

**The Duty of Disclosure in Civil Law and The Burden of Proof
for Violating the Duty: The Disputes of Lehman Brothers
Structured Notes as An Example**

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Abstract

That Lehman Brothers Holdings Inc. declaring bankruptcy in September 2008 engendered in Taiwan a series of civil litigations in which investors contended the banks, serving as brokerage firms, failed to fully inform investors of “Non-Principal Protected” credit risk when selling and introducing the financial instruments and claimed compensation. Absent specific regulations, the Taiwanese Supreme Court has been making statements several times from 2011 regarding the issues below: Whether and based on what civil jurisprudence should we impose the duty of disclosure on banks concerning the risks when selling structured notes? If so, what is the legal basis of the duty? What information needs to be disclosed? To what degree and by what means should the duty be carried out? Whether the investors should prove the banks breached the duty of disclosure or the burden should be on the banks to prove they fulfilled the duty?

On the other hand, owing to the 2008 financial crisis likewise, Taiwan enacted the Financial Consumer Protection Act in 2011 in which Article 10 and 11 impose upon financial services enterprises the statutory duty of disclosure and the strict liability for damages for violating the duty. Such regulations raise the issues below: What is the relationship between the claims in the Financial Consumer Protection Act and the ones in the general Civil Law? Is there any difference concerning the contents? How does the Financial Consumer Protection Act allocate the burden of proof regarding the breach of the duty? On the basis of

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the Supreme Court cases and the enactment of the Financial Consumer Protection Act and setting out from the representative transactions of Lehman Brothers structured notes disputes, this article endeavors to structure a dogmatic system pertinent to the duty of disclosure which encompasses the Civil Law, the Financial Consumer Protection Act, and the Code of Civil Procedure.

Keywords: duty of disclosure, structured notes, good faith, contractual liability, allocation of burden of proof