

# A Study on Proportional Joint and Several Liability of Securities Service Institutions in Cases of Misrepresentation

Gehui Zheng

School of Law, Hunan University, Changsha, China

zhenggehui2003@outlook.com

**Abstract.** Under the 2019 registration-based reform, Article 163 of the Securities Law requires securities service institutions to assume rigid joint and several liability for misrepresentation. However, judicial practice is shifting toward proportional joint and several liability. This paper aims to explore the theoretical basis and application pathways for securities service institutions to bear proportional joint and several liability. By analyzing typical court cases where securities service institutions were held liable for full joint and several liability versus proportional joint and several liability, it reveals a divergence in judicial decisions: traditional full joint and several liability overlooks differences in fault, whereas proportional joint and several liability, based on the theory of non-collusive tortfeasors under Article 1172 of the Civil Code, delineates the scope of liability by considering causal contribution and the degree of fault, thereby achieving substantive justice where liability corresponds to the degree of wrongdoing. This paper proposes using the theory of semi-superimposed multiple tortfeasors as the legal basis. When the issuer's misrepresentation has a 100% causal contribution and the securities service institution only bears a partial causal contribution, the latter should assume proportional liability within the overlapping scope. The application pathway for liability should distinguish the functions of securities service institutions, define causal contribution based on the scope of professional matters, classify the level and extent of subjective fault, and accordingly determine the scope of proportional joint and several liability. Furthermore, securities service institutions should be allowed to seek recourse in cases where causal contributions overlap.

**Keywords:** Securities Misrepresentation, Securities Service Institutions, Proportional Joint and Several Liability.

## 1. Introduction

The 2019 revision of the Securities Law replaced the approval-based system with a registration-based system, decentralizing the power of the former China Securities Regulatory Commission's issuance examination committee to stock exchanges and granting them the authority to review applications for public securities offerings. The market-oriented progression of the new Securities Law reflects a shift from government credit to market credit. The government no longer reviews the financial status or sustainable profitability of issuers but instead requires strict compliance with information disclosure regulations, ensuring comprehensive and adequate disclosure. Investors rely on the certification activities of securities service institutions, which are backed by their reputational capital, to assess the value of securities and make investment decisions. Consequently, under the registration-based reform, there is an overall higher and stricter demand for securities service institutions to fulfill their role as "gatekeepers."

Simultaneously, the assumption of civil liability by securities service institutions has long been a critical issue within China's securities legal framework. Article 163 of the Securities Law stipulates broadly that when a securities service institution is presumed to be at fault, it shall bear joint and several liability with the information disclosure obligor, resulting in an "all-or-nothing" liability approach for intermediaries. Since 2021, in cases represented by the "Zhong An Ke case," courts have ruled that intermediaries should bear proportional joint and several liability. With the continuous development of the securities market and the increasing emphasis on precise attribution of liability, the perspective of full joint and several liability faces significant challenges and breakthroughs, making it urgent to explore the issue of liability assumption by securities service institutions in cases of misrepresentation.

This paper will employ case analysis and normative analysis methods to examine the two prevailing judicial perspectives on the forms of liability for securities service institutions. By integrating the fundamental laws of the securities market, judicial interpretations in the fields of misrepresentation and audit torts, as well as judicial policy documents such as meeting minutes issued by the Supreme People's Court, it will clarify the legitimacy and rationality of proportional joint and several liability. Using literature analysis, it will compare different doctrines, provide a theoretical foundation for interpreting proportional joint and several liability based on the theory of semi-superimposed multiple tortfeasors, and attempt to construct a specific application pathway for proportional joint and several liability of securities service institutions based on existing research.

## **2. Allocation of Civil Liability for Securities Service Institutions: Regulatory Framework and Judicial Status Quo**

### **2.1. Review of Existing Rules**

Article 161 of the 1998 Securities Law stipulated that securities service institutions need only bear joint and several liability for "the portion for which they are responsible," providing a legal basis for the application of proportional joint and several liability. However, when the Securities Law was revised in 2005, Articles 69 and 173 modified the corresponding rules regarding the forms of liability for securities service institutions under the 1998 Securities Law. These revisions mandated that each securities service institution found at fault shall bear "joint and several liability for compensation" with the issuer. This rule has been retained to the present day, as reflected in Articles 85 and 163 of the current 2019 Securities Law.

