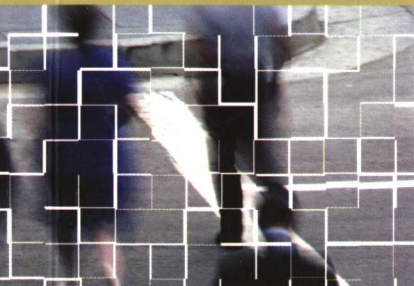


民 商 法 文 丛



注册会计师 对第三人 民事责任研究

彭真明 著

中国社会科学出版社

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中文摘要

注册会计师的民事责任问题，从 20 世纪 80 年代的诉讼爆炸以后，在许多国家都成为一个热点与难点。针对会计师事务所提起的诉讼往往成为媒体追逐的话题，因为它们大多与著名公司的破产或原告的巨额索赔联系在一起。如域外的安然—安达信，本土的银广夏—中天。同时，长期以来，会计师职业界与法律界以及社会公众之间就注册会计师民事责任的边界问题难以达成共识。实际上注册会计师的民事责任问题归根到底是一个资本市场风险的公平与合理分配的问题，研究注册会计师的民事责任问题，重点是在公司、注册会计师（会计师事务所）与报表使用人三者之间实现一种利益的平衡。本书以注册会计师对第三人的民事责任为研究对象，以证券市场信息披露中的注册会计师的民事责任为研究重点，对注册会计师对第三人民事责任的理论基础、责任性质、归责原则、责任认定及会计师侵权损害赔偿等问题进行了系统的探讨。

全书除引言部分外，分为五章，约 20 万字。

第一章从分析注册会计师及其性质定位入手，主张将注册会计师定性为专家，并从专家的角度分析了注册会计师的特征。在此基础上，进一步探讨了会计师职业产生和发展的法律背景。会计师职业作为一种较为特殊的职业，具有公共性、企业性、独立性、行业自律性等特点。注册会计师民事责任应属于专家责任范畴，它具有专家责任的共性。注册会计师对第三人承担民事责任的基础是专家的高度注意义务，并对注意义务及高度注意义务的内涵及其构成进行了较为全面的阐述。注册会计师对第三人的民

事责任为会计师违反其高度注意义务，过失出具虚假财务会计报告所应承担的责任，它产生的背景是 20 世纪 60 年代以来深刻的社会经济环境的变迁和人们对民间审计作用认识的提高。

第二章通过对两大法系立法与判例对注册会计师民事责任性质认定的分析，认为英美法系无论是制定法还是习惯法，均将注册会计师对第三人的责任定性为侵权责任，而大陆法系国家并不都将注册会计师对第三人的责任定性为侵权责任。德国立法长期以来不承认会计师对第三人的责任，为了保护投资者的利益，德国判例法在夹缝中肯定了信息提供者对第三人的责任，并且采取了“以契约责任为主、以侵权责任为辅”的解释方法将以往纯粹财产损害的契约责任扩及第三人。法国一般主张将注册会计师对第三人的责任定性为一种法定的职业责任。我国学者对注册会计师对第三人的民事责任的性质存有较大的争论，主要观点有侵权责任说、违约责任说、产品责任说、法定责任说和基于职业义务的第三种责任说五种。司法实践的做法似乎经历了从违约责任到侵权责任的转变。本章主张，会计师对第三人民事责任的性质应属于侵权责任。

第三章从分析归责原则及确定注册会计师民事责任归责原则的意义入手，评析了国内学者对注册会计师民事责任归责原则的论争，并对国外及我国台湾地区的会计师民事责任归责原则的立法进行了评价。世界上绝大多数国家或地区都没有对注册会计师民事责任采用无过错责任原则，也没有采用一般的过错责任原则。在此基础上，本章剖析了过错责任与无过错责任原则的内涵，适用范围及其产生的背景，并对我国现行立法与司法解释进行了评析。虽然现行立法并没有明确规定注册会计师民事责任的归责原则，但通过分析相关条文隐含的内容，现行立法对注册会计师民事责任的归责原则倾向于采取过错责任原则。我国注册会计师民事责任的归责原则应为过错责任原则的特殊形式——过错

