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论受信人的冲突义务

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摘要:受信人在商业或金融交易中,因对受益人负有冲突义务而身处两难境地。因过度关注自身的责任问题,利益冲突受信人一直采取对受益人来说是次优选择的方式行事,有时候甚至造成重大的社会成本。因上述两难困境很难通过合同的方式予以处理,因此,需要一个法律原则来处理此事,而现存法律尚付阙如。

关键词:受信人 冲突义务 困境

本文涉及处于金融、代理和信托法三者"交集"

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地位的利益冲突这一核心问题①:为存在商业利益冲突的当事人履职时受信人的两难困境②。例如,投资证券就几乎总是由不同类型的投资者持有。即使投资者通过投票机制来参与决定,但实际上,在人数如此众多的投资者之间,无论是征集投票权或者在内容冲突的投资指令中理出头绪来都是困难重重,而这也就意味着重要的决定将还是由代表投资者的受信人作出。③ 在美国,此处的受信人通常是指受托人或者契约受托人,后者是指投资者与证券发行人之间通过签订合同的方式授予其此类权力。④

为多样投资者担任受信人者会面临困难的挑战,即使这些投资者类型单一并且不存在相互冲突的利益,⑤也是如此。如果目标证券违

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① 我是从广义上使用"受信人"这一词语的,即一个人被要求为他人利益而行为。*See* BLACK'S LAW DICTIONARY 702 (9th ed. 2009); *see also Robert Cooter & Bradley J. Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 *N. Y. U. L. REV.* 1045, 1046 (1991)(比较常见的受信关系包括受信人和受益人、代理人和本人,公司董事和公司,合伙人之间的关系).

我近期提出的观点认为,次贷危机及其转移到全球金融体系并产生危机很大程度上归因于以下三个原因:利益冲突、投资者的自负和金融市场整体上的复杂性。详见作者"保护金融市场:次级抵押市场崩溃的教训",载《明里苏达法学评论》2008 年第 93 期,第 373 - 376 页。这篇文章阐述了这一后果的首要原因就是利益冲突。

② 我是在比较宽泛的意义上使用"商业利益"这一词语的,在此商业利益包括金融利益。相似地,本文中的商法包括了金融法。

③ Interview with Harold L. Kaplan, Partner, Foley & Lardner LLP; Chair, ABA Bus. Law Section's Comm. on Trust Indentures and IndentureTrs., in Vancouver, B. C., Can. (Apr. 18, 2009)(speaking in the context of a trustee acting for conflicted investors).

④ 契约受信人的顾问经常说,他们的客户没有普通法受信人那样概括的内容广泛的责任或者成为普通法意义上的受信人,因为"契约受信人"仅仅管理和履行基于契约的合同法上的义务。见哈罗德·L. 坎布兰和马克·F. 黑伯林:《盎格鲁—美国契约——惯例的强制力和债券违约,美国经验和来自加拿大、英国的教训》。电子资源(ABA 巴士公司,法律部,芝加哥),2009 年 6 月下列文件的第 1 页和第 4 页:http://www.abanet.org/buslaw/newsletter/0081/materials/ppl.pdf。在没有违约的情况下,上述观点确实是对的。例如在 e E. F. Hutton Sw. Prop. II, Ltd. v. Union Planters Nat'l Bank 一案中(美国第五巡回法院 1992 年案)判决书载明:无疑一个契约受信人承担的义务和责任不能高于和超过信托契据中明确规定的部分,这些义务要比真正的受信人义务有所减弱。

⑤ 担任没有利益冲突交易者的受信人的情形应与本文后面脚注 97 - 99 中所讨论的情形进行比较。在后面的例子中,没有冲突的投资者中的大部分企图私下就交换对价与证券发行人谈判,打算给这些多数投资者超过投资者群中其他人更多的利益。

约了,受信人也有足够的偿付能力的话,投资者有时可能会从事后的角度来审视受信人作出的有争议或有问题的建议,因而竭力把责任加在他们身上。这就带来一个困境:违约以后,很多决定比如是否要增加举债或实行抵押权,这些都需要精确的判断,⑥而且没有一个事先给出的清楚正确的决定。这种困境,如我在另一篇文章中探讨的那样,在契约受信人作为公众债券持有人的受信人时,⑦他们经常会遭遇此类问题。

这种困境会因投资者自身之间存在利益冲突而加剧。所谓投资者自身之间的利益冲突,比如优先权冲突或付款来源的冲突。如此一来,受信人不仅要遭受"事后诸葛亮"式对实质性判断的决定所进行的事后评估,而且还有要尽力去理解并平衡利益冲突投资者之间(有时称为分层投资者)利益冲突的义务。⑧ 本文集中讨论这一问题。相应地,此处的受信人冲突是指受信人存在相互冲突的义务而导致这一困境,而这一冲突主要缘起于受益人之间存在的冲突,而不是受信人自己与受益人之间存在利益冲突的情形。⑨

现有的法律资源尚不能完全处理这一冲突义务中的受信人困境问题。代理法更多地聚焦于本人与代理人之间的关系,以及代理人对特

⑥ 法律一般要求受信人在证券违约后至少应像一个谨慎的人在类似情形下那样行事。例如,1939 年信托合同法第 315 节 C 项,《美国法典》第 15 章 77000 节 C 项规定:合同受信人在违约的情况下应该按照一个谨慎的人在同样情形下处理自己事务那样的同等注意和技巧为受信人行事。又见麦肯锡 2006 年《纽约房地产蓬勃兴起》报告第 126 (1)中谈到"在违约的情况下,一个契约信托的受信人应按照一个谨慎的人在同样情形下处理自己事务那样的同等注意和技巧为受信人行事"。2007 年《信托法重述》(第 3 版)第 77 节(1)规定:受信人有责任作为一个谨慎的人依照信托的目的、条款和其他情形行事。本文的规范分析是建立在这一受信人行为标准基础之上的。

⑦ See Steven L. Schwarcz & Gregory M. Sergi, Bond Defaults and the Dilemma of the Indenture Trustee, 59 ALA. L. REV. 1037, 1040 (2008),债券违约时,契约受信人被要求谨慎行事,但对何为谨慎却缺乏清晰的指导。

⑧ 参见《布莱克法律字典》第 1635 页(2009 年第 9 版),所谓分层是指一种从一组类似债务人义务资产池中抽离出来的一种债券发行。一层债券通常在债券到期时间和回报率上与其他债券相区别。见脚注 14 - 18 及后文论述。

⑨ 关于受信人与受益人之间的利益冲突问题的讨论可以参见,托玛·弗兰科:"受信人法",载《加利福尼亚法律评论》1983 年第 71 期,第 795、808 - 816 页。

定被代理人的责任，而较少关注诸本人（被代理人）之间的冲突问题。[10] 信托法认识到受信人与受益人之间的冲突（考虑到受信人应负忠诚义务），以及受益人之间的冲突（考虑到受信人应负担公正对待受益人的义务）之间的区别，但是因为信托法根植于无偿信托，因此不能很好地调整商事信托安排。[11] 而商法一般适用于公平交易而不是受信人交易。[12]

一、困境状态的例子

由于产生巨量的债券违约，金融危机使得受信人的冲突问题走向前台。[13] 一个涉及受信人利益冲突困境的常见场景是，受信人为不同（支持）付款来源的证券服务，例如，支持这些证券的本金和利息被分开支付给不同的投资者时就是适例。[14] 受信人在这些情况下往往是个服务商，受雇来收集本金和利息，并为投资者利益最大化服务。[15] 典型的做法是，支持的资产是抵押资产，服务商（受信人）想对这个或更多的贷款进行结构化处理（因为结构化可以比单纯实现抵押权带来更多

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[10] 《代理法重述》（第3版）8/03（2006）规定："一个代理人不能在与代理关系相关系的情况下与本人或代表第三人与本人发生交易。但是同法8/02规定，在多个本人委托同一代理人的场合，代理人应对每一个委托人承担诚信、信息披露和公平交易的责任。"

[11] 参见脚注116及相关正文的内容。

[12] 参见乔纳·本杰明：《金融法》第527页（2007）（英国金融法下主流的规制文件预示金融交易当事人之间主要采用的是相对性原则；同时可见第一联邦存款和贷款机构诉沃尔森银行和信托公司案，919 F.2d 510，514（9th Cir. 1990）（银行和存款机构参与的商业交易通常树立相互之间的公平交易而不是受信人交易）。但是另一案件 Reid v. Key Bank of S. Me.，821 F.2d 9，17（1st Cir. 1987）[法官的意见在下列问题上开始出现观点分歧，即是否以及在何种情形下银行与其借贷客户之间可以推定产生信任（如受信人）关系]。

[13] *See* Philip Rawlings, *Reinforcing Collectivity: The Liability of Trustees and the Power of Investors in Finance Transactions*, 23 TRUST L. INT'L 14, 14 (2009) ("现在的金融问题使得受信人必然处于更大的压力之下"). See Schwarcz, supra note 1.

[14] 因为住房抵押债券这样的结构金融的受益者不再是借款人而是范围广泛的金融市场的投资者，因此很难搞清楚抵押贷款。

[15] 前书第392页。虽然受信人有时会尽力拒绝任何受信人责任，法庭也通常会忽视这些被拒绝的责任，通常的受信人关系的存在更多的是由法律而不是由当事人决定。

的现金回报),但最大化利益标准太过原则而无法提供更多的指示意见。如果服务商通过降低利息率来进行资产结构化,则会反过来影响只是以利息作为受益来源的投资者的利益,如果通过减少本金的方式进行结构化运作,当然又会影响到以本金为受益来源的投资者。[16] 无论如何,结构化可能会产生所谓的"分层冲突"。[17] 结果,服务商不对资产进行结构化,相反地却选择处置抵押资产,因此潜在性地减少恢复投资者损失的可能性,使得抵押房产者愈加贫困,且产生被弃置房产价格的崩溃,而后者更是触发金融危机的直接原因。[18]

一个更普遍的受信人利益冲突情形还表现为,在债券违约后,受信人为具有不同优先权的受益人履行职责。很多债权证券,包括由抵押贷款或其他金融资产支持的证券(和其他各种证券化债权),[19]采取分层发行的方式,每层都对支付有一个不同的优先权。例如,所谓的CDO交易通常涉及数十种证券,这些证券都是以同一个资产池支持,该资产池基于抵押贷款和其他的金融资产,但是每一类都有较于其他种类的优先权。[20]

在最简单的例子中,一种优先级投资者和次级投资者都是由相同的抵押品担保的。当出现违约情况时,在决定是否以及如何实施补偿时,受信人(有时候根据背景被称之为抵押受信人和证券受信人)不得

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[16] 这个例子中只用了对两种不同的投资者进行分配的情形,现实中的分配类型可能会更加复杂。See Schwarcz, *supra* note 1, at 393 n. 101.

[17] See, e. g., Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 CREIGHTON L. REV. 503, 563 (2002) (using the term "tranche warfare"); Randall W. Forsyth, Tranche Warfare: In CMOs, It's the Institutions vs. Individual Investors, BARRON'S, Aug. 19, 1991, at 12, 12 (same).

[18] *See* Gretchen Morgenson, *So Many Foreclosures, So Little Logic*, N. Y. TIMES, Jul. 5, 2009, at BU1 (引自 Alan M. White's 教授的结论认为在很多情况下,决定处置抵押物是不理性的经济行为,他是通过对2009年6月发生的32,000个清算处置案子的研究而得出上述结论的。研究表明,认为在很多案子中损失率达到贷款额的64.7%). *But see Christopher Foote et al.*, *Reducing Foreclosures: No Easy Answers* 22 - 23 (Fed. Reserve Bank of Atlanta Working Paper Series, Paper No. 2009 - 15, 2009), *available at* http://www.frbatlanta.org/filelegacydocs/wp0915.pdf (显示至少一些提前处置抵押物的决定是建立在合理的经济分析基础上的).

[19] 关于债权证券化的详细解释,请参见 Schwarcz, supra note 2, at 376 - 379。

[20] 见前注第377 - 378页(描述了在CDO交易中发行的不同种类的证券)。

不理解并平衡优先级和次级投资者的利益,但却很少得到该如何处置(抵押物)的指导。

英国高等法院最近就面临着这样冲突的案件,当奥锐恩金融公司,一个大型开曼结构性投资机构(SIV),[21]在对优先级投资者的支付上出现违约。这关系到数十亿美元,优先级投资者希望抵押信托人赎回在SIV名下的金融资产,而按照当时已经崩溃的市场价格计算,其资产只够支付给优先级投资者,对次级投资者却没有留下任何资产。[22] 这种方案会严重损害金融现状,并有可能损害两个持有次级证券的金融机构的最终生存能力。[23]

而次级债券投资者却希望抵押信托人延迟赎回抵押资产,希望相应的资产价格上涨或利用这些资产获得的孳息来获得支付(至少是减少损失)。[24] 但无论是生效的抵押文件(在本案中证券协议是由纽约州的法律进行管辖)还是赎回法(《纽约统一商法典》)都没有为抵押信托的受信人提供一个明确的答案。[25]

英国法院认为,优先债权人没有明示的合同权利来指示受信人进行赎回。[26] 在适用纽约法律时,也可以得出结论说,抵押是为所有被担保的当事人而持有的,这意味着次级债权人同于优先级的债权人。[27] 因此,受信人不仅仅是债权人的代理人,是应该进行自由裁量的。[28]

当受信人代表不同优先权或支付来源的投资者履行职责并发生违

㉑ See Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, [16] - [28] (Eng.), 2008 WL 2697055. 罗林斯教授指出,这个案子"体现了最近金融危机中最核心的问题"。Rawlings, supra note 14, at 28.

㉒ *Bank of N. Y.*, [2008] EWHC (Ch) 1594, [25] - [27]. The senior investors wanted to exercise a particular right on foreclosure, bidding to retain the financial assets, which had been pledged as collateral. Id.

㉓ 作者在这个案子中系金融机构关于信托法和处置抵押物相关法律问题的专家证人。See id. [31].

㉔ *See id.* [27].

㉕ *See id.* [6] - [7].

㉖ *Id.* [43], [55] - [56], [61].

㉗ *Id.* [58].

