

# ANALYSIS

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Insolvency

Compensation for 'loss of chance' to reorganise the company had the banks fulfilled their financing commitments

(Supreme Court (First Chamber) Judgment no. 1944/2025 of 23 December)

The Supreme Court applies compensation for loss of chance a second time outside the scope of healthcare liability.

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**ÁNGEL CARRASCO PERERA**

Professor of Civil Law, University of Castilla-La Mancha  
Academic Counsel, Gómez-Acebo & Pombo

## 1. The case

On 4 April 2001, Graphiland signed a notary-attested claim (commercial paper at a discount) assignment agreement with Caja de Burgos (which later became part of Banca Cívica, now Caixabank, S.A.). It also signed a notary-attested digital claim assignment agreement with BBVA on 25 May 2005. These were factoring agreements. On 7 July 2011, Graphiland entered self-petitioned insolvency proceedings. Following this, Caixabank and BBVA blocked the lines of commercial paper at a discount.

In August 2011, Graphiland drew up a viability plan, which it submitted to the insolvency practitioner and financial creditors. In order to rescue the company as a going concern and reach a composition, this plan was based on the necessary maintenance of a level of financing that would allow a flow of revenue and payments, debt refinancing and, mainly, restructuring of the company and a reduction in expenses through a procedure for the termination of employment contracts and a substantial reduction in remuneration, especially for executives/partners. The financial institutions refused to renew the commercial contracts. The Business Court, in a ruling dated 11 June 2012, ordered the closure and total cessation of the insolvent debtor's business activity based on the arguments of the insolvency practitioner. We are informed that there were already two final and conclusive judgments declaring the banks' breach of contract.

The insolvent debtor claimed redress from the banks. The claim was based on the *loss of chance* caused to Graphiland, with the

consequent harm resulting from the impossibility of obtaining the approval of the viability plan presented to achieve a composition with creditors, which would have allowed the rescue of the company as a going concern through debt restructuring and cash flow normalization, as a result of the defendants' breach—declared by two final and conclusive judgments—of their claim assignment agreements. The compensation claimed was based on the valuation of the business following the destruction of its commercial value—specifically, the difference between the value of the company according to the projections of the first viability plan (August 2011) and the value of the company according to the projections of the revised viability plan—by the defendants' breach (January 2012).

Graphiland has lodged an appeal based on a single ground, namely: compensation for the “loss of chance” to make the company successful if the financiers had fulfilled their claim assignment agreements.

## 2. Judgment

The ground is upheld. Compensation is payable for the loss of chance resulting from the frustration of the viability plan of a company subject to insolvency proceedings, harm arising from the (judicially declared) breach of contract by the defendant financial institutions due to the unjustified rejection of the remittance of receivables after the opening of the insolvency proceedings. This breach is not the only cause contributing to the collapse of the company.

The Supreme Court's case law has deemed the loss of chance to be compen-

sable<sup>1</sup> and has applied it to the civil liability of professionals in the legal and health-care fields. The first First Chamber ruling in which the theory of loss of chance was applied was the judgment of 10 October 1998, appeal 1496/1994, in a case of liability involving a nurse to whom the loss of chance to perform a hand reimplantation operation under the right conditions was attached; it is not known whether the operation would have been successful in the end, so only the loss of expectations could be attached to the nurse.

The theory of loss of chance, which has been consolidated in tort law in the liability of healthcare professionals, lawyers, and procurators (as stated in Supreme Court Judgment no. 105/2019 of 19 February), falls within the scope of material or physical causality, in which three ranges can be distinguished: an upper band, where there is causal certainty and the harm would be fully repaired; a lower band, where it can be ascertained that the agent did not cause the harm and the lost chance is not serious but illusory; and a middle band, between the previous two, where this theory resides, and where there is a serious causal probability that, while not reaching the maximum level, does exceed the minimum.

