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An injured party is under no obligation to mitigate his/her loss in the interests of the tortfeasor.

In a decision rendered on July 2, 2014, the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) confirmed its position and reaffirmed the principle according to which *"the perpetrator of a damage must remedy all the consequences and the injured party is under no obligation to mitigate his/her loss in the interests of the tortfeasor"*, including when the loss is economic in nature.

The *Cour de Cassation* thus opposes the majority of French legal writers who, for many years, have been urging French lawmakers and courts to adopt the so-called *"duty to mitigate damages"* Anglo-American concept.

In the matter at hand, by a notarial deed executed on October 30, 2006, a French *Société Civile Immobilière* (i.e. a real-estate investment company, hereinafter the "SCI") based in Pau bought off-plan a dwelling in a residence to be erected in the Reunion island.

The notaries and developers-sellers involved in the transaction indicated that this investment entitled to a tax rebate as per Article 199 undecies A of the French Tax Code that governs the grant of tax rebates for some investments made overseas by natural persons.

The shareholders and co-managers of the SCI deducted this tax rebate from their personal income for the years 2006 and 2007. They subsequently received a tax reassessment from the French Tax Authorities ("FTA") on the ground that the SCI was not a tax transparent entity.

The FTA informed the shareholders and co-managers of the SCI that they could opt for a tax reduction for

depreciation provided for in relation to the calculation of real estate income. They refused to opt for that tax regime, paid the tax adjustments and initiated proceedings against the developers-sellers and the two notary offices involved in the sale, claiming that the latter had breached their duty to provide advice.

In a judgment rendered on February 7, 2013, the Pau Court of Appeals ordered the notary offices and the insurer of one of them to jointly and severally compensate for the economic loss suffered by the shareholders of the SCI as a result of the breach of their duty to provide advice.

The notaries appealed before the *Cour de Cassation*, arguing that the Court of Appeals had violated Article 1382 of the French Civil Code as it did not held that the injured party who *"does not take reasonable measures to prevent the damage"* commits a fault that *"is likely to preclude or to reduce compensation"*.

In particular, the notaries blamed the shareholders of the SCI for refusing to opt for the tax regime proposed by the FTA, a regime that could have partially prevented the occurrence of the loss they had suffered.

Pursuant to Article 1382 of the French Civil Code, the *Cour de Cassation* dismissed the appeal and held that "***the perpetrator of a damage must remedy all the consequences and the injured party is under no obligation to mitigate his/her loss in the interest of the tortfeasor".***

Through this decision, the *Cour de Cassation* confirmed its line of case law initiated by decisions dated June 19, 2003[1] that had enshrined the above-mentioned principle.

In a first decision n°01-13.289, the Second Chamber of the *Cour de Cassation* had ruled that the victim of a road accident was not under the obligation to follow the medical treatments recommended by his physicians even though such treatments could have diminished the effects of the mental disorders for which he was seeking compensation.

In the second case adjudicated on June 19, 2003, the *Cour de Cassation* quashed a judgment of the Amiens Court of Appeals that had dismissed the claim for indemnification brought by the victim of a road accident whose bakery business had lost its value during the recovery period.

The trial judges of the Amiens Court of Appeals considered that the victim had committed a fault in failing to appoint a third-party manager during the recovery period, which would have prevented the loss in the value of the business.

The majority of French legal writers condemned this position of the *Cour de Cassation* that, according to them, encouraged victims/injured parties to be careless and negligent, notably by inciting them to let the economic loss increase, with impunity[2]. Many writers also regretted that the *Cour de Cassation* was not influenced by Anglo-Saxon law that imposes on injured parties the obligation to minimize their loss, failing which they are considered to have committed a fault, the aim being to make sure that injured parties have a sense of responsibility.

Legal writers believed for a while that the *Cour de Cassation* would not adopt such a principle in relation to contractual liability or when the damage is material in nature, and hoped that the decisions of June 19, 2003 would not become judicial precedent, especially with respect to economic losses.

These hopes were in particular fueled by several decisions of the *Cour de Cassation* that were interpreted at the time as heralds of a case-law reversal.

As such, in a decision dated January 22, 2009, the *Cour de Cassation* evoked the concept of "*reasonable management*" of the adversarial consequences by the victim[3] and, in a decision dated May 19, 2009, it implicitly suggested that the victim had an obligation to mitigate his/her damages[4].

Yet, there has not been any change in applicable case-law.

Since then, and in particular in the July 2, 2014 decision, the *Cour de cassation* has reaffirmed its refusal to impose on injured parties the obligation to mitigate their loss.

As a result, injured parties are under no obligation to mitigate their loss, irrespective of whether (i) the loss in question is a physical injury[5], an economic loss[6], or a material damage[7], and (ii) the perpetrator of the damage is liable in contract[8] or in tort[9].

Through its July 2 2014 decision, the *Cour de Cassation* recalled that its case law is enshrined, despites the various contemplated overhauls of French law of obligations, such as the *projet Catala*, i.e. draft proposals that suggested to include the following Article in the French Civil code "*Where the injured party had the possibility of taking reliable, reasonable and proportionate measures to reduce the extent of his/her loss or to avoid its getting worse, the court shall take into account his/her failure to do so by reducing the awarded compensation, except where the measures to be taken were likely to jeopardize his/her physical integrity*".

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[1] 2nd Civil Chamber of the *Cour de Cassation*, June 19, 2003 n°00-22.302; 2nd Civil Chamber of the *Cour de Cassation*, June 19, 2003, n°01-13.289

[2] Patrice Jourdain, RTD Civ. 2012 p.324 and Petites Affiches, October 17, 2003, n°2008 p.16

[3] 2nd Civil Chamber of the *Cour de Cassation*, January 22, 2009, n°07-20.878

[4] 3rd Civil Chamber of the *Cour de Cassation*, May 19, 2009, n°08-16.002

[5] 2nd Civil Chamber of the *Cour de Cassation*, June 19, 2003, n°00-22.302

[6] 2nd Civil Chamber of the *Cour de Cassation*, June 19, 2003, n° 01-13.289

[7] 2nd Civil Chamber of the *Cour de Cassation*, November 24, 2011, n°10-25.635

[8] 3rd Civil Chamber of the *Cour de Cassation*, October 2, 2013, n° 12-13.851

[9] 2nd Civil Chamber of the *Cour de Cassation*, July 2, 2014, n°13-17.599