中国民商法专题研究丛书

■梁慧星 主编

证券投资损害诉讼救济论

从起诉董事和高级职员的角度进行的研究

张明远 著

A Research on Securities Investors' Remedies Through Legal Action

—Suing the Directors and Officers

法律出版社

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内容摘要

本书的中心主题是：因他人违法或严重失职行为而遭受损失的证券投资者，应当享有向违法或失职行为人提起民事诉讼，获得经济赔偿的权利。本书的研究意义在于：在我国现有法律规定不完善，司法实践缺乏指引的情况下，为证券投资者寻求诉讼救济提供法律上的理论支持。本书运用比较研究和综合分析的方法，取得了如下成果：构建了追究董事和高级职员个人民事责任的理论框架，并分别从证券法和公司法的角度，在法律解释和立法层面上，提出了相应的建议和设想，填补了国内在这一领域的研究空白。

证券投资损害诉讼救济涉及的内容非常广泛，本书选择从上市公司股东起诉董事和高级职员的角度展开讨论。这主要是基于以下两点考虑：一、社会公众购买股票后，从证券法上讲，他是投资者，可能在因证券欺诈和其他违法行为所导致的股价变化中遭受直接的交易损失；从公司法上讲，他是股东，可能因公司财产被非法侵害而使其在公司内部的投资利益遭受间接的损害。研究证券投资者（股东）诉讼救济机制，应同时融合证券法和公司法为投资者/股东提供的法律保障。二、从根本上讲，公司毕竟是一种法律拟制的产物，其行为很大程度上取决于董事和高级职员的个人表现，这两类人员的作为或不作为，对证券投资者的权益有着至关重要的潜在影响。国外的经验表明，让董事和高级职员承担个人赔偿责任有利于公司治理结构的完善和证券市场的建设。

除第一章导论和最后的结束语外，本书主体可分为两大部分。第二、三、四章为第一部分，主要讨论了投资者在证券法体系下的

诉讼救济，是围绕实体责任展开讨论的；第五、六章为第二部分，主要讨论了投资者在公司法体系下的诉讼方式及相关法律问题。

在第一部分中，作者针对我国目前对证券市场的法律调控手段中重行政责任和刑事责任而严重忽视民事责任的现实，提出了强化当事人，特别是董事和高级职员的个人赔偿责任的主张，并详细分析了追究这两类人员个人责任的诉因、责任构成及相关法律问题。我国《证券法》关于民事责任的规定存在着非常明显的缺陷，在没有当事人从事证券欺诈或其他违法行为应承担民事赔偿责任的原则性规定的前提下，又特别提及了擅自发行证券、进行虚假信息披露和违背客户委托买卖证券等有限的几种具体赔偿责任，在客观上造成了其他欺诈和违法行为不产生民事责任的假（真）相，或者说使其他情形下的民事责任失去了直接的法内依据。鉴于《证券法》阶段性立法的特征，作者认为在现阶段可以适度鼓励投资者提起私人民事诉讼，通过司法实践和学理的互动，来逐步完善我国的证券民事责任制度。

在这方面，美国证券法中的默示民事诉权理论和 10b－5 规则项下的诉讼实践，给我们提供了如下有益的启示：1. 在符合保护投资者、阻却证券欺诈行为的立法目的的前提下，从一般侵权法原理出发，可以认为，违反证券法禁止性规范而给他人造成损失时，即使没有法律的明确规定，当事人应承担的赔偿责任也是默示存在的；2. 为便于实际操作和阻却恶意诉讼，只赋予那些实际购买或者出售了证券的投资者原告资格；3. 对于在公开交易市场中发生的欺诈行为，可援用“欺诈市场理论”来推定该违法行为和原告损失之间的（交易方面的）因果关系；4. 采用“直接损失法”来计算投资者的交易损失，并根据情况，由原告自行选择依“恒差法”或“真实价值不变法”来确定股票在交易达成当时的真实价值。

