

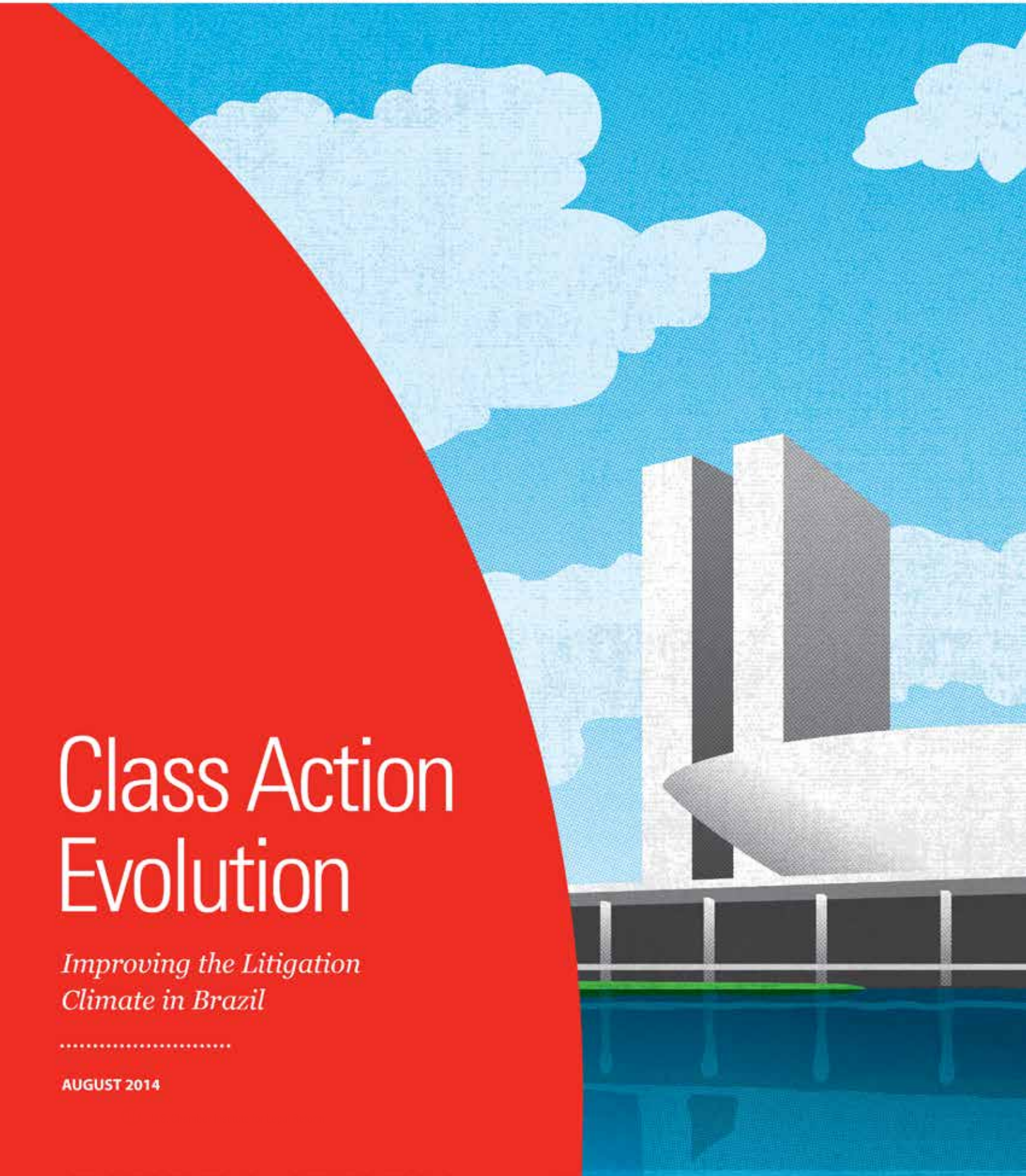


U.S. CHAMBER
Institute for Legal Reform

Class Action Evolution

*Improving the Litigation
Climate in Brazil*

.....
AUGUST 2014





U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

The purpose of this paper is to provide an explanation of the impetus for the proposed changes to class action laws in Brazil and a critical assessment of these proposed changes.

The paper starts with a brief description of Brazil's court system. It then provides a contextualized explanation of the changes brought about in the Brazilian legal system following adoption of the 1988 Constitution and how they have been reflected in Brazilian class action legislation.

In a critical assessment of the proposed changes, the paper explores the specifics of the bill currently under debate in the Senate, emphasizing its incompatibility with the constitutional principle of due process. Due process concerns arise particularly in the provisions which (i) permit individual damages awards, or a minimum damages value, to be set in homogeneous individual rights class actions, without considering any individualized proofs; (ii) alter the statute of limitations of individual and class actions; (iii) allow for the possibility of shifting the burden of proof in the judgment; (iv) allow the court on an *ex officio* basis to grant relief not sought by the parties; and (v) monetize class actions by offering "financial compensation" to civil associations in addition to costs.

The paper concludes that the proposed legislation currently before the Brazilian Senate is not only imbalanced but also represents a missed opportunity to improve the collective consumer protection system by preventing abuses. Such improvements should include (i) clearer criteria for defining what are referred to as homogeneous individual rights; and (ii) a provision that civil associations, like defendants, should also bear the economic costs of a losing claim by being subject to the loser-pays rule.

Finally, if Congress decides to approve the bill, it should also approve amendments that will correct some of the imbalances in the system. Particularly important are amendments that would require a threshold judicial determination of whether the lawsuit should be permitted to proceed as a class action. Amendments have been presented on the need to include a predominance criterion, a mechanism that forces the court to assure that collective issues predominate over individual ones; and a superiority determination, a mechanism by which the court determines that a class action process is the best means to adjudicate the claims before allowing a class action to proceed.

Overview of the Brazilian Court System

The Brazilian judiciary is divided into specialized and ordinary courts. The specialized courts include the military, electoral, and employment courts. The ordinary courts deal with all other issues and are subdivided into federal and state instances, or levels. Class actions filed by or against federal entities are trialed by federal courts. If no federal entity is involved, class actions are trialed by state courts.

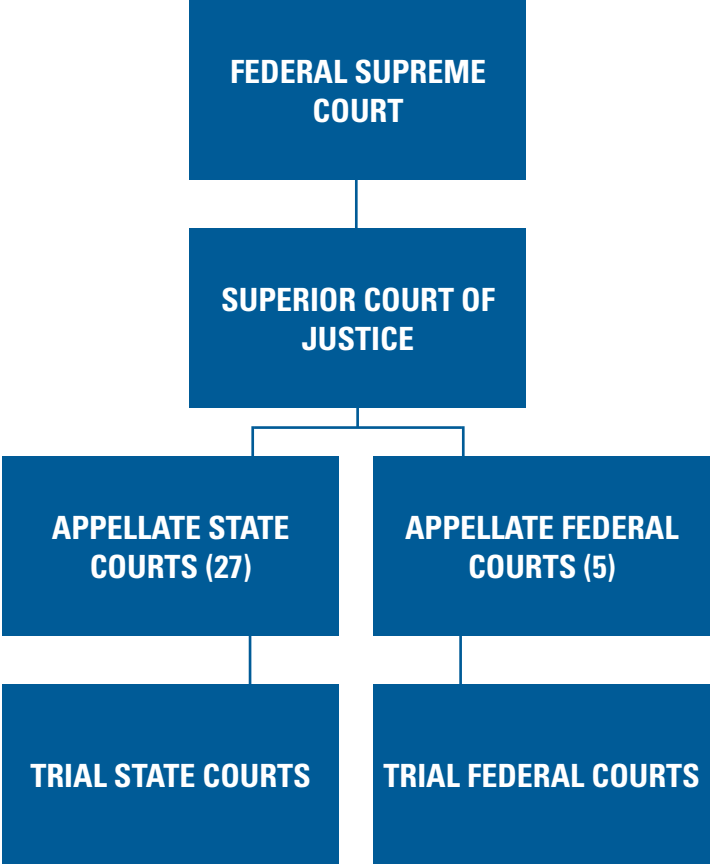
Both state and federal courts have two instances. In the first instance, cases are ruled by a single judge, who takes office after passing a public exam and after at least three years of legal practice.

In the second instance, appeals are taken up by panels normally comprised of three judges, appointed to the appellate courts by the state governor (for state courts) or the President of the Republic (for federal courts), based on criteria such as merit and length of service. One-fifth of the seats on the appellate courts are mandatorily filled by members of the Public Prosecution Service and practicing attorneys. Second instance courts of appeal are free to assess matters of fact and law. Appeals challenging second instance state and federal court decisions may be filed to the Superior Court of Justice and/or the Federal Supreme Court.

The Superior Court of Justice hears appeals against decisions which have violated federal law or given federal law an interpretation which differs from that handed down by another appellate court.¹ The Superior Court of Justice is restricted to evaluating matters of law.

Second instance decisions handed down by federal and state appellate courts can also be appealed to the Federal Supreme Court, if the appealed decision has arguably violated the Federal Constitution, among other grounds.² To be given leave to appeal, the appellant is required to provide evidence that the issues addressed in the appeal will have widespread repercussions.³

Overview of Brazil's Court System



Civil courts do not hold jury trials; juries are only present in criminal proceedings. Judicial precedents, except when handed down under specific circumstances by the

Federal Supreme Court,⁴ are not binding, although they play an important role in persuading the judge.

