

Research on the Scope of Damages for Contracting Negligence Liability

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Abstract: This paper first expounds the current situation of the scope of damages for contracting negligence liability and explains the necessity of determining the scope of damages for contracting negligence liability from the perspective of unclear legal provisions, inconsistent court judgment and diversification of theories. The scope of compensation for damages in three types of disputes, whether trust interests should compensate for indirect interests, and whether the scope of compensation is limited to performance interests, are discussed one by one. The conclusion is that inherent interests should not be included in the scope of compensation for damages, indirect interests should be compensated, and the scope of compensation for contractual negligence should not be limited to performance interests.

Keywords: Contracting Negligence; Scope of Damages; Trust Interest; Performance Benefit

1. Current Extent of Damages for Contracting Negligence

Contracting negligence liability system started late in China, the system is not sound, such as the civil code simply stipulated contract party in the contract process negligence, damage liability for several cases, the scope of compensation is not mentioned, which caused the law is not clear, the judicial practice of contracting negligence liability compensation case is inconsistent, academic contracting negligence liability compensation scope is not unified. Based on the current situation of China's legal theory and judicial practice, it is particularly important to make clear the scope of damages for contracting negligence liability.

1.1 The Law is Unknown

As for the liability for contracting negligence,

it can be traced back to paragraph 1, Article 61 of the General Principles of the Civil Law in 1986, The provision provides the legal consequences of liability for contracting negligence. "Contract law" in 1999, article 42,43,58 of contracting negligence liability further refinement, provides the malicious consultation, conceal important facts, provide false information, disclosure or improper use of commercial secrets behavior shall be contracting negligence liability, contract law, judicial interpretation of article 8 of article 42, in accordance with the provisions of the laws and administrative regulations approved or registration to effective contract, the parties not to apply for approval or did not apply for registration shall bear contracting negligence liability. Article 157 of the General Provisions of the Civil Law in 2017, and Article 500 and Article 501 of the Civil Code in 2021 basically follow the aforementioned general Principles of the civil Law and the provisions of the Contract Law.

Above is the evolution of contracting negligence liability system in China, can be determined that the law is mainly concerned about contracting negligence liability, only slightly stipulated fault party shall bear responsibility, but not clear the scope of fault liability, no clear the default party what loss relief, belong to the blank of the law.

1.2 Judicial Practice is Different

Due to the lack of clear damage scope of contracting negligence liability and uncertain standard of damages, the judge use more free evidence of the judgment, without legal or judicial interpretation, lack of certain persuasion; the arbitrariness of the judgment is also questioned, the phenomenon of different judgment is common, in the court system is not agreed: in judicial practice, whether the indirect loss claims, some judges only support the direct loss of trust interest, do not support the compensation of the indirect loss, on the

contrary, some judges think that the trust interest includes direct loss and indirect loss. For example, (2018) Judge Gan Minzhi No.1 only supported the direct loss compensation of trust interest, while (2016) Supreme No.802 and (2013) No.139 expressed their support for the direct and indirect loss of trust interest.

1.3 Three Major Controversies: The Diversification of Doctrines

If one party violates the obligation of prior contract based on good faith and causes damage to the other party, it shall bear the liability for contracting negligence and compensate for the trust interests of the other party. In terms of the scope of damage compensation for contracting negligence liability, the current scholars agree that the direct loss of trust interest only belongs to the scope of compensation. In addition, scholars have different views, which can be divided into three disputes: first, whether the scope of damages includes inherent interests; second, whether the scope of compensation includes indirect losses of trust interests; third, whether the scope of compensation cannot be limited by the performance of interests.

1.3.1 Whether the scope of damages includes inherent interests

One view is that the scope of damages contains no inherent interest. Wang Liming believes that the scope of compensation for contracting negligence is limited to trust interests, and in principle, it should not include the damage suffered by the perpetrator in violation of the protection obligation. The victim can only claim compensation based on the tort liability law [1]; Cui Jianyuan also believes that the compensation scope of contracting negligence liability is the loss of trust interest [2].

Another view is that damages include an inherent interest. The scope of protection under Huang's liability for contracting negligence covers inherent interests [3]; Hu Xianfei, Hao Jing and other scholars believe that in the process of concluding the contract, the loss of the body, health, reputation, freedom and other inherent interests should be included in the scope of compensation [4].