It operates as a palliative to the radical principle of “all or nothing” when determining the causal link between an event and the result that occurred, as a probabilistic attachment (Supreme Court Judgment no. 50/2020 of 22 January), as there

are cases in which absolute certainty is not possible and its requirement would leave victims without compensation, making it necessary to move in terms of probability. Behaviour that deprives someone of a chance is an event that may have been a necessary condition for the damage, but may also not have been.

This is a remedy for causal uncertainty, resulting in a proportional reduction in compensation. It is intended for cases where the causal link between the wrongful act and the result produced is unclear (Supreme Court Judgment no. 171/2020 of 11 March). There must be a serious, real, and non-negligible causal probability.

As stated in Judgment no. 456/2021 of 28 June, the harm from the loss of chance is hypothetical, and therefore monetary compensation is not applicable when there is no reasonable certainty that the claim would have been beneficial to the claimants.

Regarding the calculation of compensation in terms of probability, as stated in Judgment no. 105/2019 of 19 February, in some cases the Supreme Court has taken the view that the probability that the conduct would have prevented the harm was very high and has awarded full compensation, while in others (Supreme Court Judgment no. 967/2011 of 2 January 2012), it has limited the compensation “due to the probability that the harm would have occurred anyway, even if action had been taken.”

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<sup>1</sup> Supreme Court judgments of 10 October 1998, app. 1496/1994; of 25 October 1997, app. 427/1995; no. 504/2003, of 27 May; no. 948/2011, of 16 January; no. 227/2016, of 8 April; no. 5/2019, of 19 February; no. 456/2021, of 28 June; no. 204/2024, of 19 February, and no. 1692/2025, of 25 November, among others.

In the present case, after the claimant entered into insolvency proceedings, the defendant financial institutions breached their respective claim assignment agreements and unjustifiably refused to pay the respective remittances that Graphiland sought to have paid in accordance with the agreements entered into. The breach of contract has been declared with respect to both defendants by final and conclusive judgments. The appellant argues that this caused it to a loss of chance of reaching a composition. It has been proven in the proceedings that, in the insolvency petition, Graphiland intended to continue its business activity and proposed the option of reaching a composition with its creditors. It indicated that it was necessary to maintain the level of financing that would allow it to continue with its normal flow of purchases and sales. The company had been operating through this mechanism of credit assignment. At the date of the opening of insolvency proceedings, the credit assignment agreements were still in effect. In fact, the claim assignment agreements that were breached date from 2001 and 2005, and both had been renewed prior to the insolvency proceedings.

In report dated 12 March 2012, the insolvency practitioner cited the lack of discount lines in the first phase of the insolvency proceedings and the inability of those subsequently obtained to generate sufficient liquidity, together with declining sales and insufficient cost restructuring, as among the reasons for the request to cease business. In his statement, the insolvency practitioner stated that maintaining the discount lines was an important element for continuity, although he acknowledged that there were other significant causes for the cessation of business. He

also pointed out that, although the lack of financing due to the suspension of the discount lines was a cause and he had initially doubted whether liquidation could have been avoided, he had finally considered that, given the existing structural causes, the cessation would have occurred later.

The appealed judgment, although it affirms that it cannot disregard the presence and existence of the alleged cause of the acceptance of the viability plan that could have led to the composition with creditors, concludes that it cannot be established as the sole cause, nor as relevant or sufficient on its own to produce the outcome, and does not accept the claim because it is believed that such does not meet the characteristics of decisive influence.

The concurrence of these other causes, without disregarding the relevance of the frustration of the discount lines, leads us to consider that, of the amount at which the claimant values the harm, 15% of the figure for the loss of value of the company must be attributed to the loss of chance attachable to the defendants.

