A Comparative Study of Loss of Abstract Opportunity in French Law

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Introduction

The theory of loss of chance, by distinguishing between "final damage" and "damage arising from deprivation of the chance itself," and by accepting the premise that the chance itself—regardless of its probable outcome—possesses independent and protectable economic value, enables partial compensation in cases where the realization of the final outcome is not certain. This theory has been recognized in advanced legal systems as an effective mechanism for compensating losses arising from uncertainty. However, the application of this theory in civil liability claims relating to the securities market, due to the specific characteristics of this market, has undergone fundamental transformations, and French jurisprudence has employed a novel version of it under the heading of "abstract loss of chance," whereby instead of a specific investment opportunity, an abstract and unspecified chance (namely, the opportunity to make an informed decision in general) serves as the basis for compensation. The present article seeks to explain the concept and formation of this theory in French law, examine its effectiveness, and assess the feasibility or infeasibility of adopting a similar solution in Iranian law.

Problem Statement

In civil liability claims arising from violations of disclosure obligations in the securities market, investors face two fundamental obstacles: first, the difficulty of establishing causation; second, the uncertainty of damage. French jurisprudence, in order to overcome these obstacles, has resorted to the loss of chance theory, but has gradually subjected this theory to a fundamental transformation, substituting for a specific and concrete chance an abstract chance (the deprivation of the possibility of informed decision-making) as the basis for compensation. The fundamental question is whether this development of the theory, known as "abstract loss of chance," is defensible in principle and according to the criteria of civil liability law, and whether it can be accepted in Iranian law.

Main Claim

The abstract loss of chance theory, although practically capable of overcoming evidentiary difficulties in securities litigation, faces serious criticisms because it conflicts with fundamental principles of civil liability, including the principle of

full compensation, certainty of damage, the necessity of establishing causation, the principle of individualization of damages, and the prohibition of punitive damages. Moreover, given the underdeveloped state of the traditional loss of chance theory in Iranian law and its lack of acceptance in judicial practice and legislation, the adoption of its abstract version in the Iranian legal system is not only impossible but also undesirable. In contrast, alternative solutions such as establishing a statutory presumption or resorting to judicial evidentiary presumptions to facilitate proof of causation are more compatible with the legal and jurisprudential foundations of Iran.

Methodological Approach

The present research employs a comparative legal methodology, studying French jurisprudence in key cases including Flammarion (2003), Sidel (2006), Gaudriot (2010), Vivendi (2011), and Marionnaud (2014), as well as examining decisions of the Iranian Securities Dispute Resolution Council, tracing the evolution of the loss of chance theory from its traditional form to its abstract version. The analysis of legal doctrine in both legal systems, particularly the criticisms directed at the abstract theory, has served as the basis for evaluating the effectiveness of this theory. Furthermore, by reference to the general principles of civil liability in Iranian law and jurisprudential rules, including the rule of no harm, the rule of direct causation, the compatibility or incompatibility of this theory with the foundations of the Iranian legal system has been assessed.

Outline of the Article's Sections

The article begins by explaining the concept and conditions of the traditional loss of chance theory and, while examining the three elements of civil liability and the specific conditions of this theory, analyses its position in Iranian law. Subsequently, the article addresses the formation of the abstract loss of chance theory in French jurisprudence and, through a detailed examination of the aforementioned cases, demonstrates how this theory evolved. The next section of the article examines the effects of the abstract theory at three levels: "presumption of causation," "presumption of damage," and "lump-sum compensation." The article then provides a critical analysis of this theory from four perspectives: conflict with the principle of full compensation, disregard for causation, failure to individualize circumstances, and the prohibition of punitive damages. Finally, the article examines the applicability of this theory in Iranian law and, pointing to the existing obstacles, proposes alternative solutions.

Conclusion

The main conclusion of the article is that the abstract loss of chance theory, although it provides a practical response to the difficulties of proof in securities litigation, is theoretically in conflict with the fundamental principles of civil liability; because by providing partial and lump-sum compensation, it violates the principle of full compensation; by presuming causation and damage, it undermines the elements of civil liability; it fails to individualize the circumstances of different investors; and due to the determination of damages

without regard to actual loss, it acquires a punitive character. In Iranian law, the application of its abstract version appears unlikely and impossible. Therefore, instead of adopting this problematic theory, it is preferable that the legislature amend the Securities Market Act to establish a statutory presumption for establishing causation in cases of disclosure violations, or that judges, by employing judicial evidentiary presumptions, provide effective solutions to facilitate the proof of investors' claims.

Findings and Suggestions

The most important findings are: (1) this theory effectively replaces the establishment of causation and the certainty of damage with presumptions that are inconsistent with the logic of civil liability law; (2) lump-sum compensation without regard to the individual circumstances of investors conflicts with the principle of individualization of damages; (3) this theory faces obstacles in Iranian law, including the absence of legislative provision, the lack of supportive judicial practice, and inconsistency with jurisprudential rules.