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# The fluid recovery in class actions executions in Brazil and the Diffuse Rights Defense Fund (FDD)

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**Abstract:**

In the execution of class actions in Brazil, something that is especially important is the administrative funds for being the current destination of the pecuniary damages. It is an institute that, supposedly, has as main function to operate the fluid recovery. It seeks to repair the legal asset in the best possible way, when a specific injunction is impracticable. However, at the same time, it moves away from the idea of an execution connected to the jurisdiction and the potential of the injunctions determined to operate in the case. Thus, based in an analytical methodology, we seek to study the configuration and performance of the main fund in Brazil, which is Diffuse Rights Defense Fund (FDD). From the origin of its resources to the problem of their proper destination we seek, above all, to highlight the conflict of the need to repair the originally harmed legal asset in the best possible way, with the way the funds operate, that is openly disconnected from the adjudicative process.

**Keywords:** pecuniary executions; class actions; administrative funds; fluid recovery

**Resumo:**

Na execução dos processos coletivos no Brasil uma figura que ganha especial importância é a dos fundos administrativos, o atual destino das condenações pecuniárias. É instituto que, supostamente, tem como principal função operar a

reparação fluida e buscar reparar o bem jurídico da melhor maneira possível quando uma tutela específica torna-se inviável. Entretanto, ao mesmo tempo, afasta-se de uma execução ligada a jurisdição e das potencialidades dos provimentos executivos do juiz. Assim, a partir de uma metodologia analítica, busca-se o estudo da configuração e atuação do principal fundo no Brasil, que é o Fundo de Defesa de Direitos Difusos (FDD). Da origem de seus recursos ao problema de sua adequada destinação, busca-se, sobretudo, atentar ao conflito da tentativa de reparar o melhor possível o bem jurídico originalmente lesado com o funcionamento dos fundos, que é abertamente desvinculado do processo.

**Palavras-chave:** execução pecuniária; processos coletivos; FDD; reparação fluida



## 1. INTRODUCTION

The analysis of the execution is extremely relevant within the class action system, although it has been left a little aside by the doctrine. Nevertheless, it is a fundamental part of the procedure and it is crucial to keep in mind that it is the execution that makes it possible to verify the effects that the class action can operate in the real world.

It is mainly under this approach that the study of execution must be developed: as something that is organic to the jurisdiction and connected to a procedure committed to protect rights.

Thus, this study begins with a panoramic view of the execution of class actions in Brazil. Especially, we analyze how its configuration gave rise to the fluid recovery, because of a legal prediction that allocates the class actions' residual damages to a fund.

Next, we analyze the Diffuse Rights Defense Fund (FDD), a federal fund that can be considered the main one in the Brazilian system because of its organization and bulky resources – therefore a paradigm for the analysis of the others. In addition, it is fundamental to face one of the main problems that the use of the funds involve: its submission to the Annual Budget Act and its connection with the State's administration.

Finally, we analyze its function in contrast to the fluid recovery that was originally drawn in the US legal system and we try to question whether or not the Brazilian institute can be considered a fluid recovery.

## 2. EXECUTIONS OF CLASS ACTIONS IN BRAZIL AND THE ALLOCATION TO FUNDS

In general, the execution of class actions in Brazil unfolds in one way for diffuse and collective rights and in another for individual homogeneous rights; it is a division due to the similarity of the procedures to be adopted in each case.

The diffuse and collective rights *strictu sensu* have a transindividual character, distinguished, mainly, by their indivisibility, their unavailability and their non-patrimonial essence that reflect immensely in the form of their execution. The best form of protection is the preventive one, that acts in a way to avoid the injury to happen; and specific: in case it happens it should be repaired *in natura* and as a fully as possible, so as to preserve the nature of the right and keep it whole for all its owners.[1]

Moreover, a fundamental characteristic of the execution of diffuse and collective rights is their mandatoriness, which is to say that the plaintiff's representative cannot give up executing a favorable decision for the represented ones.[2] So that, in cases of their omission, there is a legal provision[3] deliberately enforcing this special: in these cases, the execution must be promoted by a representative of the Public Prosecution Service.

Thus, in the protection of collective assets, the judicial measures adopted must maintain or restore their fundamental characteristics and guarantee their use in equal conditions of quality and quantity, for all holders. The maintenance of these characteristics can only be done through the complete recomposition of the damaged asset; otherwise, it will not contemplate the plurality of interests connected to it.[4]

In attention to that, there are the provisions on specific injunctions, obligations to do and not to do, both in the Consumer Defense Code (Act n. 8.078/1990), especially in article 84 and in the Civil Procedure Code (Act n. 13.105/2015), in articles 536 to 538.[5] Because of that, there is the possibility to use all sorts of injunctions, aiming at more adequate provisions to protect the rights.

