

Identification of the Disseminator in a Case of Fundraising Fraud

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Abstract: With the high development of the virtual world, more and more fund-raising fraud crimes are spread through the Internet, and in the process of fund-raising fraud, the role of the communicator is not insignificant, and if all the communicators do not bear criminal responsibility, it will pose a great threat to the market financial order and the legitimate rights and interests of investors. By characterizing the behavior of the disseminator of fundraising fraud through the method of class analysis, its criminal liability can be clarified.

Keywords: fund-raising fraud, aiders, criminal liability

1. Introduction

On November 4, 2023, the investment platform Square Peg Pty Ltd (hereinafter referred to as SPC) announced its collapse, taking tens of millions of funds and fleeing. In the previous year, SPC attracted thousands of investors in China with its high return on investment, and it is reported that the average daily interest rate of investment projects in SPC can reach more than 1%, which is more than 200 times compared with the annual interest rate of 1.65% on one-year deposits announced by the Bank of China in 2023, so that many investors cannot resist. In the process of SPC accumulating money, there is also a kind of communicator who obtains promotion fees by developing lower-level personnel, who know that SPC is not qualified to absorb funds, and still recruit new members for the platform for the sake of high promotion fees. This paper will discuss the identification of these so-called communicators (also known as "team leaders") in the process of SPC fundraising.

2. The crime of fund-raising fraud, pyramid schemes and the crime of illegally absorbing deposits from the public

First of all, the actual controller does not constitute the crime of pyramid selling, according to China's definition of the crime of pyramid scheme, it is necessary to require the participant to pay a fee or purchase goods in the name of business activities such as promoting goods and providing services. Some scholars believe that if the actor uses the channel of multi-level pyramid marketing to attract money by recruiting members, and enables the participants to obtain commissions, bonuses or other economic benefits based on introducing others to join, and the actor only invests in the investment or informs the investment project, and does not actually have any promotion or sales of goods or services. Then the illegal act has nothing to do with the "prohibition of deterioration and multi-level pyramid schemes". Therefore, it does not constitute the crime of pyramid scheme.

Secondly, the actual controller does not constitute the crime of illegally absorbing deposits from the public, and by downloading the SPC platform for review, it can be found that the investment projects announced by the SPC on the platform are all fictitious projects, such as "solar energy investment projects" and "processing station investment projects", which have neither construction sites, nor bidding and approval of construction related documents, but only show the funds required for the project. The guarantor of the investment contract is also a fictitious guarantee company, and after receiving the investment money, it does not make actual investment, but returns dividends by collecting new and repaying old ones, which shows that from the beginning, it has the purpose of illegal possession, and the purpose of illegal possession plays a central role in the determination of the crime of fund-raising fraud and the distinction between it and the crime of illegally absorbing public deposits,[1] so the actual controller does not constitute the crime of illegally absorbing public deposits but constitutes the crime of fund-raising fraud. For the sake of convenience, the actual controller of the SPC will be referred to as the "fraudster" for short.

3. The dilemma of the identity of the communicator

An important reason for the ambiguity of the identity of the communicator is that it not only invites other people to participate in the fake investment project, but also some of the communicators themselves have invested funds, and in some cases, their losses are much greater than the platform rewards obtained for the development of new users. In order to determine the identity of the communicator in the crime of fundraising fraud, it is necessary to make a specific analysis of his objective behavior and subjective aspects.

4. Criminal liability analysis

According to the concept of hierarchy, the perpetrator needs to bear criminal responsibility, and the constituent elements must be met, and the criminal illegality and responsibility must be met.[2]

4.1. Conformity of constituent elements

According to the principle of legality of crimes in the Criminal Law of China, all crimes need to be expressly stipulated in the Criminal Law, and no crime is not a crime unless the law stipulates it, and in order to determine that the communicator constitutes the crime of fund-raising fraud, it is necessary to analyze that it satisfies the constitutive elements stipulated in the Criminal Law of China.

