

# The Dilemma of Refunding Illegal Fiduciary Fees and the Construction of Adjudication Strategies

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**Abstract:** Disputes over the return of fees caused by unlawful entrustment appear frequently in judicial practice. Proper handling of such disputes is crucial to the coordination of a rule-of-law society and a humanistic society. Based on an empirical analysis of judgment documents from paid retainer fee return cases and literature analysis, it is found that there are significant differences in how judges, lawyers, and the public attribute responsibility for retainer fees. Judicial decision paths are diverse, with the advantages and disadvantages of each path intertwined. It is difficult to take into account both legal effects and social effects. Given the above practical dilemmas, and based on the results of empirical research combined with theoretical study and analyses, this essay proposes solutions for different types of unlawful cases from the perspectives of legislative basis, legal application, the parties' subjective malice, and social harm. This approach aims to achieve a balance between a society based on the rule of law and a humanistic society.

**Keywords:** Illegal entrustment; Public order and morals; Fee refund; Empirical research; Dilemma of adjudication

**Online publication:** October 26, 2025

## 1. Introduction

### 1.1. Background

In recent years, the phenomenon of paid retainers has become more common in society, involving a wide range of favours. From promotion and children's schooling in personal life, to bidding for projects in commercial activities, to law enforcement and justice in public administration, seeking undue favours are pervasive. This phenomenon highlights significant challenges to the rule of law in China. Disputes involving the return of fees have arisen from unlawful requests for favours. These cases typically share the characteristic that the requestor enters into a fiduciary relationship with the fiduciary to obtain an illegal benefit and then demands the return of the fees if the fiduciary fails to fulfil the request. In judicial practice, judges face the dilemma of choosing between 'refund' and 'non-refund.' There are no uniform rules for adjudicating such cases, and the paths of adjudication are varied, leading to inconsistent judgments in similar cases. The governance of civil unlawful entrustment has long been neglected, and there are few studies with insufficient empirical analyses of unlawful entrustment in modern academia.

### 1.2. Literature review

Currently, the academic community has not yet reached a consensus on the path for adjudicating unlawful entrustment

cases but generally upholds the principle of analysing based on specific circumstances. Scholars construct diversified adjudication paths according to the actual situation of Chinese society and the particular characteristics of cases, avoiding one-size-fits-all treatment. Typical views are as follows:

Chen advocates defining the legal relationship of unlawful entrustment as an entrustment contract and determining its validity by the relevant rules of the Civil Code <sup>[1]</sup>. An entrustment act violating mandatory provisions of laws and administrative regulations should be considered invalid. Judges are granted discretion in applying public order and morals. Regarding fee handling, instead of using the principle of non-return for unlawful payments, rules should be established for returning the principal amount <sup>[2]</sup>.

Yang proposes abandoning the system of payment for unlawful reasons represented by Article 817 of the German Civil Code <sup>[3]</sup>. He suggests taking Article 157 of the Civil Code as the core to clarify the payer's right to request a return when a civil juristic act is invalid due to violating laws or public morals. Article 793(2) of the Civil Code can be applied by analogy to deny the return right to a payer acting for a wrongful cause.

Zhang proposes a theory categorizing requisitions into three stages with eight major types <sup>[4]</sup>. The former refines rules for adjudicating cost attribution, while the latter emphasizes differential adjudication. Zhang Hong advocates applying collection measures to violent debt collection. However, some scholars have questioned the applicability of collection measures.

With the continuous development of the market economy, unlawful entrustment has spread throughout society, seriously undermining fair market competition, eroding social order and morals, and impeding the process of building a China governed by the rule of law. Against this background, constructing uniform adjudication standards for illegal paid retainers, in conjunction with policy orientations, has become a pressing task. This is especially true as academia conducts in-depth practical research and continues to propose innovative concepts.

For this reason, this essay conducted a full-text search in the judicial case database of the Bieda Law Treasure Network using entrustment as the keyword, restricting the subject matter to contract, quasi-contractual disputes and property disputes. A total of 2,346 civil judgments and rulings issued from 23 January 2022 to 23 January 2025 were retrieved. Through reading, irrelevant cases and duplicate cases were excluded, and cases not applying the Civil Code as the basis for decision-making according to the law's temporal effect were eliminated. The screening resulted in a total of 1,104 valid civil judgments covering 30 provincial administrative regions in China.

## 2. Difficulties in adjudication: Inconsistency of adjudication standards

In cases involving disputes over the return of fees, the phenomenon of inconsistent adjudication standards is pronounced through statistical analysis of judgment documents. Decision results and decision paths are diverse and geographically specific. The majority of cases result in a full refund of the fees, while the number of cases where partial refunds are granted or the lawsuits are dismissed is relatively small. The most frequent verdicts made in different regions are also quite different from each other.