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1. VENTURI, Elton. *Execução da tutela coletiva*. São Paulo: Malheiros, 2000. p. 94.
2. VENTURI, E. *Idem,* p. 106.
3. It is stated in the Popular Action Atc: BRASIL. Lei n.º 4717/1965. Art. 16. Caso decorridos 60 (sessenta) dias da publicação da sentença condenatória de segunda instância, sem que o autor ou terceiro promova a respectiva execução, o representante do Ministério Público a promoverá nos 30 (trinta) dias seguintes, sob pena de falta grave. And in the Public Civil Action Act: BRASIL. Lei 7347/1985. Art. 15. Decorridos sessenta dias do trânsito em julgado da sentença condenatória, sem que a associação autora lhe promova a execução, deverá fazê-lo o Ministério Público, facultada igual iniciativa aos demais legitimados.
4. SALLES, Carlos Alberto de. Execução específica e a Ação Civil Pública. In: MILARÉ, Édis (Coord.). *A Ação Civil Pública após 20 anos: efetividade e desafios*. São Paulo: Editora Revista dos Tribunais, 2005. p. 86.
5. About that: MARINONI, Luiz Guilherme. *Tutela Específica (arts. 461, CPC e 84, CDC)*. São Paulo: Editora: Revista dos Tribunais, 2000 and TALAMINI, Eduardo. *Tutela relativa aos deveres de fazer e*

Regarding the execution of homogeneous individual rights, the system currently adopted is specified in Articles 95 to 100 of the Consumer Defense Code. The standard procedure is that the sentence must generically establish the liability of the defendants for the damages caused. Then, the victims, their successors or others legally legitimated may promote the liquidation and execution of this sentence.

Contrary to what happens in the execution of diffuse and collective rights, the protection of homogeneous individual interests tends to be compensatory, aimed at the payment of a certain amount, instead of a specific protection. Nevertheless, there is still the possibility to use injunctions, such as in cases involving the recall.[6]

However, even with the possibility of promoting a collective execution, usually there is a preference for this biphasic procedure, in which the case is collective only in the beginning. It dies with a sentence and leaves the execution to the individuals. Such option ends up taking away much of the strength and effectiveness of the class action, undermining the collective technique, precisely because it contradicts its aptitude for molecularizing the demands.[7]

Thus, part of the doctrine claims there is a "pulverization of rights"[8] to refer to this individualized analysis of interests or issues that is done by the Courts and whose assessment should have occurred jointly.[9]

This spraying is heavily criticized as it opposes to an effective jurisdictional performance by generating thousands of cases instead of only one. The Courts loose economic and human resources and go against a more practical and efficiency-oriented management. This ends up contributing to an overwhelming workload of the Courts.[10]

In this sense, there is a tendency to choose techniques that seek to promote a procedure that is more aligned with the fundamental objectives of the homogeneous individual rights. Incentives are given for the defendants themselves to take the necessary measures to repair the injured individuals when they are easily identifiable.[11]

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*não fazer: e sua extensão aos deveres de entrega de coisa (CPC, arts. 461 e 461-A; CDC, art.84)*. 2. ed. rev., atual. ampl. São Paulo: Editora Revista dos Tribunais, 2003.

6. ALMEIDA, Gustavo Milaré. *Execução de Interesses Individuais Homogêneos: Análise crítica e propostas*. São Paulo, 2012. 247 f. Tese (Doutorado) – Universidade de São Paulo. f. 112.
7. GAGNO, Luciano Picoli. Tutela mandamental e efetividade dos direitos individuais homogêneos. *Revista dos Tribunais*, vol. 953, p. 223-257, 2015. p. 224.
8. This term is especially used and justified by Professors Aluísio Gonçalves Castro Mendes, Gustavo Osna and Sergio Cruz Arenhart in: MENDES, Aluísio Gonçalves Castro; OSNA, Gustavo; ARENHART, Sérgio Cruz. Cumprimento de sentenças coletivas: da pulverização à molecularização. *Revista de Processo*, v. 222, p. 41-64, 2013.
9. MENDES, Aluísio Gonçalves Castro; OSNA, Gustavo; ARENHART, Sérgio Cruz. Cumprimento de sentenças coletivas: da pulverização à molecularização. *Revista de Processo*, v. 222, p. 41-64, 2013. p. 44.
10. MENDES, A. G. C.; OSNA, G.; ARENHART, S. C. *Idem*, p. 47.
11. This option is openly raised by Luciano Picoli Gagno em: GAGNO, Luciano Picoli. Tutela mandamental e efetividade dos direitos individuais homogêneos. *Revista dos Tribunais*, vol. 953, p. 223-257, 2015.

