Ruling no 886 of 24 September 2020 (18-12.593; 18-13.726) - Cour de cassation (*Court of Cassation*) - Second Civil Chamber -ECLI:FR:CCAS:2020:C200886

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LIABILITY INSURANCE

Dismissal

Summary

The provisions of Article L. 124-1-1 of the Insurance Code devoted to claims aggregation are not applicable to liability incurred by a professional in the case of breach of the duties to inform and advise, this, which is individual in nature, excluding the existence of a technical cause, within the meaning of this text, allowing them to be considered a unique damaging event.

Appellant(s): Hedios Patrimoine, public limited company (société anonyme)

Respondent(s): MMA IARD, public limited company (société anonyme), and others

Joined with appeals nos K 18-12.593 and S 18-13.726, appealing the same ruling;

Receive the Association des investisseurs en Girardin industriel photovoltaïque as intervenor;

Whereas, according to the ruling under appeal (Paris, 9 January 2018), after having given Hedios Patrimoine a mandate for finding tax-exempt investment opportunities, Mr X..., in 2008 and 2009, invested various sums in transactions, referred to as "Girardin Industriel" in the photovoltaic sector, designed by Dom Tom Défiscalisation (DTD). In 2010, he also invested a certain amount in an identical tax-exempt investment product called "Hedios Sun", designed and offered by Hedios Patrimoine. Having been subject to a rectification of his tax situation for these different investments, Mr X... claimed that Hedios Patrimoine was liable. The latter's insurer, Covea Risks, via MMA IARD and MMA IARD Assurances Mutuelles, has voluntarily intervened in the proceedings;

Whereas there is no need to rule by a specially reasoned decision on the first plea of appeal no K 18-12.593, in its first, second, and third parts, for the second plea of this appeal, and on the first plea of appeal no S 18-13.726, which are clearly not of a nature to the quashing;

On the first plea of appeal no K 18-12.593, in its fourth, fifth, sixth, seventh, and eighth parts:

Whereas Hedios Patrimoine objects to the ruling for ordering it to pay the sum of 21,632 euros to Mr X... as compensation for damages suffered due to the DTD investments carried out in 2008 and 2009 whereas, according to the plea:

> *1°/ the obligation to inform that is the responsibility of the intermediary must be evaluated concerning the capacity and experience of its clients. Hedios Patrimoine approved the mandate of November 2008. In this mandate Mr X... declared "to have sufficient revenue and a financial and tax situation that was suitable for the consideration and understanding of this type of purely tax-related transaction". This meant that Hedios Patrimoine could consider that he was an informed client, able to understand and take responsibility for the choice of this specific type of product. This also meant that Hedios Patrimoine would have therefore put in place, at the time the mandate was agreed to, a system that would ensure beforehand that the client knew about this type of investment involving a tax-exempt transaction and the risks associated with such a transaction. In so ruling, the cour d'appel (*Court of Appeal*) did not draw the correct conclusions that would infer its own statements and infringed Article 1147 of the Civil Code, which became Article 1231-1 of the same code;*

> *2°/ the obligation to inform that is the responsibility of the intermediary must be evaluated concerning the capacity and experience of its clients. The cour d'appel (*Court of Appeal*) stated that Mr X... declared, when he agreed to mandates in the months of April and August 2009, "that he knew the characteristics of this specific type of investment and the risks associated with it." As such Hedios Patrimoine could consider that he was an informed client, able to understand and take responsibility for the choice of this specific type of product. When the mandate was agreed to, Hedios Patrimoine had therefore put in place a system that would ensure beforehand that the client knew about this type of investment involving a tax-exempt transaction and the risks associated with such a transaction. In so ruling, the cour d'appel (*Court of Appeal*) did not draw the correct conclusions that would infer its own statements and infringed Article 1147 of the Civil Code, which became Article 1231-1 of the same code;*

> *3°/ the cour d'appel* (Court of Appeal)*, considered that the documentation sent to Mr X... was insufficient and did not emphasise the tax risk associated with the DTD product. It did not take into consideration the elements of information on risks listed in the Girardin Industriel summary document, as it was asked to do. The contents of this summary document are presented in the DTD brochure, and clearly indicate the main risk of Girardin Industriel products linked to a lack of operations of the investments that could result from the inability to find a lessee operator or if the lessee operator is in default. In so ruling, the cour d'appel* (Court of Appeal) *deprived its decision of a legal basis under Article 1147 of the Civil Code, which became Article 1231-1 of the same code;*