㉘ *Id.* [59]. 法庭没有试图指导受信人如何执行相关指令。

约时,同样的冲突也会产生。[29] 本文说明在对冲基金和垃圾债券投资产生时,受信人受托处理单一种类的同等权利债券也会产生受信人冲突的情形。[30] 进一步而言,虽然这篇文章聚焦于受托为投资者投资证券服务的受信人的义务冲突问题,但是受信人的冲突同样产生于商品投资和衍生工具投资,[31]甚至当受信人并不是代表投资人行事时也有此种问题发生。[32]

二、问题的重要性

受信人的两难困境问题确实存在,不仅如上文讨论所见,该问题涉及的范围很大,[33]而且事实上近年来越来越多的受信人诉诸诉讼并支

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[29] 确实,涉及为不同到期日的同类证券服务时,也会产生同类的冲突。如果支付到期日不因违约而提前的话,受信人将不得不决定是否按照到期日的顺序分配财产,在本案中,早到期的证券具有优先性。See, e. g., Interpleader Complaint at 12 - 16, Deutsche Bank Trust Co. v. Victoria Fin. Ltd., No. 600071 -08 (N. Y. Sup. Ct. Jan. 9, 2008), 2008 WL 4263259 [hereinafter Deutsche Bank Interpleader Complaint] (litigating this issue).

[30] See infra text accompanying notes 96 - 97.

[31] 罗格斯大学法学院副教授 Arthur B. Laby(证交会前助理总裁)2009 年 8 月 29 日给我的电子邮件。Laby 教授另外还观察到,在一个投资基金清算或终止投资顾问资格或两者兼备时,投资者之间的冲突非常重要。如果资产价值持续波动,甚至在基金已经停止作新的投资时,赎回权行使的时间安排对投资者最终获得的投资回报数量具有实质性影响。

[32] 参见 Myron Glucksman,前花旗证券有限公司的执行董事给作者的电子邮件。Glucksman 解释道,一些受信人的两难困境是由于交易的其他方(如提供债权保护的交易方)事先被给予合同上的权利所导致的。*For example, some CDO documents permit the CDS [credit default swap] party (upon an event of default following the failure of a Senior credit test) to direct the Collaeasteral Manager to sell certain collateral (e. g. cash bonds whose proceeds would be used to pay the CDS party a termination payment) before accessing a line of credit under a Super Senior borrowing facility that would also be used to pay the CDS holder. The practical impact is that following one order (the first mentioned above) may leave nothing for the senior creditors while following the other would. Id.*

[33] *See supra notes* 30 - 33 and accompanying text.

付相应的成本来为他们的责任"讨个说法"。[34] 这个问题之所以成为问题还因为,受信任人为了考虑如何限制其责任,他们就会以对部分或全部受益人来说次优的方式履职(如前所论),有些时候,这些次优选择会招致远超过受益人之外的社会(外部)成本,例如,即使可能有替代方案创造出更多价值和保存房屋业主的所有权,但是在违约情况发生后,受信人还是选择处置居民的抵押资产。[35] 次优选择会达到滥用的程度,例如在利益冲突情况下,受信人会试图过分依赖法律意见以减少责任而不是运用商业判断原则灵活处理。[36]

该问题之所以重要还因为这个问题不太容易通过"写入"合同的方式得以解决。因为,两难困境可以出现在任何商业机制中,一方或多方当事人可能不够专业,如果事事通过事无巨细的协商再写进合同,就可能会面临过高的订约成本。[37] 即使各方当事人都很专业,也不能通过订约来解决受信人的困境问题。虽然可能有理论认为,不确定性会使专业的合同订约方获得更好的对待给付,[38]但是这个原只是发生于

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[34] Robert J. Coughlin et al., Rule 22 to Resolve a Catch - 22: Defensive Maneuvers for Corporate Trustees Faced with Conflicting Claims, in NEW DEVELOPMENTS IN SECURITIZATION 2008, at 771, 777 (PLI Com. L. & Prac. Course Handbook Series No. 14108, 2008), WL 908 PLI/COMM. 771 (最近有一些关于公司受信人诉讼申请的趋势,这些公司受信人的资产在证券化交易中受到不同受益人的有利益冲突的请求).

[35] *See supra* notes 18 - 19 and accompanying text.

[36] *See infra* text accompanying notes 194 - 196 (观察到负有冲突义务契约受信人常常寻求法律意见来解决他们的两难困境,这些法律意见允许并且授权受信人的预期行为,虽然这些意见很少被采纳,或者即使被采纳意见作为受信人行为的基础也存在问题).

[37] *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 553 (1998) ("Unsophisticated parties face high transaction costs [when contracting] because they cannot draw upon experience in order to allocate terms among writings and because they may not know about the law.").

[38] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 115 n.22 (1989) ("如果没有事先确定下来违约的情况,很多合同方都会在合同中明示约定他们需要的相关事项以避免遭受事后不确定性违约的惩罚"). Professors Ayres and Gertner also argue that "penalty default [rules] are appropriate when it is cheaper for the parties to negotiate a term ex ante than for the courts to estimate ex post what the parties would have wanted." *Id.* Art 93.

双方当事人合同的理论,其适用范围是否可扩张存在疑问。[39] 进一步而言,受信人利益冲突的困境甚至会出现在三方合同——这一最简单的"异化"合同中。因为三方当事人订立合同可能更复杂,当事人之间的交互机制、交易成本等很可能会阻碍完全合意的实现。[40] 这些可能有助于解释为何迄今为止通过订约解决受信人冲突问题上的不确定性效果尚不明显这一现象。

为何通过订立合同的方式无法有效解决不确定性的问题,其原因还在于订人合同的条款由于"原先的用法"而造成"迟滞"原因,使当事人即使认识到该条款是次优条款,但是很难提出"偏离"既有模式的建议。[41] 这个"迟滞"性甚至更有可能发生在受益人冲突义务的场合,因为,至少对于规范证券发行的协议来说,协议主要只是由发行人和承销人协商而定的。[42]

因此,比双方当事人之间的合同有过之而无不及,在违约后,因为很多始料未及的问题都会出现,[43]因此通过合同约定不太可能解决受信人冲突的问题。更有甚者,因为商事交易复杂性程度在提高,当事人

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[39] *See* Eric Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 565 (2006) (arguing that penalty default rules are theoretical concepts that either "simply do not exist or are not a distinctive doctrinal category").

[40] 比如,如果受信人和优先级投资者同意一个既定标准,次级投资者可能不会同意;或者如果优先级投资者和次级投资者同意另一个不同的标准,而受信人则可能不同意。

[41] *See* Omri Ben - Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 651 - 653 (2006).

[42] *See, e. g.*, Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1509 (S. D. N. Y. 1989) ("[Public bond] indentures are often not the product of face - to - face negotiations between the ultimate [bond] holders and the issuing company ... [Rather] underwriters ordinarily negotiate the terms of [public bond] indentures with the issuers."); Martin Riger, *The Trust Indenture as Bargained Contract: The Persistence of Myth*, 16 J. CORP. L. 211, 215 (1991) ("Bondholders do not participate in fixing the terms of the usual indenture for publicly held bonds. This task is reserved by the issuer for itself with assistance from the lead underwriter of the issue.").

[43] *See, e. g.*, Deutsche Bank Interpleader Complaint, *supra* note 30, at 12 - 16 (litigating a completely unanticipated dispute regarding the order in which the collateral trustee should make payment to conflicting investors after default); *see also* Frank H. Easterbrook, *Two Agency - Cost Explanations of Dividends*, 74 AM. ECON. REV. 650, 655 (1984)["在(金融)合同中,未来的情况总是被预计为不完美的,所以事后的调节机制也总是需要的……"].

会发现更难达成事先预料结果的合同规则。[44]

通过逐个订立合同的方式不可行还有另外一个原因。由于要遵守一系列僵化的合同标准将会使受信人(在大多数商事交易中受信人主要是金融机构)很难发展和维持一套关于受信人最佳实践的一致的知识体系和经验法则。[45]

因此,需要有超越个案订立合同方式的法律原则来帮助解决受信人冲突问题。下文的分析考察这些原则应该是怎样的。我们从讨论实体的权利和义务开始分析,[46]我们首先设问,是否受信人冲突问题会因为其履职所基于的商事交易类型的不同而被区别对待。在推演出这些权利和义务大部分应独立于其所基于的交易,换言之,只要是商事交易即是一样之后,[47]本文主要集中讨论受信人担任受托事务时投资者之间的利益冲突问题。首先,我们分析没有投资指令时的上述冲突,然后分析已给出投资指令的情形。[48] 随后,文章将讨论解决受信人冲突的程序性方案,[49]例如,宣示判断之诉和为每一类投资者设置独立的受信人等程序性方案相关问题。

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[44] 进一步说,因为政府机构越来越多地关心复杂的债务证券,这些证券增加了整个社会系统的连锁反应风险和其他公共政策问题,其中的一部分风险和问题至少是合同规则所无法约束的。*See* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L. J. 193, 194 - 196 (2008).

[45] *Cf.* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J. L. ECON. & ORG. 55, 85 (1991) ("All firms benefit from a judicial decision clarifying the scope of permissible conduct. The benefit of clarification is... identification of a rule around which the parties... can transact.").

[46] *See infra* Part Ⅲ.

[47] *See infra* Part Ⅲ. A.

[48] *See infra* Part Ⅲ. B - C.

[49] *See infra* Part Ⅳ.

三、实体分析

(一)两难困境的性质

一个首要问题:是否受信人存在冲突义务的困境可因受信人受托职责所系于的商事交易的不同类型而有所不同?对这个问题的回答应该转变为:交易类型的(不同)是否会与两难处境存在实质性的关联?是否两难处境的本质会因而根本不同?是否依赖于受信人的下列角色差异?例如,债券或其他投资证券上的契约受信人,或者作为一个抵押贷款或其他金融资产支持证券的服务商。

在每一种交易中,两难处境的本质是受信人必须在证券违约后代表利益冲突的交易者行事。[50] 因此他的责任被分开了,从而他不能简单地只作为一个代理人行事了,[51]他又必须行使自由裁量权,[52]决定如何履行受信人职责。问题是如何行使这个自由裁量权,这个问题更多的是和投资者利益冲突本身相关,而较少涉及商事交易类型的特殊情形。[53]

法庭检验受信人的冲突义务时也相应地主要聚焦于冲突本身而不

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[50] 这篇文章关注的是违约发生之后负有冲突义务的受信人,这时候的两难境地显得最为突出。*See supra* notes 6 - 21 and accompanying text.

[51] *See, e. g.*, RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006) (代理人仅仅拥有行政管理上的义务,除非合同另有约定,代理人仅需要在通常需要代理人履行职责的类似情况下仔细地、能够胜任地并且勤勉地履行义务).

[52] *Cf.* Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, [59] (Eng.), 2008 WL 2697055 (结论是,如果抵押物是抵押受信人为具有利益冲突的不同投资者所持有,抵押受信人"不仅仅是债权人的代理人,而且被要求作出谨慎的自由裁量").

[53] *Cf.* Frankel, *supra* note 10, at 807 - 808 (observing that it is the potential for abuse of power inherent in fiduciary relationships, rather than the specific form of the fiduciary relationship, that is relevant when addressing fiduciary self - interest).

是商事交易所基于的具体类型。[54] 例如,在著名的贝克诉制造商汉诺威信托有限公司(*Beck* v. *Manufacturers Hanover Trust Co*)案中,受信人是一个契约受信人,受托担保铁路公司发行的债券。[55] 在分析违约后受信人责任时,[56]法庭不区分受信人和其他类型的受信人之间的区别。实际上,法庭认为:

即使一个契约受信人的责任范围界定得比普通受信人要小,契约受信人的义务也是契约的目的在于,在义务人违约之后,受信人尽量保护存留的剩余财产。契约受信人的义务更多的是类似于一个普通受信人的义务,而无论合同中是否存在任何限制或是豁免条款的规定。[57]

法庭的理由是在违约后,债券持有人将"不能捍卫其利益以防对其经济利益的进一步损害"。[58]

本篇文章因此利用违约后优先级投资者和次级投资者这两类利益冲突投资者的例子,[59]从一般意义上分析这种两难困境。[60] 虽然也存在其他类型投资者之间的优先权冲突并因而加剧这种冲突,但是这些并不会从根本上改变受信人责任的性质。利用上述两类投资者的例子,文章首先分析在缺乏投资者指导的情况下,利益冲突中的受信人的两

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[54] *E. g.*, Beck v. Mfrs. Hanover Trust Co., 632 N. Y. S. 2d 520 (App. Div. 1995). 这篇文章认为,规范的法律原则并不是一定需要在制定法中体现。*Cf.* ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES 18 (2d ed. 1991) (contending that "'oughts' cannot be derived from 'what is'" (citing G. E. MOORE, PRINCIPIA ETHICA 10 - 14 (1971))). The point, however, is that normative principles and positive law coincide in answering the question.

[55] *Beck*, 632 N. Y. S. 2d at 522.

[56] *Id.* at 526 (有如下观点:受信人"有对信托受益人的责任").

[57] *Id.* at 527 (emphasis added); *see also* LNC Invs., Inc. v. First Fid. Bank, 935 F. Supp. 1333, 1347 (S. D. N. Y. 1996) (quoting Beck, 632 N. Y. S. 2d at 527).

[58] *Beck*, 632 N. Y. S. 2d at 527; *cf.* Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 569 n. 70 (2003),作者在文中辩驳道,抵押信托更接近于传统的信托,其包含了资产(如抵押物)转移给受信人。

[59] *See* Geoff Fuller & Elizabeth Collett, *Structured Investment Vehicles—The Dullest Business on the Planet*? 3 CAPITAL MKTS. L. J. 376, 379 (2008) (这种两层分层的投资者结构事实上是一种典型的结构性投资工具).

[60] 这篇文章假设,无论如何,受信人所为的行为都是在商业交易的背景下进行的。See supra text accompanying notes 32 - 50.