4.1.1. Committing a crime

The essential characteristic of modern economic crime is "breach of trust", and the crime of fund-raising fraud is a betrayal of a kind of public trust. In the process of developing investors, the communicator introduces the SPC to investors as a formal investment platform, and with the collapse of the platform, the fact that the SPC is a fraud trap is exposed, resulting in the inability to recover investors' funds, which is a complete "breach of trust" behavior. The combined behavior of fraudsters providing fake platforms and disseminators reinforcing the credibility of the platforms has led investors to deliver assets to SPC platforms based on misperceptions and become victims of fundraising scams.

4.1.2. Targets of the crime

According to the general theory of this criminal law academic circle, the victims of the crime of fund-raising fraud must be an unspecified number of people,[3] that is to say, the fund-raising fraudsters have not carried out precise fraud on the victims, and they do not know the identity of the victims.

However, when we return to the perspective of the communicator, we will find that the victims promoted by the communicator are generally people they are familiar with, including relatives, friends or business partners, and the target of the communicator's behavior is specific, so does it mean that the communicator cannot constitute the crime of fund-raising fraud? The answer is no, because the communicator is an accomplice to the crime of fundraising fraud, and from the standpoint of the theory of accomplice subordination, the establishment of an accomplice is of course necessary for the principal offender to carry out the principal offense, but the issue of the subordination of the principal offender with what kind of criminal elements is the necessary element of the principal offense has always been "extreme subordination" or "strict subordination", that is, it is necessary for the principal offender to have the constitutive elements, illegality and responsibility, and "limited subordination" means that the principal offender has the constitutive elements and illegality. Minimum subordination" is the necessary opposition to the fact that the principal offender has the constituent elements.[4] According to the theory of "limiting subordination", the criminal act of an accomplice is subordinate to the principal offender, so whether the target of the crime is specific should be directed at the principal offender, not the accomplice, and the accomplice has a certain degree of independence in the elements of the crime. In the joint crime of fund-raising fraud with a large number of people, whether the victim is specific should be directed at the principal offender, and the victim cannot be required to be an unspecified target for all the perpetrators, which is not only not conducive to the identification of the helper, but also will trap the offender in a small number of core personnel, which is not conducive to the recovery of the victim's funds. Therefore, whether the target is specific is not a necessary constitutive element of aiding and abetting in the crime of fundraising fraud.

4.1.3. The results and causal relationship of the act

The property loss suffered by the investor is the obvious result of the crime, and the disseminator's communication behavior must have a certain causal relationship with the property loss in order to be illegal. When the fraudster completes the establishment of the project and discloses it to unspecified persons in the society, the danger flow will gradually flow to the investor, and in this process, if there is no intervening factor or the intervening factor is not abnormal in the process of the dangerous flow reaching the investor, it can be considered that the behavior has a causal relationship with the result, and the intervening factor is that other factors are involved between the behavior and the result, and the factor has a close relationship with the occurrence of the result. Intervening factors may sever the causal relationship between the previous behavior and the outcome, resulting in the interruption of the relationship between the previous behavior and the outcome.[5] Obviously, it is not an abnormal intervening factor, because it is expected and wanted to be actively realized before the fraudster commits the fraud, and it is also a normal situation from the general perspective of society, so it will not block the causal relationship between the fraudster's behavior and the result of the crime. At this time, the causal relationship between the communicator's communication behavior and the criminal result is analyzed, through the derivation of the danger flow, after the fraudsters complete the public behavior, the whereabouts of the danger flow are not clear, they cannot predict which specific victim will be, and the danger at this time is still abstract, but after the communication behavior of the communicator, the danger flow finds the direction to continue to travel, determines the specific victim, and the danger becomes real. Specific danger, according to the theory of equivalent causality, Professor Zhang Mingkai believes that the cognitive level of ordinary people at the time of the act should be used as the standard to judge whether there is equivalence between the behavior and the result, and the criminal act and the damage result should have a general sense of the relationship between causing and being caused,[6] in the SPC case, the communication behavior and the occurrence of the damage result is not only the relationship between no A and no B, but also a necessary helping behavior, which together with the fraud leads to the occurrence of the criminal

result, from the perspective of the cognitive level of the average person at the time of the act, the role of the communicator is even greater than that of the fraudster. In summary, there is a causal relationship between the transmission behavior and the occurrence of dangerous outcomes.

