# 信托受托人谨慎义务法律文献检索指南

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### 一、 信托受托人谨慎义务问题的提出背景

信托制度起源于英美法系,后逐渐为世界绝大多数国家所认可与接受,并从中发展出了专业的信托行业。而我国则于 2001 年颁布了《中华人民共和国信托法》,以法律形式正式确立了我国的信托制度。

从信托的演变历程来看,其经历了由消极信托到积极信托、由民事信托到商事信托的变化阶段,制度功能和价值取向亦从传统的谋求财产的保值传承转变为寻求财产的增值管理;相应地,信托受托人亦已从消极的财产持有者转变为积极的财产管理者,并且为适应此种转变,受托人对信托财产的处理权限得到极大扩张。因此,为防止受托人利用其优势地位损害受益人利益,法律必须对受托人规定相应义务以规制其行为,其中最重要的两项即为忠实义务与谨慎义务。由于现今委托人与受益人已不再满足于信托财产的单纯保值,更是积极谋其增值,因而受托人在管理财产上的谨慎义务地位愈发突出,尤其在信托投资最为活跃的英美等国,谨慎义务已成为受托人最重要的义务。但受大陆法系的影响,我国对受托人的谨慎义务仅做出了原则性规定,不利于我国信托行业的发展及受益人权益的保护。在此背景下,或可以美国相关立法、判例与文献为参考,完善我国的信托受托人谨慎义务规则,故特作本法律文献检索指南。

## 二、信托受托人谨慎义务之法律文献检索指南概述

### (一) 关键词

信托(trust)、受托人(trustee)、管理人(manager)、谨慎义务(duty of prudence)、信义义务(fiduciary duty)、谨慎投资者规则(prudent investor rule)、谨慎人规则(prudent person rule)。

#### (二) **5W** 分析法

Who(主体): 受托人(trustee)、委托人(client)、受益人(beneficiary)。

What (客体): 信托财产 (trust estate; trust property)。

Why (法律关系): 委托人将其财产权利委托给受托人,由受托人按照委托人的意愿,为受益人的利益或特定目的,对信托财产进行管理和处分。

When (受托人谨慎义务适用时间): 受托人对信托财产进行管理或者处分时。 Where (法域): 本文所涉法域范围为中国与美国。

### (三) 检索词语

- 1. 中文检索词语: 信托、受托人、谨慎义务。
- 2. 英文检索词语: trust、trustee、duty or duties、prudent or prudence。

#### (四)阅读对象

本文论题主要是关于我国信托制度中受托人谨慎义务规则的完善,因此本文 主要面向想要了解该问题的法科学生与学者,以及立法部门中涉及相关领域的工 作人员,同时亦可为司法实践中法官对相关法律的适用提供一定参考。

### (五)检索工具

- 1. 中文检索网站: 北大法宝、中国知网。
- 2. 英文检索网站: Westlaw Next、 Heinonline。

#### (六) 检索策略

本文从中文文献出发,按照从一次文献到二次文献的顺序进行检索,以期首 先对该论题建立起基本的认知体系,在此基础上再进行外文文献的检索,检索顺 序与中文文献相同。

# 三、中文法律资源

#### (一) 中文一次资源

1. 现行法律法规

选用数据库: 北大法宝

检索路径:法律法规一中央法规司法解释一匹配方式:精确-全文-同段,在检索框中输入"信托 受托人 谨慎"一进行检索。

检索结果: 共检索到法律 2 篇, 有效部门规章 3 篇。

1.1 2016 年《中华人民共和国慈善法》第四十八条,载"北大法宝",【法宝引证码】CLI.1.266755。

第四十八条 慈善信托的受托人管理和处分信托财产,应当按照信托目的,恪尽职守,履行诚信、谨慎管理的义务。

慈善信托的受托人应当根据信托文件和委托人的要求,及时向委托人报告信托事务处理情况、信托财产管理使用情况。慈善信托的受托人应当每年至少一次将信托事务处理情况及财务状况向其备案的民政部门报告,并向社会公开。

1.2 2001 年《中华人民共和国信托法》第二十五条,载"北大法宝",【法宝引证码】 CLI.1.35342。

第二十五条 受托人应当遵守信托文件的规定,为受益人的最大利益处理信托事务。

受托人管理信托财产,必须恪尽职守,履行诚实、信用、谨慎、有效管理的义务。 1.3 2017 年《慈善信托管理办法》第二十四条,载"北大法宝",【法宝引证码】 CLI.4.298794。

