民商法学博士文库

常言道："天有不测风云，人有旦夕祸福。"人类时时刻刻都面临着来自自然或社会的各种风险，社会发展的过程也是同风险不断抗争的过程。在这个过程中，人类创立了保险制度。

保险缔约信息义务制度研究

曹兴权 著

保险是通过对风险的主动利用而进行风险防范的制度，其基本原理在于"人人为我，我为人人"的互助合作机制，当自己发生灾害时，保险因为借助他人救助而具有"人人为我"的功效；在自己平安而他人发生灾害时，保险则使自己能够救助他人而具有"我为人人"的功德。

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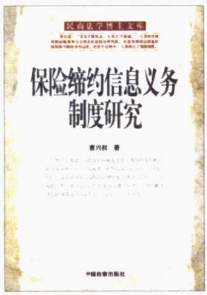
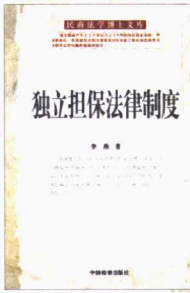
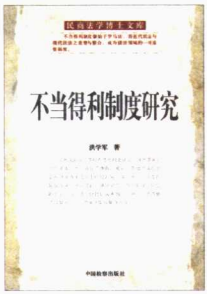
曹兴权，男，1971年7月出生于四川蓬安，讲师。2000年毕业于云南大学法学院宪法与行政法学专业，获硕士学位。2004年毕业于西南政法大学民商法学专业，获博士学位。现在西南政法大学民商法学院从事民商法教学科研工作。发表了《企业独立与法律形态的分化设计》、《中小企业组织立法的发展与启示》、《政府采购监督机制的政策目标》、《交易注意配置论纲》等论文。







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总　序

西南政法大学，坐落在长江和嘉陵江交汇处的美丽山城重庆，背倚以红岩精神称著的烈士英灵安寝处歌乐山脚。西政大校园和西政大人似乎受到烈士英灵的格外庇佑，以至从此处走出的西政学子常有一种得道成仙的灵气和悟性。中国海内不少优秀法学人才，多出自西政大这所并不悠久但却著名的学府；于民商法学人方面而言，尤其典型：在这块热土上不仅崛起过我国老一辈著名民商法学家张序九先生、金平先生、杨怀英先生等人，更培育出了当今中国诸如梁慧星、王卫国、尹田、张新宝、黄松有、张玉敏、赵万一、陈苇等著名民商法理论家和实务家。茵蕴如此，作为西政大民商法学科学术带头人和负责人之一的我和我的几位博导同仁梁慧星教授、张玉敏教授、赵万一教授、陈苇教授、石慧荣教授等便有了继往开来、进一步建设好西政大民商法学科，为祖国培养更多、更优秀的民商法人才的义务和责任。正是意识到这种义务和责任，我们才有了与中国检察出版社合作，共同创办“民商法博士文库”的举措，希望以此作为一个阵地，培养和推出民商法新秀。当然，本文库亦非专为西政大民商法博士点而设，在出版西政大民商法博士点毕业生的博士论文的同时，我们亦欢迎校内外其他博士点的毕业生参与，将其民商法学研究范围内的优秀博士论文在本文库出版。

西政大民商法学科是1998年获得博士学位授予权的，自1999年开始到2003年为止已招收五届四个方向（民法、商法、知识产权法、婚姻家庭法）的数十名博士研究生。本《文库》

首批陆续推出的数篇论文就是从西政大民商法博士点1999级至2001级博士生通过答辩的优秀或比较优秀的博士学位论文中遴选的。这些博士论文自然是博士研究生们独立完成的，但是在选题、研究设计及创作过程中亦融合和凝结了导师们的心血以及博士生师兄弟们的集体智慧。有些选题还源自导师们授课、指导讨论的专题，如刘云生的《民法与人性》，章礼强的《民法本位论》，就是我为民法博士生所开《民法总论专题研究》课中的一个学习、研究、讨论专题“民法本位、伦理、价值取向和基本原则”延展出来的子课题。因此，我们可以说这些博士论文既是西政大近几年培养的民商法学博士生个人，同时也是西政大博士点集体奉献给法学界和读者们的心香。这些博士论文或从人性新角度对民法学问题进行解析；或从哲学新视野对民商法学有关问题进行追问、辩剖；或结合历史与现实、理论与实务对民法具体制度进行审视、置疑、检讨和重构，都有其独到之处。这些论文成果或许存在某些稚嫩和苦涩之处，但可以肯定的是，它们植根于西政大这块经由前辈和先行者们辛勤开拓、耕耘半个世纪的熟土之中，只要读者愿用心品尝，都能品出清馨的新春茶味来——苦中带甜、涩中带香……