难处境,然后文章再分析存在投资者指导的情形。

这并不是说不同的交易类型不会影响上述分析。例如,一个抵押受信人不能因为不同种类的投资者由单一资产池进行担保而存在利益冲突,就采取辞职的方式来回避这个问题。[61] 同样地,抵押服务商的自由裁量权比其他受信人受到更多的限制。[62] 但是,此类差别都是次要的。当然,如果这些差别对文章的讨论有实质的重要性时,届时文中将予以说明。

(二)没有指示时受信人的冲突义务

在缺乏投资者指示时,任何分析都会以受信人代表所有利益冲突的投资者这一假定为起点的,[63]接着就讨论每一类投资者的利益为何?以及如何在那些冲突义务之间寻求平衡?作者还是沿用一类是优先级投资者,另一类是次级投资者且债务人违约这个例子来予以说明。[64] 此处至少有三种组合平衡方式:(1)受信人对冲突保持不偏不倚的态度。(2)受信人应该偏惠于优先级投资者。(3)受信人应该更多保护次级投资者的利益。至于何种方式适当,则要求受信人对每一类投资者所负义务的理解。

次级性本身并不改变公司对每个债权人分别支付的义务。它只是要求根据合同的规定次级债权人应把收到的支付移交给优先级债权人。[65] 因此,优先级债权人与公司,次级债权人与公司,两者的期待都是相同的。从逻辑上讲,受信人对每一种债权人的义务,除了相对优先

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[61] *See infra* note 147 and accompanying text.

[62] *See supra* notes 16 – 18 and accompanying text (explaining that a mortgage servicer usually faces a relatively simple choice: to foreclose on a defaulted mortgage loan or to work out the loan's indebtedness—though the latter option has its own complications).

[63] *Cf.* Beck, 632 N. Y. S. 2d at 526, 530 (作为受信人,其义务具体的约定在契约里,其对所有的信托受益人负有忠诚义务); Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, [58] - [59] (Eng.), 2008 WL 2697055 (规定受信人不仅仅是优先级投资者的代理人).

[64] *See supra notes* 60 – 61 *and accompanying text.*

[65] *See, e. g.*, CHRISTOPHER L. CULP, STRUCTURED FINANCE AND INSURANCE: THE ART OF MANAGING CAPITAL AND RISK 287 – 290 (2006) (explaining that the proper way to understand subordination is to view the holders of subordinated securities as selling repayment insurance to all holders of securities that are contractually "senior").

的义务外，应该相同。

在违约之前，这些义务通常都是日常事务。[66] 在违约之后，如笔者在另一篇文章中所言，受信人对债权人的义务是最大化债权人的利益。[67] 从那个角度出发，下一步逐项讨论受信人处于利益冲突债权人之间，采取平衡义务来使价值最大化的三种模式中的每一种（依然援用前面的例子），即（1）对价值冲突保持中立；（2）偏惠于优先级投资者；（3）偏惠于次级投资者。

受信人之所以对利益冲突保持中立的态度，不偏不倚地对待每一投资者的利益，其理由是明显的：偏惠于任一特定投资者就与其对所有投资者的责任不相协调。因此，在可能相同的情势下，调整无偿信托的法律给受信人强加了公正对待利益冲突的受益人这样的义务（例如，收入受益人和剩余财产受益人之间的冲突利益）。[68] 受信人必须公正对待所有受益人。[69]

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[66] *See supra* note 5.

[67] *See* Schwarcz & Sergi, *supra* note 8, at 1057 – 1060（解释了为什么"契约受信人可能而且肯定应该有为债券持有人获取最大化回报的义务"）；*see also* ROBERT I. LANDAU & JOHN E. KRUEGER, CORPORATE TRUST ADMINISTRATION AND MANAGEMENT 171 (5th ed. 1998)（"如果清算和重组是必要的，受信人应当明白证券持有人希望他们的请求得到完全的满足或者是可能的最大化满足。"）；JAMES E. SPIOTTO, DEFAULTED SECURITIES: THE PRUDENT INDENTURE TRUSTEE'S GUIDE XVIII – 1 (1990)（"[I]t is the role of the indenture trustee to help maximize the return to the holders, once a default or troubled situation has occurred."）.

[68] See RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 183 & cmt. a (1990)（解释道，公正责任被运用于"无论信托受益人在信托财产上的利益是共同的还是有顺序的"）.

[69] RESTATEMENT (THIRD) OF TRUSTS § 79 (2007)（"受信人有义务为各种信托受益人公正地管理信托财产……"）；id. § 79 cmt. b（"[I]t is the trustee's duty, reasonably and without personal bias, to seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust."）；*see also* UNIF. PRINCIPAL & INCOME ACT § 103(b) (amended 2008), 7A U. L. A. pt. III, at 429 (1997)（"[A fiduciary] shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust ... clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries."）. Any action taken in accord with the Uniform Principal and Income Act (UPIA) "is presumed to be fair and reasonable to all beneficiaries." Id. All provisions of the UPIA are default rules which may be altered by the terms of the trust. *Id.* § 103(a).

对民事信托来说,公正责任是足够的,因为受信人可以通过履行委托人的义务来解决这一冲突问题。[70]因为民事信托的受信人的期待比商业信托的受信人通常更容易满足,因此这个责任对民事信托来说也更有弹性。

虽然民事信托的优先级投资者和剩余财产请求权人的利益不是一回事,但是只要通过对信托财产保值即可满足所有请求权人的期待。并且保值通常需要受信人一方的相对事务性的努力。因此,在公正责任的原则下灵活操作即可。[71]

但是违约后,公正责任在商业背景下不能提供充足的实践指导。

首先,因为在商业背景下,并不存在与民事信托相对应的无偿委托人这一角色。对委托人来说缺少类似的数据,因此,受信人无法据此履行委托人的意愿。[72] 因为,在此背景下,受信人的责任是最大化信托财产的价值而不仅仅是保值。受信人因此需要很好地进行判断,因为价值最大化必然涉及价值贬损的风险,[73]受信人因此很有可能面临法律诉讼。[74] 公正责任对此几乎没有指导意义,它甚至无法指导处于利益冲突的受信人去决定是否应提前处置抵押物。

其次,我们来考虑要求处于利益冲突中的受信人偏惠于优先级投资者利益的规则。如此做的理由就好像之所以称其为优先级投资者一样,那是合同规定的。但是这个规则存在的问题是合同次级性问题在

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[70] Comment of Deborah A. DeMott, David F. Cavers Professor of Law, Duke Law School; former Reporter, Restatement (Third) of Agency, at Duke Law School Faculty Workshop on this Article (July 22, 2009) (on file with author); *see* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 726 (8th ed. 2009) ("受信人必须考虑委托人在指导文件或以其他方式明示表示的偏好").

[71] Schwarcz, *supra note* 59, at 578. 随着信托形式在商业化中的运用不断增加,无论如何,这将引发传统信托法的公正义务发展成为一种需要具备更加专业化标准的义务。Cf. id. at 579 ("If ... a significant market in residual trust claims were to develop, it is not inconceivable that the law would evolve to impose on trustees a [more sophisticated] duty to such residual claimants ...").

[72] Comment of Deborah A. DeMott, *supra* note 71.

[73] See *infra* note 87 and accompanying text.

[74] *But cf.* Richard M. Horwood & Lauren J. Wolven, *Managing Litigation Risks of Fiduciaries*, Tax Mgm't Est., Gifts, & Tr. Portfolios (BNA) No. 857, at A-3 (Apr. 2, 2007) (现在针对无偿信托受信人提起的诉讼越来越多).

合同中的范围非常有限,合同对优先级投资者是否在行动和决定上更应该得到偏惠,规定得多数模棱两可。[75]申言之,受信人的责任有些时候可能会超越合同条款。[76]

最后,考虑一下偏惠于次级受益人的情形。乍一看,与合同规定应该保护的对象相反,这个规则有点令人匪夷所思。然而,这个规则的性质有一个限定性前提:只有当优先级投资者的本金和利息支付已经得到保障,其价值已经最大化的情形下方能如此。债权人不能请求超过本金和累计的利息之外的部分。[77] 受信人因此就满足了对优先级受益人的责任。然后,受信人应该专注于其对附属投资者的义务,来使他们的利益最大化。这个平衡就是受到争议的帕累托最优定律:提高次级投资者利益但并不损害优先级投资者的利益。[78]

例如,在违约后抵押物只能支付优先级投资者而再无法全额支付次级投资者。这种情况实际上在违约后极其普遍。[79] 如果延迟取消抵押人的回赎权会提高抵押物的价值,受信人应该抢先阻止取消抵押人的回赎权。[80] 因为,优先级投资者最终会被支付利息的,延迟并不会实

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[75] *Cf. supra* notes 38 – 41 and accompanying text (explaining the difficulty of resolving conflicting fiduciary obligations through contract).

[76] *See infra* notes 101 – 129 and accompanying text (examining contractarian and noncontractarian axioms underlying fiduciary analysis).

[77] U. C. C. § § 9 – 608(a)(4), 9 – 615(d) (2009).

[78] *But cf. infra* note 82 (解释这为什么不可能是完美的帕累托最优情形).

[79] 这可以被直观地理解,在这样一个典型的交易中,抵押物的总价值按照偿付顺序偿还投资者,次级投资者面临相对来说尽量小的偿付风险,而优先级投资者则没有实质上的偿付风险。See STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION § 2:4 (Adam D. Ford ed., 3d ed. 2009). This is done by paying senior investors, after default, from the extra collateral originally expected to pay the subordinated investors. *Id.*

[80] 即使抢先取消抵押人的赎回权可能会提高抵押物的价值,但是这样做还是很可能冒抵押物价值贬损的风险,在有些时点上,抵押物价值的贬损甚至会损及优先级投资者的利益。一个受信人通常会管理这个风险,比如通过设置一个最低门槛标准,当抵押物价值一旦位于此门槛之下即立即终止赎回权实现抵押权。*See, e. g.*, Foote et al., *supra* note 19, at 25 (observing that even when borrowers are offered an initial "forbearance," creditors can protect themselves by reserving the right to foreclose if collateral value is declining and the borrower still appears unlikely to cure).

质性地影响他们的地位。[81]

在优先级投资者已经受到保护的情况下,利益冲突中的受信人应该更多地保护附属投资者利益,这种类型的限制规则看起来非常有趣,这形成了另外一个潜在类似的利益冲突的情形,即公司董事会对股东和债权人之间的责任。一旦公司具备偿还能力(因此可以对优先级投资者,比如它的债权人),董事会有责任更多保护其股东利益(附属投资者)而不是债权人利益。[82] 这样做的潜在理由是,这样的责任会最大化所有公司投资者的利益。[83]

这种情况看上去更接近于本文所说的商业环境而不是无偿信托法和其公正责任。与无偿信托不同,在那里,信托财产的投资都很保守,处于无风险之中。[84] 而公司法假定,公司的董事会应该把公司财产投

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[81] 这也可能不会是完美的帕累托最优情形,因为即使迟延偿付的损失可以通过累计利息来弥补,这种迟延可能损害无现金流的投资者的利益,因为这些投资者需要获得偿付以避免自己无法履行义务而对第三人违约。总体说来,无论如何,法律还是把最终偿付中的累计利息的部分视作对不及时履行偿付义务的补偿。*See*, *e. g.*, U. C. C. § 9 - 623 (2009) (prescribing a right to redeem collateral covered by the Uniform Commercial Code); 1 MICHAEL T. MADISON ET AL., THE LAW OF REAL ESTATE FINANCING § 5:36 (2009) (observing that a mortgagor who defaults has a right at equity to redeem the mortgaged property if he is able to repay the principal and accrued interest prior to a foreclosure sale).

[82] *See*, *e. g.*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A. 2d 92, 101 - 102 (Del. 2007).

[83] *See* Robert Dean Ellis, *Securitization Vehicles*, *Fiduciary Duties*, *and Bondholders' Rights*, 24 J. CORP. L. 295, 315 - 316 (1999) (discussing the efficiency rationale for shifting directors' duty from shareholders to bondholders in the vicinity of insolvency and commenting on the *Credit Lyonnais* decision in these terms).

[84] 比如,如果丈夫生前把终身产业资产以妻子和孩子为受益人设立信托,受信人发现了一个非常好的使信托财产增值的机会,如果把丈夫留下的终身产业资产投入企业中,有90%的可能使资产翻倍,另外有10%的可能使资产受到损失。如果妻子现正处于穷困状态以至于不能承受这10%的损失风险,则受信人的公正责任很可能使其不会从事这样的投资。Schwarcz, *supra note* 59, at 577. 信托法并不当然禁止受信人将信托资产置于风险之中,不管怎样,如果前面例子中的妻子自身是富裕的,则受信人"将会有更多的余地根据其公正责任作出投资决定。"*Id.* at 577 n. 122. 当然,这需要委托人事前向受信人表明信托财产是可以进行具有一定风险的投资的。*See* DUKEMINIER ET AL., *supra* note 71, at 726 ("受信人必须考虑委托人在指导文件或以其他方式明示表示的偏好").

入风险之中以产生利益和增长。[85] 这样一个目标同样存在于违约发生后，应将财产最大化而不是仅仅去保护财产。[86] 升值比单纯地保值要更困难，这使得公正的责任很难在商业环境中得以应用。[87] 相反，偏惠于附属投资者、剩余利益索取权者等受益人利益的责任在无偿信托背景下不太实际，因为利益冲突中的受信人在优先级投资人去世之前，不太会知道他是否已经得到信托财产的保护。[88]

上面的分析指出了最普遍的违约情形，即附属投资者而不是优先级投资者的利益处于风险之中。[89] 在一些情况下，甚至优先级投资者的本金和累积的利息是否会得到支付也不确定。在这些案例中，很难说受信人如何平衡这些利益冲突的不同种类的投资者。任何这类平衡都是很敏感的事情。

考虑一下这样一种情况，就是抵押物甚至不能补偿优先级投资者的利益。理论上来说，受信人对优先级和附属投资者都有同样的财产最大化的义务。[90] 如果不能确定延迟终止抵押人的赎回权是否会提高还是降低抵押物的价值，或者如果抵押物价值的提升将不太够支付附

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[85] *See In re* United Artists Theatre Co. v. Walton, 315 F.3d 217, 233 (3d Cir. 2003) (explaining that the business judgment rule acknowledges that board's function includes "decisionmaking... [involving] the weighing of the potential of risk against the potential of reward"); 18B AM. JUR. 2D *Corporations* § 1470 (2009) (same).

