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Breach of a non-competition clause: the reaffirmation of the strict proof of damage

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Resume: *The Commercial Chamber of The French Court of cassation (Commercial chamber, December 3rd, 2025, no. 24-16.029) overturned the ruling of the Court of Appeal by pointing out that the creditor of a non-competition obligation who invokes its non-performance by the debtor must establish the principle and extent of the damage for which he is seeking compensation. The Court thus reaffirmed that damage cannot be presumed solely from the violation of a contractual non-competition clause. Published in the Bulletin and grounded in provisions of the former Civil Code that were maintained by the 2016 reform, the ruling clearly signals the Court's intention to maintain this case law for the future.*

In the present case, two companies entered into a commercial agency agreement pursuant to which Etudequipe was appointed by Conimast to market public lighting poles in Conimast's name and on its behalf.

After approximately twenty years of contractual relations, the agent terminated the agreement. The following year, the principal served formal notice on its former agent to cease performance of a commercial agency agreement subsequently concluded with a competing supplier, on the grounds that such new partnership infringed the non-compete clause by which the agent remained bound.

The former agent brought proceedings against its former principal seeking compensation for the termination of the commercial agency agreement and for the losses allegedly suffered. In response, the former principal filed a counterclaim seeking an order requiring cessation of the new agency relationship with its competitor, as well as damages for breach of the non-compete obligation.

In a decision dated February 29th, 2024, the Paris Court of Appeal held that the former agent's claim for compensation was well-founded, finding that the termination of the agreement was justified by circumstances

attributable to the principal. However, the former agent was ordered to pay damages to the former principal for breach of the non-compete obligation and for the alleged disruption caused to the principal's commercial network.

An appeal was formed before the Court of cassation, on the ground that the principal had failed to adduce evidence of any disruption to its network and had produced no evidence substantiating either the existence or the quantum of the alleged loss. It was argued that the appellate judges had inferred the existence of damage solely from the finding of a breach of the non-compete clause.

The legal issue was therefore whether the mere breach of a post-contractual non-compete clause is sufficient, in itself, to entitle the creditor to damages.

In its ruling dated December 3rd, 2025, the French Court of cassation responded in the negative to the reference to the former Article 1147 of the Civil Code and ruled that "the creditor of a non-competition obligation who invokes its non-performance by the debtor must establish the principle and extent of the damage for which he is seeking compensation." The Court of Appeal is criticized for failing to investigate whether the breach of the non-competition clause had actually caused the principal company damage related to the disruption of its commercial network.

Thus, the Commercial Chamber of the Cour de cassation reaffirms its settled case law by holding that compensation for damage resulting from the breach of a non-compete clause falls squarely within the traditional framework of contractual civil liability (I). However, this solution invites reflection, as it creates disparities between the regime governing "anti-contractual competition"[1] and that applicable to unfair competition (II).

I. The affirmation of a strict application of the traditional rules of contractual liability

The Court of cassation held that damage resulting from the breach of a non-compete clause cannot be presumed and that it is for the creditor to prove its existence and extent (A). Through this authoritative reminder, published in the Official Bulletin, the Court appears intent on firmly establishing this solution in its case law, particularly in light of the contrary position previously adopted by the Civil Chamber (B).

[1] L.Bettoni, « La violation de la clause de non-concurrence ne présume plus le préjudice pour son créancier », *Recueil Dalloz*, 2026, p.284

A. The rejection of presumed damage arising from the breach of a non-compete obligation

In the case at hand, the parties entered into a commercial agency agreement containing a post-contractual non-compete clause. The purpose of the non-compete obligation is to prevent one party from engaging in activities that could compete with the creditor of the obligation, either during the contractual relationship or after its termination. Over time, the jurisprudence of the Court of cassation has established validity requirements. A non-compete clause must therefore be essential to protect the legitimate interests of the company, limited in time and space, consider the specificities of the employee's role, and include financial compensation, these conditions being cumulative[2].

The Court of cassation addressed the question of whether the mere violation of such a clause by the debtor is sufficient to give rise to compensation. On this point, the Commercial Chamber has not innovated[3], recalling that damage is not presumed and must be proven by the creditor who suffers from the violation. Similarly, the Social Chamber aligns with the Commercial Chamber's jurisprudence, considering that compensation for an unlawful non-compete clause requires proof of an independent damage and cannot be inferred solely from the nullity[4].

Thus, although the former agent did not comply with the contractual non-compete obligation, the principal company did not provide evidence of a loss of turnover or a disruption of its commercial network and therefore cannot be compensated.

This places a heavy burden of proof on the creditor, since to be compensated they must prove the existence of the clause, its violation, and, above all, the existence of damage and its quantification. While the existence of the clause and its breach are relatively simple to establish, the existence and scope of the damage are much harder to identify[5].

Several types of damage may be claimed by the creditor: actual losses, lost profits, moral damage, or harm to reputation, image, or credibility[6]. However, demonstrating these damages, especially financial loss, enquires detailed economic and accounting analyses to link the decrease in business to the debtor's

[2] Soc. 10 juill. 2002, n° 00-45.135

[3] Cass. com., 7 mai 2019, n° 18-11.128 ; Cass. com., 26 sept. 2018, n° 16-28.133

[4] Soc. 25 mai 2016, n° 14-20.578

[5] Y. Heyraud, « Quelle indemnisation lorsqu'un agent commercial viole la clause de non-concurrence ? », *Dalloz Actualité*, février 2026 , rubrique Affaires.