4.2. Unlawfulness

Through the above analysis, the communicator's behavior has met the constituent elements of compliance, and generally speaking, it is illegal to meet the constituent elements, but there are still some illegal obstruction reasons in China's criminal law to prevent the illegality of the act, such as legitimate defense, In the case of fundraising fraud, the reason for the dissemination's illegal obstruction is generally the consent of the victim, and the consent in this case refers to the fact that the investor has been fully informed of the dangerous content, including the risk of investment or may be a scam, and still carries out the investment behavior, which can be regarded as the investor agreeing to bear the risk. Since financial investment behavior is a high-risk behavior, the communicator does not need to perform the high warning obligation like a financial institution, but only needs to fulfill the general reminder obligation of ordinary people, let alone obtain a written commitment from investors. In the case of fundraising fraud, the most frequent application of the communicator is the consent of the victim, and when the communicator is fully informed of the risks and the possibility of the scam, its communication behavior is no longer illegal to the investor, because the investor's trust and legal interests are no longer damaged by the communicator, but are damaged under the control of the investor himself.

4.3. Accountability

When the communicator's behavior meets the conformity of the constituent elements and there is no illegal obstruction, his behavior is illegal, but the illegality of the objective act does not mean that the communicator needs to bear criminal responsibility, and the accountability is also needed to build a bridge.

4.3.1. The purpose of the communicator's unlawful possession

Influenced by the theories of Japanese criminal law scholars, the mainstream theory in China holds that property-based crimes must be aimed at illegal possession, and the purpose of illegal possession is usually further divided into two aspects: the intention of exclusion and the intention of exploitation. As a type of property-based crime, the crime of fund-raising fraud also needs to have the purpose of the crime.[7] In the SPC case, the purpose of the fraudster's illegal possession is very obvious, so does the communicator's purpose of illegal possession exist? The communicator does not seem to have the intention of excluding the investor's property and the intention of using it, so there is no purpose of illegal possession, but in fact, even if it is a property-based crime, it is necessary to distinguish the difference between the purpose of illegal possession, for example, in Germany, the crime of theft and the crime of fraud have different purposes, the former is unlawful gain, while the latter is ill-gotten gain, while in Japanese theory, unlawful gain is the common purpose of the crime of theft and fraud.[8] The purpose of illegal possession contained in the traditional crimes of theft and fraud is no longer sufficient to explain the crime of fund-raising fraud, which is increasingly updated under the rapid economic development, and new efforts need to be made to explain the meaning of illegal possession. The purpose of the communicator's illegal appropriation can be invoked from the theory of illegal enrichment in German criminal law, where the communicator attracts investors for the SPC knowing that it does not have the qualifications to absorb funds recognized by the national financial supervisory authority, and the purpose is to obtain a high promotion reward, which is an illegal act that violates the state regulations. From the actual damage results, the promotion reward

seems to be issued by fraudsters, but in fact it is also the investor's capital investment, and the purpose of this illegal profit is more obvious.

4.3.2. Criminal intent of the communicator

In the crime of fundraising fraud, there are a large number of communicators, and it is impossible to say that every communicator constitutes an aider to the crime of fundraising fraud, and the key criterion for distinguishing the crime of a communicator from the crime of non-crime is whether the communicator has criminal intent. However, criminal intent here does not only refer to the direct intent to help the fraudster defraud money, but also the indirect intent to bring in investors and let them be deceived knowing that it may be a scam. Even if the communicator and the fraudster constitute a joint crime, it is still necessary to distinguish it from the criminal intent of the fraudster when analyzing the criminal intent of the communicator.