1.3.2 Whether the scope of compensation includes the indirect loss of trust interest

One view is that indirect loss does not include: Professor Wang Liming's compensation for trust interests is limited to direct losses and

should not include indirect losses. First of all, it is difficult to reasonably determine the specific amount of indirect loss. Once the indirect loss is included in the compensation scope of trust interest compensation, it is not conducive to the determination of liability in judicial practice. Secondly, it may induce malicious collusion between the parties and the third party [5].

Another view is that it should include indirect loss: Wang Zejian proposed that the damage of contracting negligence includes positive damage and negative damage, and the indirect loss is negative damage. He believes that the scope of damages in the liability for contracting negligence should include indirect loss [6]; Cui Jianyuan believes that the loss scope of trust interest consists of direct loss and indirect loss, and the loss caused by the opportunity to conclude a separate contract with a third party due to the negligence of the contracting party should be protected [7].

1.3.3 Whether the scope of compensation cannot be limited by performance benefits

One view is that the scope of compensation should be limited to performance benefits. Wang Liming believes that the trust interest compensated by the party at fault should not exceed the benefits he can obtain when the contract is valid or established, and it is the basic principle [8]. The ultimate benefit of the performance is the ultimate goal of the contracting parties in order to conclude an effective contract, under the effective contract established by the contracting parties, the maximum contract benefit as the amount of compensation is the best benefit of the parties for the completion of the performance of the contract.

Another view is that the scope of compensation should not be limited to the performance of benefits. Wang Zejian believes that the compensation of trust interests should not be limited by the performance of interests [9]; Wang Hongliang proposed that the compensation for negligence in the contract can exceed the benefit of performance under certain circumstances. As long as there is a causal relationship between the behavior leading to the loss and the damage result related to the trust, the breaching party should get reasonable compensation. If it insists on the restriction of performance interests, it will violate the original meaning of the law [10];

Ye Jinqiang also believes that machinery should not be limited to the performance of interests [11]; Cui Jianyuan believes that the amount of compensation for trust interests often does not exceed the benefit of performance, but if the benefit of performance is blindly regarded as the compensation limit of the protection of trust interests, its basis is not fully necessary [12].

2. Whether the Scope of Damages Contains an Inherent Interest

2.1 The Awareness of the Inherent Interests

If the offender violates the obligation of protection and infringes on the health or ownership of the relative party, it may constitute the contracting negligence, and the offender shall compensate for all the damage to the health or ownership, which Wang Zejian calls maintenance interests. Cui Jianyuan defines the compensation of inherent interests as the damage caused by the violation of the protection obligation and the infringement of the person right or property right of the counterpart [13] To expand physical health and ownership to the scope of personal right and real right, but the connotation of the two is consistent, maintaining the interest is the inherent interest referred to in this article. Wang Liming believes that inherent interests refer to the sum of the existing property and personal rights enjoyed by the parties to the contract that are independent of the contract and not infringed upon by anyone [14]. According to the definition of the above scholars, the inherent interests can be summarized as the rights enjoyed by the civil subjects regarding their person or property, mainly referring to the absolute rights such as personal rights and real rights.

2.2 The Scope of Damages should not Include Inherent Interests

2.2.1 Based on the original intention of the contracting negligence system

The German jurist Yelin is concerned about when the contract cannot be established due to the negligence of the party, whether the negligent party should be liable for the losses suffered by the other party due to the establishment of the trust contract. He believes that the person engaged in the contract must fulfill the necessary duty of care when

contracting the contract. The law protects not only an existing contractual relationship, but an ongoing contract should be included. Contracting fault liability is to protect the trust of the damaged interests, its purpose is to protect the contract consultation stage, one party spending the subject based on the reasonable trust of the subject of the damage, the principle of good faith damage is the one party of the other party, such as the provisions of the civil code of malicious consultation, provide false information, damaged person can claim contracting fault liability to recover losses.