Brazilian Political Changes in the 1980s and Their Impact on the Legal System

Between 1964 and 1985, Brazil was governed by a military dictatorship. When the country returned to democratic rule, different sectors of society had a wide range of demands. The 1988 Constitution became a type of sponge, absorbing all of these demands. The resulting Constitution was extensive and politically ambitious.

The Constitution mentions citizenship and human dignity among its founding principles.⁵ Some of its many goals include building a free, fair, and united society, eradicating poverty, reducing regional inequalities, and promoting well-being for all.⁶ The Constitution also contains a long list of fundamental rights, sub-products of the “inviolable right to life, liberty, equality, security and property.”⁷

The text is so promising that academics started using the expression “roadmap constitution,” invented by Portuguese scholar José Joaquim Gomes Canotilho, which he used to describe a legal and sociological situation in which society would be radically transformed by the enforcement of the Constitution.⁸ Despite the undeniable institutional advances in Brazil over the past 25 years, a substantial number of the promises made by its Constitution have not been completely fulfilled.

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Access to the Courts/Justice

After Brazil returned to democracy, one resulting change was increased access to justice. The Constitution guaranteed full and free legal counsel for persons who prove they cannot afford it themselves;⁹ created special courts to decide and enforce less complex civil cases;¹⁰ and increased the number and type of parties allowed to file direct actions against

allegedly unconstitutional laws, including union confederations and nationwide class entities.¹¹

As a result, Brazil has experienced a boom in litigation since the enactment of the Federal Constitution.¹² The number of attorneys graduating every year is increasing,¹³ providing people with greater access to legal advice. Even so, there is a general perception that the structure of the judiciary and current laws are inadequate to cope with the rising demand for justice in the country.

In the judiciary, an abyss exists between what technology has to offer and how it is used, and systems remain inefficient. The Brazilian Civil Procedure Code was conceived in the 1970s to address a society that was much less complex than it is today.

It is not by chance that the quest for alternative dispute resolution methods, which had been scarce until very recently, erupted. Arbitration was regulated by federal law in 1996, with the stated intent of reducing the courts' workload "by following the example of several countries, especially in Europe and South America."¹⁴ Additionally, conciliation procedures at appellate courts have been adopted in an attempt to speed up the grinding progress of the bloated judicial system.

The overloaded lower and higher courts¹⁵ and the lack of clear parameters that provide foreseeability of courts' decisions (also known as "legal security") have driven the introduction of mechanisms inspired by common law into the Brazilian civil legal system. Examples are the binding precedent¹⁶ and the criterion of "general repercussion" in extraordinary appeals,¹⁷ tools that attempt to create a more rational and predictable process of administering justice. Similar options are being discussed by the National Congress in an effort to unclog the Superior Court of Justice's agenda.¹⁸

Empowerment of Judges

Up until the late 1970s, Brazilian legal thinking was predominantly influenced by formal and liberal concepts. The law was perceived as a way of resolving individual disputes, with a particular focus on individual assets. As political freedoms flourished between the end of the 1970s and the beginning of the 1980s, there were new concepts of what the judiciary should be, including the need to take a more "active" posture towards Brazilian problems.

The 1988 Constitution responded to these demands by significantly increasing the role of the judiciary, not only providing it with additional objective responsibilities, but more importantly by using a new type of

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language, in which legal principles take on the force of law and are used as guidelines when applying the law, taking precedence over other legal provisions.

This language is used as a way of applying a phenomenon which was initially intended to give “effectiveness” to the Constitution and which, after a certain amount of academic analysis, culminated in a theory called the “constitutionalization of law,” which means that the judiciary should interpret the law using value-based judgments and decide the meaning and scope of legislation in a manner compatible with Brazilian constitutional principles.

This tool positioned the judiciary in a gray area between enforcing positive law and constantly judging the law itself in light of the Constitution, while attempting to achieve justice. This is because the underlying legal principles are dynamic and multifaceted, which means legal disputes are open to an enormous range of (sometimes opposing) interpretations. As a result, the subjectivity and politicization of court judgments have increased. Brazil no longer lives under a state of law, but exists under a “state of justice.”

One illustration of this phenomenon is the principle of “human dignity,” mentioned

in Article 1, Section III of the Constitution, as one of the founding principles of the Brazilian State. This principle has been invoked in court to resolve many and varied disputes, even some highly technical cases, such as the statute of limitations for a contractual relationship.

The courts have interpreted this principle in many different ways. For example, some judges believe that forcing a debtor to pay a debt at a high rate of interest, even if he agreed to this rate of interest in advance with his creditor, violates the principle of human dignity. Other judges may see the debtor’s refusal to pay the debt as a violation of the same principle.

After years of academic enchantment with the constitutionalization of law, a critical reaction has started because of the very high level of judicial activism (including politicization of the law and voluntarism of the judge) caused by this phenomenon¹⁹ that has undermined other important values, such as legal certainty and security.

The appearance and evolution of class actions in Brazil, and the current challenges they face, should be evaluated within this context, which includes increasing access to the courts as well as what is referred to as the “rule of justice.”

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Class Actions

Introduction to the System

In addition to the more active role taken by the judiciary, the political freedoms that began to flourish at the end of the 1970s also caused a number of demands not often related to the law to gain greater attention. One such demand was protection for what are referred to as transindividual rights—that is, rights that transcend the mere individual perspective—initially involving the environment.

The first step was Federal Law 6,938 in 1981, which created the National Environmental Policy. This law gave the Public Prosecutor's Office the authority to file civil suits against environmental polluters, but it did not create specific rules on how such a civil lawsuit would work.

The Class Action Law was then enacted in 1985, curing the flaws of Law 6,938/81 by setting clear rules on how the lawsuit to protect transindividual rights would work. It was a turning point regarding mass torts in Brazil. This legislation gave transindividual rights the protection of the courts, thus enlarging the number of issues that could be defended by class actions and increasing the types of entities allowed to file them.

In 1991, the Consumer Defense Code came into force, the result of a joint initiative by lawmakers and legal scholars. Class actions gained greater visibility and became a sophisticated tool for litigating. Civil associations became relevant players in the collective defense of metaindividual rights in court.

How a Class Action Works

The Class Action Law and the Consumer Defense Code form a block of regulations governing jurisdictional protection of metaindividual rights. According to these laws, a class action may be filed to redress injuries:²⁰

- i. to the environment;
- ii. to the consumer;
- iii. to assets of artistic, aesthetic, historical, tourist, and landscape value;
- iv. to diffuse and collective interests;
- v. to the economic order and the popular economy; and
- vi. to the urban order.

The following entities have standing to file class actions:²¹

- i. the Federal Union, the Individual States, and the Municipalities;
- ii. public companies, foundations, and mixed capital corporations;
- iii. the Public Prosecutor's Office;
- iv. the Public Defender's Office; and
- v. civil associations incorporated at least one year previously, which includes defending the assets mentioned above in order to fulfill their institutional purposes.²²

The plaintiff in a class action is exempt from paying court costs, expert's fees, and legal fee awards, except in cases of bad faith.²³ The judge may transfer the burden of proof to the defendant if convinced that the plaintiff's claim is plausible or the plaintiff is in a weaker position.²⁴

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If the lawsuit is not filed by the Public Prosecutor’s Office, the agency shall act as a *custus legis*,²⁵ i.e., providing opinions on the issues disputed by the parties throughout the case, upon the court’s determination.

Class actions can be used to protect three types of rights: diffuse, collective, and homogeneous individual rights. Diffuse rights accrue to unspecified persons, such as the victims of misleading advertising and environmental damage. Collective rights are indivisible and belong to a group, such as shareholders of a given company. Homogeneous individual rights derive from a common origin, such as death caused by an air crash or consumer accident.

The Brazilian laws governing class action do not include a certification procedure (i.e., the court’s control over the class numerosity, adequate representation, etc.). Brazilian law, for example, presupposes that entities with standing to sue will adequately represent the interested parties

(an exception is made for civil associations, which must be incorporated for at least one year and include the rights being defended in the case within their institutional purposes,²⁶ but enforcement of this rule is controversial). Also, according to the existing laws, the court is not supposed to define the class in a preliminary stage. In cases involving homogeneous individual rights, the class is defined by the court when it rules on the case.

In the absence of a certification procedure, Brazilian courts are allowed to—and do—apply generic provisions of the Civil Procedure Code (CPC) that somehow play the role of the certification procedure, preventing baseless class actions from proceeding. For example, the CPC provides that no case can be filed unless the plaintiff shows legal interest, i.e., the case should be necessary and adequate to achieve the goal sought. If a court realizes that the enforcement of a class action decision will be difficult given the high level of particularities involving each member of the class, it can dismiss the case based on this CPC provision.

Other characteristics of Brazilian class actions include:

- The ruling must be generic, and it must not establish a monetary award.²⁷ If the class wins, individual cases are filed proving specific causation and setting damages. These individual cases may be filed before the court located in the plaintiff’s domicile, which does not necessarily have to coincide with the venue where the ruling was rendered.²⁸
- The class action judgment shall be considered in a *res judicata erga omnes* (within the territorial jurisdiction of the judge).²⁹ This means that the effects of the decision rendered by a state

judge are limited to the state where the judge adjudicates. This provision has been harshly criticized by scholars, who believe it undermines the purpose of class actions, allowing several similar cases to be filed in order to obtain the same result. The Superior Court of Justice—the highest Brazilian court with jurisdiction to analyze the application of federal law and to unite diverging decisions from the appeal courts—used to confirm this territorial limitation,³⁰ but in more recent decisions it has taken the opposite position.³¹ The issue is still up for debate.