[86] *See supra* note 68 and accompanying text; cf. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 650-652 (2004) (参见信托法和公司法的比较)。

[87] Schwarcz, *supra* note 59, at 578; *see also* Schwarcz & Sergi, *supra* note 8, at 1058-1059 (解释为什么将公司董事的受信义务与利益冲突中的受信人的受信义务进行类比是合理的).

[88] 比如，在一个无偿民事信托中，信托财产将被用来支付X的终身花费，余下的将留给Y。冲突义务中的受信人无法事先知道X的花费是多少，因为受信人无法知道X的寿命及X的开销。与此相类似的，即使信托被设计成受信人每月向X支付500美元用于生活，余下的留给Y，冲突义务中的受信人还是无法预先知道X的花费，因为受信人无法知道X的寿命。而在商业背景下，无论如何，优先级投资者的利益总量是可以计算的，利益总量等于投资的本金总量加上到支付时还没有支付的累计利息。

[89] *See supra* note 80 and accompanying text.

[90] *See supra* note 68 and accompanying text.

属投资者请求权的实际数量,[91]在这种情况下受信人应该优先考虑优先级投资者的利益。理由是优先级在价值上会首先遭受损失和获得利益,相反受信人不太可能为附属投资者提高价值。但是,如果抵押物的价值提升到一定的水准至少会补偿附属投资者请求的实质的金额总量的一部分给一定数量的次级投资者时,受信人应该首先保护这些投资者的利益,这样做的合理解释是提高抵押物的价值对两者均有利。因此,当无法确定即使优先级投资者是否能被足额支付时,受信人应该通过评估偏惠于某一类投资者而可能给其承担责任的所有种类投资者带来损益的可能性和重要性,以此方式来履行其在利益冲突各方中的平衡义务。[92] 接下来要考虑的问题是,当受信人接受优先级投资者的指示,将损及附属投资者利益,这一更具戏剧性冲突的问题。

(三)有投资指导目录时,受信人的冲突义务

在有些案例中,调整受信人的合同会约定,在违约后将授权一类投资者,通常是优先级投资者对受信人发出操作指令。例如,担保协议有时会授权优先级投资者就取消抵押物赎回权事宜对受信人进行指导。[93] 在证券化交易所谓的资产池和服务协议中,可能会授权优先级投资者在违约发生后就补偿事宜对受信人进行指示。[94] 这会产生给指令者的利益与其他投资者利益间的冲突。

同样的冲突甚至会产生于受指导的受信人仅为单独一类证券投资

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[91] 受信人通常会寻求专家的估值服务然后再作出这些决定。Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, [20] - [21] (Eng.), 2008 WL 2697055.

[92] 所以,次级债权人相对于优先级债权人拥有较少的保护条款的事实对我来说并不与这里的分析相关。

[93] *See* Laurie S. Goodman et al., *Event of Default Provisions and the Valuation of ABS CDO Tranches*, 17 J. FIXED INCOME, Winter 2007, at 85, 85 - 86 (在大多数 CDO 交易的担保协议中,如果抵押物的价值和优先级投资者在抵押物上的利益无法达到最小的比例匹配要求时,协议赋予拥有控制权的一类投资者对抵押受信人关于是否取消抵押权人赎回权以指导权).

[94] *See* Gary Barnett, *Understanding CDOs in the Current Market Environment*, *in* NEW DEVELOPMENTS IN SECURITIZATION 2008, *supra* note 35, at 739, 748.

者履行职责的情形中。[95] 随着对冲基金和垃圾债券投资者的兴起，在这些金融产品中，一种抑或数种投资者会获得一个特定类别证券的多数投票权。在有些案例中人们会发现，这些投资者曾私下与证券发行者就利益输送或其他安排进行协商，旨在获得超过其他投资者更多的优先权。[96]

无论利益冲突在投资者中是如何产生的，关于接受指令的受信人的基本问题是同样的。[97] 本文下面的分析其实与没有投资指令的情形一样，主要是聚焦于一个优先级投资者和其他次级投资者。然而，通过分析我们现在可以看到，优先级级投资者，根据受信人合同正试图"左右"受信人。[98]

从概念上讲，考虑这个困境的一个进路是去追问——在这样的指令作出以后，本文到现在为止的根本性的假设——受信人正在代表所有利益冲突的投资者行事，这一命题是否依然存在？也许，在给出指导后，受信人仅仅在为给出指令的投资者"工作"。[99] 假设如此，在逻辑上讲，受信人就没有履行保护其他投资者的义务。

在判定受信人是否在为所有（利益冲突的）投资者的利益履行其

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[95] *Cf.* Schwarcz & Sergi, *supra* note 8, at 1071 (observing that the power of majority bondholders to direct the trustee "raises serious, unresolved issues" such as "whether the majority bondholders should have legal duties to other bondholders and, if so, what should be the standard for those duties" in situations where "[s]ome or all of the majority bondholders ... have conflicts of interest with other bondholders").

[96] *See, e.g.*, Kaplan & Hebbeln, *supra* note 5, at 21 – 28 (discussing recent challenges to discriminatory consent solicitations and exchange offers); *see also* Jeffrey J. Powell, *Doing the Right Thing in Corporate Trust*, ABA TR. & INVESTMENTS, July – Aug. 2008, at 38, 38 ("大多数的契约文件要求受信人遵照占本金总额50%以上的债券持有人的指示。").

[97] *Cf. infra* note 105 (论及贝克案，案件中受信人事实上是为了单一种类的平等证券持有人持有信托财产).

[98] 虽然（像前面讨论的一样），当某一证券类别的大多数投资者想要获得优先于该类别中其他投资者的利益时，冲突同样会发生。*see supra* note 97 and accompanying text, that distinction should not fundamentally change how the duties of a fiduciary with conflicting obligations should be analyzed. A fiduciary should, nonetheless, try to be sensitive to the possibility that majority investors directing the fiduciary are attempting to gain an advantage over other investors in their class, perhaps by inquiring whether the majority investors are conflicted with other investors of the class (as would occur, for example, when the majority – investor directions are intended to benefit other investments owned by the majority). See Interview with Harold L. Kaplan, *supra* note 4.

[99] *Cf. supra* notes 52 – 53 and accompanying text (observing that so long as its duty is divided, the fiduciary cannot act ministerially as a mere agent).

义务时,或者仅仅为发出指令的投资者"工作"时,就会产生了所谓的"两难困境"。学者们摆出了两种解释受信人职责模式的路径:一种方式是合同主义,即受信人的责任应该仅仅被看做合同的违约条款,[100]受信人因而应遵守合同的明确约定,该约定投资者是默示(在有些交易中则是明示)同意的;[101]另一种方式是非合同主义路径,即受信人关系主要是在制定法中强制规定的,受信人应承担超出合同条款明确规定之外的责任。[102] 这两种解释方法实质上代表了两种根本分歧的法理基础。[103]

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[100] See, e. g., Frank H. Easterbrook & Daniel R. Fischel, Contract and Fiduciary Duty, 36 J. L. & ECON. 425, 427 (1993) ("Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings. Actual contracts always prevail over implied ones."); John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L. J. 625, 660 (1995) (arguing that fiduciary duties governing gratuitous trusts should be seen as contractual default rules); Mariana Pargendler, Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered, 82 TUL. L. REV. 1315, 1315 (2008) (arguing that "fiduciary duties areuntailored defaults that supply the term that most parties in a certain fiduciary category would have wanted," and that this is normatively desirable).

[101] See Langbein, supra note 101, at 660.

[102] *See, e. g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 887 (arguing that applying the conceptual framework of contractual analysis to fiduciary relationships is misleading, in part because many fiduciary duties are mandatory rules); Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999) ("[F]iduciary relationships ... arise and function in ways alien to contractualist thought, and ... have value and serve purposes unknown to the contractualists. Notably, that they facilitate the doing of justice, that they promote virtue, and that they enhance freedom in a distinctive way."); Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 103 - 04 (2008) (arguing that the noncontractual approach better describes fiduciary duties than the contractual approach); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 72 (2005) (arguing that in the context of trust law the moral content of fiduciary duties should be preserved and courts should enforce only relatively narrow disclaimers of fiduciary duties).

[103] *Cf.* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L. J. 573, 579 - 580 (1998) (describing differences between "proceduralist" and "traditionalist" views of bankruptcy, arguing that these reflect irreconcilable starting points, and that this disagreement results in differing views concerning the goal of bankruptcy proceedings, the effects of case law on parties' ex ante behavior, and the proper role of judges).

法庭和评论者并不总会认识到这种根本分歧的存在导致了规则的模糊和不连贯。例如,在贝克案中,法庭坚持认为一个抵押受信人"在合同明确规定的义务之上"应该对所有的信托受益人承担义务。[104] 这提供了一个非合同主义的路径。比较早些的观点还包括一个合同主义路径的声音:"受信人在违约之后必须谨慎行事,但是必须在合约规定的范围内行使权利和权力。受信人义务的范围也应由合约规定……"。[105]后来,法庭有些时候会对贝克案提出问题,认为只要合约没有明确禁止并且该行为会使投资者获得支付,受信人有超越合同之外对投资者的义务。[106]

评论者也提出了相同的"不一致性"的问题。[107] 例如,一个著名的契约信托受信人的律师,在分析多数投资者企图获得优于同一信托的

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[104] Beck v. Mfrs. Hanover Trust Co., 632 N. Y. S. 2d 520, 530 (App. Div. 1995) (conflating the duties of loyalty and impartiality). Manufacturers Hanover Trust Co. was a successor trustee for holders of defaulted bonds issued by a railway company. Mexico "for decades had had designs upon obtaining the collateral." *Id.* at 529. Mexico, therefore, "systematically purchased in excess of 95% of the bonds" and, as dominant bondholder, "had called for an auction" of the collateral. *Id.* It was clear that Mexico, directly or indirectly, would purchase the collateral at the auction, and that, given the absence of other bidders, the purchase price would plainly be the "upset," or minimum sale, price set by the trustee. *Id.* at 529 – 530. Presumably at the contractual direction of Mexico—It had this right under section 5 of the Indenture, which provided that holders of seventy – five percent of the amount of the prior lien bonds outstanding were entitled to direct and to control the method and place of conducting any and all proceedings for any sale of the premises hereby conveyed.

[105] *Id.* at 528.

[106] LNC Inv., Inc. v. First Fidelity Bank, 935 F. Supp. 1333, 1348 (S. D. N. Y. 1996).

[107] *Compare* Rawlings, *supra* note 14, at 15 ("在美国,票据受信人的受信责任并不是从对票据持有人的受信义务中产生,而是在信托契约中排他地规定出来。"), *and id.* at 16 ("[U]nder English law note trustees are trustees and as such the courts regard them as under certain core obligations . . . "), *with Melanie Ryan & Andrew Yong*, *Springwell—Are the English Courts the Venue of Last Resort for Complex Investor Claims*?, 24 J. INT' L BANKING L. & REG. 54, 60 (2009) ("[P]arties to complex financial disputes seeking to enforce the strict contractual terms of a transaction will endeavour to have their case heard before English courts applying English law... whereas those seeking to look behind the contractual documents and perhaps avoid the strict application of their terms are more likely to seek to have their case heard before the New York courts applying New York law...").

其他投资者的权利时,认为一个处于利益冲突中的合约信托的受信人"应该遵循大多数人的指令,但是也应该始终保护少数人"。[109]

《信托法重述》在密切关注(即使在无偿民事信托的背景下)利益冲突受信人的两难困境时采取了一个准合同主义的方法。如果合同条款"授予一个特定受益人一个下达指令,换言之控制受信人特定行为的权力,受信人有义务遵循该权力,除非受信人知道或有理由相信遵守该指令或违反受信任对受益人的受信义务"。[109]

在商业背景下运用这一规则,一个人会预见优先级投资者(本文例子也当如此)主要是权力拥有者或担任指导者的投资者,他们一般不会对附属投资者有受信义务。这样一来,处于冲突义务中的受信人不得不遵循优先级投资者的指令,即使此举会损害附属投资者利益。但是,信托法重述除了下文讨论的问题以外,通过规定权力拥有者(在我们的例子中是指优先级投资者)应对其他投资者承担与受信人同样的受信义务使问题的答案更加复杂化(甚至有点循环逻辑的意味),权利拥有者(优先级投资者)应像受信人一样,对其他受益人承担受信义务[110]——受信人当然对次级投资者也承担受信人义务。

这个逻辑循环当且仅当是为该权力只是为分配权力者利益几时才会被打破。[111] 此权力不是一个受信人权力。[112] 但是,要判断一个权力赋予是否只是服务于分配权力者自身利益,则要看具体的信托用语和所

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[109] Powell, *supra* note 97, at 38. This begs the question, of course, of what the minority should be protected against.

[109] RESTATEMENT (THIRD) OF TRUSTS § 75 (2007) (emphasis added). 权利拥有者自身可能就是受益人,并且作为优先级投资者对受信人进行指示。Id. § 75 cmt. a.

[110] *See id.* § 75 cmt. f (stating that the power holder has a duty "not to exercise the power in a manner inconsistent with the fiduciary duties owed to one or more of the beneficiaries"); *accord* Alexander Trukhtanov, *The Irreducible Core of Trust Obligations*, 123 L. Q. REV. 342, 344 (2007) ("[T]he larger the scope of the protector's powers [to direct the trustee], the greater the case for treating him as a fiduciary or indeed a quasi-trustee.").

[111] 112 RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. c (2007).

[112] 113*Id.* § 75 cmt. d.

有相关的背景才能判明”。正所谓“对此没有确定的规则可言”。[113]

在违约后将指示受信人的权力赋予优先级投资者或者其他受信人,这个规则应用于商业背景当然具有“似是而非”的意味,因为会导致权力被用于为这些投资者的单独利益服务。因此,当权力的运用没有不合理地与权力拥有者的利益诉求相关时,[114]只要他们没有采取损害或是漠视其他受益人利益的方式滥用该权力,受信人就会被要求遵循优先级投资者的指示。

为了分析的目的,前面在论述时,尽管信托重述实际上并不适用于商业信托,我们也假定《信托法重述》的规则在商业背景下适用。[115]然

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[113] 114*Id.* § 75 cmt. c.; *cf.* Fifth Ave. Bank of N. Y. v. Nunan, 59 F. Supp. 753, 757 (E. D. N. Y. 1945) (holding that New York trust law exempts a directed trustee of a *gratuitous trust* from fiduciary responsibility only if the direction is “express and unambiguous; it cannot be implied”). Query whether a commercial trust, where parties are sophisticated business entities, should be subject to a lower standard than “express and unambiguous.” *Id.* *But cf.* GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 541 (1993) (observing that even where terms of the instrument expressly and unambiguously seek to limit the standard of care for which the trustee is responsible, “[t]he grant of broad discretionary powers to the trustee does not relieve him from the duty to use ordinary skill and prudence in his administration of the trust” and that “[a]n exculpatory or immunity clause... should not, as such, either reduce or expand the required standard of care”).