It is noteworthy that the 2007 judicial interpretation, *Several Provisions of the Supreme People's Court on the Trial of Civil Tort Compensation Cases Involving Accounting Firms in Audit Business Activities*, explicitly stated that accounting firms must bear joint and several liability in cases of intentional tort, while in cases of negligent tort, liability should be determined based on the degree of fault. The 2019 Minutes of the National Court Civil and Commercial Trial Work Conference stipulated that "the assumption of liability should correspond to the tortious act and the subjective fault." The 2020 Minutes of the National Court Forum on Adjudicating Bond Dispute Cases proposed that the extent to which a securities service institution has fulfilled its duty of diligence should be considered, and the scope of its liability should be determined separately based on distinguishing between circumstances such as intent and negligence.

### **2.2. Examination and Summary of Judicial Disputes**

In judicial practice, two main perspectives exist regarding adjudication: full joint and several liability and proportional joint and several liability. Early judicial practice generally held that the provisions on joint and several liability for securities service institutions under the post-2005 Securities Law were rigid. This meant that no distinction was made between intentional or negligent fault of securities service institutions; as long as they could not prove the absence of fault, they were required to bear absolute joint and several liability. Cases in practice, such as *Jinya Technology*, *DZH (Grand Wisdom)*, *Huaze Cobalt Nickel*, and *Kangmei Pharmaceutical*, are typical examples where securities service institutions were held to full joint and several liability.

The *Zhong An Ke* case represents the first effective judgment that established the liability of securities service institutions based on proportional joint and several liability. At the adjudication level, it established a broad concept of joint and several liability, encompassing both full and proportional joint and several liability. It also asserted that the specific proportion of liability among intermediaries should be determined based on factors such as the degree of fault and the extent of causal contribution to the losses. The approach of proportional joint and several liability has since gradually been widely applied in judicial practice, with typical cases including *Baoqianli* and *Wuyang Bond*.

In cases of securities misrepresentation, there is typically no collusion between issuers, listed companies, and securities service institutions. Such conduct does not align with the model of joint tortfeasors under Article 1168 of the Civil Code, but rather stems from a failure to fulfill the duty of care in professional matters, constituting negligence rather than intentional misconduct. According to Article 1172 of the Civil Code, in cases of non-collusive torts by multiple actors with proportional liability, the extent of each tortfeasor's responsibility is determined based on their degree of fault and causal contribution, with each party bearing corresponding liability accordingly.

Building on this, in the Zhong An Ke case, the second-instance court applied within the broader framework of joint and several liability stipulated by the Securities Law. By integrating the judicial philosophy of non-collusive multiple tortfeasors, it established an adjudication approach centered on "proportional joint and several liability." Although this ruling represented a breakthrough in the "rigid" provisions of the Securities Law, it confined the liability of securities service institutions to a scope commensurate with their actions and degree of fault. This approach more effectively aligns with the principle that "liability should correspond to the degree of fault."

### **3. Theoretical Justification for Proportional Joint and Several Liability of Securities Service Institutions**

Existing laws, regulations, and tort liability theories have not yet encompassed the form of proportional joint and several liability. Superficially, proportional joint and several liability significantly differs from statutory joint and several liability and is fundamentally distinct from several liability. It represents a breakthrough beyond the scope of traditional tort liability. Under the statutory joint and several liability framework, there is no clear delineation of liability shares among responsible parties, whereas proportional joint and several liability defines the external scope of liability for securities service institutions. In contrast, under the several liability system, the allocation of liability shares not only determines the boundaries of external liability but also reflects the internal distribution of responsibility. Proportional joint and several liability, however, only specifies the external scope of liability and does not address the proportional allocation of internal responsibility. Consequently, it is difficult to find an explicit legal basis for proportional joint and several liability directly from traditional tort theories or the relevant provisions of the Civil Code.

#### **3.1. Limitations of Existing Interpretative Approaches**

Some scholars argue that the nature of joint and several liability for misrepresentation by securities service institutions is non-genuine joint and several liability [1]. Specifically, affected investors have the right to demand full compensation from either the issuer or the securities service institution. The issuer and its directly responsible personnel, as ultimate obligors, cannot seek recourse from the securities service institution if they have already assumed compensatory liability. Conversely, the securities service institution may seek recourse from the ultimate obligor after fulfilling its compensatory obligations. Under this unilateral recourse model, the securities service institution essentially bears no ultimate liability itself but only assumes the risk of unsuccessful recourse against the issuer, with no internal allocation of liability shares between them.