在借鉴国外先进经验的基础上，本书进一步详细分析了追究董事和高级职员证券民事责任的主要诉因。这两类人员承担个人

责任，要么是因为直接从事了带有欺诈性质的证券交易活动，如短线交易、内幕交易和操纵市场等；要么是因为虽未直接从事证券交易，但实施了与交易有关的违法行为，如以其个人或公司名义进行虚假信息披露。由于初次信息披露和持续信息披露对投资者的不同影响和它们各自不同的特点，这两种披露中的虚假陈述民事责任，在责任主体、责任属性、归责原则、因果关系的界定、赔偿数额的计算以及原告资格等诸多方面都是有所区别的；兼之在同一性质的披露下，不同类型的责任人的赔偿责任，在责任属性和归责原则等问题上也可能有不同之处，因此，应当区分不同性质的披露和不同类型的责任人，分别规定其虚假陈述责任。基于此，作者对《证券法》第63条对该问题的不科学规定进行了一一剖析，并提出了相应改进之策。另外，委托投票征集书中应披露的信息如果有虚假或误导性陈述或者重大遗漏，对表决结果不满的股东可以提起诉讼寻求相应的救济。由于董事和高级职员有机会比其他人更早获知更多关于本公司的重大信息，实有必要对其买卖本公司股票的行为予以适当规制。作者认为，应当将董事等内部人的短线交易收益归入公司，这与《公司法》第147条的规定并不矛盾。内幕交易行为人在行政或刑事责任之外，还应当承担民事赔偿责任。落实该赔偿责任的关键问题在于正确界定原告资格和赔偿范围。实施操纵市场行为者，应当赔偿受其行为影响而从事股票买卖的善意投资者所遭受的经济损失。

在第二部分中，作者指出，虽然《公司法》通过少量条款初步确立了董事对公司（间接对投资者）的赔偿责任，但由于我国迄今尚未导入股东派生诉讼制度，致使上述赔偿责任在事实上难以落到实处。而赋予股东在董事和高级职员侵害公司利益时的派生诉讼提起权，已是法制发达国家的普遍做法。在第五章的小结中，作者设计了十条关于派生诉讼法律制度的立法建议案，基本涵盖了该制度的主要内容，包括：原告资格及公司和其他股东在诉讼中的地

位，起诉前的请求程序，被告诉讼费用之担保，诉讼的和解及撤诉，董事经营判断原则和派生诉讼的驳回，当事人费用的补偿，诉讼赔偿的支付及分配，诉讼时效，诉讼结果的既判力，案件受理费的确定，诉讼管辖权等。关于股东派生诉讼制度的法律，要兼顾股东权益的保护和公司人格的独立。在通过立法正式导入该制度之前，可以在公司章程中详细规定股东的派生诉讼提起权，以此弥补法律规定的不足。

诉权、表决权、知情权为股东的三大权利，而账簿记录查阅权为股东知情权的重要内容之一。股东通过行使该查阅权，一方面，可监督董事和高级职员对公司事务的管理，另一方面，与本书的研究主题密切相关的是，打算积极行使诉权的股东可借此获取有利的诉讼证据。目前，对于股东账簿记录查阅权，《公司法》的规定和国内学界的研究都少得可怜。针对这一现状，作者提出了完善我国股东账簿记录查阅权制度的具体设想。其基本理念就是，在保护股东知情权和维持公司业务管理的独立性不使其受到外界不当干扰之间寻求适当的平衡。

ABSTRACT

This thesis's main focus is that securities investors, who suffer from securities frauds or dereliction of duties by directors and officers, should have the right to damages through action in court. At present, legal remedies regarding such frauds and breach of duties under China Securities Law and China Corporate Law are far from perfect, and judicial practices in this respect are also very limited. Under this circumstance, the intention of the research is to build a solid theoretical basis of securities investors' remedies, so that the investors can rely on them to bring suit against the wrongdoers. By comparative study and systematic analysis, the author presents many suggestions, both on the legislative and interpretative level, and from the viewpoints of securities law and corporate law. This thesis may help to diminish the academic gaps in this field in China.