[114] RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. d (2007) (emphasis added). *But cf.* Citibank, NA v. MBIA Assurance SA, [2006] EWHC (Ch) 3215, [7] (Eng.), 2006 WL 3835286 (quoting clause 10.4 of a deed of trust among the issuer of Notes, Citibank as trustee, and MBIA as guarantor of the notes, that “[w]hen giving any instructions, consents or waivers under the Transaction Documents, MBIA... need have no regard to the interests of the Noteholders, the Trustee or any other Issuer Secured Creditors”); *id.* [48] (enforcing MBIA's directions because “the Noteholders all take their commercial interests on terms that, and knowing that, MBIA wields the power that it wields. Whether or not this is good business, it is certainly not inimical to a trust structure. It is what the Noteholders have agreed should be the case.”).

[115] Part 1, Chapter 1 (Definitions and Distinctions) of the Restatement states, for example, that “[t]he Restatement of Trusts does not deal with such devices as... trusts used for purposes of security.” RESTATEMENT (THIRD) OF TRUSTS, ch. 1, introductory note. Section 1, Comment b, of the Restatement reiterates that the “law relating to the use of trusts as a security device... is not within the scope of this Restatement.” *Id.* § 1, cmt. b. Although “many” of the rules of the Restatement do apply, different rules are often applicable. *Id.* ch. 1, introductory note.

而,重述的规则和合同主义的路径一般在商业背景中显得比较合理。[116]投资者通常都是复杂的主体,了解合同条款或者应该了解合同条款。[117]进一步地说,通过使商事主体依赖于有效的合同条款,合同主义路径的方式(因为具有可预见性和确定性)从而会降低融资成本并且最终会降低基础金融资产(如抵押贷款)的利率水平。[118]

一个论者最近认为直接通过合同私下指令的方式将会规避掉此种冲突而导致的"含蓄性",非常方便地使附属投资者受到优先级投资者的"奴役",[119]至少在特定的 CDO 和 ABS CDO 交易的情况下是如此。例如,即使很多 CDO 交易的文件中包括了诸如"低价甩卖保护条款",意在保护基础资产防止被清算,除非他们的市场价值已足够偿还优先级和附属投资者的请求权时才可"甩卖"。但是,优先级投资者通常享有

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[116] *Cf.* UNIF. TRUST CODE § 102 cmt., 7C U. L. A. 411 (2000)(虽然统一信托法典主要规范无偿民事信托,但也被运用于有商业目的的商事信托,只要信托文件和其他法律没有和法典条款相冲突的地方).

[117] There may be a second, less clearly supported, implicit rationale for this rule: that gratuitous trust directions generally involve specific actions. *See* 76 AM. JUR. 2D *Trusts* § 136 (2005). To the extent this second rationale is the rationale for the rule, it is less likely to have applicability in a commercialtrust context. This is because courts of equity usually are willing to grant specific performance only where money damages is not a remedy, 71 AM. JUR. 2D *Specific Performance* § 10 (2001); for commercial trusts, only money is at stake.

[118] *Cf.* Citibank, NA v. MBIA Assurance SA, [2007] EWCA (Civ) 11, (2007) 1 All E. R. (Comm.) 475 (Eng.), 2007 WL 2852. A trustee, seeking guidance from an English court, was instructed to follow directions given by the assignee of a contractually empowered investor class, notwithstanding other investor objections, on the basis that commercial parties should be able to rely on contractual provisions. *Id.* [7], [81]. 120. Comment of Kenneth Kettering,

[119] Comment of Kenneth Kettering, Assoc. Professor, New York Law School, *following* Keynote Address at New York Law School Symposium: Fear, Fraud, and the Future of Financial Regulation (Apr. 24, 2009); *see also* Aline van Duyn & Michael Mackenzie, *'Tranche Warfare' Breaks Out Over CDOs*, FIN. TIMES, Apr. 15, 2008, http://www.ft.com/cms/s/0/9e8e661c-0a85-11dd-b5b1-0000779fd2ac.html. The authors point out that the "downgrades of some of the bonds backing CDOs are triggering little-noticed 'event of default' clauses, which often allow senior noteholders to take control of all the income." *Id.* What happens next is that "[s]enior noteholders can then accelerate payments from the CDO, which leaves other investors with the prospect of no interest payments for months or years, and also gives them no say in whether or not the instrument should be liquidated." *Id.*

合同权力，在特定情形下指导清算事宜，[120]而不管资产甩卖的结果无法再满足附属投资者的请求权。[121]

但是，对受信人利益冲突问题采取一个僵硬的合同主义的路径在概念上很难令人满意。即使在一个非受信的机制中，合同自由主义不是并且不应该是绝对的。合同自由主义会受到以下情形的限制：善良家父主义、政策和潜在的外部性。[122] 虽然，家父主义与本文所说的商业背景没有必然的联系，对受信人问题的考虑可能会与合同自由的政策和外部性限制等问题紧密相关。[123]

在特定情形下，例如，一个严格的合同主义的路径会触发市场失败。因此，在金融危机中，未经检验的优先级投资者的投票权控制很大

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[120] 比如，如果抵押物资产价值降低之后以至于无法偿付优先级投资者，优先级投资者可能将行使合同权利终止 CDO 交易，并且申请清算抵押资产。*See* Goodman et al., *supra* note 94, at 85.

[121] *See id.*; *see also* Barnett, *supra* note 95, at 748 – 749.

[122] *See, e. g.*, Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 534 – 552 (1999) (explaining why freedom of contract is not, and should not be, absolute).

[123] *Cf. Citibank*, NA, [2007] EWCA (Civ) 11, [58], [82] (observing that a fiduciary has an "irreducible" minimum obligation, but that such minimum was not violated).

程度上导致了支持证券的基础金融资产赎回权的取消和强制处置。[124] 一个严格的合同主义路径也会加剧市场失败,考虑到当投资顾问在向机构推荐购买附属证券时,太多关注那些证券的高收益率(那样做这些人会因为推荐投资而获得高的红利)而对证券违约的后果关注不够,如此一来,代理成本会因此上升。在违约事件之前,投资顾问可能希望有更多变的兼职机会。[125] 或者,就像大多人一样,他们可能会觉得

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[124] Author (Aug. 5, 2009) (on file with author). The creation of senior and subordinated tranches logically leads to voting provision[s] in an indenture or pooling and servicing agreement that allow the senior tranche, by contract or as a practical matter, to control or heavily influence the actions taken by the servicer with the borrower... If a senior class is able by contact [sic] or as a practical matter to control the servicer's actions post-default, the senior class logically will direct the servicer to foreclose and pay the senior tranche, with the remainder of the foreclosure proceeds, if any exist at all, being available to pay the subordinated class that bargained for a riskier position in the distribution scheme [but a higher contractual rate of return]. *This inescapable conflict among the classes leads to an increase in foreclosure rates, negatively impacts the borrower[s], and, in the case of residential mortgages, the community by driving down property values.* This leads one to consider whether multi-tranche issuances of securities backed by a single pool of mortgages is bad for public policy, unless the right of the senior tranche is checked in some manner. *Id.* (emphasis added). At least partly in response to this unchecked voting control, Congress recently enacted a law requiring servicers, when restructuring mortgages for owner-occupied homes, to owe a duty to maximize value to investors as a whole, not to any particular investor groups. See Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-122, § 201(b), 123 Stat. 1632, 1638-1639 (amending 15 U.S.C. § 1639a, Truth in Lending Act § 129A). Under an earlier version of § 1639a, this duty was explicitly a default rule. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1403(a), 122 Stat. 2654, 2809 (amending Truth in Lending Act by inserting new section 129A, codified as 15 U.S.C. § 1639a). The current version likewise appears to be a default rule; even though it lacks the explicit language of its predecessor, versions of the bill that would have made this a mandatory rule were not passed. *See* 155 CONG. REC. H2999 (daily ed. Mar. 5, 2009) (reading proposed version of the Helping Families Save Their Homes Act to say, "[n]otwithstanding any other provision of law, and notwithstanding any investment contract between a servicer and a securitization vehicle or investor...").

[125] Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 14 (observing that analysts who have jobs with limited time horizons may have low accountability).

违约之类的事情还离他们很遥远;[124]或者他们会感觉到(事实证明确实如此)如果其他投资顾问同样行事,他们也不会被辞退。[125] 在最近的金融危机中,投资顾问们经常向他们的机构推荐购买高度复杂的、连他们自己也没有完全理解的抵押资产支持证券产品,显然,他们在随波逐流中觉得很安全。[126]

合同主义的路径也应该受到一些诚信概念的限制,这些诚信责任暗含于所有的合同中。[127]《重述》在这一点上的限制显得比较敏感,它谈到,当指令与合同项下的利益[128]没有合理的关联时,受信人不应被要

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[124] *See, e. g.*, John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the* 1990s, 89 CORNELL L. REV. 269, 294 - 295 (2004) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982)).

[125] 128. *Cf.* Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1038 (2000) (discussing how herd behavior may have a reputational payoff even if the chosen course of action fails, and arguing that where "the action was consistent with approved conventional wisdom, the hit to the manager's reputation from an adverse outcome is reduced"); Schwarcz, *supra* note 126, at 14 (discussing findings by Professors Paul M. Healy and Krishna Palepu that investment-fund managers who, believing a stock is overvalued, nonetheless follow the crowd will not be blamed if the stock ultimately crashes).

[126] *See* Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 2008 UTAH L. REV. 1109, 1114 - 1115 ("羊群效应"可能可以成为解释近期经济危机中投资经理行为的部分原因).

[127] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *cf.* DEL. CODE ANN. tit. 6, § 15 - 103(f) (2005) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a partnership... provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

[128] *See supra* note 115 and accompanying text.

求遵循该合同中的指令。[131] 在商法类似的问题上,这个限制也存在先例,比如一个破产法庭应该排除一个投资者的投票权,因为他对重整计划的接受和反对的投票并不诚信。[132] 虽然"诚信"并不是为此目的制定,但是法庭发现诚信问题还是普遍缺乏于此类场景:投资者采用蓄意阻挠和延迟等手段来设法获得比同类投资请求权利人更好的处境,表决机制被利用旨在获取本不应给予的优先权;投票的本意不过是对权利人自私安排的保护。[133] 此外,限制问题在公司法中也有先例。[134]

通过合同法的路径解决受信人冲突的限制方式还应该和降低交易成本的商业原则相一致——降低融资成本。[135] 因为投资指令与合同项下的利益没有必然联系,可能除了作出指令者外,超出了任何一个投资

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[131] *See supra* note 99 and accompanying text (in which a leading indenture trustees' lawyer suggests that indenture trustees should be sensitive to the possibility that investors directing them are attempting to gain advantages, not contemplated by the indenture, over other investors); *cf.* Schwarcz & Sergi, *supra* note 8, at 1071 n. 258 (asserting that majority bondholders, to avoid or at least mitigate the impact of conflicts, "should have a duty to act in good faith on behalf of all bondholders" of their class, and that a "majority bondholder who, for example, votes strategically [to direct the trustee] to enhance the value of an unrelated investment, such as an equity interest in the issuer, would be violating this duty").

[132] 11 U.S.C. § 1126(e) (2006); *see also id.* § 1126(c) - (d) (excluding votes so designated under § 1126(e)).

[133] *In re* Adelphia Commc'ns Corp., 359 B.R. 54, 60 (S.D.N.Y. 2006) (emphasis added); *see also In re* Kovalchick, 175 B.R. 863, 875 (E.D. Pa. 1994) (stating the same description of bad faith). The most common type of bad faith case is the "ulterior motive" case. In re Dune Deck Owners Corp., 175 B.R. 839, 844 (S.D.N.Y. 1995). Common "badges" of bad faith are said to include votes designed to assume control of the debtor, put the debtor out of business or otherwise gain a competitive advantage, destroy the debtor out of pure malice, or obtain benefits under a private agreement with a third party which depends on the debtor's failure to reorganize. *Id.* at 844 - 845. Stated differently, bad faith may be found where "(i) the claimholder attempts to extract or extort a personal advantage *not available to other creditors in its class*, and (ii) the creditor has an ulterior motive... that does not relate to its claim." Id. at 844 (emphasis added).

[134] 公司法认识到一个控股股东在为自身利益行事时,不能滥用自己的控制权,应遵守诚信责任原则不能通过压制或损害少数股东利益的方式提升自己的利益。

[135] *See supra* note 119 and accompanying text.

者或其他当事人的预料，从而导致融资成本不合理地提高。[139] 因为，在商事背景下，投资者通常都很复杂，对合同的信赖降低了融资成本。

如此看来，解决受信人冲突的合同主义路径，只能适用于合同中明确了的投资指令。但是，合同主义的路径不应僵化。甚至在非受托机制中，合同自由主义没有也不应该绝对化，合同应该受制于诚信的概念。因此，受信人不应被强制遵守可能引起或加剧重大的市场失败后果的指导，特别是失败会导致系统问题时尤其如此。同样，不应要求受信人遵守与合同项下的利益没有合理关联的指令。

四、程序法上的分析

上面的分析讨论了处于冲突中的受信人的实体权利和义务。本部分讨论采取何种程序上的步骤能降低受信人的冲突或者减少冲突的影响或使之更易解决。当利益冲突受信人的实体性权利义务问题尚未解决或含糊不清时，这些程序上的步骤在司法裁决中就有了特别的价值。

（一）提供运算上的确定性

这种方法至少在理论上能够降低受信人冲突的最明显的步骤是在合同中设定细致的条款，给受信人一套计算公式或其他易于遵守的解

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[139] The good faith limitation on the contractarian approach, discussed above, represents a minimum that should be applicable to fiduciary conflicts. The limitation arises in the context of investors voting on a plan of reorganization, but such investors have no fiduciary or other independent obligation to vote for the course of action they believe is fair to others. *See In re Adelphia Commc'ns Corp.*, 359 B. R. at 62. In contrast, fiduciaries with conflicting obligations should attempt to fairly balance their obligations to multiple investor classes.