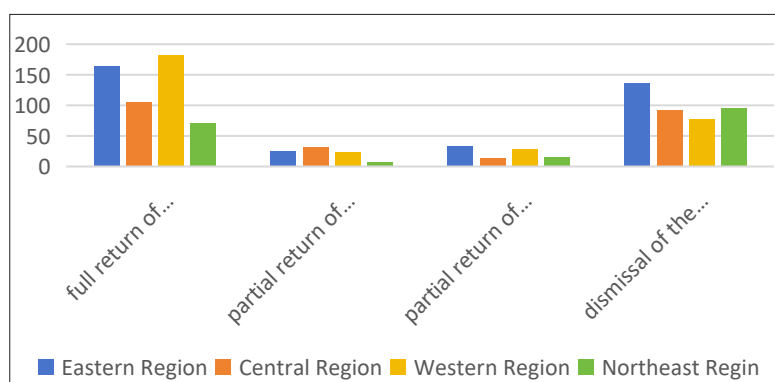


Figure 1. The number of judgment results in different regions.

Currently, outcomes in such cases are generally divided into two categories: return and non-return. These can be subdivided into four types: full return of costs, partial return of costs, dismissal of the claim, and dismissal of the action. Cross-tabulation and nominal regression model analyses revealed significant differences in the distribution of cases by geographic region and the result of the decisions, indicating that the outcome of this type of case shows specific geographic characteristics <sup>[5]</sup>.

According to judicial reasoning, there are five main decision paths in this type of case as follows:

- (1) Invalid act - return path;
- (2) Unjust enrichment - return path;
- (3) Wrongful payment - no return path;
- (4) Legal theory - no return path;
- (5) Suspected criminal offense - dismissal of prosecution path.

This phenomenon of different judgments in similar cases undermines judicial credibility and unity. When significant differences exist in the decisions of various courts or judges for similar cases, it is difficult for the parties to form reasonable expectations. It is also easy for the public to question judicial impartiality, ultimately weakening legal authority <sup>[6]</sup>. Furthermore, this phenomenon condones unlawful solicitation. Because the cost of violating the law becomes uncertain, it encourages individuals to take chances, thus weakening the law's deterrent and normative effect. This will undermine the deterrent effect and regulatory role of the law.

### **3. Conflicts of interest in 'refund' and 'non-refund'**

In adjudicating the return of illegal fees, the question of whether to support the return of fees often involves a conflict of interest and a choice of values, making it a key point of contention. Supporting return may weaken the curbing of illegal behaviours, while not supporting return upholds legal authority but may allow the fiduciary to retain undue gains and even intensify conflicts <sup>[7]</sup>. Courts need to balance curbing illegal fiduciary behaviours and maintaining justice in individual cases. This contradiction makes unifying adjudication standards difficult and has become a knotty point in judicial practice.

#### **3.1. The dilemma of return**

If fees are allowed to be returned before the requested matter is concluded, the requestor may form a false perception: "If the request is successful, profit is gained; if unsuccessful, the money can be recovered through a lawsuit. There is nothing to lose, and it can be tried again next time." This perception essentially condones or even encourages the continuation of unlawful requests. For the fiduciary, to avoid returning the fees, they may exert more effort to complete the unlawfully entrusted tasks. In this way, a judgment favouring reimbursement not only condones the undesirable social phenomenon of unlawful entrustment but also encourages the fiduciary to strive to complete the entrusted matters.

#### **3.2. The dilemma of non-return**

In cases where reimbursement is not favoured, judges often use the wrongful payment doctrine or inherent legal reasoning. The legislative spirit of the wrongful payment doctrine's non-refundability principle is to refuse to let the law protect the wrongful payer, thereby sanctioning wrongful acts <sup>[8]</sup>. In judicial practice, the primary reason for not supporting fee returning is that this kind of judgment would likely encourage the growth and spread of such undesirable social customs and illegal behaviours. Compared to supporting return, not supporting return can more effectively avoid indirectly promoting fiduciary acts. Legally, it conveys a resolutely negative attitude towards illegal fiduciary acts, which is conducive to maintaining social order and the rule of law.