Although this interpretation appears reasonable from an explanatory perspective, according to tort liability theory, the ultimate allocation of liability should fully consider the degree of fault of each actor and the causal contribution of the misrepresentation, thereby assigning a proportional share of final compensatory responsibility for the harm [2]. In cases where a securities service institution is negligent, even if its causal contribution is less than 100%, it still exerts a direct and objective causal force on the misrepresentation and should bear compensatory liability commensurate with its actions or fault. Under the non-genuine joint and several liability model, it is unreasonable for the securities service institution to bear no ultimate liability at all.

### 3.2. Interpretative Pathway Based on the Theory of Semi-Superimposed Multiple Tortfeasors

In cases of securities misrepresentation, there is often no collusion between issuers, listed companies, and securities service institutions, which can be categorized as non-collusive multiple tortfeasors. Issuers, listed companies, actual controllers, and others possess the most direct and primary causal relationship to the occurrence of harm and are the primary beneficiaries of misrepresentation. Their acts of concealing material information, making false records, or issuing misleading statements lead to financial losses for numerous investors. In contrast, securities service institutions, by failing to fulfill their duty of diligence and due diligence, neglect to detect the issuer's misrepresentation. Subjectively, this constitutes negligence, and they only bear a partial causal contribution to the harm. Against this backdrop, what is the theoretical basis for securities service institutions to bear proportional joint and several liability?

The mainstream academic view holds that Articles 1171 and 1172 of the Civil Code stipulate the constitutive elements and forms of liability for non-collusive multiple tortfeasors. Specifically, Article 1171 addresses several superimposed torts, where the tortious act of each actor is sufficient to cause the entire harm—meaning each act has 100% causal contribution to the harm—and thus joint and several liability applies. Article 1172 addresses several non-superimposed torts, where the combined causal contribution of all actors amounts to 100%, and several liability applies. However, between these two types, there exists in practice a semi-superimposed several tort not explicitly prescribed by law [3].

In comparative law, the concept of semi-superimposed several torts originates from Japanese scholar Kawai Ken's theory of "partial joint and several liability based on differences in illegality." This theory posits that due to variations in the causal contribution of each tortfeasor to the harm, a greatest common denominator should be identified within the scope of their shared causal contributions, for which the actors bear joint and several liability. The portion exceeding this common scope shall be borne solely by the actor with greater causal contribution [4]. The core objective of this theory is to mitigate the potential excessive harshness of joint and several liability in specific contexts of objective joint torts.

In domestic academia, Professor Yang Lixin points out that proportional joint and several liability is the rule applied to several semi-superimposed torts. He defines semi-superimposed several torts as follows: Where two or more actors commit torts separately, causing the same harm, and the act of some actors is sufficient to cause the entire harm while the act of others only causes part of the harm, such actors shall bear proportional joint and several liability as several tortfeasors [5].

The widespread acceptance of Professor Yang Lixin's view is largely due to the legal basis he provides for proportional joint and several liability, namely Article 7 of the Supreme People's Court's Interpretation on Several Issues Concerning the Application of Law in Trying Cases of Environmental Tort Liability Disputes (hereinafter, the Judicial Interpretation on Environmental Torts). This provision elaborates on the allocation of liability among tortfeasors with varying degrees of causal contribution: Where two or more tortfeasors separately pollute the environment or damage the ecology, and the act of some tortfeasors is sufficient to cause the entire harm while the act of others only causes part of the harm, the injured party may demand that the tortfeasor(s) sufficient to cause the entire harm bear liability for the full harm and jointly and severally liability with other tortfeasors for the portion of the harm caused collectively.

Thus, the form of liability for tortfeasors with lesser causal contribution in environmental torts is proportional joint and several liability [6]. Environmental tort disputes share commonalities with securities misrepresentation cases: both involve multiple actors without collusion causing the same harm; both entail complex causality, where some actors have 100% causal contribution to the harm while others have only partial causal contribution. This paper argues that although securities misrepresentation falls under information torts, its logic of liability allocation can draw insights from the causal contribution approach in environmental torts. Article 7 of the Judicial Interpretation on Environmental Torts provides normative support for the practical application of the theory of semi-

superimposed multiple tortfeasors in the field of securities misrepresentation and the adoption of proportional joint and several liability.