In cases of injury to bank customers, for example, the financial institution itself should make the deposits into their customers' accounts.

It is about using techniques that do not require an individual action of the injured party. Although being the easiest alternative within the current system, it is by far the most inefficient and distant to the fundamental objectives of the Brazilian class action.

In summary, we can perceive that, in general, in order to repair injuries to diffuse, collective and individual homogeneous rights, techniques that have the ability to reconstitute as much as possible the damaged legal asset are privileged, drifting away from the techniques applied on individual claims.

However, if this is not possible, the only alternative is to resort to an ordinary technique that is not always efficient, either due to the very nature of the damaged property or due to flaws that are inherent of the judicial system. Considering that, the legislation itself sought to create a safeguard so that, even in this situation, there could be an attempt to hold responsible the ones who caused the injury and also to try to recover the legal asset as much as possible. We refer to the provisions of article 13 of the Public Civil Action Act (Act n. 7.347/1985) that brought the so-called fluid recovery, allocating this money to funds that, in turn, will try to perform this recomposition.

## 3. PARADIGM FOR ANALYSIS: THE FDD

The Public Civil Action Act, might not be the first legislation on collective rights, but was the first one that predicted the possibility of allocating the amount from pecuniary damages in collective cases to a fund, due to the impossibility of full compensation.

On federal level, this fund was initially regulated by Decree n. 92.302/1986, subsequently repealed by Decree n. 407 of 1991, which was again repealed by Decree n. 1.306/1994, which is currently valid, with some amendments from Decree n. 96.617 /1988. The fund is denominated Diffuse Rights Defense Fund (FDD). The Consumer Protection Code, in turn, made reference to the fund that was created by the Public Civil Action Act as the recipient of any amount that might be residual in consumer class actions.

The FDD was chosen as paradigm for this analysis not only because of its detailed regulation, but also for being the most relevant and resourceful fund. In addition to that, there is a serious issue regarding the lack of standardization of the states' funds in terms of regulation.[12]

12. A major problem to study the state funds is the lack of their implementation by many federated states. Also because of the federative system, it is difficult to verify their operation. Only to have a parameter: in a survey carried out by the State Public Prosecutor's Office of Goiânia in 2013, on the situation of the state funds of the Environment, Diffuse Rights and Forests, it can be seen that the states of Alagoas, Amazonas and Espírito Santo, did not have any funds for this area. The other states, mostly adopted the Special Fund for the Envirolment (FEMA). Survey available at: <http:// www.mpgo.mp. br/portal/system/resources/W1siZiIsIjIwMTMvMDQvMTYvMTJfMDNfMjRfOTlfZ

Even so, many questions remained about the operation of the FDD, especially regarding the duties of its management council. Therefore it was edited the Act n. 9.008/1995, which created the Federal Board of the Diffuse Rights Defense Fund (CFDD) inside the organizational structure of the Ministry of Justice. It was established the main rules regarding its purpose, the origins of its resources and their application.

Act n. 9.008/1995, already in its article 1, section 2, brings the resources that can integrate the FDD. Basically, they are the judicial damages from class actions that seek to protect the environment, consumers, legal assets or rights of artistic, aesthetic or historical value and other diffuse or collective interests. In addition, FDD funds include fines and damages resulting from the protection of people with disabilities and fines against violations of the economic order.

Although being created in 1985, at least until 2005, the FDD had a negligible revenue level, considering the demands involving damages on collective rights. This may be due to not only the lack of adequate regulation of the origins of the resources, but also due to the lack of knowledge about how the FDD operated.[13] However, there has been a gradual increase in its revenue over the last 11 years.

In addition, it is important to consider the percentage that each of the categories contribute to the revenue of the fund. In this sense, data survey conducted by Professor Albano Francisco Schmidt[14] and complemented in this study seems fundamental.