第二十四条 受托人管理和处分慈善信托财产,应当按照慈善信托目的、恪尽职守,履行诚信、谨慎管理的义务。

### 2. 案例

选用数据库: 北大法宝

检索路径:司法案例一匹配方式:精确-全文,在检索框中输入"信托 受托人 谨慎义务"一进行检索。

检索结果: 共检索到 17 篇案例并按相关性进行筛选。

2.1 "湖北银行股份有限公司等与四川信托有限公司等合同纠纷上诉案",湖北省高级人民法院(2017) 鄂民终 2301 号民事判决书,载"北大法宝",【法宝引证码】CU.C.10687702。

相关判决内容节选:"受托人以按照湖北银行指示向满洲里实业公司发放信托贷款的方式正确合理运用和处分信托财产导致的财产收益与损失由信托财产承担;四川信托按上述具体运用方向,管理、运用信托财产,即视为四川信托已履行了恪尽职守、诚实、信用、谨慎、有效管理的义务。"

2.2 "邢江材诉杨仲通其他合同纠纷案",上海市青浦区人民法院(2015)青民二(商)初字第2108号民事判决书,载"北大法宝",【法宝引证码】CLI.C.40875397。相关判决内容节选:"原告设立信托目的是为受益人获得良好的投资收益,而自

信托设立至今,金汇通公司经历三次重大经营变更,被告作为受托人未及时告知原告,且未经原告许可,将信托财产出质给案外人,亦未向原告支付过股份利润或红利,经原告催告,亦未回应。被告上述行为均表明其拒绝履行受托人诚实、信用、谨慎、有效管理的主要合同义务,原告可以单方解除合同。"

#### 3. 条约

选用数据库: 北大法宝

检索路径: 法律法规一中外条约一匹配方式: 精确-全文-同段, 在检索框中输入 "信托 受托人 谨慎"一进行检索。

检索结果: 无

(二) 中文二次资源

#### 1. 中文著作

选用数据库: 浙江大学图书馆

检索路径: 书刊查询一通用命令语言检索一词邻近: 否一中文文献库一输入"受托人 OR 管理人 OR 谨慎义务"一进行检索。

检索结果: 共检索到 13 篇书目并按相关性进行筛选。

钟向春:《我国营业信托受托人谨慎义务研究》,中国政法大学出版社 **2015** 年版。

王众:《信托受益人保护研究:基于商事实践的视角》,法律出版社 2014 年版。 张敏:《信托受托人的谨慎投资义务研究》,中国法制出版社 2011 年版。

### 2. 中文期刊

选用数据库:中国知网

检索路径:高级检索—期刊—主题:"信托"并含"受托人",并且关键词:"谨慎义务",来源类别:核心期刊、CSSCI—进行检索。

检索结果: 共检索到 6 篇期刊文章。

谢冰清、周迈、肖宏伟:《我国社会保障基金依托的规范管理模式研究》,载《现代管理科学》2014年第8期,第81页。

何新容:《美国对灾难救济信托的法律规制及其对我国的启示》,载《河北法学》 2012年第9期,第178页。

黄素萍:《论信托受托人的谨慎投资义务——以美国〈统一谨慎投资人法〉为视

角》,载《政治与法律》2008年第9期,第150页。

### 3. 学位论文

选用数据库:中国知网

检索路径: 高级检索一博硕士一主题: "信托"并含"受托人",并且关键词: "谨慎义务"一进行检索。

检索结果: 共检索到硕士论文 13 篇, 无博士论文, 并按相关性进行筛选。

林兴盛:《信托受托人谨慎义务研究》,中国政法大学硕士学位论文,2010年。

陈烨:《我国信托受托人谨慎义务研究》,南京大学硕士学位论文,2013年。

唐宝四:《我国信托受托人义务的法律研究》,暨南大学硕士学位论文,**2013**年。

### 四. 英文法律资源

### (一) 英文一次资源

#### 1. Federal Materials

#### 1.1 Statutes

选用数据库: Westlaw

检索路径: Federal Materials—USCA—advanced—Statutory Text 输入"trustee /s (prudence or prudent)"—Search.

检索结果: 共检索到 2 条法规并按相关性进行筛选。

15 U.S.C.A. § 77000 (West)

§ 77000. Duties and responsibility of the trustee

#### (c) Duties of the trustee in case of default

The indenture trustee shall exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

### (c) 受托人为免违约所负有的义务

为免违约(相关条款已在契约中作出规定),契约受托人应当依照契约的授权行使权利和使用权力,并在行使及使用时,应当如同一个谨慎的人在同样情况

下处理自己的事务那样,进行注意与使用技能。

#### 1.2 Cases

选用数据库: Westlaw

检索路径: Federal Materials—Federal Cases—U.S. Supreme Court—advanced—Synopsis/Digest 输入"trustee /s pruden!"—Search.