- The *res adjudicata* in homogeneous rights claims operates *secundum eventum litis*. That is, if the case is found to have grounds, the decision will benefit all members of the class.³² If the case is dismissed with prejudice, it does not prevent class members from filing individual claims, nor does it affect ongoing individual cases³³ dealing with the same issues of fact and law.
- Brazilian legislation envisages an opt-in and opt-out system for preexisting individual cases.³⁴
 - Opt-in occurs when an individual plaintiff moves to stay the lawsuit within thirty days, which is counted as the cognizance of the class action. If a decision is made to “opt in,” the individual plaintiff benefits from the class action decision and may restart the individual lawsuit if the class action is dismissed with prejudice.
 - Opt-out occurs when an individual plaintiff does not move to stay his or her individual lawsuit after being made aware of the class action. In this case, if the class action is found

to have grounds, the judgment shall not apply to the individual plaintiff.

- Individuals who are not suing a defendant on an individual basis may petition to join existing class actions as co-plaintiffs. If they do so, they submit to the risks of litigation: they will benefit if the class action is found to have grounds, but they will be prohibited from filing individual claims if the class action is dismissed.³⁵

Use and Economic Significance of Class Actions Awards

The better-known official statistics on the use of class actions are consolidated in a 2007 report from the Brazilian Center for Legal Surveys and Studies, produced in partnership with the Ministry of Justice.³⁶ The report collected data from all state and federal courts and concluded that the “legal system that is now in effect, as it is interpreted by the courts, proved to be inefficient to effectively process the volume of concurrent class actions (as well as the individual lawsuits) that have been filed, having also been unable to achieve one of the main objectives of the class action, that is, to prevent millions of repetitive individual lawsuits being filed.”

Even though this survey showed that “a relevant percentage of decisions from lower courts were finding in favor of class action plaintiffs,” the opposite was happening at the appeals courts. The state appeals courts, which had compiled more data on the subject, found that the number of class actions found to have grounds (in whole or in part) during the period of five years had been lower than the number of dismissals.³⁷

Taking into account the fact that appellate court judgments are delivered by a group of judges, which in theory renders them less susceptible to error, the data refutes the common assumption that the law inevitably sides with class action plaintiffs. However, defendants often must endure the time and expense of a trial and an appeal before prevailing. This is an important piece of information which needs to be taken into account when one assesses the present and the future of class actions in Brazil.

With respect to the economic significance of the awards, the existing data refer to judgments related to diffuse rights, in which the judge is allowed to set a specific and enforceable value. In 2013, for example, these values varied between 200 BRL and 4.5 million BRL (approximately \$85.00 to \$2 million in U.S. dollars), according to figures from the Ministry of Justice.³⁸

Past and Present Class Action Reform Proposals

The “Rule of Justice” Impetus to Modify the Law

Past and ongoing proposals to change the class action law have sought to expand its scope, either increasing the range of entities with standing to sue or the range of issues that can be brought before the court. This expansion is presented as if it were a model of legislative progress supporting certain constitutional principles, such as citizenship.

According to the supporters of these changes, current procedural rules and safeguards to guarantee an objective and fair process should be relegated to a more peripheral role, because the ends (an alleged “increase in citizenship”) should justify the means (removing procedural obstacles to successful litigation).

Obviously, this position ignores the massive increase in litigation in Brazil (in 2012, for example, more than 20 million cases were filed before the state level throughout the country).³⁹ Any solution to this serious problem must discourage frivolous litigation, including meritless class actions. Within this context, the main challenge posed by lawsuits in general and by class actions specifically is how to endow them with greater rationality and efficiency, rather than simply seeking ways to encourage their use. Instead of encouraging the filing of class actions, the system should try to ensure these lawsuits are decided quickly

and produce effective and just results. Access to justice is not merely about a plaintiff’s access to the courtroom, but should mean that all parties to litigation have a fair and efficient opportunity to achieve a just result.

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Bill 5139/09: Justification, Sponsors, Intentions, and Results

The first attempt to change the 1985 law on class actions came in 2009, when the Executive Branch introduced Bill 5139 (Bill 5139/09) before Congress. The intent of Bill 5139/09 was to “adapt to the significant and in-depth economic, political, technological and cultural changes taking place worldwide and which have sped up significantly since the turn of the 20th century, in order to provide protection for citizens’ rights not consolidated under the current class action statute, from 1985.”⁴⁰ Ultimately, Bill 5139/09 was defeated, but the bill is significant to the understanding of current efforts to change the existing class action legal framework.

Bill 5139/09 was based on several studies by a group of specialists in legal procedure who had already been involved in producing the so-called “Model Codes” for collective actions in Brazil and Ibero-American countries. This group was backed by the Ministry of Justice during former President Lula’s second term, which meant they were able to convert their ideas into a bill.

Bill 5139/09 increased the list of entities with standing to file class actions, including political parties and other organizations. The bill allowed changes to pleadings and the cause of action at any time or instance; suspended time limitations in individual claims when process has been served on a defendant in a class action; and allowed *ex officio* interim relief. Among other changes, it also permitted the judge to shift the burden of proof at any time and plaintiffs to file suit to revisit any decision to dismiss a case if new evidence is discovered.

The goal of the bill was clear: to ensure that plaintiffs in class actions would succeed, whether or not the claim had merit, giving rise to a series of constitutional and procedural issues. The best examples of the bill’s intentions are the proposal to allow plaintiffs to change the pleading and cause of action at any time and the rule that any claim should be interpreted expansively.

Traditionally, Brazilian procedural rules regarding changes to the pleading and the cause of action have said that (i) the pleading may only be amended before the defendant is served;⁴¹ (ii) after process is served, the pleading and the cause of action may only be amended if the defendant agrees;⁴² and (iii) once a pre-trial decision is rendered, the pleading and the cause of action may no longer be changed.⁴³

There is a reason for this type of rule. It expresses the principle of procedural stability, which is fundamental for litigation to proceed in an orderly fashion.⁴⁴ Stability, according to Brazilian legal scholars, is a value that is “practically inherent to the idea of the Law,” and the quest for stability “has been a constant throughout the history of civilizations and is umbilically tied to the ideals of security and predictability.”⁴⁵

In the Brazilian Federal Constitution, these ideas are portrayed by the principles of due process and a full defense,⁴⁶ both of which intend to ensure that litigation is foreseeable and allows the defendant to exercise his defense within the objective and subjective limits that have been freely determined by the plaintiff.

Proposals such as Bill 5139/09 not only undermine these principles; they reduce the speed at which class actions can proceed. Once the pleading and the

cause of action have been changed, the defendant must be given the opportunity to comment, new preliminary arguments may be posited, exceptions may be made, and new evidence may be produced. In other words, everything changes.

When the bill refers to a more extensive interpretation of the claims and cause of action, it is an attempt to change a model that has remained unchanged in Brazil since at least the 1939 Code of Civil Procedure,⁴⁷ i.e., the pleading may be interpreted with restrictions.⁴⁸

To allow this type of change would unjustly harm the defendant, who is forced into a guessing game to determine the scope of the pleading. The provision would affect the formal balance that must exist between the parties, putting the stability of the litigation at further risk and increasing the threat of an unpleasant surprise in the future, which was described by one of the great Brazilian legal scholars as “radically repugnant to the postulates of the Rule of Law.”⁴⁹

These and other radical aspects of the bill have attracted attention from the legal and business communities, who informed Congress of their concerns through the Federal Board of the Brazilian

Law Association, the Study Center of Law Firms, the National Confederation of Industry, and a number of well-respected legal scholars.⁵⁰

This reaction was heard in Congress. The House of Representative’s Constitution and Justice Committee rejected Bill 5139/09, an unusual step because the bill had been authored and supported by the Executive. The majority opinion stated:

Basically, the bill does not resolve the problems in the current model of public class action litigation, it generates an unimaginable amount of legal insecurity, it foments frivolous litigation to defend collective interests with no guarantee that these interests are being well represented, and exposes the economy, society and all individuals to the risk of becoming defendants in a case where they will be treated like pariahs, from the beginning until its distant conclusion.⁵¹

An appeal was filed against the Committee’s decision with the House Plenary Committee, but the appeal has yet to be heard.

“ Once the pleading and the cause of action have been changed, the defendant must be given the opportunity to comment, new preliminary arguments may be posited, exceptions may be made, and new evidence may be produced. In other words, everything changes. ”

Present Class Action Reform Proposal: A Case of Déjà Vu

Bill 5139/09 was rejected in March 2010. Less than two years later, a separate effort to change the Brazilian Consumer Defense Code (CDC) began in the Senate. The proponents of these reforms initially focused on areas not currently dealt with by the Code, namely e-commerce and excessive bank debt.

However, when the bill, referred to as Bill 282, was brought to the Senate in August 2012, it also included changes to the Code's chapter on class actions. The proposed changes were quite similar to the proposals in Bill 5139/09, in particular:

- individual damages or a minimum value may be awarded in the generic judgment (article 95-A);
- obligations could be enforced on an *ex officio* basis (articles 95-A, paragraph 3 and 90-G, I and II);
- the statute of limitations for individual or class action cases directly or indirectly related to the dispute could be suspended (article 90-A, paragraph 5);
- the statute of limitations would be flexible (article 81, paragraph 5);
- the burden of proof could be shifted in the judgment (article 90-D, VI);
- financial compensation for the civil association's attorney would be awarded and borne by the defendant (article 87, paragraph 3); and
- the rule providing twice the usual amount of time to respond to a claim if more than one defendant attorney is involved would be eliminated (article 90-C).