The subject of investors' legal remedies touches upon many problems in law. The reason why the author selectively concentrates his research on investors' right to action against directors and officers is that:

1. The corporation is an artificial person. In fact, it is the directors and officers who determine the conduct of a corporation. Whether the interests of investors could be protected depends largely upon the action or omission of the directors and officers. The experience in legally developed countries proves that it is conducive to the construction of corporate governance and securities market to make directors and officers bear personal liabilities.

2. The person who purchases shares is, in the sense of securities law,

the investor, and, in the sense of corporate law, the shareholder. Therefore, he may suffer two kinds of damages, one is direct loss arising from the diminution of securities market price; the other is indirect loss arising from the decrease of corporate value. In order to get comprehensive understanding of investors/shareholders' legal remedies system, we should combine securities law with corporate law when carrying out the study.

Besides Chapter 1, Introduction, and the Concluding Remarks, the content of this thesis can be divided into two parts generally. Part One, consisting of Chapter 2, Chapter 3 and Chapter 4, explores investors' remedies under securities law. This Part focuses on the substantive liabilities of securities fraud. Part Two, consisting of Chapter 5 and Chapter 6, probes investors' remedies under corporate law. Discussion in this Part centers on the shareholder's derivative action and relating issues.

In Part One, the author points out that a pertinent feature of our regulatory system of securities market is that administrative penalty and criminal punishment occupy a disproportional importance, while civil liability is being ignored seriously. However, what investors concern most is how to get back the money they have lost, not what kind of disciplinary measure has been taken against the wrongdoer or how many years the wrongdoer has been put into prison. The author further argues that since civil liability has peculiar functions, which can not be replaced by administrative and/or criminal liabilities, such as the liability to make compensation, therefore the liability of directors and officers to compensate their victims should be strengthened. Provisions regarding civil liability of the parties concerned in securities issuance and transaction in China Securities Law have a lot of defects and loopholes. At present stage, private securities action should be encouraged. Through the interaction of judicial practice and academic research, the backward legislation of securities civil liability will be im-

proved gradually.

In this area, we can gain the following enlightenment from the "implied private right of action" theory under American securities law, as well as precedents relating to SEC Rule 10b – 5:

1. If it is in line with the legislative intention, the investor suffering economic losses should have the right to sue the person who violated anti – fraud and/or other mandatory provisions of Securities Law, even if there is no explicit stipulation regarding his right of action. General principle governing tort law is another source for the investor's implied private right of action.

2. The plaintiff should be either a "purchaser" or "seller" of securities in the transaction being attacked.

3. "Transaction causation" can be presumed on the basis of "fraud on the market" theory in cases involving misrepresentation or omission in open markets.

4. The damage alleged can be ascertained with the "out – of – pocket" measure. Plaintiffs may apply, as they opt, the "constant ribbon" method or "constant true value" method to determine the true value of the securities in question at the time when the transaction was concluded.

Basing on the foregoing analysis, the thesis makes a thorough study on the cause of action against directors and officers. Unfortunate investor may seek compensation from the directors and officers, either because they have dealt fraudulent securities transactions directly with plaintiffs; or because they have conducted illegal actions relating to issuance of securities or securities transaction, even though they have no direct link with plaintiffs. In other words, a director or an officer could be sued for her misrepresentation or omission when discharging the disclosure duties of the corporation or for herself, or her participation with insider trading or manipu-

lation. Generally speaking, the elements of civil liability for misrepresentation under initial disclosure are distinct from that under periodic disclosure. Even under the same kind of disclosure, standards of liability of people of different types (issuer, director, accountant or other intermediaries) may also differ from each other. Therefore, Article 63 of China Securities Law, stipulating the parties' civil liabilities regarding misrepresentation and omission without distinguishing different kinds of disclosures and different types of liable person, is imprecise. The author thus suggests this Article be revised according to his conclusion. Remedies for misrepresentation in proxy form also get careful analysis in Part One. There is no provision regarding director's civil liability when trading upon inside information in China Securities Law. But, we agree that directors should return their profits gained from short - swing trading to the corporation, in addition to their liabilities to compensate any person who is "contemporaneously" trading the same security on the other side of the market when purchasing or selling securities by use of material nonpublic information. Moreover, China Securities Law should give a right of action to a person who makes bona fide opposite trading while a market price manipulation scheme is being undertaken.

