access to remedies. The litigation trust system through the individual entrusted to form a collective, with a high degree of autonomy and stability, is a feasible and efficient option. If the law prohibits litigation trust, so that the court should be able to recuse themselves from the lawsuit, in the short term, does help to ease the pressure on the court, but in the long run, will undoubtedly gradually abandon the role of people's expectations of the law, disguised deprivation of the parties to use litigation to obtain a fair trial and the right to resolve disputes.

Third, litigation trust can expand the party-eligible subjects and provide investors with more choices. With the development of the Internet and other information technology, social disputes have

increased significantly, and there is a wide range, large scale and new types of characteristics, making the traditional party dispute mechanism lags behind the actual needs of people, in order to deal with the new social disputes, the expansion of party eligibility has met the requirements of objective social development. In order to deal with new social disputes, the expansion of the parties' capacity is in line with the objective social development.

3.2 Rationalization of judicial practice of litigation trust

Article 11(4) of the Trust Law enacted in 2001 stipulates that "trusts cannot be established for the purpose of litigation and debt collection." From the content of this law, our country, like Japan and Taiwan, prohibits litigation trusts and debt collection trusts, but it does not prevent the litigation trust system from achieving good results in judicial practice. We believe that litigation trusts have strong adaptability in judicial practice.

3.2.1 Economic reasonableness of litigation

There is an economic rationale for litigation trusts, meaning that the litigation effects of litigation trusts outweigh the institutional costs behind them. From this perspective of our litigation trust system, the litigation trust has the effect of excluding fragmentation and fragmentation in group litigation, and facilitates the integration of fragmented and sizable interests to form a unity of interests. From the perspective of the parties, the trustee is transferred the substantive rights and litigation rights to give him sufficient voice to fully access the actual rights of litigants, saving the cost of communication and procedural costs, but also to reduce the litigation of the parties. From the judicial level, the group litigation trust circumvents the occurrence of duplicate cases, reduces the cost of court notification to each party, because under the characteristics of the trust mechanism, the trustee has full substantive rights, the amount of the group of parties in a sense into a whole, the distribution of benefits under the whole also has the support of the trust mechanism, reducing the burden of the insured institutions and courts.

3.2.2 Relief by way of expansion

For small and medium-sized investors, the special representative litigation system for them to break the previous securities disputes can not be sued the deadlock, but although with the establishment of the special representative litigation system, the interests of small and medium-sized investors have been greatly protected, but so far, the number of cases to start the representative litigation system is still not much, securities disputes under the parties "dumb and dumber "The main reason for this is that there is no mechanism for small and medium-sized investors to take a real dominant position. The litigation trust system can be a good solution to the difficulty of judicial practice of special representatives in this regard, through the group entrusted, the formation of relief inertia, insurance institutions also form a fixed paradigm for dispute resolution. The realization of the group litigation trust mechanism opens the door to the rights of small and medium-sized vulnerable investors, with the introduction of the trust mechanism, the selection criteria of the insurance agency will become more open and transparent, the insurance agency will not be confined to the public interest nature and narrow the scope of the selection of cases, while increasing the efficiency, you can increase the number of special representative litigation cases. The special representative litigation system will be truly extended to the field of securities tort disputes.

3.2.3 The parties are fit to expand

The litigation trust can also be in judicial practice to make the parties eligible to expand, the existing special representative litigation system also did this, but in comparison, the litigation trust more able to expand the scope of eligible parties, because many parties because the cost of litigation is greater than the benefits, choose to give up litigation, although the special representative "express withdrawal Although the special representative "express withdrawal" mechanism and public interest insurance institutions as a representative of the system to solve this problem, but so far, only Comet Pharmaceuticals case was selected by the insurance agency, there are so many securities tort civil

disputes of the parties can still only choose to "dumb", from another point of view, as an From another point of view, as an economic person, not all existing cases in the litigation efficiency is very high, the parties in order to avoid litigation, or will choose to withdraw from the representative litigation. But after the introduction of litigation trust, the situation is different, in the case of ineffective litigation, the economist will choose to transfer all the substantive rights to the trustee, the principal in the process, whether there is no judgment, or whether there is no enforcement, will improve his litigation effectiveness.

4. Conclusion

In general, many systems have been developed from scratch, and now we dare not imagine and promote the system not because it is not applicable, but more because the promotion and realization of the system requires a certain process, and we need to do our best to avoid risks in this process. Putting aside the possible risks of abuse, the trust system itself is a system that exists because of its flexibility and transcendence, and the introduction of the trust mechanism for group litigation will certainly solve the problem of inefficient group litigation, although there are many problems that need to be designed to avoid the system, but the macro view, the introduction of trust litigation is a choice that has more advantages than disadvantages.

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