### 3. Commentary

The doctrine of ‘loss of chance’ uses probability calculations to replace or remedy a cognitive process that cannot determine the “certain cause” of a harmful event. What is compensated is the loss of a saving probability in a counterfactual state of affairs that the defendant was obliged to procure. The chance that is irreversibly lost is that, in a state of affairs in accordance with the law, the harm would probably not have occurred. In another, more unorthodox and much broader sense, harm is compensated to the degree of proba-

bility provided by the evidence when this has not reached subjective certainty of the judge, i.e., compensation is paid for 80% of the harm when the evidence taken has not gone beyond providing an 80% probability of harm. However, the latter case should never be classified as compensation for loss of chance, even though it is also a probabilistic procedure.

Since its inception as a unified theory, the doctrine has been systematic, but only applied in civil proceedings (not in others: public procurement tendering procedures in the Court of Justice of the

closer the day of the accident is to the end of the pregnancy (Supreme Court Judgment of 31 March 2009).

However, reality is not subject to limits in this regard, and a generalized application is possible. There are at least three cases (plus the present one) in which it has been applied in contexts other than professional liability. In the judgments of the Third Chamber of 1 December 2021 (ECLI:ES:TS:2021:4432) and 9 July 2015 (ECLI:ES:TS:2015:3399), the Supreme Court analyses the possibility — claimed by the claimant — of recognizing compensation

for loss of chance in two cases in which a person had been excluded from a list of candidates for the position of substitute judge and insolvency practitioner, respectively. Although in both cases the claim for compensation is dismissed — in the

first case, on the grounds that the harm was certain and proven, as the candidate would have obtained the position if the procedure had been followed correctly, and in the second case, that it was merely an “expectation,” an expression that seems to allude to the low probability that the appointment would actually take place — the relevant point is that the Supreme Court does not, in principle, exclude the application of the doctrine of “loss of chance”. In Supreme Court Judgment no. 1692/2025 of 25 November (ECLI:ES:TS:2025:5436), the doctrine is applied to a dispute in the insurance sector, but ultimately also to not uphold the claim.

The doctrine is incorrectly linked to a problem of causality. And it is a strange way of speaking to argue that banks are

## *The doctrine of ‘loss of chance’ is normally linked to a problem of causality*

European Union) to the liability for professional negligence of lawyers and to medical liability, often in the context of (lack of) “informed consent of the patient,” late diagnoses, chance of aborting a foetus with Down syndrome. The most iconic civil cases probably remain those of the Supreme Court judgments of 10 October 1998 [loss of the expectation of reimplantation of a severed hand] and 19 February 2019 [death of a child from asphyxiation in kindergarten], failed contraceptive treatments, and malpractice in general. With regard to “late diagnoses”, that of Supreme Court Judgment no. 334/2024 of 6 March. In judicial review litigation, the Supreme Court Judgment of 7 February 2012 (RJ 2012\3819). But also the “chance to be born” of a child lost due to malpractice, a chance that is all the more solid the

the adequate cause of 15% of the harm suffered by the insolvent debtor and that there are other adequate causes for the rest of the percentages. We could even arrive at a hundred adequate causes, each with a 1% probability of the harm being suffered. I would not speak in these cases

*This doctrine always ends up compensating something, although sometimes the amount is less than compensatory*

of a loss of chance (15% of the chance of succeeding). What has been done is something more drastic: a preliminary step of selecting and purging the concurrent causes has been dispensed with, and all of them have been deemed valid, even though none of them was adequate for the totality of the harm. All concurrent causes count. Prior to this ruling, it had

been said that only those exceeding a *de minimis* threshold would count, and it was taken for granted that 15% did not exceed the *de minimis* threshold, which this ruling refutes. It is not that the insolvent debtor has lost a hypothetical alternative cause, worth 15% of the harm, but rather that the

banks' conduct amounts to a causal contribution of 15% of all the concurrent causes of the company's collapse. Or better still, that the "alternative lawful conduct" of the financial institutions would have increased the probability of the company's recovery by 15% . It does

not appear that the banks have been given the opportunity to prove that alternative lawful conduct would have been futile and would not have led to a different outcome than the one that resulted, which is clearly the most likely scenario, but this will force banks in the future to counterplay with counterfactual alternative hypotheses that are, in fact, unverifiable.