**Table 1. Total revenue of the FDD (per year)**

| YEAR | REVENUE | % OF REVENUE |
|---|---|---|
| 2005 | R$4.534.793,04 | 100% |
| 2006 | R$11.682.120,87 | 100% |
| 2007 | R$30.038.220,75 | 100% |
| 2008 | R$73.139.111,42 | 100% |
| 2009 | R$52.196.887,98 | 100% |
| 2010 | R$31.161.751,83 | 100% |
| 2011 | R$44.240.709,38 | 100% |
| 2012 | R$58.128.704,71 | 100% |
| 2013 | R$121.870.115,27 | 100% |
| 2014 | R$192.354.624,49 | 100% |

nVuZG9zX2VzdGFkdWFpc19kZV9tZWlvX2FtYmllbnRlX2VfZGlyZWl0b3NfZGlmdXNvcy5wZGYiXV0/fundos_estaduais_de_meio_ambiente_e_direitos_difusos.pdf>

13. SCHMIDT, Albano Francisco. Os primeiros 30 Anos do Fundo De Defesa De Direitos Difusos sob a luz da Análise Econômica Do Direito: "contribuintes", projetos apoiados e novas perspectivas sociais. *Argumentum Revista de Direito*, n. 15, p. 201-226, 2014. p. 216.
14. The reserach originally made by professor Albano Schmidt brings data from the last 10 years of the FDD revenue, from 2005 until half of 2014. Based on the data already collected by the author we use the same methodology of cataloging and organizing it, completing it with the data of the end of 2014 and 2015.

| YEAR | REVENUE | % OF REVENUE |
|---|---|---|
| 2015 | R$564.272.628,92 | 100% |
| TOTAL | R$1.183.619.668,66 | 100% |

It is possible to verify that the FDD resources from fines and damages on cases that involve the environmental protection represented only 0.83% of the fund's total revenues in recent years. This raises many to questions related to whether the amounts collected adequately mirror the reality in Courts:[15] either the injunctions on the cases are being highly efficient and providing an *in natura* reparation; or actions are not moving forward due to the complexity and high costs that this kind of case usually involves.

**Table 2. Fines and damages of the FDD in the Environmental Protection (per year)**

| ENVIRONMENT | FINES + DAMAGES | % OF REVENUE |
|---|---|---|
| 2005 | R$43.840,00 | 1,04% |
| 2006 | R$29.288,36 | 0,26% |
| 2007 | R$840.120,92 | 2,80% |
| 2008 | R$1.788.225,28 | 2,46% |
| 2009 | R$1.106.917,53 | 2,23% |
| 2010 | R$620.694,33 | 2,01% |
| 2011 | R$3.445.073,02 | 8,31% |
| 2012 | R$679.571,20 | 1,19% |
| 2013 | R$1.008.904,22 | 0,84% |
| 2014 | R$152.226,27 | 0,08% |
| 2015 | R$192.407,34 | 0,03% |
| TOTAL | R$9.907.268,58 | 0,83% |

Fines and damages related to Consumer protection represent approximately 1.25% of total revenue since 2005. It is known that consumer actions are thousands in the Brazilian judiciary, which again leads us to inquire if the execution is being so effective that there is no need to direct residual values to the fund, or it is the opposite: if there is a fundamental problem and the class actions are not even making to this stage.[16]

**Table 3. Fines and damages of the FDD in the Consumer Protection (per year)**

| CONSUMER | FINES + DAMAGES | % OF REVENUE |
|---|---|---|
| 2005 | R$1.144.097,23 | 27% |
| 2006 | R$245.206,03 | 2,16% |
| 2007 | R$713.451,71 | 2,38% |
| 2008 | R$3.801.021,17 | 5,22% |

15. SCHMIDT, Albano Francisco. *Op. Cit.*, p. 217.
16. SCHMIDT, A. F. *Idem*, p. 218.

| CONSUMER | FINES + DAMAGES | % OF REVENUE |
|---|---|---|
| 2009 | R$202.142,85 | 4,01% |
| 2010 | R$305.572,89 | 1% |
| 2011 | R$315.978,33 | 2,1% |
| 2012 | R$3.767.691,26 | 6,71% |
| 2013 | R$1.546.523,04 | 1,2% |
| 2014 | R$2.101.163,13 | 0,45% |
| 2015 | R$760.596,32 | 0,12% |
| TOTAL | R$14.903.443,96 | 1,25% |

On the other hand, the reports consulted – available on the Ministry of Justice website – show that 6.95% of the total amount collected, almost fifty million Brazillian Reais that are about 16 million US dollars, and are under the caption "other collective and diffuse interests".