Why Bill 282 is Misguided

Like Bill 5139/09, several provisions in Bill 282 would create an unbalanced system, focusing on providing additional tools for plaintiffs to succeed rather than improving the existing law to make it more fair and reasonable. Bill 282 seems to be inspired not only by the assumption that class actions should become more popular, but that they should invariably result in judgments favorable to plaintiffs. The bill shows a legislative bias in favor of plaintiffs in class actions, regardless of the merits of their claims. This position is contrary to the constitutional principles of equality and legal due process.

Additionally, many of the provisions in the bill undermine efforts to achieve swift justice. In an attempt to tip the balance in favor of the plaintiff, the bill would bring about an avalanche of class actions filed by attorneys seeking financial rewards, further clogging an already-overloaded judicial system.

Bill 282 Would Result in an Imbalanced Environment for Litigation

ADJUDICATING INDIVIDUAL DAMAGES IN GENERIC JUDGMENTS

When considering homogeneous individual rights, the main section of article 95-A of Bill 282 states that whenever possible, the judge will award individual damages payable to each member of the class during judgment.⁵² Alternatively, the judge will award a minimum value to remedy the injury. According to paragraph 1 of article

95-A, these values can be determined in the class actions judgment, as long as they are uniform, predominantly uniform, or can be reduced to a mathematical formula.⁵³

By its nature, an award for injury to homogeneous individual rights can only be generic, because there is no viable way of investigating individual injuries and causal relationships in class actions. This is why homogeneous individual rights undergo a specific settlement procedure, referred to by legal scholars as “improper liquidation.”

In these cases, after rendering the judgment, not only does a judge have to calculate the amount payable, there is also the need to investigate “(a) the factual allegations related to the injury suffered individually by claimant; (b) the causal relationship between the injury and the potentially injurious fact determined by the judgment; and (c) the facts and allegations related to the scale of injury suffered.”⁵⁴

The need to investigate these issues is because of the nature of these rights that are being converted from collective rights into individual ones. As an injurious event has different consequences for each of the injured parties, the judgment must be specific and take into account the particular characteristics of each separate case.

The liquidation and enforcement of a generic award rendered in a homogeneous individual rights class action must take place in a new case—filed individually⁵⁵—in which the proof of the injury and the specific causation need to be established. This is the case law⁵⁶ and legal scholarship position.⁵⁷

Paragraph 1 states that when the amount of damages is uniform, it will be set in the class action sentencing (i.e., judgment) phase. However, this is not feasible in practice. A judge cannot decide whether the amounts are uniform without investigating each person’s individual situation and calculating the amount payable to each of the persons injured.

When protecting homogeneous individual rights, damages should be set during the liquidation phase. However, the bill fails to explain how the judge should assess individual injuries during the phase that involves a generic evaluation of the merits of the case.

By allowing the judge to establish damages (or a minimum value) when sentencing, the bill subverts the logic and goals of the class action system, which are specifically to handle widely-held rights on a collective basis in order to save time and money. If the bill is approved, judges will be forced to investigate the specific details of each case forming the class action decision, which would be so time-consuming that a class action would never reach a final conclusion, or would result in injustice.

Even if a judge could set a minimum value, the new method being proposed would not expedite justice because the subsequent liquidation phase would still be needed to calculate the final fair value of the award.

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EX OFFICIO IMPOSITION OF OBLIGATIONS TO PROTECT HOMOGENEOUS INDIVIDUAL RIGHTS

Article 90-G of Bill 282 allows the judge to order the defendant to undertake positive covenants and set payments, regardless of the plaintiff's claim.⁵⁸ Paragraph 3 of article 95-A allows the court to impose *ex officio* obligations in relation to homogeneous individual rights.⁵⁹

The proposal is inappropriate based on the principles of jurisdictional limitation and the court limiting itself to the claims presented. The judge must remain unbiased to avoid excessive and dangerous state involvement in court proceedings. As Brazilian legal scholars have pointed out:

Judicial authority is inert and must be called upon by an interested party before it can act. This is what we call the principle of action: *nemo iudex sine actore*. In both criminal and civil proceedings, experience has shown that a judge who initiates proceedings on his own initiative becomes psychologically linked to the claim, putting him or herself in a position where he or she is likely to uphold it. This results in an inquisition, which has many times been seen to be inappropriate because of the bias demonstrated by the judge. (...) And, finally, in a third example of the principle of action, we have the rule according to which the judge—who

cannot initiate proceedings—also cannot act outside the limits of the claim: *ne eat iudex ultra petita partium* (see CCP, arts. 459 and 460).⁶⁰

A court decision must restrict itself to the claims presented by the plaintiff. If the plaintiff does not request adjudication of a certain claim, it is because he or she did not intend for the defendant to be convicted (found liable) under the terms of article 90-G. Judges cannot be handed the power to supplant the will of the plaintiff. If the plaintiff is allowed to withdraw the lawsuit, then there is even greater justification for the plaintiff's ability to choose what he or she seeks from the defendant's conviction.

If judges were to enforce measures not sought by the parties, this would violate the principle that the parties are responsible for bringing proceedings, determining their scope, and producing evidence. This system is an expression of legal due process and rule of law in that it limits the judge's actions to the claims presented by the parties.

Finally, the proposed measures are too wide-ranging and subjective. In the absence of any clear parameters guiding the judge's decision, the parties will not know beforehand what precisely their obligations will be if required to reconstitute the other party's rights or property and mitigate any injury, nor on what terms this will be defined.

“ If judges were to enforce measures not sought by the parties, this would violate the principle that the parties are responsible for bringing proceedings, determining their scope and producing evidence. ”

If approved, this provision will cause uncertainty, and the litigants will be unable to predict what they can expect from the courts. This is damaging to the plaintiff, whose claim may result in a decision which is different from the one originally sought and not necessarily suitable for his or her requirements. It is also damaging to the defendant, who cannot foresee what obligations may be imposed or determine how to defend him- or herself. The entire situation will undermine the concept of legal security, the effectiveness of the courts, and the right to a fair hearing.

SUSPENSION OF TIME LIMITATIONS IN INDIVIDUAL LAWSUITS

Paragraph 5 of article 90-A of Bill 282 states that when a defendant is served in a class action, the statute of limitations of individual and class actions directly or indirectly related to the dispute is suspended. The rule would apply retroactively from the time the case was filed until the end of the class action, even if the case is dismissed without prejudice.⁶¹

This provision flies in the face of recent changes to legislation that have attempted to reduce the statute of limitations in order to mitigate the instability caused by the long-term possibility of a lawsuit being filed. An example of this is the civil law statute of limitations: the 1916 Civil Code established a general period of 20 years, whereas the 2002 Civil Code reduced this general period to 10 years, or three years for civil claims seeking damages.⁶²

The statute of limitations and the concept of time-barring are ways of guaranteeing legal security and stabilizing situations in which interested parties have not attempted to enforce their rights. If these periods of time are to be suspended, the

holder of the right must unequivocally demonstrate their intention to enforce it.

The bill sidesteps this rule because it interrupts time limitations on an individual claim when a defendant is validly served in a class action by a legitimate party who is unrelated to the individual entitled to make such a claim. The latter, despite his or her failure to act, will personally benefit from action taken by a third-party unrelated to the individual claim.

Additionally, the text itself of paragraph 5, article 90-A of Bill 282 is unclear. It uses a vague concept (“directly or indirectly related to the dispute”) and fails to explain which cases will or will not be encompassed by a given class action and benefit from the time limitation suspension.

FLEXIBLE LIMITATION PERIODS

Paragraph 5 of article 81 allows the courts to ignore the Consumer Defense Code (CDC) statute of limitations whenever general law determines a more favorable period for the holder of a given material right.⁶³

This provision undermines paragraph 2, article 2 of the Act of Introduction to the Civil Code, because it allows a general law to take precedence over a provision in the CDC—a special law adapted to the specific situations—based on how much this would benefit one of the parties. This is referred to as “dialogue of sources,” a concept that has been heavily criticized by some of Brazil’s foremost legal scholars⁶⁴ and whose practical application has been rejected by the Superior Court of Justice.⁶⁵


Lawmakers are responsible for specifying the periods of time that govern any legal relationships. The statute of limitations on class actions must be set in advance and determined by the CDC. If the objective

of the bill is to change the time limitation on class actions, it should do so directly, strengthening the principle of legal security and clearly stating that “claims under substantive law are time-barred in accordance with the time limitation determined by this Code.”

SHIFTING THE BURDEN OF PROOF IN THE JUDGMENT

Article 90-D, item VI of Bill 282 allows the judge to shift the burden of proof when rendering the judgment, transferring it to the party in the best position to produce the evidence, if that party has specific technical, scientific, or other knowledge about the cause.⁶⁶

Although article 90-D states that a fair hearing must be allowed, the possibility of shifting the burden of proof in the judgment violates the constitutional guarantees of legal due process and a fair hearing,⁶⁷ as legal scholars⁶⁸ and the Superior Court of Justice⁶⁹ have pointed out.