#### **4. Application Pathway for Proportional Joint and Several Liability of Securities Service Institutions**

When determining the allocation of intermediary liability in securities misrepresentation cases, it is essential to consider the distinct roles and scopes of responsibilities of different securities service institutions. This involves evaluating their causal contribution from two dimensions: transaction causation (the causal link between the misrepresentation and the investor's decision to trade) and loss causation (the causal link between the misrepresentation and the investor's actual losses). Simultaneously, the scope of proportional joint and several liability for securities service institutions should be comprehensively determined based on the degree of their subjective fault.

##### **4.1. Determining Liability Allocation Based on Causal Contribution to Harm**

The proportional scope of liability for securities service institutions must be objectively grounded in the theory of causal contribution. Causal contribution refers to the role played by different factors in causing or exacerbating the same harm when multiple causes contribute to the victim's loss [7]. In the *Zhong An Ke* case, the court determined the causal contribution of the securities company and the accounting firm based on the scope of their respective duties, i.e., by assessing the role of their actions in causing the harm according to their duty of care [8]. Therefore, evaluating the causal contribution of intermediaries requires an overall understanding of their functional positioning in information disclosure activities, meaning that liability should be judged based on the professional scope of each securities service institution, with joint and several liability confined to their respective professional domains.

Securities service institutions include securities companies with underwriting and sponsorship functions, as well as verification institutions such as accounting firms and law firms engaged in brokerage services and securities investment consulting. As "gatekeepers" of the securities market, securities service institutions must review the issuer's listing materials and issue relevant documents such as sponsorship letters, audit reports, and legal opinions. China's securities service institutions operate under a "strict lead sponsor model," where the sponsor institution has the broadest scope of verification and documentation. If discrepancies or non-compliance with listing conditions are found, the sponsor can prevent the issuer from going public. Thus, the sponsor institution is positioned as the "lead actor," with comprehensive and in-depth involvement in the securities issuance process. In contrast, other intermediaries play relatively peripheral roles.

The sponsor institution must understand the issuer's situation, industry background, and prospects, employing professionals in law, accounting, and other fields. Its scope of duties exceeds that of accounting and law firms, and it bears a higher duty of care, playing a leading role in verifying listing materials and guiding the listing process. If the securities regulatory authority identifies misrepresentation in the issuer's information disclosure, the sponsor's violation is the primary direct cause of the harm, with greater causal contribution than other intermediaries.

Law firms and accounting firms are only responsible for matters within their professional scope and issuing relevant documents, assuming liability in legal and accounting domains, respectively. Law firms review the legal conditions for the issuer's listing and issue legal opinions to disclose legal risks. Accounting firms disclose accounting information, and their audit reports directly influence investors' assessments of the issuer's profitability and operational performance. Their importance in the listing process differs, making it challenging to measure their causal contribution solely based on the scope of duties or duty of care. Instead, courts must analyze and allocate liability based on the nature of their actions, their significance, and their contribution to the harm. However, both have limited causal contribution and bear smaller shares of liability compared to the sponsor.

#### **4.2. Determining Joint and Several Liability from the Perspective of Fault Differentiation**

Allocating intermediary liability solely based on causal contribution is insufficient. The scope of proportional joint and several liability must be comprehensively determined by integrating causality and fault to ensure that securities service institutions' liability corresponds to their degree of wrongdoing. In cases of intentional or knowing misconduct, securities service institutions bear joint and several liability for investors' full losses, grounded in Article 1168 of the Civil Code on joint tort liability, a point widely accepted in academia.

In cases of negligence, faults can be categorized into gross negligence, ordinary negligence, and slight negligence. However, Paragraph 2 of Article 13 of the Supreme People's Court's Provisions on Several Issues Concerning the Trial of Civil Compensation Cases for Misrepresentation in the Securities Market narrowly excludes ordinary and slight negligence, focusing only on gross negligence involving severe breaches of the duty of care. Meanwhile, Article 163 of the Securities Law implies that the prerequisite for the determination of liability for securities service institutions is based on their professional scope and the standard of expert liability [9]. Therefore, negligence in matters outside their professional scope should not trigger the presumption of fault or joint and several liability under Article 163 of the Securities Law.