Professor Schmidt criticizes the fact that such a large amount is under a vague caption. This would contradict the FDD guidelines, that determines the injured rights to be clearly revealed, in order to make it possible to direct the resources for their proper reparation. In addition, this generic figure jeopardizes the transparency of the fund and also the analysis of the compatibility of what has been developed by the CFDD and the objectives of its creation.[17]

**Table 4. Fines and damages of the FDD in other Collective and Diffuse Interests Protection (per year)**

| OTHER INTERESTS | FINES + DAMAGES | % OF REVENUE |
|---|---|---|
| 2005 | R$443.548,76 | 10,5% |
| 2006 | R$366.219,35 | 3,22% |
| 2007 | R$683.975,15 | 2,28% |
| 2008 | R$2.595.334,85 | 3,57% |
| 2009 | R$1.854.965,82 | 3,73% |
| 2010 | R$5.486.265,20 | 17,80% |
| . | | 15,42% |
| 2012 | R$6.420.152,64 | 11,26% |
| 2013 | R$17.037.216,16 | 14,16% |
| 2014 | R$11.287.502,51 | 5,87% |
| 2015 | R$29.737.931,18 | 5,28% |
| TOTAL | R$82.312.451,33 | 6,95% |

Finally, the data collection from offenses that involve the economic order show that in the last years, their protection represented at least 87.53% of the FDD revenues. We highlight that, in the year of 2015, it reached the percentage of 93.02%.

17. SCHMIDT, A. F. *Idem*, p. 218.

**Table 5. Fines and damages of the FDD in the Economic Order Protection (per year)**

| ECONOMIC ORDER | FINES + DAMAGES | % OF REVENUE |
|---|---|---|
| 2005 | R$2.530.573,64 | 59,92% |
| 2006 | R$10.715.548,85 | 94,18% |
| 2007 | R$27.693.861,48 | 92,42% |
| 2008 | R$64.114.659,78 | 88,12% |
| 2009 | R$46.026.106,42 | 92,58% |
| 2010 | R$23.863.448,07 | 77,44% |
| 2011 | R$30.536.112,68 | 73,65% |
| 2012 | R$45.642.670,28 | 80,06% |
| 2013 | R$91.857.098,46 | 76,36% |
| 2014 | R$169.098.785,48 | 87,91% |
| 2015 | R$524.027.225,58 | 93,02% |
| TOTAL | R$1.036.106.090,72 | 87,53% |

Therefore, it is possible to state that the overwhelming source of revenue of the FDD comes not from judicial convictions in class action, according to the provisions of the Public Civil Action ACt, but from administrative infractions determined by the Administrative Council of Economic Defense (CADE), which is responsible for this kind of control. This is related to, above all, the high specialization and expertise of this instance that makes its decisions extremely difficult to change in the adjudication.[18] In addition, it seems important to take into consideration how this impact, or should impact, on the performance of fund managers, especially the CFDD.

It is also worth noting the inclusion of the § 2o in article 13 of the Public Civil Action Act, by Act n. 12.288/2010. It states need for the allocation of resources for damages on cases involving ethnic discrimination, according to the guidelines of the National Council for the Promotion of Racial Equality or the local Racial Equality Promotion Councils, depending on the extension of the damages.[19]

Regarding the allocation of resources, it usually occurs through agreements or specific transfer contracts with public agencies, at federal, state or municipal level and with nonprofit organizations.[20] These partnerships are regulated by administrative acts

18. About CADE's work on the economic order's defense: FORGIONI, Paula. *Os Fundamentos do Antitruste*. 8. ed. rev. atual. São Paulo: Revista dos Tribunais, 2015.
19. BRASIL. Lei n.º 7.347/1985. Art. 13. § 2o Havendo acordo ou condenação com fundamento em dano causado por ato de discriminação étnica nos termos do disposto no art. 1o desta Lei, a prestação em dinheiro reverterá diretamente ao fundo de que trata o caput e será utilizada para ações de promoção da igualdade étnica, conforme definição do Conselho Nacional de Promoção da Igualdade Racial, na hipótese de extensão nacional, ou dos Conselhos de Promoção de Igualdade Racial estaduais ou locais, nas hipóteses de danos com extensão regional ou local, respectivamente.
20. A celebração dos convênios é regulada, principalmente, por meio da Portaria Interministerial nº 507, de 24 de novembro de 2011 do Conselho Federal Gestor do Fundo de Defesa dos Direitos Difusos.