Shifting the burden of proof in the judgment violates the principles of adversary proceedings and full defense, because it does not allow the party on which this burden has been placed to present new evidence and fulfill a duty which did not exist prior to the judgment.

Shifting the burden of proof in the judgment violates the principles of adversary proceedings and full defense, because it does not allow the party on which this burden has been placed to present new evidence and fulfill a duty which did not exist prior to the judgment. Furthermore, it imposes this duty when it is not only impossible but also useless to enforce the corresponding rights.

It should be highlighted that Bill 166/2010, which seeks to enact a new Civil Procedure Code (CPC), was approved by the Senate in December 2010 (still pending final review by the Senate) and acknowledged the need to respect adversarial proceedings and provide the party responsible for producing evidence an adequate opportunity to do so. Article 358, paragraph 1 of the bill states:

Based on the circumstances of the case and the specific characteristics of the facts that require evidence, the judge may invert the burden of proof on proper grounds and subject to counterargument, and lay that burden on the party in the best position to produce the evidence. Whenever the judge distributes the burden of proof in any way not referred to in article 357, the court shall give that party an opportunity to adequately discharge the obligation imposed upon them.

Therefore, the Senate has already sent a clear message that no shifting of the burden of proof should occur in the judgment. In order to be consistent with prior legislative decisions, the Senate should have taken this into consideration when proposing Bill 282.

“ Today, there is no justification for new rules that would encourage people to file more class actions, particularly when the incentive is purely financial. What is really needed is making this type of lawsuit more effective, fair, and balanced. **”**

FINANCIAL COMPENSATION AS A STIMULUS FOR LITIGATION

Article 87, paragraph 2 of Bill 282 defines the legal fees payable to associations for complex, professional work.⁷⁰ Item I sets legal fees at no less than 20% of the award, but sets no upper limit. Item II states that if Item I cannot be applied, proportional and reasonable legal fees shall be adjudicated by the judge.

Awarding costs is a way of compensating the attorney who assisted the winning party for his or her technical work. Under the current Brazilian class action regime, costs are only awarded against the defendant. In other words, current legislation only benefits one of the parties. The pending bill intends to increase this advantage, accentuating the differences between litigants and justifying the change by claiming it will stimulate more class actions.

More than 20 years after the CDC was enacted, class actions are widely accepted as part of the Brazilian legal system and everyday legal practice. Today, there is no justification for new rules that would encourage people to file more class actions, particularly when the incentive is purely financial. What is really needed is making this type of lawsuit more effective, fair, and balanced.

The proposed new text for article 87, paragraph 2 is not a step in the right direction. In fact, it goes in the opposite direction by monetizing class actions and opening the door to frivolous litigation.

Legal costs awards based on the complexity of a case should only be a guideline for judges, who must operate within limits determined by the law. Otherwise, this criterion will become overly subjective and dependent solely upon the judge’s discretion. It is unreasonable to force a losing party to automatically pay unlimited and unpredictable costs.

One would expect the law to set an upper limit for cost awards, not a lower one. This is the rule that the Brazilian courts have adopted, based on article 20, paragraph 3 of the Code of Civil Procedure,⁷¹ which sets a maximum 20% limit for cost awards.

In addition to giving disproportional attention to costs awarded to associations under article 7, paragraph 2, in matters of “material public interest” directly or indirectly represented by the association’s claim, paragraph 3 of the same provision⁷² authorizes the judge to award financial compensation in addition to costs payable by the defendant.

Payment of a reasonable percentage of costs is positive and compensates the

association that filed the litigation and won the class action. The same cannot be said of the financial compensation referred to in paragraph 3, which can only be construed as a reward for associations and a punishment for defendants in class actions.

By linking additional compensation to “public interests directly or indirectly addressed” by the class action, the bill makes it practically inevitable that the defendant will be ordered to pay, whatever the result of the case. If certain public interests are indirectly addressed by the claim, although never directly mentioned in the claim, the defendant could be forced to pay an additional award to plaintiffs.

With the possibility of obtaining additional financial compensation and no risk of costs in a losing case, this type of award will open the door to frivolous litigation. The rising number of class actions would overload the judiciary, flying in the face of the current trend to expedite the judicial process.

Class actions are important tools, but they should only be used in exceptional situations. What should be encouraged is more rational, effective, and reasonable use of this type of lawsuit, not an indiscriminate flood of lawsuits to obtain financial reward and punish defendants. The proposed rule is unacceptable and risks monetizing legal action.

Furthermore, paragraph 3 of article 87 of Bill 282 militates against the bill itself. This is because the justification for the bill provides that it seeks to “take disputes between consumers and suppliers out of the courts, reinforcing the use of other channels and, at a procedural level, implement consensual dispute resolution methods.”

The possibility of receiving an award for winning creates an obvious conflict of interest between associations and their members. Instead of focusing solely on compensating damages their members are entitled to, associations will have their own stake in the case. Associations may act in ways that are detrimental to their members’ interests in their attempts to obtain financial awards for winning cases.

The proposed measures are not only unfair, they overburden the defendant, distort the structure of incentives for filing class actions, and may become a source of unlawful enrichment for plaintiffs.

ELIMINATING THE RULE PROVIDING TWICE THE AMOUNT OF TIME TO RESPOND TO A CLAIM IF MORE THAN ONE ATTORNEY IS INVOLVED

Article 90-C⁷³ of Bill 282 sets a period of between 20 and 60 days for responding to class actions, but does not apply other benefits defendants enjoy under the CPC or other special legislation.

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Class actions normally involve a number of defendants with different attorneys. In these cases, it is logical, reasonable, and proportional to apply the same rule from Article 191 of the CPC,⁷⁴ which provides twice the amount of time to respond to a claim when litigants are represented by different attorneys.

Procedural law sets these deadlines based on the procedures involved, so the parties have sufficient time to carry out these procedures without delaying the proceedings. When there are several defendants with different attorneys, the deadline for responding is the same for everyone.

During this period, the case records are held in a notary's office, and the attorneys may only remove them when acting jointly or when otherwise agreed to in a petition filed with the court (article 40, paragraph 2, CPC).⁷⁵ The restricted access to case records justifies the longer deadline for concluding procedural acts. A longer deadline is warranted because sufficient time is required to analyze the case documents and act accordingly.

The prerogative of a longer deadline also complies with the principle of material equality. Offering defendants with different attorneys a longer deadline is an attempt to put them on equal footing with plaintiffs who, with just one attorney, have unrestricted access to the case record. This is what Brazilian scholars have highlighted:

[I]t is more difficult for co-parties to take steps during proceedings when they are represented by different attorneys, because all litigants are entitled to consult the case record and this creates certain difficulties when more than one attorney is acting in the defense of

the co-parties. This longer deadline is therefore justified and complies with the constitutional principle of equality.⁷⁶

Therefore, the following paragraph should be added to article 90-C of Bill 282: "When the co-parties are represented by different attorneys, the deadline referred to in the main section of this article shall be no less than 30 days."

A Lost Opportunity: Revision of the Legal Aid Benefit/Loser-Pays Rule and the Predominance Criterion

Bill 282 does not address two sensitive issues in the CDC chapter on class actions: (1) plaintiffs still face no risk in a class action because they are not liable for court costs and expenses or the risk of being ordered to pay costs; and (2) the bill ignores the clear need to more accurately define the concept of homogeneous individual rights to establish that collective issues take precedence over individual ones.

LEGAL AID/LOSER-PAYS RULE

The bill does not amend article 87 of the CDC, which states that in class actions governed by the Code, there shall be no advance payment of costs, fees, expert's fees, or any other expenses, nor any award against the plaintiff association to make payment of legal fees, costs and procedural expenses, except in cases of bad faith.

There is a distorted understanding in Brazil of the meaning of legal aid in class actions and legal actions in general.⁷⁷ This mechanism is commonly known as "cost free justice," even though nothing is free when services are provided by the state. Society bears the cost of litigation on behalf of the economically disadvantaged.

This mechanism is important and it attends to a longing for social unity. A lack of economic resources should not prevent one from claiming rights through the courts. However, taking into account the general obligation to manage direct or indirect public expenditures properly, it would be advisable to create tools allowing society to evaluate the convenience to bear the cost of any particular claim.

A preliminary judicial assessment of the likelihood of success in a class action filed under “cost free justice” is both a responsible and necessary measure, which could be adopted by the Brazilian legislation, similarly to what happens in Germany.⁷⁸ Indeed, a preliminary judicial assessment would be advantageous in all class actions, allowing the judge to act as a gatekeeper to avoid wasting judicial resources on cases that should not be prosecuted on behalf of a class.

An early decision would discourage people from filing lawsuits as class actions without consistent legal grounds. In class actions, half of the suits filed in one Brazilian state were dismissed. All were filed under the shield of “cost free justice.” Had there been a preliminary examination of their chances of success as class actions, the majority of these lawsuits would probably have never been filed.

If one looks at the exemption from payment in cases of loss of suit, the issue is more intriguing. Why is it that the plaintiff should not bear the costs of the loss if the defendant wins the class action? Why is it that the defendant is not entitled to reimbursement for the costs borne from a claim that lacked merit? The loser-pays rule was conceived to protect the parties, the judiciary, and the law against abuse and time-wasting. It seems we should reconsider this rule after more than 20 years of class actions in Brazil.