推定。其理由在于：①会计师对第三人承担的责任应是一种“合理的保证责任”，而不是一种“绝对保证责任”。②采取过错推定原则有利于保护信息活动中弱势群体的利益。③有利于维护会计师职业的生存空间。④符合我国现行法律的规定和国际通行做法。

第四章探讨了会计师民事责任的认定问题。关于民事责任过错的认定，民法学界历年来有主观说与客观说之争。本章认为，两种学说对侵权法各有贡献，在实际运用中亦可兼收并蓄。从各国的司法实践来看，大多数国家法律均采取客观标准来认定行为人的过错。而客观说主要以“注意义务”作为过错的检验标准。判断注册会计师主观上是否存在过错，既不能以是否严格遵循程序为标准，也不能以财务报告是否虚假为标准，应以“职业谨慎”作为衡量会计师有无过失的标准。而判断注册会计师在审计活动中是否尽到了职业谨慎，可以从以下几方面进行：①业务约定时的职业谨慎；②评审内部控制时所应有的职业谨慎；③取证和鉴证时应有的职业谨慎；④审计报告的措辞和意见表达方面的职业谨慎；⑤审查客户前景财务资料时的职业谨慎。应设立专门的机构鉴定虚假审计报告。关于因果关系的认定是会计师民事责任认定中最难的一个问题。本章通过对两大法系因果关系理论的比较分析，认为英美法系在因果关系认定上的二分法思路条理清晰，实用灵活，针对性强，证明方法简便可行。这种理论比较合理，宜为我国因果关系理论所借鉴。美国在认定注册会计师民事责任条件的因果关系时，采用了因果关系推定理论，即只要投资者信赖注册会计师提供的财务会计报告并因此遭受损失，法院就推定会计师出具的虚假财务报告与投资者的损失之间具有因果关系，而无须原告负举证责任。推定因果关系成立的理论基础是“欺诈市场理论”。我国现行司法解释对注册会计师民事责任条件的因果关系认定有所涉及，但不合理。司法实践对虚假陈述民事

责任因果关系的认定采用了必然因果关系理论,即强调违法行为与损害结果之间具有内在的、本质的、必然的联系。这对保护投资者的利益极为不利。在认定会计师侵权民事责任的因果关系时,宜借鉴美国的做法,对于事实因果关系,以“重大性”为依据,采用因果关系推定理论。对于法律上因果关系的认定,可采用英美法中的“合理预见说”,即对于会计师出具虚假财务报告的,应对那些属于其合理预见内的原告因信赖虚假陈述而遭受的财产损失承担责任。对于虚假审计报告“重大性”的认定,我国应从理性投资者决策和信息对股价的影响两方面综合考虑“重大性”的标准。

第五章探讨了注册会计师侵权民事责任的承担与损害赔偿问题。该章探讨了四个问题。第一是关于注册会计师侵权损害赔偿的请求权主体问题。通过对两大法系对第三人范围界定的比较分析,评析了我国学者关于第三人范围界定的主要分歧,主张我国立法宜将第三人的范围界定为:①依据会计师提供的虚假会计信息进行证券买卖或从事其他行为;②利用该虚假信息时怀有善意;③受到损失。即只要是善意地依赖注册会计师提供的虚假会计信息进行了证券的买卖或从事了其他投资,或者订立契约而受到损失的人,均可以请求会计师赔偿因此所受的损失,包括证券买卖人、合同之债的债权人、潜在投资者等等。第二是关于注册会计师民事责任的承担主体。本章评析会计师民事责任承担主体的两种不同观点,认为一元说的观点不利于保护受害人的利益,也不符合世界通行做法。主张会计师民事责任的承担主体应为会计师事务所和过失出具虚假财务报告的注册会计师。第三是关于注册会计师共同侵权责任的承担问题。本章评析我国现行立法与司法解释对会计师共同侵权责任承担的规定,主张只要会计师出具了虚假的财务报告,不管是故意还是过失,都应认定与客户构成共同侵权,对第三人承担连带赔偿责任。第四是注册会计师侵

权民事责任的损害赔偿问题。会计师侵权损害赔偿应坚持全面赔偿原则和对损害数额给予适当限制原则。对于损害赔偿的计算起点,应确定为虚假陈述披露之日。而对于损失计算的终止时间,我国宜确定为揭露日或变更日后第 30 个交易日。赔偿损失的种类包括投资差额损失、投资差额损失部分的佣金和印花税、资金占用利息损失、律师费和诉讼费。投资者的投资差额损失的计算方法为:投资者在虚假陈述期间买入证券的价格与虚假陈述被披露或更正后 30 天内平均收盘价的差乘以投资人所持证券数量。