近几年来，基于我国民商事立法和司法的需要，我国民商法学的研究已呈蓬勃发展、欣欣向荣的景象，在民商法学的百花园中已开满簇簇鲜花，结出累累硕果。但是，面对这令人鼓舞的景色亦有使人常感遗憾之处，这就是民商法博士论文这类鲜花和硕果并未得到人们应有的培育和关注。这不仅表现在迄今为此出版界尚无出版民商法博士论文的专门阵地，更表现在民商法博士论文的读者层面远较民商法系列教材、一般专著、论文为窄。其实，在本人看来，民商法博士论文大都具有选题前沿，资料收集丰富，研究方法多样，运用相关学科知识广泛，观点创新，论证严密等优点。经过数名专家评阅和数名专家面对面的质疑、答

辨，其学术质量较之民商法系列教材、一般专著和论文更有保障，更值得出版界出版和民商法理论工作者、实务工作者、教师和学生阅读、学习、研究。就本人之情况而论，如果说本人这些年来在学问上还有长进的话，那我要说句诚实的话，这大多源于对本人指导的博士论文初稿的阅读、研究和进一步修改的指导，源于对他人指导的博士论文的评审和答辩。

在《文库》最初几本博士论文即将出版之际，我要首先感谢中国检察出版社的合作与支持。他们不计经济得失，一心开辟和培育这个专门出版民商法博士论文的学术园地的高远志向令我钦佩。有容乃大，我更希望有更多的出版社关心民商法博士论文的出版，有更多的民商法博士点和民商法博士生参与我们这个文库的合作与出版，有更多的民商法理论工作者、实务工作者、教师和学生关爱和欣赏我们这个《文库》出版的民商法博士论文。我相信，我们这个《文库》出版的民商法博士论文之是真是伪、是美是丑，是经得起读者诸君公正评判的。

最后，我想改用孙中山先生的一句话来作为《文库》总序的结语，以勉励我自己和《文库》的广大合作者们："我们的事业尚未成功，同志仍需努力"。我相信，只要我们共同做出不懈的努力，我们的《文库》一定能够茁壮成长、壮大。

李开国

2004 年 8 月

内容摘要

保险市场中不公平交易现象突出的现实使得我们对相关法律如何应对的思考成为现实必要。就市场微观角度考察，保险人对保险产品的虚假宣传与误导说明、保险人随意利用告知义务进行拒赔抗辩、标准保险合同条款的滥用等现象严重损害了投保人的保险预期。这些其实都与保险交易的信息问题有关，而保险法中的告知义务与说明义务是缔约过程中的信息义务，合理界定这些义务直接关涉着保险交易公平的实现。本文运用分析法学、法律经济学、社会法学、比较法学、法律史学的基本理论，在合同法理论视野中检视保险缔约信息义务问题，从而在解答交易公平维护过程中法律的作用何在、最佳作用途径何在等问题的基础上，对保险缔约信息义务进行功能定位、制度设计。

本文除导论外，分为六章：

第一章　保险合同法的现代课题。通过对保险交易公平的理论分析、保险市场的实证考察、保险制度的演进规律的探究，笔者认为，保险合同法应当以保护投保人利益为根本出发点。

第二章　投保人利益保护的路径选择。合同自由原则应当坚持，国家对合同交易的强制并没有动摇其基础地位。合同缔结过程的强制、合同程序正义的坚持，是合同自由与强制的协调点。缔约信息义务的一般理论已经形成，应当确立当事人需要在合同缔结过程中向对方提供有关交易情报的一般义务。缔约信息义务的实质是改变当事人在合同缔结过程中的注意配置结构。交易注意结构配置论以交易自由仍为合同法基本原则、交易问题的根源

在于信息不对称的认识为基础而展开，并且指出交易主体、交易类型是对合同缔结过程中信息义务进行合理配置应当考虑的基本因素。投保人利益保护应当坚持市场化的思路，体现合同自由原则，以合同的程序正义为基本诉求，以交易过程中当事人的信息提供义务制度为依托。当然，缔约信息义务也不能够解决所有问题。

第三章　在合同法一般理论框架中展开保险缔约信息义务的基本理论。保险缔约信息义务包括告知与保险人说明，本质上属于先合同义务，制度实质是要改变当事人在交易过程中的交易注意结构。把“最大诚信”论作为告知义务产生的理论依据已经不合适宜，诚信没有大小之分，因为它不仅有循环论证的逻辑缺陷、制度构建的困惑，也不符合保险制度发展的实际需要。告知义务的理论基础应当是多元的，危险信息不对称与危险估计需要是事实基础，而诚信原则是该事实需要转化为制度构建逻辑结论的理论工具。保险缔约信息义务在不断发展，体现出告知义务弱化、说明义务强化的反向演化趋势。