PREDOMINANCE AND SUPERIORITY CRITERIA

Regulated by articles 91 to 100 of the CDC, class actions to protect homogeneous individual rights were one of the main innovations in the CDC.⁷⁹ The protection of homogeneous individual rights is justified for its convenience, speed, and standardized method of seeking justice.⁸⁰

To ensure that these class actions proceed smoothly, the individual rights must be homogeneous, i.e., they must have a common origin.⁸¹ If the individual rights are different enough from one another that enforcement will require an individual judgment equivalent to individual enforcement proceedings, a generic judgment in a class action, as described in article 95 of the CPC,⁸² would be ineffective. In this case, the claim should be

“ *A lack of economic resources should not prevent one from claiming rights through the courts. However, taking into account the general obligation to manage direct or indirect public expenditure properly, it would be advisable to create tools allowing society to evaluate the convenience to bear the cost of any particular claim.* **”**

“ Experience from abroad offers a number of examples that would help improve Brazilian legislation in two main areas: the need to establish the predominance and superiority of collective issues, and the need to initially verify whether a class action is admissible. ”

dismissed. Ada Pellegrini Grinover, one of the most reputable class action experts in Brazil, summarizes the issue as follows:

However, even in Brazil, we cannot prefer class actions if they do not provide at least the same level of effectiveness as individual proceedings. If a collective judgment does not facilitate access to justice, if the individuals are forced to perform the same procedural activities during sentencing that they would have to perform in any individual enforcement proceedings, the adjudication made by the court is useless and ineffective and is of no benefit to society.⁸³

Practical experience in Brazil has shown that there are no clear criteria for the judge to verify whether the collective aspects of the individual claims justify a class action during the initial phase of proceedings. Bill 282 is a valuable opportunity to look at alternatives that could help fill this gap. Experience from abroad offers a number of examples that would help improve Brazilian legislation in two main areas: the need to establish the predominance and superiority of collective issues, and the need to initially verify whether a class action is admissible.

Class actions to protect homogeneous individual rights, as described in the CDC, are inspired by the U.S. class action for damages.⁸⁴ Like the class action under article 91 of the CDC,⁸⁵ the class action

pursuant to U.S. Federal Rules of Civil Procedure 23(b)(3) is not necessarily justified and is not always permitted to proceed as a class, even if it is brought in the court as one. A class action for damages must pass a number of tests before it can proceed, two of which are particularly relevant: predominance and superiority.

The predominance test is an attempt to ensure that the class action is only accepted by the court if the issues common to all plaintiffs are more significant than the individual issues. For example, in *Amchem Products, Inc v. Windsor*,⁸⁶ the U.S. Supreme Court vacated a judicially-approved class action settlement from a lower court where plaintiffs were seeking damages for alleged asbestos contamination. The decision was based on the lack of predominance because the differences between the types and periods of asbestos exposure as well as the physical consequences for plaintiffs resulted in individualized issues of fact and causation so disparate that they could not be dealt with in a single case.

The superiority test means that the court must decide whether the class action is the best way of resolving a claim, or whether individual lawsuits filed by the plaintiffs would achieve the best result. Rule 23(b)(3) contains certain parameters that help the court to apply the superiority test: (a) the interest of each plaintiff in controlling their

individual claim; (b) the extent and nature of previous claims related to the facts in the class action; (c) the convenience of concentrating all of the claims in a single jurisdiction; and (d) the possible difficulties of managing the class action.

According to Ada Pellegrini Grinover, the tests in Rule 23(b)(3) are based on two important aspects of the principle of access to the courts: the procedural facility of dealing with individual claims and the effectiveness of the decision.⁸⁷ Based on these tests, U.S. courts have allowed cases which are collective to proceed, such as those arising out of airline and environmental disasters,⁸⁸ and have refused lawsuits which could be more appropriately resolved through individual litigation.⁸⁹

Use of this mechanism is also recommended in civil systems. This is why the Ibero-American Model Code on Collective Actions, which was produced with contributions from several specialists under the auspices of the Ibero-American Institute of Procedural Law, incorporates the principles of predominance and superiority⁹⁰ in article 2, paragraph 1.⁹¹


The Explanation of Reasons for the Model Code justifies this choice and specifically mentions the Brazilian experience, and Ada Pellegrini Grinover supports adapting it to the Brazilian legal system, drawing parallels between predominance and the legal grounds for the claim, and between superiority and legal interest.⁹²

In Brazil's current regime, a class action may proceed even where individual issues take precedence over collective ones and even if the resulting decision is unable to protect plaintiffs' rights. Testing the predominance of common issues and assessing whether a class action would be more appropriate

would have benefits for the administration of justice, the effectiveness of legal proceedings, and the individual rights for which protection is sought.

If the predominance and superiority tests are to be adopted, the law should clearly state at which point during the proceedings these tests should be applied by the court. Commencement of the proceedings would be the most appropriate time. Allowing a class action to advance to the discovery phase or to a judgment on the merits without first assessing whether it passes the admissibility tests creates unnecessary uncertainty and costs for the parties involved and for the judiciary, which is incompatible with the principles of legal safety, procedural economy, and the effectiveness of legal proceedings.

This is the right time to include a rule stating that the predominance and superiority tests should be applied in class actions and assessed alongside other admissibility conditions. This would allow the courts to reject lawsuits that fail to pass the class action test in a relatively short period of time and instead concentrate their time and energy on other lawsuits which actually need the collective treatment.



This is the right time to include a rule stating that the predominance and superiority tests should be applied in class actions and assessed alongside other admissibility conditions.

THE COST IS BORNE BY SOCIETY

The debate over changing class actions under the CDC is not encouraging. This bill needs a moderate approach to find a point of equilibrium, because current rules already afford class action plaintiffs a number of rights and privileges. This means accepting different points of view on the collective defense of consumers in court, especially views on the inconsistencies that clearly exist in the system.

A rope stretched to breaking point has little tolerance for additional stress. A careless gesture, even if well-intentioned, could easily break it. For the CDC, this would result in an excessively biased consumer rights protection framework, the cost of which will inevitably be paid by us all, the consumers.

Conclusion

The proposed changes to class action rules are not positive because they create mechanisms that either stimulate the filing of class actions (such as granting civil associations financial compensation and making statute of limitation rules more flexible in plaintiff's favor) or undermine current safeguards that guarantee unbiased and predictable proceedings (such as allowing the shifting of the burden of proof in the judgment and permitting the court to impose *ex officio* obligations over defendants, among others).

However, the Brazilian challenge with respect to the judiciary in general and regarding class actions specifically is exactly the opposite—that is, to create effective tools to restrict litigation in general, given the structural saturation of the courts, and to adopt innovative solutions to ensure class actions are only used when necessary. Above all, any proposal to change class actions needs to enforce, rather than weaken, the basic Brazilian constitutional principles of judicial impartiality and legal due process.

If, however, lawmakers choose to approve a system that would stimulate further litigation in Brazil, a counterbalance should be created because for every right there is a corresponding obligation. For example, if Brazilians lawmakers decide to allow civil associations to receive the controversial “financial compensation” if they successfully pursue a class action, the rule exempting these associations from paying

costs if a class action is unsuccessful must necessarily be eliminated.

This would not restrict their access to the courts, because civil associations that have a legitimate and well-grounded claim are likely to litigate successfully. However, those who intend to file unfounded class actions must run the economic risk of litigation, which is to pay the court costs and be subject to the loser-pays rule. There is no legitimate reason for society to economically support the pursuit of a frivolous case. Any change in the law must aim at promoting responsible use of the judicial system.

This is also the time to revisit the definition of homogeneous individual rights in Brazil to obtain a more objective meaning and scope for this expression. The bill has ignored this issue, but it should not. Including the criteria that collective issues must predominate over individual ones, and

adopting a test whereby the class action mechanism must be a superior process for the particular case, as part of our definition of homogeneous individual rights would restrict the spread of “false” class actions (which are nothing more than a group of individual lawsuits that proceed down the class action route).

The inclusion of the predominance requirement in the class action law would be consistent with the goal that every lawmaker should pursue when considering amendments to existing laws or creating new laws on how a lawsuit should work: to ensure such a lawsuit, no matter its nature, adequately serves the purpose for which it has been conceived.

Class actions were conceived to resolve mass-tort claims through expedited and economically rational means, but experience has shown that this goal has not been met. Absent the predominance and superiority criteria, there is no guarantee that a class action will solve the issues at stake because individual issues may be at the center of the litigation, making it impossible for the court to issue a single decision covering the entire class. When class actions proceed without gatekeeping mechanisms, the result is at best a waste of time and economic resources and at worst, skewed justice that prejudices defendants. Lawmakers should seize the opportunity to restore balance to this system in a sensible and meaningful way.