Trust interests are different from the inherent interests, first, The stage where trust interests are protected is during the contract consultation phase, The the contract has not yet been concluded, And the inherent interests are not limited to that, The protected period runs through the entire transaction; next, The occurrence of trust interest is the premise of contract negotiation and contact for transaction, And from the understanding of the inherent interests, It does not require any relevance to the contract, can even say, The inherent interest exists outside of the contract, It is an interest that should be protected, independent of the contract, Is the absolute right originally enjoyed by the civil subject, so, Since inherent interests are independent and without necessary connection with contractual contracting, Then it is unreasonable to force the inherent interest into the scope of damages for contracting negligence liability, This will lead to the expansion of the scope of contracting negligence liability. If the inherent interests into the scope of compensation, increased the responsibility of the contracting parties, affect the enthusiasm of market transactions is on the one hand, will also involve the definition of other concepts, inherent interests damaged because one party did not fulfill the obligation to protect, and protection obligations because into the special relationship, how to define the two sides have entered the special relationship, it is difficult to determine in the actual transaction. Therefore, inherent interests should not be included in the scope of liability for contracting negligence.

2.2.2 The remedy of China's tort liability law is already sufficient

First response is, in the inherent interests into the contracting negligence compensation scope,

it is difficult to determine whether the special combination relationship exists and when the problem, in the tort liability law is no longer a problem, because the protection object is the rights of the general person, no longer need to judge whether the two sides into the special relationship, with the tort liability law security obligations replace the contract stage protection obligation is more appropriate.

Second, the inherent interests in the German civil law into the scope of contract protection, is because in the German civil law, contract law and tort law in the liability principle, auxiliary liability differences, tort law in these aspects is not enough to fully protect the interests of the victim, so the German protection obligations in contract law, to borrow the contract law to strengthen the relief of the victim [15]. German civil law of inherent interests is based on the protection of tort omissions, has its special system background, and our country civil law can directly from the practice of German law to protect the inherent interests of the contractual obligation is questionable, because in the case of inherent interests, our law does not need to borrow like German law in the law of contract law rules to make up for the deficiency of tort relief to the victims. Different from the German tort law that distinguishes rights and interests and determines different protection standards and responsibilities, China's tort law has always adopted French large general terms and does not strictly distinguish rights and interests. The Tort Liability Law does not set self-limits. Therefore, the protection of interests in China's civil law should be developed in the framework of tort liability law in the future, without not having to borrow relevant tools from the contract law like German civil law. And scholars for the scope of protection obligation is different, Germany many scholars is to inform, assist, confidentiality, inform, explain the obligation to the concept of "protection obligation", the scope of its inherent interests is bigger, and Chinese scholars use only within the scope of the concept, as wen-sheng wang said, the protection obligation as the obligation of contract law, for the inherent interests after the victim damage compensation relief is no significant advantage, but to the specification of the civil law system.

3. Whether the Scope of Damages Contains an Indirect Interest

3.1 The Awareness of the Indirect Benefits

Wang Liming believes that indirect loss refers to that the contracting party can obtain all kinds of opportunities, and the contract cannot be formed due to the fault of the other party, and the essence is a kind of opportunity interest [16]. Wang Zejian believes that the damages for the trust interest include the cost of the contract, the preparation of the performance and the damage of the loss of the contract opportunity. The loss of the contract opportunity is the negative loss referred to and the indirect benefit to be discussed in this article [17]. There is no big difference between scholars in the understanding of indirect interests, which can be summarized as opportunity interests. The legislative interpretation of the Article 42 of the Contract Law made by the Legislative Working Committee of the NPC Law points out that the loss of the party in the contract should include indirect loss, and the indirect loss is the loss of the opportunity for the party to conclude a contract with the third party.

3.2 The Scope of Damages shall Include Indirect Benefits

3.2.1 Objective indirect interests should be compensated

Fuller, an American scholar, pointed out three kinds of interests protected by contract law in the Contract, among which "trust interest" is the loss suffered by the trust promise, and the scope of protection is not limited to the loss incurred, but also includes the loss suffered by the loss of a certain opportunity. Larenz, Germany, points out that the revocation party shall compensate the relative party for the trust damage, which means that the other party shall lose the opportunity to accept the offer of the trust expression or the loss of the opportunity to accept the offer of another third party [18]. The author agree with the point of view, before the contract is formally established, the parties will because and the other consultation or some promise and a reasonable trust, to the early stage of the investment, the investment not only includes the actual expenditure of property or property interests, also should include the parties based on the principle of good faith refused to contract with the third

person leads to the benefit loss [19]. The loss of such opportunity interest is objective and foreseeable, so the loss compensation of contracting negligence liability should be comprehensive and the indirect interest can be compensated.