Gross negligence refers to a failure to meet the high duty of care required by law, even falling short of the general standard of care that everyone should and can exercise. In securities misrepresentation, gross negligence manifests as a failure to fulfill the duty of care expected of experts in professional matters, even failing to meet the standard of care expected of an ordinary person. The key issue lies in the criteria for determining the level of negligence. The special duty of care of professionals serves as the benchmark, with the average duty of care of securities service institutions as the reference. Falling below this average constitutes at least ordinary negligence, while failing to meet the general standard of care in professional matters amounts to gross negligence. The degree of negligence must further be considered to delineate the proportion of liability.

#### **4.3. Allocation of Proportional Joint and Several Liability and Recourse Among Securities Service Institutions**

In both the Zhong An Ke and Wu Yang Bond cases, the courts only defined the proportion of joint and several liability within the total debt without determining the internal liability shares between the issuer and intermediaries. The liability proportion determined by the court does not equate to the recourse proportion among joint debtors, leaving the ultimate allocation of responsibility unresolved.

First, whether securities service institutions have the right to seek recourse from the issuer after bearing liability. In the securities market, the primary bearer of information disclosure obligations is the issuer. Given the highly concentrated ownership structure of Chinese listed companies, controlling shareholders and actual controllers typically possess all information about the issuer and have a decisive influence on the completeness and accuracy of information disclosure [10]. Therefore, for misrepresentation, the issuer, listed company, and their controlling shareholders and actual controllers should be regarded as the primary responsible parties, bearing full liability for intentional misrepresentation. This inevitably overlaps with the liability of other securities service institutions bearing joint and several liability. For securities service institutions subjectively negligent, even if they bear joint and several liability within a certain scope, they should have the right to seek recourse from the issuer to assume ultimate responsibility.

Second, when multiple securities service institutions bear different proportions of joint and several liability for the issuer's debt, whether they can seek recourse from each other and how the scope of recourse should be defined. In clarifying internal recourse among securities service institutions, it is necessary to analyze whether their causal contributions overlap and further determine whether the liability scopes of proportional responsible parties intersect to define internal liability allocation and recourse proportions. If the professional scopes or functions of securities service institutions overlap, the possibility of overlapping causal contributions arises. For example, both the sponsor and the accounting firm are responsible for reviewing the issuer's accounting records—the former under

regulatory requirements and the latter under accounting laws. If both fail to exercise due diligence and are negligent, their causal contributions to the harm may overlap, leading to overlapping liability scopes and potential mutual recourse.

For the overlapping portion of causal contribution between a securities service institution and the issuer, liability should be shared equally with the issuer. If there is further overlap with another securities service institution, the overlapping portion should be shared equally among the two securities service institutions and the issuer. This determines the ultimate liability share of the securities service institution. If it bears more than its share, it may seek recourse from other parties based on their respective ultimate liability shares.

## 5. Conclusion

The framework of absolute joint and several liability under Article 163 of the current Securities Law appears excessively harsh due to its disregard for differences in the fault levels of securities service institutions. It is imperative to construct and refine a mechanism for differentiating their liability. The adjudication approach of proportional joint and several liability established in the Zhong An Ke case represents a breakthrough from the original system, better aligning with the rule-of-law principle that "liability corresponds to fault," while also avoiding the "deep pockets phenomenon" in liability allocation.

The theory of semi-superimposed multiple tortfeasors provides a rational basis for constructing proportional joint and several liability: when the issuer's conduct is sufficient to cause the entire harm and the intermediary institution only contributes partial causal force, the latter shall bear joint and several liability only within the overlapping scope of causal contribution. Liability allocation must adhere to a dual-tiered logic: objectively, dividing causal contribution based on the professional scope of the service institution, and subjectively, scientifically determining the level and extent of the institution's fault. Simultaneously, a recourse mechanism must be established between the issuer and securities service institutions, as well as among the securities service institutions themselves, in cases where causal contributions overlap.

This pathway responds to the regulatory demand for strengthening the "gatekeeper" role under the registration-based system while avoiding a "chilling effect" that could hinder the development of the securities service industry. Although the current determination of liability for securities service institutions is gradually becoming more specialized, rationalized, and precise, new problems arising from the continuous development of the capital market will continue to emerge, presenting fresh challenges to judicial practice. It is foreseeable that future discussions and practices regarding the liability system for misrepresentation by securities service institutions will deepen in the fields of legislation, judiciary, and theoretical research, thereby promoting the maturation of China's securities market.

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