检索结果: 共检索到 9 篇案例并按相关性进行筛选。

### Tibble v. Edison Int'l, 135 S. Ct. 1823, 191 L. Ed. 2d 795 (2015)

Declined to Extend by Singh v. RadioShack Corporation, 5th Cir.(Tex.), February 6, 2018

#### Synopsis:

Beneficiaries of defined-contribution retirement savings plan brought Employee Retirement Income Security Act (ERISA) action against alleged fiduciaries of plan, seeking to recover damages for alleged losses suffered by plan, in addition to injunctive and other equitable relief. The United States District Court for the Central District of California, Stephen V. Wilson, J., granted summary judgment for alleged fiduciaries in part, 639 F.Supp.2d 1074, granted summary judgment for alleged fiduciaries on remaining claims in part, 639 F.Supp.2d 1122, and, following bench trial, determined that fiduciaries had breached duty of prudence, and awarded damages, 2010 WL 2757153. Parties cross-appealed. The United States Court of Appeals for the Ninth Circuit, O'Scannlain, Circuit Judge, 729 F.3d 1110, affirmed. The Supreme Court, Justice Breyer, held that Court of Appeals erred in concluding that claims were untimely, based solely on alleged fiduciaries' initial selection of funds, and without considering the contours of the alleged breach of fiduciary duty.

固定缴款退休储蓄计划的受益人向案涉计划受托人提出了基于《雇员退休收入保障法》的诉讼,要求赔偿案涉计划所受损失,并要求禁令性及其他衡平法救济。美国加利福尼亚中部地区法院 Stephen V. Wilson 法官支持了对被诉受托人部分即决判决,即 639 F.Supp.2d 1122,并在审判后认为受托人违反了谨慎义务,应当赔偿损失,即 2010 WL 2757153。后当事双方相互上诉。美国第九巡回上诉法院 O' Scannlain 巡回法官维持原判,即 729 F.3d 1110。最高法院的 Breyer 法官,

认为上诉法院的结论是错误的,即仅根据被诉受托人对基金的最初选择就提出索赔是过早的,而且亦未考虑到所指控的对信托义务的违反的要件。

2. State Materials (take New York for example)

2.1 Statutes & Court Rules

选用数据库: Westlaw

检索路径: States Materials—Statutes & Court Rules—advanced—Statutory Text 输入 "trustee /s pruden!"—Search.

检索结果: 共检索到 12 条并按相关性进行筛选。

McKinney's Retirement and Social Security Law of 2011 § 177, N.Y. Retire. & Soc. Sec. Law § 177 (McKinney)

§ 177Eligible investments

9. Investments, which do not qualify or are not permitted under any other subdivision of this section, notwithstanding any other provision of law, provided…… (b) such investments shall be for the exclusive benefit of the participants and beneficiaries, and the trustee or trustees of a fund shall make such investments with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and……

即使有其他法律规定,不符合或者不被本条任何其他分项规定允许,但投资只要满足……(b)此类投资应当仅为委托人与受益人的专有利益,并且受托人或者基金受托人在投资时应当满足注意、技能、谨慎和勤勉上的要求,这些要求是指一个具有类似能力和目的的谨慎的人处于类似职位且在熟悉相关事务的情况下所会遵循的标准……

2.2 Cases

选用数据库: Westlaw

检索路径: States Materials—Cases—New York Court of Appeals—advanced—Synopsis 输入"trustee/s pruden!"—Search.

检索结果: 共检索到 22 篇案例并按相关性进行筛选。

Guar. Tr. Co. of New York v. Fisk, 270 N.Y. 550, 200 N.E. 312 (1936)

#### Synopsis:

The Special Term surcharged the respondent Lewis L. Clarke, the individual trustee herein, with the purchase price of shares of stock of the General Baking Corporation on the basis of findings made by it that such purchases were acts of negligence on his part and not errors of judgment, and that in making such purchases he did not employ such vigilance, sagacity, diligence, and prudence as, in general, prudent men of discretion in like matters employ in their own affairs. The Appellate Division reversed and found that, in making such purchases, and certain exchanges of such stock, the individual trustee exercised reasonable care and diligence, and accordingly struck out the surcharge against him.