The author agrees that the protection of trust interests is a similar "restoration" protection [20]. The protection of the trust interest is to put the plaintiff before the contract. Its purpose is to return the plaintiff's contract, performance costs to him to restore him to the original situation. But in the understanding of "before the contract state", should not be limited to the parties, that the compensation party direct loss can make it back to the state before the contract, should expand the scope, focus on the parties and the third party contract opportunity, in the compensation losses, compensation for the loss of the part, to make its completely restored to the interests before the contracting state. Protection of indirect losses is also necessary to maintain fairness and justice. If to keep promises of indirect losses turn a blind eye, is not conducive to the rights of the party full relief, the consequences may lead to more people can less cost against the principle of good faith, and keep group to bear greater losses, is not conducive to promote trading in the contract law principle, is not conducive to long-term economic development.

3.2.2 Judicial interpretation and guiding cases support the tendency to compensate for indirect benefits

Although the Civil Code does not explicitly stipulate that indirect losses should be included in damages, the judicial interpretation and guiding cases of the Supreme Court can see the inclusion of indirect losses in the scope of compensation.

The Supreme People's Court on the trial of commercial housing sales contract dispute cases the interpretation of some issues of applicable law, article 9, if not the corresponding purchase contract, a party can ask the other party to return has paid, at the same time can ask the seller need to pay not more than twice the money. Accordingly, the total amount can reach the amount of the amount of the highest, the compensation part is much higher than the direct loss of the person that buy a house, belong to indirect interest, just because the amount is difficult constant, therefore make compensation amount with

performance benefit only (just a kind of calculation means).

As can be seen from the guiding cases, judicial practice increasingly tends to support the scope of trust interests including the existence of indirect losses. In 2016, the Supreme People's Court published the equity transfer dispute between Shenzhen Municipal Investment and Development Co., Ltd. and Anshan Finance Bureau, with a detailed explanation of the indirect loss in the compensation of trust interest and included the indirect loss in the trust interest compensation. The Supreme People's Court held that when the contracting parties have concluded a contract, but the conditions have not yet been effective, the trust of both parties has been very high, then the contracting party should compensate the other party for the loss of opportunity. Although the guiding case has not solved how to determine the amount of indirect loss, it affirms the indirect loss in the compensation of trust interest, which is a development tendency of judicial practice.

3.2.3 The amount calculation problem is a false problem

Some scholars believe that the reason why indirect benefits should not be included in the scope of damages for contracting negligence is that the specific amount of indirect losses is difficult to be reasonably determined, which is not conducive to the determination of liability. The author thinks that this is a false problem. The scholars in this view have one mistake: the purpose of contracting negligence liability is to safeguard the trust interests of the injured person, and to restore the compensation to the compensation of the amount of indirect loss is against the institutional objective; the thinking logic is reverse. Generally speaking, it can deny the indirect interest itself is unnecessary, but it is not wrong to claim the indirect interest by determining the amount of loss. Holding that indirect interests cannot be asserted because the amount is difficult to determine, the subtext is that if the amount can be determined, then indirect interests can be asserted. Under this assumption, it is clearly stipulated that indirect interests should not be claimed. Under the case of the objective existence of indirect interests, the interests of the damaged person cannot be redeemed, which is not in line with the original intention of scholars, because the damaged person does

not have the corresponding right to claim, and his right to remedy is completely strangled. On the contrary, if a clear indirect interest can be asserted, then it is beneficial and harmless to the injured. When the indirect interest exists objectively and is determined, the damaged person can get relief; when the indirect interest does not exist and cannot be determined, it is reasonable for the damaged person to bear the burden of proof and bear the risk of losing.

4. Whether the Scope of Damages shall be Limited to the Performance of Benefits

4.1 Knowledge of Performance Benefits

Performance interest is a kind of positive contractual interest, which refers to all the benefits that one party can obtain through the performance of contractual obligations by another party in a contractual relationship. The effect of obtaining compensation for performance benefits is to make the parties in the state where the contractual obligations are performed.