决冲突的法则。[137] 但是,这是不切实际的。一个人是断不可能完全事先预见到所有的冲突问题及其交错复杂的情形的。因此,在受信关系不断变化的环境中,受信人的责任必须且只能以原则和宽泛的条款在合同中进行规定。[138]

一些冲突会显而易见,例如,受信人为利息投资者和本金投资者同时担任受托职责,或者为优先和次级投资者都履行受托职责。虽然,考虑制定限制投资者冲突的规则的想法可能比较有吸引力,但是任何一个这样的规则都可能人为地限制金融的灵活性,可能潜在地导致意想不到的后果。[139] 例如,优先—次级这样的分层结构被广泛认可,而且使得公司和投资者能在其他收益中更精确地按照不同的投资偏好分配风险。[140] 当在商业上没有充足担保能力的第三方进行担保时,这种产品结构还是对第三方担保机制的有效替代。[141] 一个更好的可行方法是为每一类利益冲突的投资者分别设置受信人。

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[137] In theory, algorithmic or otherwise easy-to-follow contractual rules to address fiduciary conflicts should remove the "fiduciary," insofar as it follows those rules, from fiduciary duties. *Cf.* Citibank, NA v. MBIA Assurance SA, [2007] EWCA (Civ) 11, [82], (2007) 1 All E. R. (Comm.) 475 (Eng.), 2007 WL 2852 (observing that "it would be a surprising interpretation of the documentation, against which the court should lean, if the powers of the trustee were so reduced that it ceases to be a trustee at all..."). A noncontractarian would likely argue, though, that the fiduciary's inherent duties should at least sometimes override mechanical application of those contractual rules. *See, e. g.*, Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 99 - 107 (2005) (arguing that a duty of care should apply to trustees of gratuitous trusts, and that this duty should be waivable only in specific, narrow contexts).

[138] Cooter & Freedman, supra note 2, at 1049. Parties nonetheless should strive to craft easy - to - follow rules. *Cf.* Steven L. Schwarcz, *The Future of Securitization*, 41 CONN. L. REV. 1313, 1322 (2009) ("Parties should write underlying deal documentation that sets clearer and more flexible guidelines ...").

[139] 规则可能并不必要,因为组织交易的当事人和投资者自身都希望整个过程简化以避免冲突义务所产生的不确定性。*See, e. g.*, Schwarcz, supra note 139, at 1322 (recommending that parties in securitization transactions "should try to minimize allocating cash flows to investors in ways that create conflicts"); *cf.* AMERICAN SECURITIZATION FORUM ET AL., RESTORING CONFIDENCE IN THE SECURITIZATION MARKETS 13 - 14 (2008) (recommending harmonizing and improving securitization servicing standards).

[140] 141 SCHWARCZ, *supra* note 80, § 2:4.

[141] *Id.*

(二)需要为每一类投资者都分别设立受信人

为每一种潜在冲突的投资者分别设立一个受信人的成本会非常高。当然,这些成本是否值得花说到底当然是个实证问题。[48] 但是,可

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[48] *Compare* David Isenberg, *Exercising the Intercreditor Buyout Clause: Lessons from the Trenches*, J. CORP. RENEWAL, Nov. 19, 2008, http://www.turnaround.org/publications/articles.aspx?objectid=10068 ("If the senior lien facility and junior lien facility are designed to accommodate multiple holders, as most are, a collateral agent or administrative agent will be appointed by the original holders at each priority level to hold the liens as agent."), *and* Gary D. Chamblee et al., Draft Model Intercreditor Agreement, ABA Com. Fin. Committee (Apr. 11, 2009), http://www.abanet.org/buslaw/committees/CL190000pub/materials/2009/spring/mica_draft_20090411.pdf (providing for separate collateral agents for first and second lien claimholders, and for a single "control" agent in model agreements designed to reflect standard practices), *with* Kirk Davenport et al., *Second Lien Financings—Answers to the Most Frequently Asked Questions*, MONDAQ BUS. BRIEFING, Apr. 30, 2004, http://www.mondaq.com/unitedstates/article.asp?articleid=25777 (noting that most of the "larger second lien bond deals" have employed a single independent collateral trustee for the benefit of the holders of first and second lien debt).

Trust Indenture Act of 1939 § 310(b)(i), (b)(iii)(1), 15 U.S.C. § 77jjj(b)(i), (b)(iii)(1) (2006). The U.S. Office of the Comptroller of the Currency has extended a similar requirement to certain issuances of debt not governed by the Trust Indenture Act. 12 C.F.R. § 9.18(8)(i) (2009) ("A bank administering a collective investment fund may not have an interest in that fund other than in its fiduciary capacity. If, because of a creditor relationship or otherwise, the bank acquires an interest in a participating account, the participating account must be withdrawn on the next withdrawal date.").

Trust Indenture Act § 310(b)(i).

根据作者的经验,很少有机构愿意在违约的情形下成为继任受信人。Interview with Harold L. Kaplan, *supra* note 4.

Relatively few institutions are willing, in the author's experience, to become a successor trustee in a default scenario. *See* E-mail from Zaina M. Zainal, Assistant to Harold L. Kaplan and Mark F. Hebbeln, to author (Aug. 24, 2009) (on file with author) (attaching Kaplan's comments on this Article, which state that trustees for conflicting tranches often find it "not possible or practical" to resign conflicting trusteeships).

See supra notes 22-29 and accompanying text (discussing this procedure in the English High Court of Justice, Chancery Division). The parties chose this procedure in the *Bank of New York* case "because the matter was urgent and could be settled more quickly under Part 8 of the [English] Civil Procedure Rules". Rawlings, *supra* note 14, at 28. http://www.mondaq.com/unitedstates/article.asp?articleid=25777 (noting that most of the "larger second lien bond deals" have employed a single independent collateral trustee for the benefit of the holders of first and second lien debt).

以采取一个折中的立场,即可以只在违约后为利益冲突的投资者分别设立受信人。

美国《信托合同法案》就采取了这个中间立场。美国公债的受信人在违约发生后的90天内在技术上必须辞去冲突的受信人角色,[143]包括在违约后必须辞去为非同等权益投资者履职的事务。当然,受信人必须继续留任直至一个或多个继任者接替为止(这要根据需要解决冲突的程度)。[144]

严格来说,这个折中方案也不尽完美。即使在信托合同法文本中,因为有多种机构参与受托事务,在受信人已经被要求作出关键性的决定后,[145]对受信人的替换会"很费周折"。[146] 再说,在合理的情况和条件下,能胜任工作的新受信人可能并不总是可以找到。进一步而言,在多种投资者的权益由单一抵押资产池担保的情况下,抵押受信人也不能通过辞职来避免冲突。任何一个继任的抵押受信人都会有同样的冲突问题,因为抵押资产本身是单一的。

要求在违约后给每类利益冲突的投资者分别设立受信人也可能会引起误导。它可能会帮助解决利益冲突义务中的受信人自身的两难困境,但是它恰恰也会加剧投资者自身之间的内在冲突。独立的受信人之间几乎没有积极性去共同工作。因此,看上去限制利益冲突和为利益冲突投资者设立独立的受信人这两种方法均不可行。

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[143] Trust Indenture Act of 1939 § 310(b)(i), (b)(iii)(1), 15 U.S.C. § 77jjj(b)(i), (b)(iii)(1) (2006). The U.S. Office of the Comptroller of the Currency has extended a similar requirement to certain issuances of debt not governed by the Trust Indenture Act. 12 C.F.R. § 9.18(8)(i) (2009) ("A bank administering a collective investment fund may not have an interest in that fund other than in its fiduciary capacity. If, because of a creditor relationship or otherwise, the bank acquires an interest in a participating account, the participating account must be withdrawn on the next withdrawal date.").

[144] Trust Indenture Act § 310(b)(i).

[145] 根据作者的经验,很少有机构愿意在违约的情形下成为继任受信人。Interview with Harold L. Kaplan, *supra* note 4.

[146] Relatively few institutions are willing, in the author's experience, to become a successor trustee in a default scenario. *See* E-mail from Zaina M. Zainal, Assistant to Harold L. Kaplan and Mark F. Hebbeln, to author (Aug. 24, 2009) (on file with author) (attaching Kaplan's comments on this Article, which state that trustees for conflicting tranches often find it "not possible or practical" to resign conflicting trusteeships).

(三)使利益冲突的受信人获得指导的司法程序

另一种可能的方法是建立一个更加具有效益的、及时的和具有实践性的司法程序来使处于利益冲突中的受信人获得必需的指导。本文已经提及英国法为此已经承认了一种"宣示—判断"的司法程序。[147] 下面的讨论会比较美国法和英国法之间的司法程序。

美国法提供了两种基本的司法程序以供冲突义务的受信人来解决争议问题,即争讼程序和宣示判断程序。[148] 争诉程序是在联邦和州法下都可以援用的程序,在这个程序中,占有财产的当事人一方在另一方主张权利时可能要求提出请求权主张的人就他们之间的争议提起单独的程序。[149] 联邦法提出了两种类似的争诉程序:规则争诉程序和制定法争诉程序,制定法争诉程序存在更宽泛的程序上的要求。[150] 州法(本文主要指纽约州法)[151]与联邦法基本类似,只有一处例外:联邦法要求争议财产处于法庭控制之下,州法则无此要求。[152]

一个负冲突义务的受信人在采取行动从而可能因此遭受责任之

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[147] *See supra* notes 22 – 29 and accompanying text (discussing this procedure in the English High Court of Justice, Chancery Division). The parties chose this procedure in the *Bank of New York* case "because the matter was urgent and could be settled more quickly under Part 8 of the [English] Civil Procedure Rules." Rawlings, *supra* note 14, at 28.

[148] The following discussion of judicial procedures relies heavily on Coughlin et al., *supra* note 35.

[149] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 74, at 534 (6th ed. 2002) ("Interpleader is a form of joinder open to one who does not know to which of several claimants he or she is liable, if liable at all. It permits the person to bring the claimants into a single action, and to require them to litigate among themselves...").

[150] *Id.* ("There are two kinds of interpleader available in federal court. A statute, 27 U. S. C. A. § 1335, authorizes interpleader and makes very liberal provisions for jurisdiction, venue, and service of process. Nonstatutory interpleaded is available under Rule 22, but the jurisdictional and procedural requirements there are the same as in an ordinary civil action.").

[151] Much of the litigation concerning applications for court direction by fiduciaries with conflicting obligations is governed by the laws of England or New York. *See* Ryan & Yong, *supra* note 108, at 60.

[152] *See* N. Y. C. P. L. R. 1006 (McKinney 2009); *see also* Coughlin et al., *supra* note 35, at 778 – 779 (noting this distinction between federal and New York interpleader laws).

前,也可以通过寻求一个宣示判断让联邦或州法庭来决定他的权利。[153] 与争诉程序不同的是,宣示判断程序要求存在一个"真正的争议"。[154] 联邦宣示判断程序允许法庭采取一个对相对方的快速听证程序。[155]

司法要求或诉讼策略也可能会影响到当事人在联邦宣示判断程序和州程序间的选择。[156] 一些州甚至为受信人提供了目的性更强的规定程序以期获得司法指导。[157] 当然,这些程序通常被设立仅仅应用于民事信托,因此,对这些程序是否会被应用于商业背景尚不确定。[158] 特拉华法也提供了一个简易程序来解决商业争议,只要争议有一方是该州公民或商业主体,并且所有当事人同意选择适用该程序即可。[159] 但是,尚缺乏明确的案例来说明如何运用该程序。

近期涉及利益冲突义务受信人的案件尽管不多,但是也充分显示了在涉及受信人冲突情况下对诉争程序的应用。[160] 看来如此应用此程

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[153] Coughlin et al., *supra* note 35, at 782 - 783 (quoting Banos v. Winkelstein, 78 N. Y. S. 2d 832, 834 (App. Div. 1948)).

[154] *See id.* at 783. Generally, interpleader requires only a good faith concern that the claimant may be exposed to multiple liability claims, whereas declaratory judgment requires reasonable apprehension of liability and may have a further ripeness requirement. Compare *id.* at 780 (noting the requirement for a good faith showing of conflicting claims), *with id.* at 783 (noting that courts will not grant declaratory judgment in cases of "remote or hypothetical possibilities that may never come to fruition").

[155] FED. R. CIV. P. 57 ("法院可以组织一场快速的听证会来进行宣示判断").

[156] *See* Coughlin et al., *supra* note 35, at 784 - 785.

[157] *See, e. g.*, N. Y. C. P. L. R. 7701 (McKinney 2009) (为书面信托提供了一个特别程序).

[158] *See* Coughlin et al., *supra* note 35, at 779. N. Y. C. P. L. R. 7701 provides, for example, that a "special proceeding may be brought to determine a matter relating to any express trust except a voting trust, a mortgage, [or] a trust for the benefit of creditors." N. Y. C. P. L. R. 7701.

[159] *See* DEL. SUP. CT. CIV. R. 124 - 131. The Summary Proceedings for Commercial Disputes provides for an expedited schedule of service, discovery, trial, and decision.

[160] *See infra* notes 163 - 168 (listing type of interpleader employed in each case). Federal statutory interpleader is the most common of the interpleader options among these cases.

序会产生相对长的诉讼进程(除非案子很快被当事人自愿撤销)。[160] 下表1总结了这些案子的诉讼进程表。

表1 部分美国相关案件的进程

LaSalle Bank v. *Citigroup*[162]	2008. 7. 11	2008年8月26日自愿撤销
LaSalle Bank v. *BNP Paribas*[163]	2008. 7. 3	简易程序动议2010年1月获许
U. S. Bank v. *MBIA*[164]	2008. 5. 22	简易程序动议2010年12月2日获许
LaSalle Bank v. *UBS*[165]	2008. 4. 17	2008年6月10日自愿撤销

[160] The cases that were quickly and voluntarily dismissed appear to have been settled. The potential high cost of lengthy litigation encourages settlement by effectively acting as a type of penalty default rule. Cf. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 598 – 599 (7th ed. 2007) (observing that when parties to a dispute anticipate high litigation costs, they are more likely to settle). But another interpleader case, Deutsche Bank Trust Co. v. Victoria Finance Ltd., No. 600071 – 08 (N. Y. Sup. Ct. Jan. 9, 2008), appears to be heading towards a lengthy litigation. See Deutsche Bank Interpleader Complaint, supra note 30.

