

CIVIL LIABILITY OF MANAGERS OF EFPCs: COMPARISON BETWEEN  
COMPLEMENTARY LAW 109 AND THE BRAZILIAN CORPORATIONS LAW

03 JUNE 2019

The evolution of the Brazilian economy in recent years has brought new challenges to those responsible for the management of closed private pension entities (EFPCs), governed by Complementary Law No. 109/2001 (LC 109) and by Law No. 6,404/1976 (the Brazilian Corporations Law). Unlike companies that have the purpose of obtaining profit for their shareholders and other stakeholders involved, however, EFPCs aim at the management of funds for the payment of pension benefits to their beneficiaries.

The adoption of bad management practices and the commission of illegal acts have been closely monitored by stakeholders since the wave of investigative proceedings inaugurated with Operation Car Wash and related matters. In the context of the liability of these managers for the actions performed in the management of entities and companies, we observed an increase in the number of civil liability actions against these agents seeking to obtain compensation for damages caused to these organizations.

This increased vigilance, coupled with a positive evolution of corporate governance of entities and companies, with the adoption of good practices for compliance, ethics, and management, ushered in a new era in relation to the liability of professional managers in conducting business, investments, and relations with civil society in general.

It is therefore appropriate to analyze the main aspects and limits applicable to these managers when committing acts that bring about damages to the entities or companies managed. In this article, we will briefly discuss the differences and similarities in the civil liability rules applicable to EFPCs and companies, by comparing the provisions of LC 109 and the Brazilian Corporations Law.

LC 109, which should be read in conjunction with Resolution No. 4,661/2018, delimits the scope of civil liability of directors and officers of EFPCs in its article 63. The provision states that directors and officers<sup>[1]</sup> shall be liable for any damages or losses they cause, whether by action or omission. In addition, articles 35 and 39 establish a duty to inform the regulatory bodies regarding the executive officer responsible for the application of the entity's resources and order that the other members of the executive board be jointly and severally liable with said officer for the damages and losses to which they contributed.

In the Brazilian Corporations Law, civil liability is delimited by article 158. It establishes that the director or officer must repair the damages that they cause when they act out of fault or willful misconduct and/or violate the law or the company's by-laws. Paragraph 1 of the article establishes the joint liability of the other directors or officers only in the case of collusion, negligence, or contribution to the act generating the damage, granting them the possibility of withdrawal of joint and several liability when they unequivocally express an opinion contrary to the decision or harmful act committed.

In addition, the establishment of joint and several liability, according to paragraph 2 of the article, is independent of the duties assigned to each of the directors or officers, all of which must contribute to the fulfillment of the duties imposed by the law.

This establishment of joint and several liability independently of the functions assigned in the bylaws is removed in the case of directors and officers of publicly-held companies, as set forth in paragraph 3 of the provision. The directors and officers will also be jointly and severally liable with their predecessors if they note the commission of illicit and/or harmful acts by the old management and fail to report this to the general meeting of the company.

The civil liability of managers of EFPCs and companies will always depend on proof of the wrongful act, the existence of intent or guilt, and proof of the causal link between such act and the loss actually suffered by the entity or company. This analysis must be done on a case-by-case basis, since it is necessary to conduct factual adjustment to each of the above-cited requirements.

In conducting this exercise in comparison, it is possible to observe that there are several similar elements in LC 109 and the Brazilian Corporations Law for the civil liability of directors and officers. The great difference lies in the establishment of joint and several liability among them: while in LC 109 it is imputed without exemplification of the elements that could remove it, in the Brazilian Corporations Law this possibility is clearly expounded, either in the case of a vote to the contrary or in the obligations to report to the competent organs when any unlawful act is noted.

Despite this difference, the same elements mitigating joint and several liability contained in the Brazilian Corporations Law apply mutatis mutandis to the directors and officers subject to LC 109. The core of the fiduciary duties of management (diligence, loyalty, good faith, and information, among others) is applicable to all members of the management in Brazil. Therefore, it is necessary to adopt the same criteria of good practices, compliance, and ethics in both EFPCs and companies.

The conceptual difference in civil liability within the context of EFPCs and the companies is that directors and officers of entities, because they manage funds from third parties in order to guarantee retirement rights, should be even more careful in conducting their activities. In turn, the directors and officers of companies, whose objective is profit, always act with the intention of obtaining pecuniary advantages for their shareholders, although also they must shroud themselves with various precautions. Of course, this directly influences the actions of these two types of managers, as well as the elements establishing their civil liability.

---

<sup>[1]</sup> They are also civilly liable for the damages caused by proxyholders with management powers, members of statutory boards {boards set up in the bylaws}, officers {administrators, managers} of promoters or incorporators {sponsors or assignors}, actuaries, independent auditors, management assessors, and other professionals providing technical services to the entity.