However, not supporting return means the fiduciary retains the trust fees, allowing them to profit from their illegal behaviour in court, which is contrary to the principle of fairness. When a claimant is at fault for an unlawful solicitation, the fact that the fiduciary, who also committed a wrongful act, profits from it creates unfairness. It has been argued that

non-restitution under the wrongful payment doctrine is a negative sanction intended to penalize the payer. While the purpose is to punish the requestor, the fiduciary should also receive a negative assessment. Non-return is a sanction that overly punishes the payer but fails to effectively restrain the fiduciary, potentially leading to an imbalance in the overall regulation of wrongful acts.

### **3.3. Unjust aspects of dismissal of a lawsuit**

According to statistical data from judgment documents, courts predominantly rely on Article 2 and Article 122 of the Civil Procedure Law of the People's Republic of China. They typically rule claims inadmissible on the grounds that the requestor's asserted interest does not constitute a legally protected right. This tendency to dismiss cases at the preliminary stage effectively blocks substantive judicial review, hindering analysis and resolution of trustee fee restitution issues within civil proceedings.

From the perspective of civil law system coherence, rulings of dismissal lack logical consistency. The unjust enrichment doctrine, a cornerstone of civil law, explicitly empowers civil courts to adjudicate cases involving benefits obtained without legal basis to the detriment of others. The disputes involving clearer legal bases should fall within civil court jurisdiction. By summarily dismissing claims based on a purported lack of legally protected interests, courts violate the internal logic of the civil law system. This artificially severs civil justice from legitimate intervention pathways for such disputes, preventing proper adjudication of civil matters and undermining systemic integrity.

Viewing this practice within the broader criminal-civil justice framework reveals problematic jurisdictional dissonance. China maintains robust criminal mechanisms, complete with statutory provisions, clear procedures, and vigorous enforcement, to address bribery and corruption arising from unlawful entrustment<sup>[9]</sup>. This reflects the state's emphasis on public official integrity and standardized public power exercise. Conversely, civil courts' reluctance to adjudicate trustee fee restitution creates a stark regulatory gap for functionally similar conduct across legal domains. This inconsistency creates logical incoherence and regulatory loopholes. Functionally, civil justice plays an irreplaceable role in safeguarding rights, ensuring fairness, and adjusting civil property relations. Avoidance of trust-related disputes prevents civil justice from fulfilling its governance function and establishing complementary connections with criminal justice. This impedes will develop a comprehensive, systematic legal framework to address complex unlawful entrustment phenomena.

Requestors' right to sue is compromised. Article 13 of the Civil Procedure Law establishes the principle of party disposition, requiring courts to respect litigants' claims. Claims for restitution of unjust enrichment in trustee fee disputes inherently involve civil legal relationships. Per Article 32 of the Guidelines, courts should determine contract validity through substantive hearings, even where contracts suffer defects, rather than denying the lawsuit.

## **4. Strategy building**

### **4.1. Decision paths for criminal-civil intersectional trust matters**

In judicial practice, fraud is often involved in civil entrustment cases. The key to determination is whether the fiduciary fabricated objective facts, causing the trustor to fall into a false understanding. For trust matters involving suspicion of economic crimes, such as falsely issuing VAT invoices, these matters should be dealt with according to the Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Criminal Suspicions in the Trial of Economic Dispute Cases (amended in 2020). Under Articles 10 and 11 of these Provisions, if the court finds the requested matter is suspected of being a criminal offense, it shall dismiss the prosecution and transfer the materials to the public security or procuratorial organ.

Procedurally, this approach aligns with the basic principle of "criminal before civil" in criminal-civil cross-border cases. Substantively, the criminal recovery system allows for the complete deprivation of the proceeds of law-breaking. Based on policy considerations, it can effectively cut off the chain of unlawful entrusted behaviour and achieve the general deterrent effect of crime prevention.

## 4.2. Decision paths for administrative offence-type requests

For unlawful entrustment concerning matters like social security, property purchase and rental, and household registration, it is appropriate to adopt a mode of handling that involves dismissing the prosecution and making a judicial recommendation for administrative seizure. The reasons are as follows:

Such requests seriously harm societal interests. They interfere with normal approval, law enforcement, and judicial procedures and order. For example, cases involving illegally applying for licenses bypass formal processes, posing serious threats to public safety and social order. Cases concerning social insurance, housing purchase and household registration are closely linked to the public's fundamental rights and interests. Irregularities will lead to social problems and harm society's overall interests<sup>[10]</sup>.

In such cases, the subjective malice of both the requestor and fiduciary is apparent. Relevant laws and regulations provide explicit provisions on these matters. Both parties know their behaviour is illegal<sup>[11]</sup>. Simply dismissing the return claim or supporting it cannot comprehensively address the wrongdoing. Achieving the due legal deterrent effect is difficult, so additional punitive measures are needed.