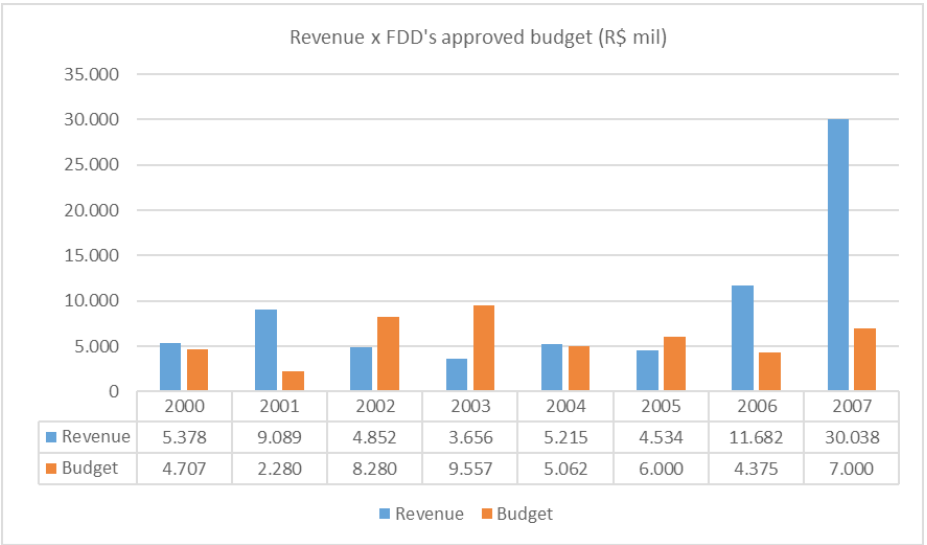
such as resolutions that establish the general guidelines for their signing, execution, supervision and accountability.

For the selection, the interested parties must submit to the CFDD projects that are related to the criteria and requirements established by the decrees. The project must include all the basic data of the recipient and the project that will be financed, especially: (i) the description of the project; (ii) the justification with the link between the proposal and the guidelines of the fund's program with the expected results; (iii) an estimative of the necessary financial resources; (iv) a prediction of the deadline for completion; (v) and information about the technical capacity of the proposer to conduct the project.

However, before allocating revenues for projects, it is fundamental that the fund has its resources secured in the annual Budget Act.

## 4. RESOURCES AND THEIR DESTINATION: THE PROBLEM OF THE FDD'S SUBORDINATION TO THE ANNUAL BUDGET ACT

The FDD's resources depend a great deal of the Annual Budget Act, since it integrates the public administration, with its management council, the CFDD, linked to the Ministry of Justice. Thus, the doctrine heavily criticizes this subordination that could deplete its purposes, since because of a political decision not to grant budgetary credits to the fund, its performance would be compromised. This concern is plausible, especially since it indeed happens quite usually. An analysis carried out by Arthur Badin shows that, from 2000 to 2007, budgetary credits approved for the FDD were significantly lower than the revenues:




| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|---|---|---|
| Revenue | 5.378 | 9.089 | 4.852 | 3.656 | 5.215 | 4.534 | 11.682 | 30.038 |
| Budget | 4.707 | 2.280 | 8.280 | 9.557 | 5.062 | 6.000 | 4.375 | 7.000 |

Source: BADIN, Arthur. O fundo de defesa de direitos difusos. *Revista de Direito do Consumidor*, ano 17, n. 67, p. 62-99, 2008. p. 85. Author's formatting.

The logical option would be the full availability of what was collected in a year, for the next year, since it is an amount with a specific purpose. However, it is not what happens when we analyze the resources available to be used in projects by CFDD. This situation becomes even more problematic when we verify that the State is also one of the biggest defendants in the Judiciary.[21] However, the funds and their configuration were a choice made by the legislator. Much censurable it might be, it seems difficult to be ignored by the Courts.

Another major concern of the doctrine is the proper application of the amount available in the fund considering the original plaintiffs. Professor Elton Venturi, for example, defends that even after integrating the fund, the values must be directed to the benefit of the injured members of the class action – specifically aiming to satisfy their common interests.[22] Therefore, there is an undoubtful link between the origin and application of the resources, even though the legislation has left a wide margin of discretion for the fund management council.

However, the only parameter established by the legislation is article 7 of Decree n. 1.306/1994 that determines that the use of the resources should be, as much as possible, related to the nature of the infraction or damage caused. Thus, values from pecuniary convictions in the consumer protection must be applied in this area, instead of in the environmental area, for example.

The doctrine also defends the importance of the use of the revenues in the same geographic area where the damage occurred. Although there is no specific rule that determines so, it seems a logical alternative considering the best protection of those who were more directly harmed.[23]

The use of the fund's resources in an attempt to repair the damaged legal asset does not surprise considering its own purpose. On the other hand, its use in the promotion of educational and scientific events and in the edition of informational material specifically related to the offense or damage caused also appears to be justifiable, from a prospective idea of protection and considering that many damages will not allow any kind of reparation.[24]

This seems to be the case predicted by § 2 of article 13 of the Public Civil Action Act regarding the promotion of programs related to ethnic equality and diversity, on damages resulting from ethnic discrimination actions.

