# Second civil chamber : scope of Article L. 124-1-1 of the Insurance Code devoted to claims aggregation

**24/09/2020**

**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.**

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

**Dismissal**

Only the french version is authentic

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

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

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**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**

[redacted]

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