[162] Interpleader Complaint, LaSalle Bank Nat'l Ass'n v. Citigroup Global Mkts. Ltd., No. 08 Civ. 6294 (S. D. N. Y. July 11, 2008), 2008 WL 4486807 (initiating proceedings under federal statutory interpleader); Notice of Dismissal, LaSalle Bank Nat'l Ass'n, No. 08 Civ. 6294 (S. D. N. Y. Aug. 26, 2008).

[163] Interpleader Complaint, LaSalle Bank Nat'l Ass'n v. BNP Paribas, London Branch, No. 08 Civ. 6134 (S. D. N. Y. July 3, 2008), 2008 WL 4486738 (initiating proceedings under federal statutory interpleader); Order Granting Motion for Summary Judgment, *BNP Paribas*, No. 08 Civ. 6134 (S. D. N. Y. Jan. 26, 2010).

[164] Interpleader Complaint, U. S. Bank Nat'l Ass'n v. MBIA Ins. Corp., No. 08 Civ. 4791 (S. D. N. Y. May 22, 2008), 2008 WL 2972551 (initiating proceedings under federal statutory interpleader); Order Granting Motion for Summary Judgment, U. S. Bank Nat'l Ass'n, No. 08 Civ. 4791 (S. D. N. Y. Dec. 2, 2009).

[165] Complaint, LaSalle Bank Nat'l Ass'n v. UBS AG, No. 08 Civ. 3692 (S. D. N. Y. Apr. 17, 2008), 2008 WL 2306127 (initiating proceedings under federal rule interpleader); Notice of Dismissal, UBS AG, No. 08 Civ. 3692 (S. D. N. Y. June 10, 2008).

续表

Deutsche Bank v. *LaCrosse*[168]	2008. 1. 29	简易程序动议 2009 年 10 月 27 日获许
Wells Fargo Bank v. *Calyon*[169]	2007. 12. 12	2008 年 2 月 8 日自愿撤销

相比较而言,英国法提供了一种更快捷的司法程序,这个程序可帮助冲突受信人解决争议。从下文详细的讨论可见,这样一个受信人可以根据英国 1986 年破产法案中的《英国民事诉讼规则》第八部分,或者通过一个争议程序来获得法庭的指导。英国最近对此民事诉讼程序进行了很大的改革,[169]出台新的民事诉讼程序规则,旨在解决以前系统中存在的高支出、缓慢和复杂等现象。[170] 英国《民事诉讼规则》的首要目标是公正地处理案件,其中又包括尽快处理这些案件,根据案件所涉金额、重要性和争议的复杂程序和当事人的金融地位等采取相应的方式给予处理等。[171]

虽然英国大多数的法庭行动都是根据《民事诉讼规则》第七章发起

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[168] Interpleader Complaint, Deutsche Bank Trust Co. Americas v. La - Crosse Fin. Prods., LLC, No. 08 Civ. 0955 (S. D. N. Y. Jan. 29, 2008) (initiating statutory interpleader action); Memorandum of Law in Support of Motion to File Exhibits Under Seal, Deutsche Bank Trust Co. Americas, No. 08 Civ. 0955 (S. D. N. Y. Jan. 31, 2008), 2008 WL 887107 (referring to proceedings under federal statutory interpleader); Order Granting Motion for Summary Judgment, Deutsche Bank Trust Co. Americas, No. 08 Civ. 0955 (S. D. N. Y. Oct. 27, 2009).

[169] Interpleader Complaint, Wells Fargo Bank, N. A. v. Calyon, No. 07 - 650335 (N. Y. Sup. Ct. Dec. 11, 2007) (initiating proceedings under New York state interpleader); Notice of Discontinuance Without Prejudice, Calyon, No. 07 - 650335 (N. Y. Sup. Ct. Feb. 8, 2008); Interpleader Complaint, Wells Fargo Bank, N. A. v. Calyon, No. 08 Civ. 1297 (S. D. N. Y. Feb. 8, 2008), 2008 WL 888995 (refiling case in federal court under statutory interpleader); Order Granting Motion for Summary Judgment, Calyon, No. 08 Civ. 1297 (S. D. N. Y. Sept. 29, 2009).

[170] *See* generally PAULA LOUGHLIN & STEPHEN GERLIS, CIVIL PROCEDURE 1 - 8 (2d ed. 2004).

[171] *Id.*

[172] *See* U. K. R. CIV. P. 1; see also LOUGHLIN & GERLIS, supra note 169, at 10 - 11 (emphasizing the great practical import of the CPR is judicial interpretation pursuant to the Overriding Objective).

的,[171]但是,那些不太可能涉及实质性事实问题的争议(如仅仅涉及合同争议的受信人冲突)就可能依据更快捷的第八章采取行动,[172]例如,法庭在申请文件一旦被提交后马上确定听证日期,[173]在第七章中所规定的额外要求为因应快速处理而得以减轻或改变。[174] 同样,英国的 1986 年《破产法案》使一个破产公司的行政接管者能够得到法庭的指导。[175]

英国法中的争议行动被合并到《民事诉讼规则》之中。[176] 一个处于冲突义务中的受信人如果持有财产,该财产受到多数当事人的对待请求,同时该受信人希望被这些当事人起诉的话,他就能够提出一个争议动议。[177] 受信人必须明确对系争财产没有相关利益,不能与任何申请人串通,必须自愿将财产转让进法庭。[178] 法庭对这类案件有广泛的裁量权。[179]

最近英国发生的涉及冲突义务受信人的案例也不多,但是通过这些案例可以对这些程序进行比较。下表 2 给出了正在起诉案件的进程情况,纽约银行案和花旗银行诉 MBIA 保险公司案适用的是第八章的程

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[171] *See* LOUGHLIN & GERLIS, supra note 169, at 217.

[172] *See* U. K. R. CIV. P. 8.1(2). Part 8 differs from the general claims procedure in that parties are given much shorter timeframes in which to acknowledge service and submit evidence. Id. 8.3 (Acknowledgement of Service); id. 8.5 (Filing and Serving Written Evidence); see also LOUGHLIN & GERLIS, supra note 169, at 217 - 223.

[173] *See* U. K. R. CIV. P. Practice Direction 8 (Alternative Procedure for Claims), § 6.1.

[174] *See*, e. g., U. K. R. CIV. P. 8.3 (providing shortened period for acknowledgement of service); id. 8.5 (providing shortened period for filing and serving of written evidence); id. 8.9 (stating that standard procedures pertaining to statements of the case, defense and reply, and allocation to a case management track do not apply to Part 8 proceedings).

[175] *See* Insolvency Act, 1986, c. 45, § 35 (Eng.).

[176] U. K. R. CIV. P. Sched. 1, RSC Order 17, Rule 1 - 17 (providing the procedure used in the Supreme Court, including the Chancery Division, where several recent cases of fiduciaries with conflicting obligations applying for court directions have been heard); ENG. R. CIV. P. Sched. 2, CCR Order 33 Pt. II, Rule 6 - 11 (providing a very similar procedure for use in the County Courts).

[177] U. K. R. CIV. P. Sched. 1, RSC Order 17, Rule 1(1).

[178] *Id.* at Rule 3(4)(a) - (b).

[179] *See* id. at Rule 8(1).

序;相反,其他案件(涉及有行政接管人的破产实体)发生于破产法案之中。[180] 争议行为尚未用于这些案件。

表2 部分英国相关案件的进程

案件名	请求权提起时间	听证时间	裁决时间
In re Sigma Finance Corp. [181]	2008. 11. 3	2008. 11. 4	2008. 11. 7
In re Golden Key Ltd. [182]	2008. 9. 25	2008. 12. 11 – 12	2009. 4. 2
Bank of New York v. *Montana Board of Investments* [183]	2008. 5. 2	2008. 7. 3 – 4	2008. 7. 10
In re Whistlejacket Capital Ltd [184]	2008. 2. 28	2008. 3. 3 – 4	2008. 3. 5
In re Cheyne Finance Plc [185]	2007. 9. 4	2007. 9. 11	2007. 9. 12

[180] *See infra* notes 182 – 187 (列举了每个案件所适用的程序).

[181] In re Sigma Fin. Corp. (In Administration), [2008] EWHC (Ch) 2997 (Eng.) (listing hearings on November 4, 2008); id. [1] ("This is an application pursuant to section 35 of the Insolvency Act by the Receivers..."); In re Sigma Fin. Corp. (In Administration), [2008] EWCA (Civ) 1303, [1] (Eng.) ("This judgment is given on three appeals from an order of Sales J. made on November 7, 2008, in proceedings issued on November 3...").

[182] In re Golden Key Ltd. (In Receivership), [2009] EWHC (Ch) 148 (Eng.) (listing hearings on December 11 and 12, 2008); id. [24] ("Receivers now ask for appropriate directions from the court pursuant to section 35 of the Insolvency Act 1986. The proceedings were begun by an originating application issued on 25 September 2008.").

[183] Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594 (Eng.) (listing hearings on July 3 and 4, 2008); Rawlings, supra note 14, at 28 – 29 (stating that Bank of N. Y. was initiated under Part 8); id. at 29 n. 78 ("Proceedings were filed on 2 May 2008.").

[184] In re Whistlejacket Capital Ltd. (In Receivership), [2008] EWHC (Ch) 463 (Eng.) (listing hearings on March 3 and 4, 2008); id. [1] ("This is an Originating Application... by the receivers of Whistlejacket Capital Limited... for directions as to the management of the Company's business."); In re Whistlejacket Capital Ltd. (In Receivership), [2008] EWCA (Civ) 575, [14] (Eng.) ("The receivers' application for directions was issued on 28 February.").

[185] In re Cheyne Fin. Plc (In Receivership), [2007] EWHC (Ch) 2116, [3] (Eng.) ("The urgency of the matter, it being recognised on all sides that the Receivers need directions today after a hearing yesterday afternoon..."); see id. [1] ("This is an urgent application for directions by Messrs. Nicholas Edwards, Neville Kahn and Nicholas Dargan, all of Deloitte & Touche LLP, as Receivers of the business and assets of Cheyne Finance Plc, having been appointed on 4th September of this year...").

续表

案件名	请求权提起时间	听证时间	裁决时间
Citibank NA v. *MBIA Assurance SA*[186]	2006. 11. 20	2008. 11. 21 – 12. 11	2006. 12. 13

通过比较表1和表2,可以看到英国法庭在受信人冲突的解决上似乎更及时。纽约州的那些没有自愿撤诉的案件在起诉后往往经过一年以上的诉讼周期,而英国的案件根据其紧急程度都是在一周到大约半年内就全部得以解决。

因此,英国的裁判体系比纽约的司法体系提供了更快速的处理受信人冲突的方案。当然,这并不是说,英国的体系提供了更好的解决方案。至少有人曾经质疑,是否英国法庭如此神速地处理案件倒可能是负面的,因为这样可能就没有机会对争议问题进行全面和完整的分析。[187] 英国的法庭也提出类似质疑,快捷的英国司法程序将以失去缜密性为代价。[188] 相比较而言,有人会认为纽约法庭冗长的、高额的诉讼会有效地

[186] Citibank NA v. MBIA Assurance SA, [2006] EWHC (Ch) 3215 (Eng.) (listing hearings on a number of dates from November 21 through December 11, 2006); id. [20] ("Citibank had become concerned as to whether it could safely accept the direction of MBIA. It commenced the present proceedings on 20th November as trustee under the deed of charge and trust deed seeking a direction as to whether it had to comply with MBIA's direction..."); E-mail from Alex Southern, Clerk to Jasbir Dhillon, Brick Court Chambers, to Garth Spencer, Research Assistant to Professor Steven L. Schwarcz (Aug. 12, 2009) (on file with author) (confirming that Citibank v. MBIA was initiated under Part 8).

[187] *Rawlings*, *supra note* 14, *at* 32 (*observing that the speed of the English Part* 8 procedure "did not [in the Bank of New York case], perhaps, allow for a full discussion of [applicable] law, or investigation of the facts surrounding the disposal" of collateral).

[188] *See* In re Sigma Fin. Corp. (In Administration), [2008] EWCA (Civ) 1303, [1] (Eng.), 2008 WL 5044404 ("[W]e give judgment today, although, for my part at least, I would have preferred to have had more time in which to formulate and express my reasoning; among other things this judgment might then have been shorter."); In re Cheyne Fin. Plc, [2007] EWHC (Ch) 2116, [3] ("The urgency of the matter... means that this judgment has had to be both extempore and in a relatively abbreviated form without the full explanation to the uninitiated of the relevant and complex contractual and commercial background which I would have preferred to provide."). But see id. [2] ("I am satisfied that the two alternative constructions have, despite the shortness of time, been fully argued.").

扮演了一种惩罚违约的规则,因为它鼓励提前解决方案,比如撤诉。[189]

很显然,对英国和美国纽约法庭程序需要更系统和长期的研究。或许直到那时,未来利益冲突的受信人应该就决定权进行个案协商时,是在英国法庭还是纽约州法庭提起受信人冲突之诉呢?[190] 例如,在纽约银行案中,受信人有此选择权,甚至虽然合同由纽约法管辖,但是他们会选择在英国法庭提起诉讼。[191]

(四)通过商业判断原则减轻受信人的责任

上述讨论的程序性步骤中都不能完全解决利益冲突受信人的"两难困境"。进一步来看,即使在裁决中试图平衡一个受信人的权利和义务,模糊性依然存在。没有一个平衡检验可以与明确的规则作用相同,同样,任何一个不明确的规则势必会带来主观判断。主观判断使得作投资决定的人(本文中指受信人)会遭受事后质疑并会承担责任。这就会影响到受信人的行为方式,他会选择降低责任的行为模式而不会真正采取使投资者利益最大化的方式。

前面本文在讨论抵押财产违约的情况下已经提及此种影响,即受信人会提前处置抵押物而不是对财产进行重组以提高其变现价值。还有其他例子。[192] 利益冲突的契约信托的受信人被掣肘而不能采取任何行

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[189] *See supra* note 162.