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21. On this matter see: BRASIIL. Conselho Nacional de Justiça. *100 Maiores Litigantes*. Brasília, 2011. And: FONSECA, Juliana Pondé. *O (Des)controle do Estado no Judiciário brasileiro: direito e política em processo*. Curitiba, 2015. 274 f. Tese (Doutorado) – Universidade Federal do Paraná.
22. VENTURI, Elton. *Execução da tutela coletiva*. São Paulo: Malheiros, 2000. p. 158.
23. LEITE, José Rubens Morato; DANTAS, Marcelo Buzaglo. Algumas considerações acerca do Fundo para reconstituição dos bens lesados. *Revista dos Tribunais*, v. 726, p. 71-82, 1996. p. 81.
24. MACEDO JÚNIOR, Ronaldo Porto. Propostas para a reformulação da Lei que criou o Fundo de Reparação de Interesses Difusos Lesados. In: MILARÉ, Édis (Coord.) *Ação Civil Pública: Lei 7.347/1985 – 15 anos*. 2. ed. rev. atual. São Paulo: Editora Revista dos Tribunais, 2002. p. 814.

A more controversial issue refers to the use of fund's resources in the modernization, acquisition and improvement of the equipment of the State agencies responsible for activities related to the protection of diffuse and collective interests. Such an extension is dangerous and undesirable, since it opens the possibility to use resources in activities that are completely diverted from the class action's purpose.[25]

Although some authors, such as Arthur Badin, defend this initiative stating that it was attentive to the scarcity of public resources[26] others – rightly – claim that this possibility would not be justifiable, since it would go against the original intention of the legislator.[27]

In addition, there is a large gap on the supervision of how the fund's resources are being used. The process of selecting proposals is relatively well defined and objective. However, there is a great margin of discretion for the fund's council in this choice, especially since the establishment of priority areas is defined by administrative act.

Thus, there is a very strong criticism for the fact that the use of the resources from the funds is limited to the simple presentation of projects by the interested parties with the approval, or not, by the members of the CFDD.[28]

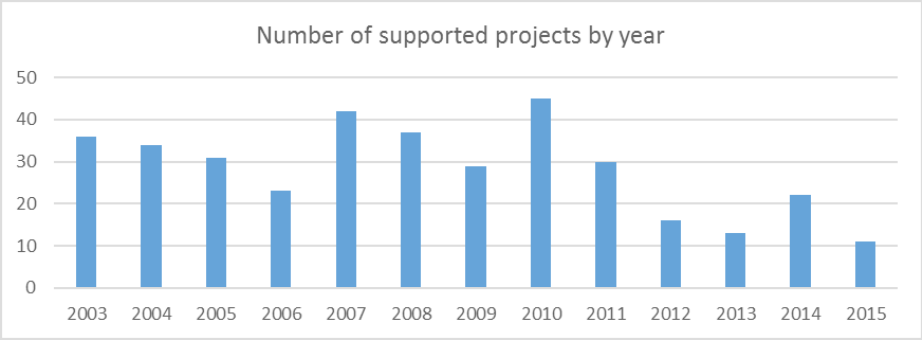
When analyzing the Public Calls of the CFDD, in particular the last one published, the n. 01/2015, we can see that there is a thematic division between five main areas, each with its own Call: (i) environment, (ii) consumer (iii) antitrust (iv) historic patrimony and (v) other diffuse rights.

The Call I, for the environment, has prioritized projects involving sustainable actions, promotion of traditional practices in rural communities, protection of the environment through the sustainable use of natural resources. The selected projects for Calls II (consumer) and III (competition) focused on projects that involved the conscious consuming and the promotion of an antitrust culture focusing on the more needing communities.

Projects selected for Calls IV (historic patrimony) and V (other diffuse and collective rights) involve valuing linguistic diversity – in particular, projects that focused on the Brazilian Language of Signs (LIBRAS), the fight against child labor and the promotion of racial equality. Also, preserving the historic patrimony from the human, environmental and architectural points of view.

25. MACEDO JÚNIOR, R. P. *Idem*, p. 814.
26. BADIN, Arthur. O fundo de defesa de direitos difusos. *Revista de Direito do Consumidor*, ano 17, n. 67, p. 62-99, 2008. p. 81.
27. MILARÉ, Édis. SETZER, Joana. CASTANHO, Renata. O compromisso de ajustamento de conduta e o fundo de defesa de direitos difusos: relação entre os instrumentos alternativos de defesa ambiental da Lei 7.347/1985. *Revista de Direito Ambiental*, n. 38, p. 9-22, 2005. p. 9.
28. DELLORE, Luiz Guilherme Pennachi. Fundo federal de Reparação de Direitos Difusos (FDD): aspectos atuais e análise comparativa com institutos norte-americanos. *Revista de Direito Ambiental*, vol. 38, p. 124-139, 2005. p. 131.