[6] G.Maire « Violation d'une clause de non-concurrence : le préjudice ne se présume pas ! », *Revue responsabilité civile et assurances*, n°2 – février 2026, Lexis Nexis

competitive actions, and cannot rely on approximations or assumptions. Distinguishing between different heads of damage is complex, and some, such as network disruption, are difficult to separate from the general impact of contract termination, making proof particularly heavy and delicate to establish before the courts[7].

B. A decision of presumed damage arising from the breach of a non-compete obligation

The publication of the 3 December 2025 judgment in the Bulletin demonstrates the Court's intent to give significant weight to this decision. This can partly be explained by the divergence in case law created by the Civil Chamber of the Court of cassation, which had accepted that a breach of the non-compete obligation could, in itself, constitute compensable damage[8].

However, these rulings were issued under the lens of the former Article 1145 of the civil code, which was repealed by the 2016 reform. The present judgment, which excludes any presumption of damage from breach of the clause, was rendered under the former Article 1147 of the civil code, now codified in the new Article 1231-1 of the civil code. This choice naturally suggests that the solution will remain valid under the new contract law, and that the Civil Chamber will likely align its jurisprudence accordingly[9] as it did previously about nullity[10].

Thus, the evidentiary advantage previously granted to creditors by the Civil Chamber is tending to disappear, and the Commercial Chamber's solution should prevail under the new law. This decision therefore strengthens the evidentiary requirement for the creditor, consolidating the traditional contractual liability regime in the context of anti-contractual competition.

II. A controversial solution considering the broader law of competition

Although the decision delivered by the Court of cassation does not introduce any genuine novelty, it nonetheless raises questions regarding the difference in legal regimes and evidentiary requirements between anti-contractual competition and unfair competition. Indeed, the latter is characterized by a certain relaxation of the burden of proof borne by the victim (A). However, the evidentiary difficulties faced by the creditor of a non-compete clause may be mitigated by specific corrective mechanisms (B).

[7] Ibid., p.1.
[8] Civ. 1re, 10 mai 2005, n° 02-15.910
[9] Ibid., p.1.
[10] Ibid., p.5.

A. A questionable difference in treatment with unfair competition

The jurisprudence of the Cour de cassation on contractual non-competition is distinct from that relating to unfair competition.

As a preliminary point, it seems necessary to recall that these two compensation regimes differ in terms of their triggering events. Contractual non-competition sanctions breaches of contractual stipulations, whereas unfair competition sanctions wrongful conduct on the basis of tort liability. Moreover, the former prohibits the competitive activity itself, while the latter targets the means employed. Therefore, the two regimes must be considered separately[11].

In cases of unfair competition, the Court of cassation eases the evidentiary burden on the creditor. Indeed, in the UberPop case, it recognized a presumption of moral damage for the victimized company[12] and allowed recourse to the gain unjustly taken to assess economic damage[13]. However, in both regimes, the creditor still faces the difficult task of proving economic damage, particularly the direct causal link between the decline in activity and the wrongful conduct[14].

Furthermore, such jurisprudence places the third-party accomplice in a less favorable position than the debtor of the non-competition clause, since the former may be held liable under unfair competition for participating in the violation of the clause[15], whereas the latter is not obliged to compensate the victim if they fail to prove the existence of damage. In this respect, the victim could have held Valmont liable, with whom the former agent entered into wrongful contractual relations[16].

Finally, a question and a point of confusion also arises when the Cour de cassation rules in a situation where the third party invokes the contract against a party, alleging a contractual breach on tort grounds. In this case, the Court appears to equate the situations of the third party and the co-contractor by allowing the debtor to invoke against the third party the conditions and limits of liability that apply in the relations between the contracting parties [17]. It is naturally possible to question why the Court of Cassation contrasts the situations of the third party and the co-contractor in the case discussed.

B. Mechanisms available to the creditor to overcome evidentiary difficulties

[11] Ibid., p.1.
[12] Com. 9 avr. 2025, n° 23-22.122
[13] Com. 7 janv. 2026, n° 24-18.085
[14] Ibid., p.1.
[15] Cass. com., 11 oct. 1971, n° 70-11.892
[16] Ibid., p.6.
[17] Cass. com., 3 juill. 2024, n° 21-14.947

To mitigate the heavy evidentiary burden required by a claim for damages, some authors propose preventive mechanisms.

It may be prudent to incorporate a penalty clause into the contract, in this case, the commercial agency agreement, providing for a fixed amount of damages in the event of a mere breach of the non-compete clause. Such a clause enables the injured creditor to dispense with the need to prove both the existence and the extent of the loss claimed[18]. However, the penalty must remain proportionate; otherwise, it risks being reduced by the judge or considered inadequate and thus ineffective[19].

As previously mentioned, and unlike in the case under review, the injured creditor may bring an action for unfair competition against the third-party accomplice[20]. Indeed, the creditor benefits from an irrebuttable presumption of moral damage and can perfectly combine actions in contractual liability against the debtor with tort actions against the third-party accomplice[21].

Finally, the creditor may also seek specific performance of the non-competition obligation and, cumulatively, an injunction to cease the prohibited competitive activity, subject to proportionality.

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[18] Ibid., p.1; Ibid., p.6.
[19] Ibid., p.5.
[20] Ibid., p.1.; Ibid., p.5.
[21] CA Paris, 20 mars 2019, n° 17/09164