> *4°/ the cour d'appel* (Court Appeal) *criticised Hedios Patrimoine for not having been critical of the elements provided by DTD that were supposed to clarify the serious nature of the investment. The court did not take into account, as it was asked to do, and as was ruled by the cour d'appel* (Court of Appeal) *of Paris in four rulings on 10 June 2016 opposing Hedios Patrimoine to investors in Girardin Industriel products offered by DTD, that Hedios Patrimoine,*

involved as a distributing intermediary, was not responsible for guaranteeing the proper execution of the transaction set up by DTD, nor above all for anticipating the possible risks of fraud within the framework of the transaction set up by this company, the complex nature of which had been established. In so ruling, the cour d'appel (Court of Appeal) *deprived its decision of a legal basis under Article 1147 of the Civil Code, which became Article 1231-1 of the same code;*

5°/ the cour d'appel (Court of Appeal) *criticised Hedios Patrimoine for not being aware of the information transmitted by the Chambre des Indépendants du Patrimoine (CIP) on the risks linked to Girardin Industriel tax-exempt investment products. This included their eligibility for tax reductions offered by the tax administration, and the additional precautions to take concerning the conditions for connecting equipment, which were mentioned in an email dated 9 April 2009. The court did not take into account, as it was asked to do, and as ruled by the cour d'appel* (Court of Appeal) *of Paris in four rulings of 10 June 2016 with investors in Girardin Industriel products offered by DTD opposing Hedios Patrimoine, on the one hand, the fact that this general information did not concern DTD and, on the other hand, the letter of Mr Y... produced by DTD, in order to reassure Hedios Patrimoine of the serious nature of the transaction, where, as an intermediary, it did not need to be involved with DTD's affairs. In so ruling, the cour d'appel* (Court of Appeal) *deprived its decision of a legal basis under Article 1147 of the Civil Code, which became Article 1231-1 of the same code;*

After analysing the conditions of the mandates and questionnaires that Hedios Patrimoine submitted for Mr X... to sign, the ruling maintains on its own authority that this company, in regards of its client, was committed to informing said client of the characteristics and risks of the products offered and to verify that they are appropriate for the client's financial situation, experience, and objectives. It also maintains that this company cannot claim to have fulfilled its commitment by stating that the signing party has "sufficient revenue and a financial and tax situation that is appropriate for the study and understanding of this type of transaction that is purely of a tax-exempt investment nature", this statement not emphasising the client's understanding of complex legal mechanisms, but of their capacity to meet its financial obligations. It then maintains the same claim for the statement, located only on the mandates dated 16 April 2009 and 19 August 2009, the terms of which state that the party signing the mandate confirms that they "are aware of the characteristics of this type of investment and its associated risks", the characteristics and risks in question only being able to be those that are presented in the "Vous connaître" questionnaire, indicating that the objective sought is a tax-exempt investment "in exchange for a risk of capital loss, and a minimum lockout period". The ruling also reveals that the documentation sent to Mr X... in no way emphasised the tax risk associated with the DTD product, which was, on the contrary, minimised. It also maintains that Hedios Patrimoine lacked a critical regard on the elements communicated by DTD, which were supposed to demonstrate the serious nature of the investment, even if it should have, as a professional, examined them closely, as it concerns the guarantee of tax risk given by the Luxembourg representative office of Lynx Industries, an unincorporated entity, and that the note of legal cover was drafted by a tax lawyer based in Guadeloupe, which limits itself to stating the eligibility of the product for the tax-exempt programme and limits the risks only by taking into consideration the elements provided by its client. Lastly it maintains that at the date on which the DTD products were proposed to Mr X..., Hedios Patrimoine

had relevant information both on the opposition of the tax administration to the transactions for "Girardin Industriel" and on the DTD product, information that called its eligibility for tax exemption into question. Given these statements and evaluations, the cour d'appel (*Court of Appeal*) was able to maintain that Hedios Patrimoine, who offered a mandate for signature to Mr X..., without a contract or prior information for research for tax-exempt investment products in "Girardin Industriel" without appreciating that Mr X... was a novice investor, and the appropriateness of these products in relation to his expectations. Hedios Patrimoine then offered him an application for subscription to a DTD product without completely informing him of the tax risk and its significant nature, as the company could have understood it on the date of subscriptions. The company committed faults that make it liable concerning the tax-exempt investment opportunities offered in 2008 and 2009. The plea is unfounded.