Endnotes

- 1 Federal Constitution, Article 104, III.
- 2 Federal Constitution, Article 102, III.
- 3 Federal Constitution, Article 102, paragraph 3.
- 4 Federal Constitution, Article 103-A.
- 5 Article 1, II and III.
- 6 Article 3, III and IV.
- 7 Article 5.
- 8 COUTINHO, Jacinto Nelson de Miranda (org). *Canotilho e a Constituição Dirigente*. Rio de Janeiro: Renovar, 2003.
- 9 Article 5º, LXXIV
- 10 Article 98, I.
- 11 Article 103, IX.
- 12 Official data available in the website of the National Council of Justice indicates that, in 2012, there were approximately 92.2 million cases active in the country (http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/sumario_exec_in2013.pdf).
- 13 A survey carried out in 2008 by the National Bar Association found that there were 571,360 lawyers in Brazil.
- 14 Exposition of reasons in Federal Law 9,307/96.
- 15 Official data available on site <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual> indicates that the Supreme Court decided approximately 78,400 appeals in 2013.
- 16 Federal Constitution, article 103-A: "The Supreme Federal Court may, on its own account or by provocation, and through the decision of two thirds of its members, and after reiterated decisions about the matter, approve a statement which, as of its publication in the official press, shall have a binding effect on the remaining Branches of the Judiciary and to the direct and indirect public administration on the federal, state and municipal spheres, as well as to proceed to its review or cancellation, pursuant to law."
- 17 Federal Constitution, article 102 §3: "In the extraordinary appeal, the appellant must evince the general repercussion of the constitutional questions being discussed in the case, pursuant to the law, so that the Court may examine the appeal, said Court only being able to refuse after the pronouncement of two thirds of its members."
- 18 Proposal of Constitutional Amendment nº 358/2005.
- 19 See: GRAU, Eros Roberto. *Por que tenho medo dos juízes*. São Paulo: Malheiros, 2013, pp. 117-119; MORAES, Maria Celina Bodin de. *Na medida da pessoa humana*. Rio de Janeiro: Renovar, 2010, prefácio; RAMOS, Elival da Silva. *Ativismo judicial – parâmetros dogmáticos*. São Paulo: Saraiva, 2010, pp. 23, 141; SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. São Paulo: Malheiros, 2012, pp. 60-84.
- 20 Law 7,347/85, article 1.
- 21 Law 7,347/85, article 5.
- 22 The requirement as to pre-constitution may be waived by the judge in case of "a manifest social interest evidenced by the dimension or characteristics of the damage, or by the relevance of the legal asset to be protected." (Consumer Defense Code, article 82, IV).
- 23 Law 7,347/85, article 17. Consumer Defense Code, article 87.
- 24 Consumer Defense Code, article 6, VIII.
- 25 Law 7,347/85, article 5, § 1.
- 26 Federal Constitution, article 5, XXI: "associative entities, when explicitly so authorized, have the standing to represent their associates either officially before the Court or unofficially."
- 27 Consumer Defense Code, article 95.
- 28 Consumer Defense Code, article 98, § 2, I, and article 101, I.
- 29 Law 7,347/85, article 16.
- 30 Superior Court of Justice. ED in CC 64328/PI, reporting Justice José Delgado, ruled on 11.28.2007. HCJ. CC no. 56228/MG, reporting Justice Eliana Calmon, ruled on 11.14.2007. HCJ. AgRg no REsp no. 422.671/RS, reporting Justice. Francisco Falcão, ruled on 8.16.2007.
- 31 Superior Court of Justice. REsp. 1.243.887, reporting Justice Luis Felipe Salomão, ruled on 10.19.2011. REsp. 1.243.386, reporting Justice Nancy Andrichi, ruled on 6.12.2012.
- 32 Consumer Defense Code, article 103, III.
- 33 Consumer Defense Code, article 103, § 3.
- 34 Consumer Defense Code, article 104.
- 35 Consumer Defense Code, article 103, §2.
- 36 http://www.cebepej.org.br/pdf/acoes_coletivas.pdf.
- 37 Pursuant to the data from the Court of Appeals of the State of Rio Grande do Sul, 761 class actions were found grounded/partially grounded during a period of five years, while 788 were found to be groundless/dismitted without prejudice during the same period.

- <http://portal.mj.gov.br/cfdd/main.asp?View-ID=%7B2148E3F3%2DD6D1%2D4D6C%2DB253%-2D633229A61EC0%7D¶ms=itemID=%7BB83C48F5%2D2761%2D4BB3%2D86FB%2DDF5F-2759C477%7D;&UIPartUID=%7B2868BA3C%2D-1C72%2D4347%2DBE11%2DA26F70F4CB26%7D>.
- 38 <http://www.cnj.jus.br/BOE/OpenDocument/1308221209/OpenDocument/opendoc/openDocument.jsp>.
- 39 http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=99639434EAC5D5875F7D2EE6039D9438.node2?codteor=651669&filename=PL+5139/2009.
- 40 Civil Procedure Code, article 294: “Before the service, the plaintiff may amend the pleading, bearing the increased costs arising from this initiative.”
- 41 Civil Procedure Code, article 264: “Once the service has been made, the plaintiff is prevented from changing the pleading or the cause of action, without the consent of the defendant, by maintaining the parties except for the substitutions allowed by law.”
- 42 Civil Procedure Code, article 264, sole paragraph: “Under no circumstances shall the change of the pleading or of the cause of action be allowed once the pre-trial decision is rendered.”
- 43 THEODORO JÚNIOR, Humberto. *Curso de Direito Processual Civil*, vol. I. Rio de Janeiro: Forense, 2002. p. 269.
- 44 Procedural acts are governed by the principle of interdependence, each developed as a function of the others (Civil Procedure Code, articles 248 and 249), which grants the proceeding the characteristic of progressiveness (within this context, see CINTRA, Antônio Carlos de Araújo [et. al.]. *Teoria Geral do Processo*. São Paulo: Malheiros, 1999. p. 288).
- 45 WAMBIER, Teresa Arruda Alvim; WAMBIER, José Miguel Garcia Medina. *O dogma da coisa julgada: hipóteses de relativização*. São Paulo: RT, 2003. p. 63.
- 46 Federal Constitution, article 5, LIV and LV. Case law: Superior Court of Justice, AgRg in Ag. 660814, reporting Justice Fernando Gonçalves, ruled on 8.16.2005; Rio de Janeiro Court of Appeals. AC no. 2006.001.24300, reporting Justice Antonio Cesar Siqueira, ruled on 5.30.2006; São Paulo Court of Appeals. AI nº. 316.598-5/5, reporting Justice Ricardo Lewandowski, ruled on 4.9.2003; Rio de Janeiro Court of Appeals. AC no. 2006.002.01878, reporting Justice Roberto Felinto, ruled on 4.11.4.2006. Doctrine: DINAMARCO, Cândido Rangel. *Instituições de Direito Processual Civil*, vol. II. São Paulo: Malheiros, 2001. pp. 67-75; FUX, Luiz. *Curso de Direito Processual*. Rio de Janeiro: Forense, 2004. pp. 199-203.
- 47 PASSOS, José Joaquim Calmon de. *Comentários ao Código de Processo Civil*, vol. III. Rio de Janeiro: Forense, 2005. p. 236.
- 48 Civil Procedure Code, article 293: “The pleading is interpreted from a restricted point of view, the principal, however, encompassing legal interests.”
- 49 ATALIBA, Geraldo. *República e Constituição*. São Paulo: Malheiros, 1998. p. 185.
- 50 One example was the article written by José Ignacio Botelho de Mesquita, emeritus professor at the faculty of law for the University of São Paulo, under the title “incessant reforms of civil procedure”, published in newspaper *Valor Econômico* on 10/1/2012.
- 51 http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=754582&filename=Tramitacao-PL+5139/2009.
- 52 Article 95-A. “When handing down a conviction, damages for the individual injuries suffered shall, when possible, be fixed by the judge as individual damages payable to each member of the group or a minimum value to remedy the injury.”
- 53 Paragraph 1. “When the values for individual injuries suffered by members of the group are uniform, predominantly uniform will can be reduced to a mathematical formula, the class action judgment shall determine these values, or the formula for calculating individual damages.”
- 54 DIDIER JR., Fredie; ZANETI JR., Hermes. *Curso de Direito Processual Civil*. Vol. 4. Salvador: Jus Podivm, 2009, p. 375.
- 55 ZAVASCKI, Teori Albino. *Processo Coletivo*. São Paulo: Revista dos Tribunais, 2011, p. 178.
- 56 Superior Court of Justice. Resp. nº 1098242/GO, reporting Justice Min. Nancy Andrighi, ruled on 10.21.2010.
- 57 GRINOVER, Ada Pellegrini, et al. *Código Brasileiro de Defesa do Consumidor*. Rio de Janeiro: Forense, 2001, pp. 795- 797.
- 58 Article 90-G. “In actions for damages related to diffuse and collective interests and rights, independent of the plaintiffs claim, the conviction shall consist of: I - the assumption of obligations to specifically reestablish the rights and interests and mitigate any injury; II - measures to minimize the injury and avoid future repetition; and III - damages for moral and material injury.”
- 59 Paragraph 3. “The provisions in article 90-G shall apply to homogenous individual rights or interests.”
- 60 CINTRA, Antônio Carlos Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria geral do processo*. São Paulo: Malheiros, 2005, pp. 59-61.
- 61 Paragraph 5. “Service of process in class actions suspends the statute of limitations in individual and collective claims directly or indirectly related to the dispute, applying retroactively from distribution of the case until conclusion of the class action, even if the case is dismissed without a resolution on the merits.”
- 62 Article 206. Statute of limitations: Paragraph 3. “In three years: V - civil claims for damages.”
- 63 Paragraph 5. “When applicable, the time limit for claims under substantive law is the period determined by this code, or by law, whichever is more favorable to the beneficiary.”