4.2 The Mainstream View of Judicial Practice.

Civil code and judicial interpretation is not contracting negligence liability damage scope whether to perform the interests of the provisions, but the national court civil and commercial trial work conference minutes of the third part of article 32 of the dispute explained: the contract is not established, invalid or revoked, the parties to the contracting negligence liability should not exceed the performance of the contract. Although nine people summary is not a judicial interpretation, not directly quoted as the basis for quote, but it represents the court system internal unified referee ideas, the court judges at all levels in the referee will be affected by this view, in terms of actual effect, than apply a word meaning fuzzy still need to explain more directly. To some extent, the regulation represents the mainstream view of the judicial system.

The researchers selected 142 related sample cases, including the judge made it clear in the judgment documents trust interest compensation scope should not exceed the performance of the interests of 4 cases, the remaining 138 cases of the judgment documents although no clear trust the scope of

compensation shall be limited to perform the interests, but the final amount of compensation are not more than perform the scope of interests [21]. From the empirical research results, the current court in dealing with the problem of trust interest compensation in the contracting negligence liability, is basically taking the mainstream view, that is, the compensation scope of the trust interest in the contracting negligence liability should not exceed the performance interest.

4.3 The Scope of Damages shall not be Limited to the Performance of the Benefits

In the contract is not established, invalid or revoked, the parties to the contracting negligence liability shall not exceed the contract benefit is its rationality, but this should be limited to the contract is not established, invalid or revoked, will part of the situation as all the circumstances of general practice is questionable.

4.3.1 The amount of contracting liability for contracting negligence may exceed the amount of performance benefit

Some scholars believe that under normal circumstances, compensation based on the interest of trust cannot reach the scope of the validity of the contract or when the contract is established, so it is necessary to limit the benefit of performance [22]. The scope of damages for the view of contracting negligence shall not be limited to the benefit of performance, because the amount of the loss of trust interest may exceed the benefit of performance. Scholars in its view attached to the trust interests of the compensation of the premise, but the premise is not absolute, the reality is likely to happen between the amount, the amount exceeds the other amount, and the objective indirect interests should get compensation, so the premise of the argument is defective, cannot be concluded to fulfill the interests of limit is necessary to this conclusion. The German Civil Code sets the upper limit of the damages for the contract, namely performance of benefits. But the rule also defaults to a premise that, That is, the amount of performance benefit is greater than or equal to the amount of compensation for liability for contracting negligence, Since the premise is not always true, In some cases, The amount of contracting negligence liability will exceed the performance benefit, So the German courts did

not strictly limit the limits of the amount of compensation, Judges often judge according to the causal relationship between the loss of trust interest and the breach of contractual obligations by the parties, As long as there is a causal relationship exists, The judge would support the claim for damages of the injured party, In this way, Germany has amended the liability of the law limited to the performance of benefits.

4.3.2 Trust interests and fulfillment interests are independent of each other

The author believes that the amount of compensation for contracting negligence liability should be realistic, and the victim should compensate how much he can prove the loss, which is not limited to the performance of interest, because there is no necessary relationship between trust interest and performance interest, but in practice, some courts take the performance of interest as the calculation method because the amount is difficult to determine. The loss of trust interest is based on the reasonable trust of the other party, and the behavior of the counterpart's violation of the contractual obligations causes the loss of the trust interest of the party. The performance of benefits is all the benefits that one party can obtain through the performance of contractual obligations by the other party of the other party, and the compensation for the performance of benefits is for the failure, delay or incomplete payment in the performance of the effectively established contract. They are independent of each other and have different functions, so the amount of damages should not be limited by performance interests. Some scholars point out that trust interest is a kind of existing interest, and performance interest is a kind of future interest. It is logically unreasonable to limit the existing interest by future interests [23] The author believes that the scholar also proves that the difference in the performance of interests should not limit the amount of trust interest compensation.

5. Epilogue

The main content of this paper is to discuss the three major disputes about the contracting negligence liability. From the perspective of the original intention of the full remedy of the tort liability system in China, the scope of damages should not include the inherent interest; the loss of indirect benefits is

objective, from the perspective of fairness and justice and the maintenance of the order of transactions.

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