This kind of entrustment is closely related to administrative authorities. Settlement, public rental housing, and social insurance matters require approval by corresponding administrative organs. Various documents are also issued by administrative departments. Following Article 24 of the Judicial Interpretation on the General Principles of the Contracts Section of the Civil Code, courts are required to make judicial recommendations to relevant administrative authorities when handling contracts that violate the law.

## 4.3. Rules for adjudicating civil nullity petitions

For requests concerning school enrolment, jobs, and projects, it is appropriate to confirm contract nullity and order the return of fees. The judge shall declare the contract null and void according to Article 153 of the Civil Code, giving it a negative evaluation. The court should then approve the return of the money under Article 157, considering the degree of the fiduciary's fault to determine full or partial return. Since the fiduciary is at fault for the contract's invalidity, their requests for returning interest and attorney's fees payment shall not be supported<sup>[12]</sup>.

### 4.3.1. The 'Wrongful Payment - Non-Return' and 'Legal Theory - Non-Return' paths should not be applied

From a legislative perspective, the wrongful payment doctrine is generally adopted by civil law countries. Legislative history shows the 2018 Civil Code draft included provisions for it, but they were eventually deleted. The theory of cause, the cornerstone of the wrongful payment doctrine, is not established in China's civil law system<sup>[13]</sup>.

Concerning legal application principles, specific provisions should take precedence over abstract provisions or legal theories. The entrustment relationship is a bailment, and the Civil Code's provisions on contract validity (Articles 153 and 157) are fully applicable. Applying abstract legal theory to deny fee returns when specific provisions exist is unreasonable.

Regarding the parties' subjective culpability, it is relatively low in such cases. For example, in school enrolment cases, parents wishing to enrol their children in a quality school. Parents may not be aware of the act's unlawfulness, perceiving it merely as morally flawed and seeking the fiduciary's help<sup>[14]</sup>. In such cases, a judgment favouring restitution serves as both an admonishment and a punishment for both parties.

From the perspective of social harm, although such cases have adverse effects, the harm is limited. Most often, the behaviour mainly violates public order and morals, not necessarily reaching the level of serious legal violation. Imposing full or partial restitution can better safeguard the public interest in these instances.

Therefore, applying the "Wrongful Payment - No Return" and "Legal Theory - No Return" paths to this type of request is not reasonable.

### 4.3.2. The "Unjust Enrichment - Return" and "Other - Non-Return" paths should not be applied

Unjust enrichment refers to the legal fact that one party benefits at another's expense without a legal basis. However,

the fiduciary's possession of the fees based on the entrustment relationship does not meet the constitutive elements of unjust enrichment. Simultaneously, some cases held the fiduciary constituted a breach of contract for failing to fulfil the agreement. However, the agreement violated public order and morals. The fiduciary cannot be held liable for the breach to continue fulfilling such an agreement. Finding the fiduciary in breach implicitly recognizes the contract's validity. It is undeniable that requests like school admission violate public order and morals and harm fair competition. They should be negatively evaluated by finding them invalid to uphold correct values. The argument that it constitutes a breach but cannot be enforced has no legal basis. Therefore, applying the "Unjust Enrichment - Return" and "Other - Non-Return" paths to this type of request is not reasonable.

#### **4.3.3. The "Nullity-Return" path should be applied**

The legal nature of the fiduciary relationship belongs to the category of bailment. Therefore, applying Articles 153 and 157 of the Civil Code has sufficient legal basis and practical reasonableness. Applying existing legal provisions to adjudicate is the appropriate choice. Moreover, judgment document statistics show nearly half of judicial practice cases are adjudicated using Article 153 (invalidity of acts violating public order) and Article 157 (consequences of invalid acts). This statistic demonstrates the reasonableness of determining unlawful entrustment invalid in practice. Since the fiduciary was also at fault for the contract's invalidity, their claim for interest return should not be supported. If the fiduciary incurred reasonable expenses, they may deduct these costs and return the remaining amount.

## **5. Conclusion**

Currently, unlawful entrustment is pervasive throughout society, affecting the social atmosphere and undermining justice. Correctly handling unlawful entrustment cases and upholding the principle of consistent judgments for similar cases is essential for maintaining the rule of law. Therefore, when adjudicating cases involving the return of illegal entrustment expenses, courts should make reasonable judgments based on legislative basis, application of law, the parties' subjective malice, and social harm. Judicial consistency should be maintained to balance the interests of the requestor, the fiduciary, the individual, and society, achieving the unity of legal and social effects in case adjudication.

## **Disclosure statement**

The authors declare no conflict of interest.

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