- 64 "It is my opinion that this position is *unreasonable* because it proposes, on behalf of a *paternalistic* ideology, to set aside the rules in the Consumer Protection Code whenever other rules, in the Civil Code, are more favorable to consumers. (...) The Consumer Protection Code is indeed a protective law, increasing the liabilities of goods and product suppliers in various ways (...). In fact, this is a *protective microsystem* which, like all microsystems, enjoys a significant level of autonomy in relation to the central system, therefore *mixing* rules from hither and thither to provide overreaching and paternalistic protection falls outside the boundaries of any system. Either we apply the microsystem in its entirety, or we deny it is a part of our legal framework." "(...) In the Consumer Protection Code, the time limitation is shorter, but this is offset by delaying the point in time that the limitation period begins, which is not when the injury occurred, but when the injured party became aware of the injury (CBC, article 27). This is the *balance of systems*. A longer period, which only begins when knowledge is acquired. It would be contrary to the system and particularly unfair to adopt this interpretation of the rules, arbitrarily destroying the balance between the two systems by cherry picking rules here and there to benefit one of the parties on a paternalistic pretext which is not compatible with the due process of law." (Emphasis added.) DINAMARCO, Cândido Rangel. *Relações de consumo, prescrição e diálogo das fontes*. In: LOPEZ, Teresa Ancona. *Estudos e pareceres sobre livre-arbítrio, responsabilidade e produto de risco inerente: o paradigma do tabaco aspectos civis e processuais*. Rio de Janeiro: Renovar, 2009. pp. 117, 124-125.
- 65 Resp n°. 304.724, reporting Justice Gomes de Barros, DJe 22.8.2005.
- 66 Article 90-D. "If conciliation cannot be obtained and the defendant submits a defense, the judge will schedule a procedural hearing and shall take the following decisions, on proper grounds, and shall hear counterargument: (...) VI - explain distribution of the burden of proof and the possibility of it being inverted to protect the vulnerable party and immediately, or when judging the cause, invert the burden of proof notwithstanding the terms of article 6, VIII, transferring the burden to the party which is in a better position to present the evidence because that party has specific technical or scientific knowledge or other information related to the facts."
- 67 Federal Constitution. Art 5. "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: 'LV – litigants in court or administrative proceedings and those who stand accused in general shall be guaranteed a right to counterargument and a fair defense, with recourse to the means and resources inherent thereto.'"
- 68 "Shifting the burden of proof during sentencing breaks with the legal due process system and violates the right to a fair hearing. We cannot punish a party who has failed to prove the truth or falsehood of a given allegation without giving that party an opportunity to do so. On the other hand, simply by establishing that the burden of proof may be inverted and fall upon a supplier, forcing that supplier to present evidence that extinguishes, modifies or curtails a claim against it, such as disproving a consumer's right, makes inverting the burden of proof a legal matter when lawmakers intended it to be a judicial matter (in fact, certain tests must be applied before inverting the burden of proof)." DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael. *Curso de Direito Processual Civil*. Vol. 2. Salvador: Ed. Jus Podivm, 2009, pp. 81-83, 85.
- 69 "SPECIAL APPEAL. CONSUMER. LIABILITY FOR PRODUCT DEFECT (ARTICLE 18 OF THE CPC). SHIFTING THE BURDEN OF PROOF (ARTICLE 6, VIII, CPC). TIME OF SHIFTING. PREFERABLY DURING THE PRETRIAL PHASE OF THE PROCEEDINGS.
- The burden of proof may be inverted by law ('ope legis'), in cases of product or service liability (articles 12 and 14 of the CPC), or by order of the court ('ope iudicis'), as in this case, which refers to a product defect liability (article 18 of the CPC). Please see the rules in article 12, paragraph 3, II and 14, paragraph 3, I and 6, VIII of the CPC.
- Distribution of the burden of proof is not only a discretionary rule available to the judge (objective aspect), it is also a rule of conduct which applies to the parties, which will guide their behavior during the proceedings depending on the burden attributed to each party (subjective aspect). Doctrine.
- If the method by which the burden of proof is distributed has an influence on the procedural behavior of the parties (subjective aspect), judicial inversion of the burden of proof cannot be ordered at the time the judge (judgment) or the appeal court (appeal ruling) rules on the action.
- See article 262, paragraph 1 of the Draft Code of Civil Procedure. Judicial inversion of the burden of proof shall preferably take place at the pretrial hearing, or shall at least allow the party not initially subject to the burden of proof the opportunity to present further evidence.
- Diverging jurisprudence from the Third and Fourth Panel of This Court.
- SPECIAL APPEAL DENIED." (Resp. n°. 802.832/MG, reporting Justice Paulo de Tarso Sanseverino, ruled on 4.13.2011).
- 70 Article 87. (...) Paragraph 2. "If a class action is upheld, the legal fees payable to the associations, when the work involved has been complex: I - shall be set as a percentage of no less than 20% of the value of the conviction; II – shall be arbitrated by the judge if the terms of item I cannot be applied, subject to the criteria of proportionality and reasonability."

- 71 Article 20. "The judgment shall convict the losing party to pay the winning party costs paid in advance and legal fees. These fees shall also be payable when attorneys have represented themselves. Paragraph 3. Legal fees shall be set between a minimum of 10% of maximum 20% of the amount of the conviction, subject to: (a) the standard of care presented by the attorney; (b) the location where services were rendered; and (c) the type and importance of the case, the work performed by the attorney and the time spent on the case."
- 72 Paragraph 3. "In matters of material public interest directly or indirectly resolved in the claim brought by the Association and notwithstanding the cost award, the judge may set financial compensation to be paid by defendant, subject to the criteria of proportionality and reasonability."
- 73 Article 90-C. "The judge shall set a deadline for responding to class actions which shall be no less than 20 and no more than 60 days, according to the complexity of the case and the number of litigants. This period shall commence on the date of the conciliation hearing or the final session of the conciliation process. Sole paragraph. The additional periods for responding to the lawsuit set out in the Code of Civil Procedure and special legislation shall not apply to the period referred to in this article."
- 74 Article 191. "When co-parties are represented by different attorneys, the deadlines for submitting a defense, appealing and otherwise petitioning in the case shall be doubled."
- 75 Article 40. (...) Paragraph 2. "As the parties share the same deadline, their attorney shall only remove the case records jointly or when otherwise agreed in a petition filed with the court, except when obtaining copies, in which case each attorney may remove the case records for a period of one hour, independent of any other agreement."
- 76 NERY JUNIOR, Nelson. *Princípios do Processo Civil na Constituição Federal*. São Paulo: Revista dos Tribunais, 2004, pp. 93-94.
- 77 Federal Law 1,060, of 2.5.1950, obliges public authorities to grant legal assistance to the needy. Pursuant to the law, said legal assistance comprises (i) legal fees; (ii) court costs and the costs of the Public Prosecution Service and its employees; (iii) expenses with essential publications in newspapers in charge of the disclosure of official acts; (iv) indemnities paid to witnesses who, when employed, shall receive their full salaries from their employers as if they were performing their duties, except for the regressive right against the Federal Authorities in the District Federal and in the Territories, or against the state public authorities in the States; (v) attorney's and expert's fees; (vi) expenses for DNA exams when requested by the judiciary authority in paternity or maternity investigation suits. The law sets forth that the granting of the benefits is to take place through a simple statement in the initial complaint saying that the party is not in position to pay court costs and legal fees, as well as attorney's fees without harming oneself and one's family.
- 78 In Germany, it is said that free justice is only granted when the judge is convinced that the chances of success of the suit are so big that it is justifiable to have the society bear its costs. The matter is regulated by article 114 of the German Civil Procedure ("Zivilprozessordnung").
- 79 GRINOVER, Ada Pellegrini. *Da Class Action for Damages à Ação de Classe Brasileira: os requisitos de admissibilidade*. Revista de Processo nº 101, 2001, p. 11.
- 80 BARROSO, Luís Roberto. *A Proteção Coletiva dos Direitos no Brasil e Alguns Aspectos da Class Action Norte-Americana*. Revista de Processo nº 130, 2005, p. 135.
- 81 Article 81. "The protection of rights and interests of consumers and victims may sought individually or collectively. Sole paragraph. Collective protection be sought when it involves: (...) III - homogenous, individual rights or interests, which shall be construed as those arising from a common origin."
- 82 Article 95. "When the claim is admissible, the conviction shall be a generic one, determining the defendant's liability for the injuries caused."
- 83 GRINOVER, Ada Pellegrini. *Ob. cit.*, p. 27.
- 84 *Ibidem*, p. 26. Also: BARROSO, Luís Roberto. *Ob. cit.*, p. 135.
- 85 Article 91. "Those eligible under article 82 may file class actions in their own name or on behalf of the victims or their successors, to find liability for individual injuries suffered, as described in the following articles."
- 86 *Amchem Products, Inc. v. Windsor*; 117 S.Ct. 2231 (1997).
- 87 GRINOVER, Ada Pellegrini. *Ob. cit.*, p. 15.
- 88 *Id.*, p. 16.
- 89 For examples and a detailed description of supporting precedent, see GRINOVER, Ada Pellegrini. *Ob. cit.*, p. 17-19.
- 90 "For homogenous, individual rights, we have turned to the US system to look at the tests establishing whether the common issues take predominance of individual ones and the utility of collective action in each specific case (predominance and superiority) (...)". Ibero-American Institute of Procedural Law. *Ibero-American Model Code for Collective Actions. Justifications*. Revista do Processo, nº 121, 2005, p. 137.
- 91 Article 2. (...) Paragraph 1. "In order to protect homogenous, individual rights or interests, in addition to the tests referred to in items I and II of this article, we must also assess whether the common issues take predominance over individual ones and the utility of a collective claim in a particular case."
- 92 GRINOVER, Ada Pellegrini. *Ob. cit.*, p. 21-24.



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