第四章　通过解析制度的构成要素以找到合理界定告知义务的基本变量。告知义务制度由义务主体、告知范围、违反构成、违反的法律后果等内容构成，其中告知范围、违反构成、违反的法律后果是决定投保人告知义务负担的关键变量。告知义务有一定范围限制，重要性事实、已知或应知以及告知除外是限制该范围的三个主要要件，其中重要性事实是决定性因素，也是理论与实践关注的焦点。根据对事实重要性进行判断的方法以及判断的具体标准不同，告知义务的范围有无限、有限之分。就义务的诚信本质看，义务违反构成应当考虑主观心理状态。告知义务违反的法律后果，有自动无效主义与解除主义两种不同的处理规则。保险人解除保险合同后，对保险人保险责任的处理大体有全部被免除与按照比例原则处理两种不同的方式。保险保证制度因为其

履行的严格性与违反后果的严厉性而成为保险人无限扩大投保人告知义务负担的法律工具，需要通过限制保险保证的构成、限制保险保证违反的构成、软化违反后果等方式来适当控制保险人的运用。

第五章　考察保险人说明义务的合理规范问题。说明义务的对象主要但又不仅仅是由保险人事先拟订的条款。可以要求保险人就程序性条款与实质性条款进行不同程度的说明。保险人说明义务并不能够全部免除投保人交易时应当具有的谨慎与注意。保险人说明义务实际上可以界定为提醒、说明、如实回答义务。对于违反说明义务后果的界定，必须考虑保险的团体性、保险合同责任免除条款的特殊性、说明义务履行的形式化以及保险交易过程的特点等诸多因素。赋予投保人在一定期间内合同解除权的冷静观察期制度能够较好平衡保险团体性与投保人利益保护的矛盾。说明义务应当与不利解释原则协调运用，在引进投保人冷静观察期制度的基础上，使不利解释成为控制保险合同格式条款的最后防线，但实质说明也具有排除其适用的可能。

第六章　对我国保险法的缔约信息提供义务制度加以评价并提出完善建议。在告知义务制度方面，笔者认为，我国保险法中的告知义务制度的规则体系已经建立，但是对于被保险人属于告知义务主体、代理人订立合同时投保人告知义务的规避防范、保险保证的控制、投保人对询问事实重要假定的抗辩、重要事实判断的谨慎保险人标准、如实告知应当知道事实、告知事实的除外、重大过失的限定等规则方面还存在缺失。对于说明义务制度，对缔约过程中的信息义务期望过高，也没有考虑保险制度技术与操作上的特殊性是理论认识的不足；坚持义务履行的实质标准，没有规定提醒规则，没有给投保人以一定期间内的解除权是制度设计的不足。

Abstract

These unfair insurance transactions in insurance markets make us to reflect on the related law and regulations. The insured, most of them being insurance consumers, encounter many illegal trading means such as fraudulent information, misrepresentation, bad faith complaint about the insured's disclosure duty, all of which is regard to dealing information, and to which the information-supplying duty in the dealing course is the most effective answer. The duty of disclosure of the insured and the accounting duty of the insurers are information duty By comparing analysis, criterion analysis, economic analysis and history analysis, the dissertation discusses this information-supplying duty in the view of social fair dealing institution and the theory of contract law, and puts forward some suggestion to reform.

The dissertation consists of six parts except introduction.

Part one analyzes the substantial task of insurance law and the challenge to modern insurance contract law. By analyzing the unfair dealing, the function of the law and the development trend of the information duty, this dissertation insists that how to prevent insurers from abusing unfair terms to jeopardize trading fairness is a key task of insurance contract law.

Part two is about the choice of the measure to protect the insured. The principle of freedom is still the basic foundation of contract law in modern times. After having a comparatively research on the in-

formation-supplying duty in dealing course in different countries, this paper concludes that there is the general theory of the duty and we should specify this general duty. The information supplying duty in dealing course changes the basic dealing care structure in the context of caveat venditor. The substance of arrangement of dealing care duty is re-definition of the information-supplying duty in dealing course. The economic analysis of contract law affords the guideline on the arrangement, and the subjects and type of trade are the essential factors that should be considered. According to general principles of contract law, The regulating measures include conclusion regulation, such as rules concerning information-supplying duty and acceding, and content regulation, for example, compulsory rules of written law, minimal criterion stipulated by regulating agency and intervention by jurisdiction. The information supplying duty should be the fundamental measure. However, the coercive measure, including the information duty, can't solve this entire problem.