关键词: 注册会计师 第三人 侵权责任

Abstract

Ever since the litigation explosion in the 1980s, CPA's civil liability has arisen as a controversial issue in many countries. The lawsuits brought against the accountant firms frequently became topics of the media, as they were mostly connected with famous corporations' bankruptcy or plaintiff's huge sum of indemnity claims, which were embodied in the case of Enron Anderson of foreign countries and the case of Yinguangxia-Zhongtian of our country. Simultaneously, the accountancy circle and the law circle can hardly find common grounds upon the marginal problem of CPA's civil liability. The focus of CPA's civil liability is in nature the issue of fair and reasonable sharing of capital market risks. The key point of research should pinpoint the balance of the interests among the corporations, CPA (accountant firms) and users of report forms. This thesis mainly deals with CPA's civil liability towards third parties with emphasis upon CPA's civil liability in the information disclosure of securities market, exploring systematically the theoretic basis, liability nature, doctrines of liability fixation, liability confirmation and tortious damages in CPA's civil liability towards third parties.

The thesis, totaling 200,000 Chinese characters, consists of 5 chapters besides the introduction.

Beginning with CPA's nature orientation, Chapter I insists CPA be characterized as experts and analyzes CPA's characteristics in the role of experts. Then, it further probes into the legal background for CPA's appearance and development and puts forward that accountancy, character-

istic of commonality, enterprise, independency, and trade discipline is a unique occupation. The author then attributes CPA's civil liability to the category of expert liability, endowing it with common aspects of expert liability. The basis for CPA's civil liability towards third parties is expert's high-degree duty of care. Comprehensive exposition is given to duty of care and the connotation and composition of high-degree duty of care. CPA's civil liability towards third parties arises from his behavior of providing false financial accounting reports against his high-degree duty of care in the background of radical social economic environment change and people's enhanced awareness of the role that civilian auditing has played since the 1960s.

Through analyzing two main legal systems' legislation and precedents on the characterization of CPA's civil liability, Chapter II shows that the Anglo-American Law System characterizes it as tort liability in either statutory law or customary law, while the Continental Law System countries do not all characterize it as tort liability. German legislation has long negated CPA's liability towards third parties. To protect investors' interests, German precedents confirmed information provider's liability towards third parties and extended the contractual liability for the pure property damage to third parties with the interpretative method of "mainly contractual liability and secondarily tort liability". In France it's characterized as a legal occupational liability. Chinese scholars have much controversy upon the character of CPA's civil liability. The main ideas are as follows: doctrine of tort liability, doctrine of liability for breach of contract, doctrine of product liability, doctrine of statutory liability and doctrine of third-type liability based on occupational duty. The judicial practice seems to have experienced the conversion from adopting liability for breach of contract to tort liability. The thesis argues that CPA's civil lia-

bility towards third parties belongs to tort liability in nature.

Analyzing doctrine of liability fixation and the meaning in confirming it, Chapter III evaluates domestic scholars' controversy upon the doctrine of CPA's civil liability fixation and appraises the legislation in this aspect in foreign countries and Taiwan district. It concludes that neither no-fault liability doctrine nor doctrine of liability for wrongs is adopted on this issue in the vast majority of countries and districts in the world. Analyzing the connotations, application scope and arising background of no-fault liability doctrine and doctrine of liability for wrongs, the thesis comments on the current legislation and judicial interpretation of our country. Although the current legislation did not prescribe the fixation doctrine of CPA's civil liability, by analyzing relevant provisions' implications, the current legislation tended to adopt the doctrine of liability for wrongs. And the fixation doctrine of CPA's civil liability in our country should take its special form doctrine of presumptive wrongs. The reasons are: a) CPA's liability towards third parties is a kind of "reasonable guarantee liability", but not "absolute guarantee liability"; b) adoption of this doctrine is advantageous for the protection of weak groups' interests in information activities; c) it is favorable for maintaining accountancy's subsisting room; d) it conforms with current domestic law and international common practice.