A huge number of projects are presented every year, and it keeps increasing. It is mainly due to a better knowledge about the FDD. Just to illustrate the point, in 2014, 526 working proposals were sent to the CFDD (257 in the environment area, 213 in historical and other diffuse rights' area and 56 in the consumer area). Of those, 29 were selected as priority, but only 11 projects received resources in 2015.[29]




Source: BRASIL. Ministério da Justiça. Secretaria Nacional do Consumidor. Relatório de Gestão do Exercício de 2015. Brasília, 2016. p. 29. Author's formatting.

Although FDD's revenue collection has increased in recent years, the number of projects supported has been decreasing, and is well below expectations, considering the relation between resources available and the reversions to the Fund.

In addition, it should be noted that although the supported projects are undoubtedly deserving of this funding, many doubts remain about their connection with those who were plaintiffs of the action that originated these resources. Also, it should be noticed that there aren't any public reports detailing these projects' performance and results. This, in a certain way, harms the accountability on the allocation of the values that have originated from an injury to the community.

## 5. FLUID RECOVERY?

As previously noted, there would be a fluid recovery system in Brazil because of the allocation of the residual resources of class actions to a fund. This fund would be entrusted to perform the reparation of the damaged legal assets in an indirect manner, in the best possible way.

Such technique would be inspired by the fluid recovery in the US system, which takes place, precisely, in an attempt to offer a suitable allocation to the residual amount left in the class actions' damages.

It is above all a recognition of the influence that the US class action had on the Brazilian system, since it comes from it - albeit indirectly, through the Italian

29. BRASIL. Ministério da Justiça. Secretaria Nacional do Consumidor. *Relatório de Gestão do Exercício de 2015*. Brasília, 2016. p. 28.

doctrine; also, it's justifies the US class action to be the most important source in the interpretation and application of our collective procedural law.

However, in a more detailed analysis it is possible to verify several points in which the fluid recovery of the Brazilian system differs from the institute in US system. Mainly, because of the technique of the funds used in Brazil. So, it is not only an ontological difference, but also the very framework that its application in both systems ended up getting.[30]

Above all, the fluid recovery in the United States is jurisdictional. That is to say, the institution that determines how to apply the residual amount are the Courts, unlike the Brazilian system in which the application of resources is given by the fund's management council linked to the Public Administration.

In this sense, some authors claim that in order to carry out a comparative study of the fluid recovery between the Brazilian system and the US legal system, considering the FDD, it would be better to compare it to the fund created by the US environmental legislation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Professor Carlos Alberto de Salles defends this position saying that the similarity comes mainly from the fact that CERCLA Superfund is also an administrative fund, linked to a government agency, the Environmental Protection Agency (EPA) that determines the destination of its resources.[31]

Nevertheless, it is important to highlight that the CERCLA Superfund has a very complex mechanism that involves funding not only through class action damages, but mostly through taxation on the chemical and petroleum industries as well as a very strict liability system.[32]

## 6. CONCLUSIONS

At the end of the analysis carried out in this research paper, several questions remain, especially since fluid recovery in Brazil does not match any other institute in comparative law; neither it's compatible with the system of collective procedure that we hope to have.

30. GIDI, Antonio. *A Class Action como instrumento de tutela coletiva: As ações coletivas em uma perspectiva comparada*. São Paulo: Editora Revista dos Tribunais, 2007. p. 17.
31. SALLES, Carlos Alberto de. *Execução Judicial em Matéria Ambiental*. São Paulo: Revista dos Tribunais, 1998. p. 309-315.
32. To start a study about the CERCLA Superfund see: HIRD, John A. *Superfund: The Political Economy of Environmental Risk*. Baltimore: The Johns Hopkins University Press, 1994 and JUDY, Martha L. PROBST, Katherine N. Superfund at 30. *Vermont Journal of Environmental Law*, vol. 11, p. 191-247, 2009.

The Brazillian system cannot be considered a fluid recovery as proposed by US system. It is not a mechanism linked to the Courts, nor is it connected to the case that originated the resources.

However, it is also not possible to compare it bluntly to other institutes like the CERCLA Superfund, only because they both are administrative funds. Their purpose, in essence, is completely different, especially considering the destination of resources in both cases.

In addition, the fluid recovery through funds that was developed in Brazil has several inconsistencies with an execution that is effectively linked to the jurisdiction. Its current configuration demands an urgent reflection on this matter and in the way we want to develop our collective procedure.

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