On the first plea of appeal no K 18-12.593, in its ninth part, and on the first plea of appeal no S 18-3.726, drafted in similar terms, joined:

Deliberated by the Commercial Chamber under the same conditions;

Whereas Hedios Patrimoine and MMA IARD and MMA IARD Assurances Mutuelles make the same criticism of the ruling, the latter two also criticise it for having ordered them to guarantee to the former the order pronounced against it concerning the investments carried out by Mr X... in 2008 and 2009, subject to the set fee of the contract of 15,000 euros. According to the plea, by deciding that due to the faults of Hedios Patrimoine, Mr X... lost an opportunity to be able to "decide against his project" or "to not sign the contract" evaluated at 80%, after having nevertheless stated that for the investment in the Hedios Sun product subscribed in 2010, he was "perfectly informed on the risks being taken". Even if completely informed on the tax risk and its significant nature, this resulted in Mr X... subscribing to the tax-exempt investment transactions in 2008 and 2009. In so ruling, the cour d'appel (*Court of Appeal*) did not draw the correct legal conclusions that would infer its own statements and infringed Article 1147 of the Civil Code, which became Article 1231-1 of the same code;

But the prejudice that came from the failure of an investment services provider to provide information that it has in relation to its client is seen here as the loss of an opportunity to make a more judicious decision, which is what happened in the end. It follows that this prejudice cannot be remedied when it is certain that, if he were better informed, he would have nevertheless carried out the investment that ended up being unfavourable. The court is not able to deduce from the sole fact that Mr X... invested a certain sum in the Hedios Sun product in 2010 after having declared that he was well-informed of the tax risks involved in the transaction then, and that he would have nevertheless done the same in 2008 and 2009 if he had been at that time fully informed of the tax risks of these transactions, as they are investments carried out on different dates and having involved different products, offered in one instance by DTD, and in the other by Hedios Patrimoine. It is on its own authority that the cour d'appel (*Court of Appeal*) determined that, for the investments carried out in 2008 and 2009 on products offered by DTD, Mr X..., who was not faithfully informed of the risk taken, lost an opportunity to not subscribe, which it set at 80%. This plea is unfounded;

And on the second plea of appeal no S 18-3.726:

Whereas MMA IARD and MMA IARD Assurances Mutuelles objects to the ruling for ordering them to guarantee Hedios Patrimoine for the order pronounced against it concerning the investments carried out by Mr X... in 2008 and 2009, subject to the set fee of the contract of 15,000 euros, while, according to the plea, that they result from the same technical cause and must consequently be considered a unique damaging event, since the damaging events come from the same design flaw or the same error of analysis. The court considered that the failure of Hedios Patrimoine to meet the obligations imposed on it would be specific to this case opposed to Mr X... and would not have the same cause as those that were criticised based on claims made by other subscribers. It did not analyse if these various failures on the part of Hedios Patrimoine in relation to its obligation to inform its clients of a tax risk related to the lack of connection of photovoltaic panels acquired prior to 31 December of the year when the investment was carried out would not bring about the same design flaw in the presentation of tax-exempt investment products and from the same analysis error concerning the extent of tax risks linked to these products. In so ruling, the cour d'appel (*Court of Appeal*) deprived its decision of a legal basis under Article L. 124-1-1 of the Insurance Code.

The provisions of Article L. 124-1 of the Insurance Code devoted to claims aggregation are not applicable to liability carried by a professional in the case of their failure in terms of their obligation to provide information and advice. These obligations, which are individual in nature, exclude the existence of a technical cause, within the meaning of this text, allowing them to be considered a unique damaging event;

Having noted that in this case the responsibility of the insured party was studied concerning their failure in carrying out the obligations for which they were specifically responsible in relation to Mr X..., the cour d'appel (*Court of Appeal*) rightly dismissed the claims aggregation requested by MMA IARD and MMA IARD Assurances Mutuelles. The plea is unfounded.

ON THESE GROUNDS:

DECLARES ADMISSIBLE the voluntary intervention of the Association des investisseurs en Girardin industriel photovoltaïque;

DISMISSES the appeals;

President: Mr Pireyre
Reporting Judge: Mr Besson
Advocate-General: Mrs Nicolétis
Lawyers: SCP Ortscheidt - SCP Boré, Salve de Bruneton et Mégret - SCP Waquet, Farge et Hazan

Ruling no 212 of 18 March 2021 (17-20.226) - Cour de cassation (*Court of Cassation*) - Second Civil Chamber - ECLI:FR:CCAS:2021:C200212

Only the French version is authentic

Partial quashing

Appellant(s): Caisse d'assurance retraite et de la santé au travail (*CARSAT*) *d'Alsace-Moselle* (Alsace-Moselle pension and workplace health fund)

Respondent(s): Mrs *P... V... and others;*

Facts and procedure

1. According to the ruling under appeal (Colmar, 27 April 2017), Mrs *V...* (the insured party), who resides in Germany, requested that the *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle* (the fund) carry out the liquidation of her pension rights pursuant to French law, increasing the insured term for the education of a disabled child, based on the recognition of the child's disability under German social law.