[190] 这可以通过合同的当事人聘请同意接受英国和纽约法院管辖的受信人来完成。*See* Steven L. Schwarcz, The Universal Language of Cross - Border Finance, 8 DUKE J. COMP. & INT'L L. 235, 244 (1998). Of course, a party who believes, ex ante, that delay would better serve its interests in the event of a fiduciary conflict might prefer submitting only to jurisdiction in a New York court, and vice versa.

[191] *See* Rawlings, supra note 14, at 28.

[192] *See*, e.g., Schwarcz & Sergi, supra note 8, at 1041 - 1042 (describing attempts by trustees to minimize their liability rather than to protect investors and observing that trustees "sometimes devote as much of their energies to avoiding personal liability as to protecting bondholders"); E - mail from Philip J. Rawlings, Professor of the Law of Finance, University College London, to author (Sept. 11, 2009) (on file with author) ("There is certainly a view [in the United Kingdom] that bond trustees—in spite of various powers in the bond deed—will not act, except under instructions from the investors so as to obtain an indemnity from the investors against potential liability for wrongful action, and, even if this causes delay and so loss, they are protected because there is no obligation to act.").

动,除非得到顾问的意见说某个行为是被授权和允许的,[188]而这些意见很少具有预见性;[189]或者即使具有预见性,一份单纯的法律意见能否对涉及复杂商业和法律考量的受信人的决定提供指导也是不无疑问。[190]

利益冲突受信人牺牲投资者的利益从而使自己的责任最小化的趋势带来了一个最终的问题:那些试图以诚信的方式审慎斟酌行事的受信人是否能够在责任承担上受到保护呢?例如,在为利益无冲突的投资者担任受信人时,我曾经提出过这样的观点,在谨慎人标准下,通过商业判断规则来限制受信人责任将会真正改善受信人的行为,因为受信人更有可能进行独立的判断。[191] 商业判断规则是假定公司的董事们在作出一个商业决定时,他们是在知情的基础上,本着诚信、诚实的信念,采取的行为是符合公司利益最大化的目标的。[192] 对受信人责任的类似限制是

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[188] Interview with Doneene Damon, outgoing Chair of the ABA Bus. Law Section's Comm. on Trust Indentures and Indenture Trs., in Vancouver, B. C., Can. (Apr. 18, 2009); see RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2) (2007) (受信人必须在"寻求及考虑律师建议时"尽到谨慎的义务).

[189] Interview with Doneene Damon, supra note 194.

[190] See Harold L. Kaplan & Mark F. Hebbeln, *Keeping a Level Playing Field: The Evolution of Discriminatory Consent Solicitations and Exchange Offers*, ABA TR. & INVESTMENTS, Mar. - Apr. 2008, at 44, 50 - 52 (observing that indenture trustees with conflicting obligations are also requesting additional indemnifications and seeking declaratory judgments).

[191] See Schwarcz & Sergi, supra note 8, at 1073 ("[A]pplying a business judgment rule to indenture trustees will lower the cost of public debt while, at the same time, providing public bondholders with greater, not less, protection.").

[192] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

否也会改善利益冲突受信人的行为绩效呢?[198]

回答这个问题的一个方法是通过成本收益分析。[199] 在公司作出决定的程序中,商业判断原则通过限制他们的责任风险来鼓励合格的董事提供管理服务,鼓励那些不可避免地存在风险但可以达到价值最大化的交易。同时,限制高昂的司法介入,而司法介入并不适合对此类决定的是非进行评判。[200] 但是,这些好处必须和这个规则带来的成本进行平衡,这些成本包括增加董事自利行为的概率,[201]以及可能对董事勤勉的

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[198] *Cf.* Schwarcz & Sergi, *supra* note 8, at 1040 - 1041 (explaining why indenture trustees on public bonds, presently obligated to act under a "prudent man" standard, should be protected by this type of rule). In this context, one might consider whether a fiduciary could gain protection by choosing the law of a state with such a business - judgment - type rule to govern its performance. For example, if a particular state, e. g., New York, limited fiduciary liability, would an agreement choosing New York law to govern the fiduciary's performance protect a fiduciary with conflicting obligations? Courts generally respect contractual choice of governing law unless there is no reasonable basis for the choice or application of the chosen law would contravene a fundamental policy of a state with a materially greater interest in the contract. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 371 - 373 (2003) (analyzing judicial enforcement of contractual choice - of - law provisions). It is not precisely clear which policies are fundamental, however. Laws pertaining to formalities or general matters of contract law are unlikely to be fundamental, whereas a law designed to address an imbalance of bar gaining power may be. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g ("[T]o be 'fundamental,' a policy must in any event be a substantial one."). New York's provisions for contractual choice of law are broadly similar to the Restatement. *See* Woodling v. Garrett Corp., 813 F. 2d 543, 551 (2d Cir. 1987). Indeed, parties may choose New York law to govern their contract even if the contract bears no reasonable relation to the state of New York, so long as the contract relates to a transaction valued over $250,000. *See* N. Y. GEN. OBLIG. LAW § 5 - 1401 (McKinney 2001).

[199] *See* POSNER, *supra* note 162, at 402 - 404 (discussing cost - benefit analysis). Cost - benefit analysis is sometimes criticized, however, because it is based on disputed premises of autonomy and equality, it sacrifices minority interests for the benefit of majorities, it ignores effects of wealth distribution, and it attempts to quantitatively measure intangible values. *See* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 916 - 919 (2009).

[200] *See* Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 444 - 445 (2007).

[201] *See id.* at 439.

不利影响因素。[202]

虽然考量这些成本和收益会涉及实证问题而使答案高度不确定。[203]但是,这一决策理论原则提示我们,在利益平衡时应考虑到存在一定合理程度的不确定性这一变量。[204] 在公司决定的作出过程中,论者关注到司法介入的特定成本问题,而这对商业判断规则的适用有莫大的帮助。[205]

再回到对利益冲突受信人的分析,我们会看到商业判断规则应该有类似的平衡功能。因为对潜在的责任是否将阻止合格的受信人提供服务尚不确定。一个商业判断规则的有利之处尚未被包含于上述平衡之中。但是也有可能,在商业判断原则下,在违约现象发生后受信人更愿意作出虽有风险但是却可使资产价值最大化[206]的必要的投资决定。这个规则也会限制对自由裁量信托的不合适的司法介入所产生的成本。上述两种情况下,这些有利之处在做成本和收益平衡时也应被考虑进来;此外,商业判断原则的不利之处,即提高受信人自利行为的概率和影响董事勤勉义务,尚不能肯定。[207] 当然,也没有理由相信其有利和不利

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[202] *See id.* at 446 (高风险的责任比如导致更多的勤勉义务).

[203] *See id.*

[204] *See id.* at 456 (characterizing this as an informal version of the principle of insufficient reason, in which decisions are made on the basis of only what is known, implicitly assuming that "unknown costs and unknown benefits are equally likely and therefore cancel each other out").

[205] *Id.* at 473 ("The one sure effect of increased judicial involvement in business judgment litigation is a substantial rise in litigation costs."); see also Paul N. Edwards, *Compelled Termination and Corporate Governance: The Big Picture*, 10 J. CORP. L. 373, 388 (1985) ("[T]he strongest justification for the traditional business judgment rule [is] that of keeping the judiciary out of the corporate boardroom due to courts' institutional inadequacy and the highly discretionary nature of most business decisions...").

[206] *See supra* note 68.

[207] In a corporate context, for example, the business judgment rule does not apply to protect unconsidered inactions or to protect self - interested transactions by directors. See Robert T. Miller, *Wrongful Omissions by Corporate Directors*: Stone v. Ritter *and Adapting the Process Model of the Delaware Business Judgment Rule*, 10 U. PA. J. BUS. & EMP. L. 911, 913, 919 (2008).

之处完全,[208]因此那些成本将不会包含于平衡中。如此一来,看上去平衡的天平倾向于将商业判断原则应用于利益冲突交易中的受信人。[209]

这个利益平衡与对商业判断原则是否应该适用于在违约后债券合约信托的受信人所作的相关分析是一致的。这个分析结论是可以适用的。我们发现,支持公司决策模式规则的理由一样应用于契约信托的受信人作出决定的情形,这些理由和必要性就是:(1)价值最大化而不仅仅是保值的需要;(2)吸引高水平投资决策者的需要;(3)提供一个有效率的决策体系的需要;(4)还有就是因为法庭评估复杂决定审慎性的不切实际。[210] 这些原因应同样适用于违约后的利益冲突中的受信人作出决定的情形。如上文讨论所见,这样的受信人应该极力实现价值最大化。目前,一方面是市场对高水平的受信人需求急剧上升,[211]但另一方面现在对受信人冲突义务和责任的不确定性影响到他们作出及时和有价值的投资决定。[212] 同样,对没有商业判断和专业能力的法庭来说,让

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[208] *Cf.* Gold, *supra* note 201, at 469 ("[T]he decisionmaker should be able to discern that the consideration given dispositive weight is, in some rough sense, of the same order of importance as the discarded imponderables." (quoting ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 175 (2006))). As a former engineer, I recrafted that test to ignore uncertain costs only when there is no reason to believe that such costs would be of the same order of magnitude as the certain benefits.

[209] Some may object that applying this decision - theory approach to costbenefit analysis effectively ignores all the costs of a business judgment rule. Still, this approach, "although not ideally rational from the point of view of an omniscient observer, will at least be as rational as can be expected." Gold, *supra* note 201, at 456 - 457 (quoting JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 135 (1989)).

[210] *See* Schwarcz & Sergi, *supra* note 8, at 1061 - 1063.

[211] *Cf.* Interview with Doneene Damon, *supra note* 194 (observing that issuers are not yet willing to pay the higher fees that trustees are requesting, and that trustees are beginning to want to be compensated at the top of the payment "waterfall").

[212] *See supra* note 46 and accompanying text.

他们评估受信人复杂决定的审慎性与否同样不切实际。[213]

因此,让利益冲突中的受信人在商业判断原则下行使权力看来比较适当。很有趣的是,英国法庭在纽约银行案中明确采用了商业判断原则,法庭坚持认为抵押受信人有义务行使自由裁量权,[214]因此有效使受信人免予承担诚信义务的责任。[215] 商业判断原则当然不会规定受信人应该为谁的利益进行判断。[216] 对此,应该由合同决定,在合同没有具体指令的情况下应采用平衡相互冲突的受益人利益原则来确定。

结 论

本文讨论了一个真实而又在理论上有趣的问题:受信人在商业或金融交易中,因对受益人负有冲突义务而身处"两难境地"。由于过度关注自身的责任问题,利益冲突受信人一直采取对受益人来说是次优选择的方式行事,有时候甚至造成重大的社会成本(例如,在金融危机中很多家庭住房被处置,而不是采取经济上可能效果更好的借款维持方案)。

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[213] *See* Corinne Ball et al., *The Board of Directors' Fiduciary Duties*, *in* MERGERS & ACQUISITIONS 2009: TRENDS AND DEVELOPMENTS 131, 166 (PLI Corp. L. & Prac. Course Handbook Series No. B-1713, 2009), WL 1713 PLI/CORP. 131 ("Courts generally acknowledge that they lack the information and skill necessary to evaluate business judgments."). Ex post evaluations of decision making also can suffer from hindsight bias. *See* Gold, *supra* note 201, at 443.

[214] *See* Bank of N. Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, [59] (Eng.), 2008 WL 2697055.

[215] At least one commentator questions, however, whether limiting the liability of a fiduciary with conflicting obligations by a business judgment rule would go far enough. *See* E-mail from Eric J. Pan, Professor of Law and Director, The Samuel and Ronnie Heyman Center on Corporate Governance, Benjamin N. Cardozo School of Law, to author (May 22, 2009) (on file with author) (asking "how can one decide how a prudent man would balance the competing interests of two conflicting investors?" and suggesting that "the only solution is to give complete discretion to the trustee"). The prudent man standard is the standard of a fiduciary to act, after default, as a prudent person, discussed supra note 7.

[216] *See* Gold, *supra* note 201, at 434-442 (商业判断原则是否只是运用于股东或者运用于更广大的利益相关者目前还不明确).

因为上述"两难困境"很难通过合同的方式予以处理,因此,需要一个法律原则来处理此事,而现存法律尚付阙如。

为了获得合理的制度规则,本文首先分析了没有受益人指令时的受信人冲突问题。在本文中,笔者认为,在大多数受信人冲突的情形下,受信人应该优先保护次优受益人的利益。[207] 这个方法对民事信托来说并不妥适,但是,在商业和金融背景下则具有经济上的现实意义和合理性,因为此种方法使得所有的受益人利益最大化。这种方法也和法律对诸如公司董事处理股东和债权人利益等类似的利益冲突情形的处理规定相一致。

本文接下来分析了有受益人指令的受信人冲突问题。通过分析提出了这样的根本性问题,即受信人是否对所有的受益人有受托义务还是只对进行指示的受益人有此义务?这个分析依赖于这样一个理论性的讨论,即受信人责任是否只是合同性的违约条款,或者反而言之,有些时候会超越合同的明确规定?

虽然在商业和金融的背景下,将受信人责任作为合同违约条款处理的想法很普遍,但是本文解释了当存在受信人冲突时,这种处理方式应该受到限制。利益冲突受信人不应该被强制要求,比如说,遵循指令,而这个指令与合同项下所欲实现的利益没有合理的关联,或者遵循指令会触发或加剧伴随着系统性后果的市场失败。这种限制是与使合同当事人通过合同约定相关责任的商业准则相一致的。

最后,本文讨论了降低受信人冲突或减少其影响并使其易于解决的程序法上的步骤。这些步骤在利益冲突受信人的义务和权利问题难以解决或模糊不清时,对其司法裁决具有特别的价值。

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[207] In these scenarios, the senior beneficiaries are reasonably assured to receive payment whereas the subordinated beneficiaries are at risk. *See supra* notes 80 – 89 and accompanying text. In certain less common scenarios, though, this Article argues that a fiduciary with *conflicting obligations should balance its obligations to conflicting beneficiaries on a more nuanced* case – by – case basis. *See supra* note 191 and accompanying text.