特别条款附加了被告 Lewis L. Clarke 作为个人受托人根据其调查结果购买 General Baking Corporation 股票的价格,即这些交易是其自己的过失行为,而非 判断错误,因其在进行这些交易时并未按照应有的在警觉、明智、勤勉与谨慎上的要求行事,其中谨慎是指如同一个谨慎的人在处理自己类似事务时所会尽到的谨慎注意。上诉法庭推翻了特别条款并认为,在进行此类交易或者某些此类股票交换时,个别受托人的行为满足合理注意和勤勉的要求,并因此取消了对他的附加费。

### In re Allen's Will, 306 N.Y. 720, 117 N.E.2d 906 (1954)

#### Synopsis:

The appointee appealed to the Court of Appeals, contending that preliminary and procedural objections of executor and trustee were without merit, and that transactions objected to showed such mismanagement and want of diligence, care, and prudence on his part that he was required to be surcharged with losses thereby sustained by the estate, and that deceased co-executor and co-trustee did not participate in mismanagement of affairs of estate and was not cognizant of alleged mismanagement, and that objections to account were properly filed by objectants, and that executor and trustee was not entitled to commissions, and that personal claim of executor and trustee for services allegedly rendered by him during lifetime of testator was properly disallowed.

被任命者向上诉法院提起上诉,主张执行人和受托人的初步和程序性异议是没有根据的,并且这些被反对的交易表明其管理不善,缺乏应有的勤勉、注意和谨慎,因而其被要求承担由此造成的损失;其同时主张已故的共同执行人和共同受托人未曾参与对相关财产事务的不当管理,对案涉的管理不善亦不知情;此外,其还主张反对者已提出适当的理由,执行人和受托人没有资格获得佣金,且执行人和受托人对其在遗嘱人在世期间所提供的服务的个人权利要求被合理地否决了。

## (二) 英文二次资源

#### 1. monograph

选用数据库: 浙江大学图书馆

检索路径:书刊查询一通用命令语言检索一词邻近:否一西文文献库一输入 "trustee AND duty"一进行检索。

检索结果: 共检索到 13 篇书目并按相关性进行筛选。

Robert L. Mennel and Sherri L. Burr, Wills and Trusts: In A Nutshell (St. Paul, MN: Thomson/West, c2007)

Contents: Introduction -- Intestacy -- Rights of the spouse and children -- The statute of wills -- Revoking and changing wills -- Beneficiaries -- Changes in items bequeathed -- Interpretation -- Probate administration -- Creation of trusts: overview - - Elements of a trust -- Trustee powers and duties -- Trust administration problems.

目录: 引言一无遗嘱死亡一被继承人配偶和子女的权利一遗嘱法令一遗嘱的撤销和变更一受益人一遗赠项目的变更一解释一遗嘱的管理一信托的建立: 概述一信托的要素一受托人的权力和义务一信托管理问题

Gary Watt, Equity & Trusts Law (Oxford, U.K.: Oxford University Press, c2012)

Contents: Introduction to equity and trusts -- Understanding trusts -- Capacity and formality requirements -- Certainty requirements -- The constitution of trusts -- Public policy limitations on the formation of trusts -- Purpose trusts -- Charitable trusts -- Variation of trusts -- Trustee appointments -- The nature of trusteeship -- Trustees' duties -- Maintenance and advancement -- Investment -- Breach of trust: defences and relief -- Resulting and constructive trusts -- Informal trusts of land -- Tracing -- The equitable liability of strangers to the trust -- Equity: doctrines and

remedies.

目录: 衡平法与信托法的引言一理解信托一能力和形式要求一确定性要求一信托的组成一公共政策对信托成立的限制一目的信托一慈善信托一信托的变更一受托人的任命——受托人职责的本质—受托人义务—维护和促进—投资—违背信托义务: 防御和救济—由此产生的和建设性的信托—非正式的土地信托—追溯—陌生人对信托的衡平责任—衡平法: 学说与救济

#### 2. Law review articles

选用数据库: Heinonline

检索路径: Law Journal Library—Advanced Search—Article Title 输入"trustee AND (prudent OR prudence)"—Search.

检索结果: 共检索到 15 篇文章并按相关性筛选。

Paul G. Haskell, Prudent Person Rule for Trustee Investment and Modern Portfolio Theory, The , 69 N.C. L. Rev. 87, 112 (1990)

The prudent person rule may make it illegal for a trustee to invest in a market fund because some of the components may be speculative. This is unsound and should be changed.