In Part Two, discussion reverts to topics under corporate law, discussing topic beyond securities transaction losses. As mentioned above, an investor will become a shareholder after he purchases a company's shares. Any appropriation of corporate property can at once be treated as *infringement of shareholders' rights and profits*. So, investors should be entitled to force the corporation to seek remedies when the corporation itself unreasonably waives the right to remedies. Although China Corporate Law has established a principle that directors and officers shall be responsible to the corporation for breach of duties owed to the corporation, the

enforcement of this principle and relevant provisions in the Corporate Law is not sufficient. One of the critical reasons is that China has yet adopted shareholder's derivative action. The author holds that shareholder's right to derivative action should be acknowledged when revising our Corporate Law next time. After careful comparative study, the author drafts 10 clauses detailing the derivative action regime for reference by legislative organs. These 10 clauses specify the standing of plaintiffs, written demand on the corporation and other prerequisites for derivative action, discontinuance and private settlement of derivative action, "business judgment rule" and dismissal of derivative action, reimbursement of expenses, payment of the judged amount, res judicata, jurisdiction, time limitation, and other related matters. The author suggests vesting shareholders the right to derivative action by the corporation's bylaws before legislative adoption of this regime.

It is sometimes indispensable for a shareholder, who is willing to file litigation or is in litigation against the directors and officers to have the right to inspect corporate books and records. For example, through inspection of shareholders list, the shareholder can get in touch with other shareholders, discussing the matter of derivative action; by inspection of material transaction records, the shareholder may find supporting evidence for his lawsuit against the chairman. Regrettably, there is almost no stipulation directly governing the shareholder's right to inspect books and records in China Corporate Law, and academic research on this subject is very rare. Guided by the idea that the shareholders' right to information should keep balance with the unfettered right to manage the corporation by the directors and officers, the author puts forth his legislative suggestions on the right of inspection of corporate books and records by the shareholder.

序

如今出书，几乎总要有序：或请人代劳；或亲自捉笔。

仔细读来，举凡由人作序者，莫不是对作者学品之高、著作成就之大倍加赞赏。当然，赞赏之余偶尔也会举一些“瑕不掩瑜”之处。而作者自为之序，虽总免不了一番让人发酸的感慨，却也是肺腑之言，反觉亲切。由于担心请别人写序对我这本书大加赞赏会误导读者，所以决定再辛苦一下自己。

本书基本上保留了我博士学位论文的全貌，这倒不是因为我对论文如何的满意，以致不想再动大手术，而是限于能力和精力，不得已为之。证券投资损害诉讼救济是一个理论性和实践性都很强的课题，而我本人这十年来基本上都是囿于大学教室和宿舍的小圈子里。因此，本书持论多少总会让人感觉有些纸上谈兵的味道。目前看来，系统地研究这一课题似乎为时尚早，也无法从国内司法实践中得到相应的回应，但随着时间的推移，相信证券民事诉讼会受到越来越多的关注。

任何学术创作皆建立在前人研究成果之上，本书亦不例外。这样，在总结、领会别人观点之时难免参及己见，甚至有所谬解、曲解；出于论证需要，又不免对写作材料妄加取舍。此外，作为学位论文，其行文免不了夹杂一种学生式的偏激和冲动。以上种种，恳请诸位体谅！

最后，感谢梁慧星教授抬爱，将本书列入“中国民商法专题研究丛书”出版。

张明远

2000 年 11 月 15 日

目　录