Part three is about the nature, source, and rationality of the information supplying-duty in the insurance contract construction course in the view of general contract theory. The information-supplying duty includes the duty of disclosing of the insured and insurer's accounting duty, either of which has its particular connotation. Both kinds of duties are essentially pre-contract duty. The disclosing duty is an inherent special institution of insurance while the accounting duty is in essence the product of the development of pre-contract duty theory of general contract law. Information supplying duty is determined by the nature of insurance transaction and standardized insurance clauses, including liability-exemption terms, as well as disclosing duty are technical requirement to realize consideration equilibrium of insurance

trading. Because of the logical and institutional shortcoming and the like hood of misleading, the principle of Utmost Good Faith is not the reasonable theory of the duty of disclosure. The article concludes that only a pluralist conception of the duty can hope to provide a satisfactory account, of which the information asymmetry and the technical need to value the risk degree is factorial foundation and the principle of good faith is the theoretical instrument upon which the change from need to institution structure has finished. Along with the development of social economy and insurance industry, the disclosing duty of the insured has a growing trend towards gradual lowering in importance whereas the accounting duty of the insurer tends towards being enhanced. The two contrast development trends reflect protecting the insured's interests. Based on the principle of contract freedom and the rational structure of the dealing prudence, accord to the trend of institution, the information supplying duty should be reconstructed.

Part four discusses the construction of the institution of the duty of disclosure comprising the subject of duty, the scope of disclosure, violation and liability. And the last three of them are key sections when the insured's disclosure duty is decided. The duty of disclosure is limited by three key requirements, namely, materiality, known or should-know and exception. The materiality of fact is examined by two criteria: substantial judgment and formal judgment. The later one require limited disclosure principle, therefore, the duty is just a duty of answering question while the first one, based on unlimited disclosure principal, the insured must disclose every material circumstance. As for the bona fide nature of duty, violation requirement involves with subject psychological state. As for as liability, there are two different rules: the void principle, exempting insurers from lia-

bilities, and the avoidable principle, endowing insurers with right of deliquescence. If insurers deliquesce insurance contracts, their liabilities can be exempted either fully or proportionately. Proportionate principle, against the substance of apprising duty, is favorable for protecting the insured. Lastly, the warranty in insurance contracts should be restricted.

Part five reviews coercive regulation of insurer's accounting duty. The object of accounting duty is the terms insurers have drawn out in advance. Distinct terms affect the insured differently, so insurers are required to make different accountings for procedural terms and substantial terms. But the accounting duty of insurer does not fully exempt prudence and care the insured should have while trading; moreover, complete exemption is unpractical because the formalization of duty performance cannot be avoided. So insurer's accounting duty can be defined as the duty of reminding, accounting and answering according to facts. The definition of the results of violation of accounting duty must consider the group characteristics of insurance; the specialty of the exemption of insurance contract liability, the formalization of accounting duty performance and casual denial of effectiveness of liability exclusion terms of definition of risk range will jeopardize the group characteristics of insurance. According to the institution of calm observation, if insurer does not perform the accounting duty about insurance contract terms, the insured can demur and deliquesce contract within one mouth after receiving insurance policy, otherwise clauses not interpreted are still part of insurance contract. At last, the duty of accounting should be harmonized with the contra profer-enten rule.

The last part evaluates the institution of information-supplying du-

ty of our insurance law and brings forward suggestion to reform. This article considers that as for the duty of disclosure of the insured, theoretical limitation is that analysis on the nature of utmost good faith ignores the trend of looseness, and the following shows the institution deficiency: deputy preventing the insured from evading the duty, regulation measures on insurance warranty, the insured's plea to important presumption of enquiring facts, prudent insurers standard of material fact judgment, disclosing according to facts, the exception of disclosing and limitation on gross negligence. We should reform insurance contract law accordingly. As for accounting duty of the insurer, there is a great gap between our good expectation of the duty of accounting duty of insurers and insurance market, which derives from the default of institution and our misunderstanding of it. To enhance insurer's accounting duty for filling the gap, we should, having rationally understood the spirit of the institution, the fundamental principle of insurance, and the convention of insurance dealing, introduce the rule of accounting, the rule of answering the question asked by the insured, the rule of reminding the insured, the rule entitling the insured the right to demur and deliquesce contract within one period after receiving insurance policy.

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