Chapter IV explores the confirmation of CPA's civil liability. The civil law scholars have long debated upon the subjective doctrine and objective doctrine regarding the confirmation of civil liability fault. This thesis holds that they both have contribution and can be adopted simultaneously. Having examined the judicial practices of different countries, it claims that most countries' law has adopted objective doctrine to identify the actor's fault. The objective doctrine mainly uses "duty of care" as

the test for fault. The criterion to judge whether the accountant is subjectively in fault is not whether he has strictly observed the procedures or whether the financial report is false, but his "occupational prudence". To judge whether the accountant has given his "occupational prudence" in the auditing activities, we should pay attention to the following five aspects: a) occupational prudence while making business promises; b) occupational prudence necessary while assessing inner control; c) occupational prudence necessary while taking evidence and identifying evidence; d) occupational prudence in the diction and opinion expression in audit reports; e) occupational prudence while checking clients' prospect financial material. Special body should be established to identify false audit reports. The identification of causality is the most difficult issue in the confirmation of CPA's civil liability. Through comparison between two major legal systems' causality theories, this thesis holds that the dichotomy used in the causal identification in the Anglo-American Law System is clear, practicable, flexible and pertinent with simple proof method. This theory is comparatively reasonable and appropriate to be referred to by our country. Furthermore, America adopts theory of presumptive causality while confirming causality for CPA's civil liability, i.e. once investors relied upon the financial accounting reports provided by the accountant and suffered loss, the court should infer that causality existed between a CPA's providing false financial report and investors' loss, and the plaintiff is exempt from burden of proof. The theoretic basis for establishing causality is the "cheating market theory". The existing domestic judicial interpretation involves causality identification in CPA's civil liability but it is unreasonable. The judicial practice adopts positive causality theory on this issue, i.e. stressing the inherent, essential and inevitable links between unlawful acts and damage. It's extremely disadvantageous

to investors' benefit. Therefore, when deciding the causality in CPA's tort liability, American practice can be used as reference, i.e. adopting presumptive causality theory on factual causality according to "materiality". On the determination of legal causality, the "doctrine of reasonable prediction" in the Anglo-American Law System can be adopted, i.e. CPA providing false financial reports should be liable for the property loss suffered by plaintiffs within CPA's reasonable prediction for relying upon false statements. In deciding false audit reports' "materiality", the standard for "materiality" should be considered in two aspects in our country: rational investors' decision-making and information's influence upon stock price.

Chapter V discusses the assumption of CPA's tort liability and compensation for damage, specifically divided into four issues. The first issue is who has claimed for damages caused by CPA's tort. By comparing two major legal systems' scope of third parties, the thesis reviews the main difference in the scope of third parties among domestic scholars and insists that domestic legislation define the scope of third parties as who: a) deal in securities or perform other conduct relying upon the false accounting information provided by the CPA; b) are bonafide while utilizing the false information; c) suffer loss. In other words, once a person such as a securities dealer, a creditor in the contract privities, a potential investor and so on, conducted security sale or other investment or signed a contract relying upon false accounting information provided by the CPA in good faith and thereby suffered loss, he could require the CPA to compensate him for the damages. The second issue is who should assume the CPA's civil liability. The thesis comments on the two different ideas about the issue, and argues that the view of monism is not good enough to protect the victim's benefit and is out of line with the common practice of the

world. The author insists that the accountant firm and the CPA who provided false financial reports assume the liability. The third issue is about the assumption of CPA's joint tort liability. Having reviewed the provisions on this subject in the current legislation and judicial interpretation of our country, this thesis proposes that on providing false financial reports, whether willfully or negligently, the accountant should be held as joint tort with the client and assume joint liability towards third parties. The last issue is the compensation for damages in the liability assumption by accountant, which should follow the principle of full compensation subject to reasonable limitation. The starting date for the compensation calculation should be determined as the date of disclosure of false statement and the terminating date for loss calculation is best settled as the 30th transaction date since the disclosure or alteration date in our country. The types of loss compensation include investment margin loss, the commission and stamp tax paid for the investment margin loss, interest loss for capital occupation, attorney's fee and expense for litigation. Method for calculating investment margin loss is: the difference between the buying price paid by the investor under the influence of false statement and the average closing price in 30 days since the disclosure or correction of the false statement, multiplied by the amount of securities held by the investor.

Key Words: CPA third parties tort liability

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