谨慎人规则可能会认为受托人投资市场基金是非法的,因为其中的一些组成部分可能是投机性的。这种情况是存在问题的,应该予以改变。

Gil Yaron, The Responsible Pension Trustee: Re-Interpreting the Principles of Prudence and Loyalty in the Context of Socially Responsible Institutional Investing, 20 Est.Tr. & Pensions J. 305, 388 (2001)

Accordingly, it is important to reiterate that the purpose of this article is not to undermine the fiduciary duties imposed on pension trustees. Rather, it is to demonstrate that prudent and loyal institutional investment practices in today's investment environment require seeking long-term benefits for pension beneficiaries that take into consideration the full range of interests and benefits received by plan beneficiaries.

因此,必须重申,本文的目的不是要否定受托人所承担的信义义务,而是要 表明,在当今的投资环境中,谨慎且忠实的机构投资行为应当为养老金受益人谋 求长期收益,同时也应考虑到计划受益人所应得的所有利益与收益范围。

Generally speaking, there is nothing preventing pension trustees form applying non-financial criteria to investment decisions per se, provided that the investments are prudent and made in the best interests of the beneficiaries.

一般来说,只要投资是谨慎的,并且符合受益人的最大利益,就没有什么可以阻止受托人将非金融标准适用于投资决策本身。

### 3. Texts & Treatises

选用数据库: Westlaw

检索路径: Secondary Sources—Text & Treatises—advanced—Title 输入"trustee /s (prudence or prudent) /s dut!"—Search.

检索结果: 共检索到 12 条并按相关性进行筛选。

§ 612.Skill and prudence demanded of trustee in investing, The Law Of Trusts And Trustees § 61 (Bogert's Trusts And Trustees, June 2018 Update, Chapter 30. Trust Investments—General Standards—Statutes)

The standard articulated by judicial decision and the statutes incorporating some version of that standard generally require that in the exercise of investment powers and discretions a trustee act in the same manner as a person of prudence, discretion, and judgment would in managing his or her own affairs with the purpose of accomplishing objectives similar to those of the trustee, not for speculation but for the permanent disposition of the trustee's own funds. In some jurisdictions, the standard required that a trustee must act with the prudence, care and skill of one acting as trustee for another person rather than in the management of the trustee's own affairs, which is considered to be a somewhat higher standard. In some states a trustee who had special skills or expertise was judged by the standard of care and prudence attributable to a professional trustee.

相关司法裁判与规定有该标准的某些版本的法令,一般要求受托人在运用其 投资权与决定权时,应当如同一个谨慎和有判断力的人在处理自己的类似目的事 务那样行事,其中的目的不是为了投资,而是为了受托人自己资产的永久性管理。 在某些法域中,该标准要求受托人必须以担任另一人受托人的谨慎、注意和技能 标准行事,而非管理受托人自己事务的标准,因为其被认为是更高的标准。在一些州,拥有特殊技能或专长的受托人适用专业受托人的注意和谨慎的判断标准 § 22:15.Powers and duties of executors and trustees: Prudent Investor Act, N.Y. Elder Law Practice § 22:15 (New York Elder Law and Special Needs Practice, June 2018 update, Chapter 22. Wills, Waivers, and Renunciations)

The Prudent Investor Act1 establishes prudent investor standards and requires all executors and trustees to invest and manage property in accordance with those standards. The perforance of the executor or trustee will be judged by that standard of care with regard to the investment of the entire portfolio rather than on an individual investment. However, the Prudent Investor Act did not fully address the competing needs of income and remainder beneficiaries.

《谨慎投资者法》确立了谨慎投资者标准,并且要求所有执行人与受托人根据这些标准投资和管理财产。招待人或者受托人的业绩将根据整个投资组合的投资而非单个投资,来判断是否符合谨慎标准。然而,《谨慎投资者法》没有充分满足收入与其余受益人间的竞争性需求。

### 五、结语

在对中美两国受托人谨慎义务规则进行比较的基础上可以发现,相较于我国,美国已经通过法令法规及大量判例确立了更为详尽具体的受托人谨慎义务规则。受托人就信托财产实施某种行为时是否履行了谨慎义务,是确定受托人对由此造成的损失是否承担责任的关键。美国法中受托人谨慎义务的核心标准是,受托人应当如同一个谨慎的投资者处理自身事务一样,管理和使用信托财产投资。

虽然我国已经初步形成了受托人的谨慎义务规则,但尚存在投资权责不够明确、谨慎义务过于粗疏、缺乏可操作的具体标准等问题;而美国信托法评判受托人谨慎义务的技术标准已较为成熟,具有很强的可操作性,其经验性的具体考察要素可以为我国司法部门在适用抽象法律原则时提供参考。尽管我国信托制度及实践与美国的信托业存在诸多差异,但从信托制度的功能性运用方面来看,我国受托人谨慎义务规则的完善,必然离不开对美国法的借鉴。