2. As the fund refused to pay this supplement, the insured party made an appeal to a social security court.

On the first part of the plea

Statement of plea

3. The fund criticises the ruling for having admitted the right to appeal, whereas "the application of the EU legislation cannot result in reverse discrimination, granting more rights to persons who have been subject to the benefit systems of other Member States than socially insured persons who have always been subject only to the French system ; that as rightly argued by the Fund before the cour d'appel *(Court of Appeal)*, the increase in the period of insurance because of the disabled child assumes that the child suffered from a permanent disability of at least 80%; that the cour d'appel (*Court of Appeal*) could rule as it did without verifying that Mrs *V...'s* daughter had suffered from a permanent disability of at least 80%; that the cour d'appel (*Court of Appeal*) had infringed both Article 5 of Regulation EC No 883/2004 and Articles L. 351-4-1 and L. 541-1 of the Social Security Code."

Court's response

In view of Articles L. 351-4-1, L. 541-1 and R. 541-1 of the Social Security Code, and 3 and 5 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004, on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009:

4. According to the first of these texts, an increase in the period of insurance is provided to socially insured persons raising a child that gives them the right, based on the second and third texts, to the child-rearing allowance for a disabled child and any supplement thereto when the permanent disability of the child is at least equal to 80%, or under certain conditions, 50%.

5. The Court of Justice of the European Union, having received a question referred for a preliminary ruling from the Cour de cassation (*Court of Cassation*), ruled on 12 March 2020 (CJEU, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, case C-769/18):

"Article 3 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004, on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009, must be interpreted as meaning that the support for integrating mentally disabled children and adolescents, provided for in Article 35a of the Eighth Book of the Sozialgesetzbuch (German Social Code), does not constitute a service, within the meaning of this Article 3, and, consequently, does not fall within the material scope of application of this regulation

Article 5 of Regulation No. 883/2004, as amended by Regulation No 988/2009, must be interpreted as meaning that:

- the allowance for education of a disabled child, provided for in Article L. 541-1 of the French Social Security Code, and support for the integration of mentally disabled children and adolescents, according to Article 35a of the Eighth Book of the German Social Code, cannot be considered as services that are of an equivalent nature, within the meaning of point a of this Article 5 ;
- the principle of assimilation of facts provided for in point b) of this Article 5 applies in circumstances such as those involved in the main proceedings. It is therefore up to the competent French authorities to determine if, in this case, the occurrence of the required event in the sense of this provision has been established. In this respect, the authorities must take into consideration such events that took place in Germany as if they had occurred on their own territory."

6. The Court of Justice specified, in the grounds of its decision: that these authorities must take into consideration such events that took place in Germany and cannot limit, in their evaluation of the permanent disability of the child in question, to only the criteria provided for in the guiding principles in France according to Article R. 541-1 of the French Social Security Code ; that in order to establish if the rate of permanent disability has been reached, they cannot refuse to take into consideration similar events that took place in Germany, which can be demonstrated by all elements of proof, including reports from medical examinations, certificates, or prescriptions for care or medication ; that in the case of such a verification, they must also respect the principle of proportionality by ensuring that, specifically, the principle of the assimilation of facts does not lead to results that are objectively unjustified, in compliance with recital 12 of Regulation No 883/2004.

7. To receive the appeal, the ruling states that the city of Stuttgart having provided to the insured party, starting on 10 November 1995, regular financial aid to lessen the burden of costs linked to her daughter's disability, based on Article 35a of the Eighth Book of the German Social Code, the insured person therefore received revenue linked to a disability likely to bring about a legal effect, and that the German and French benefits being equivalent for similar facts or events, she could apply, based on the European rule of coordination and without the fund being able to impose the disability rate of a minimum of 80%, for the career increase provided for by French law.

8. In so ruling, whereas the French and German benefits were not equivalent and it being up to the cour d'appel (*Court of Appeal*) to verify as such, under the terms and conditions noted in § 6 above, if the rate of permanent disability of the disabled child required by French law was reached, the cour d'appel (*Court of Appeal*) infringed the abovementioned texts.

ON THESE GROUNDS, and without having to rule on the other objections, the Court:

QUASHES AND SETS ASIDE, except the elements it deems admissible in the appeal and confirms the decision of 11 September 2012 of the amicable settlement board (*commission de recours amiable*) that set the effective date of the pension of Mrs *V...* at 1 April 2011, the ruling of 27 April 2017 between the parties set out by the cour d'appel (*Court of Appeal*) of Colmar;

President: Mr Pireyre
Reporting Judge: Mrs Taillandier-Thomas
Advocate-General: Mr de Monteynard
Lawyers: SCP Gatineau, Fattaccini et Rebeyrol