According to the general theory of Chinese criminal law scholars, joint crime refers to the situation and phenomenon in which the offender and the person jointly commits the crime to constitute a joint crime, it is necessary for the participants to communicate with each other about the intent of the crime, and if the crime is committed by others, some kind of accomplice, such as an aider, can be established even if there is no communication with the others. As mentioned above, joint criminality is a form of wrongfulness. When handling cases of joint crimes, it shall first be judged from the level of illegality whether a joint crime has been established, and then from the level of responsibility, whether and what kind of responsibility each participant has responsibility shall be determined individually. In other words, the particularity of joint crime is only manifested at the level of wrongfulness, and the legislation and theory of joint crime only solve the problem of wrongfulness; Therefore, joint crimes must be determined with a focus on wrongfulness.[9] In the previous article, the author has discussed the illegality of the communicator, and at the level of illegality of the act, the communicator and the fraudster jointly led to the criminal result of the investor's funds being defrauded, which should be considered to constitute a joint crime, and at the level of responsibility, the intention of the two does not need to be completely identical, and the intention of the communicator can be the intention to help or the intention to let go.

The author believes that the promotion fee system launched by the SPC platform can be regarded as an invitation, that is, to send a signal to potential communicators: I am going to start defrauding investors, if you also want to get some benefits in the process of fraud, then let more victims in. If a communicator knowingly invites others to invest in the scam, it is a direct intention, and like the fraudster, it constitutes an intention to obtain money from others.

In addition, there are more indirect intentional situations, which refers to the mental attitude of the perpetrator who knows that his or her conduct may have a result harmful to society, and allows such a result to occur. Laissez-faire is another form of intention stipulated in the Chinese criminal law, which exists in indirect intention, and is the volitional factor of indirect intention.[10] Returning to the case of fundraising fraud, the indirect intention of the communicator refers to the fact that the communicator knows that the SPC investment platform may be a scam, but still recruits new members to participate, and allows the result of being deceived to happen.

However, the perpetrator's criminal intent belongs to the spiritual world, and other people cannot directly know what a person really thinks in his heart at the time of the crime, let alone judge it solely on the basis of the actor's statement, but should deduce it through the actor's overall objective behavior. In the process of derivation, the principle of allowing rebuttal and rebuttal should be followed, and both the factors of proof of intent to the actor and the factor of proving that the actor did not have intent should be considered, both of which need to be taken into account.[11] The following two factors can be used to analyze whether the communicator has criminal intent.

4.3.2.1. Communicator's financial investment

If the communicator thinks that the SPC is a safe investment platform, in the face of such a high rate of return, unless he is penniless, he will not invest funds to participate in the investment; if the communicator has no capital investment or only a symbolic investment of a very small amount, but strongly invites others to enter the SPC platform for investment, it can be inferred that he has already judged the fraud trap and has the intention of helping or allowing the fraud. If the communicator invites others to participate in the investment and invests a considerable amount of money himself, he can be unaware of the fraud trap, and there is no intention to help or indulge the fraud.

4.3.2.2. False promises by communicators

As mentioned above, the crime of fundraising fraud is a crime of "breach of trust", which is not only reflected in the deception of investors by fraudsters, but also in the deception of investors by communicators, regardless of whether the communicator knows that SPC is a fraud trap or not, and makes false investment promises to guarantee the legitimacy of SPC and the guarantee of returns, which strengthens the trust of investors. After the investor's loss is incurred, the communicator refuses to fulfill the promise on the grounds that it also has losses, which is an obvious "breach of trust", and when the communicator makes a false promise, it can be inferred that it has at least the intention to allow the harmful results to occur.

5. Conclusion

If it can be determined that the communicator has direct or indirect intent, it is responsible, and if there is no reason for obstruction of responsibility, the responsibility is established, and the communicator should bear criminal responsibility.

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