LITIGATION

ACTION FOR LIQUIDATION OF JUDGMENT BY THE COMMON PROCEDURE: GUARANTEE OF THE ADVERSARIAL PROCESS AND A FULL DEFENSE

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The Public Civil Actions Law (Law No. 7,347/85) precedes the Federal Constitution of 1988 (CF/88) and seeks to ensure to citizens, since it was approved, better instruments of access to the Judiciary. In addition, collective actions guarantee wide-ranging efficacy (*erga omnes* effects), make it possible to concentrate claims, speed up the judicial process, and provide (procedural, financial, and personal) savings to the Judiciary. It is an effective instrument to settle claims.

In procedural advances and advances in scope, CF/88 promoted expansion of the subject matter of public civil actions to also include protection of individual and collective rights by representative entities, and further expansion through Law No. 11,448/07, which established the current wording of article 5 of the Public Civil Actions Law. According to the article, the following have standing to bring an action: the Public Prosecutor's Office; the Public Defender's Office; the Federal Government, the States, the Federal District, and the Municipalities; municipalities, agencies, public companies, foundations, and government-controlled companies; and associations, provided that certain particularities are observed (paragraphs a and b).

It was also after the Consumer Protection Code that the scope and subject matter of public civil actions were expanded, with confirmation of the possibility of filing a collective action for the protection of "homogeneous individual interests or rights, understood as those arising from a common origin" (article 81, III, of the Consumer Protection Code). It is this point that we will examine next.

Collective protection for the defense of "homogeneous individual interests or rights" requires the existence of an original fact that qualifies it as a "homogeneous individual" interest. There is an initial element of identity of the fact that extends to all those affected by that very same element: the collapse of a building, the rupture of a dam, the failure to provide sewage to a region. It is the life event that will indicate who are affected by the judgment that will be handed down in the collective action, as highlighted by the STJ case law and the best legal scholarship:

"The common origin, which establishes the homogeneous individual interest, refers to a specific fact or peculiar right that is universal to the countless individual legal relations, from which there will be a procedural connection between the interests, characterized by the identity of the proximate or remote cause of action" (STJ, REsp 1599142/SP, opinion drafted by Justice Nancy Andrighi, 3rd Panel, decided on September 25, 2018)

"The Brazilian legislator wished to value the common genesis existing among homogeneous individual rights (claims originating from the same fact of the supplier's liability), inspiring itself in the class action of the law of the United States in order to provide the consumer with accessible, swift, uniform, and efficient judicial relief" (STJ, REsp 1281023/GO, opinion drafted by Justice Humberto Martins, 2nd Panel., decided on October 16, 2014)

"The common origin, insofar as they arise as a consequence of the same fact or act, and the homogeneity that characterizes them imply the loss of their atomic and structurally isolated condition and their transformation into interests worthy of supra-individual procedural treatment."[1]

"Finally, homogeneous individual rights are those of a common origin (article 81, sole paragraph, III, Consumer Protection Code). Despite the criticism made against the legal definition, there is no doubt that the owners of homogeneous individual rights can legitimately act in court, in atomized lawsuits, in their own name, defending their own interests. However, the treatment as a category of transindividual right derives from a legislative option, for the sake of harmony of judgments and, above all, procedural economy. A homogeneous individual right is the one that affects more than one subject due to a common genesis, whose object is divisible. Normally, it is the collectivity of consumers harmed by the acquisition of the same defective product that holds the ownership of the homogeneous individual right."[2]

The main characteristic of the judgment handed down in a public civil action for the protection of homogeneous rights is that it is generic (article 95 of the Consumer Protection Code).[3] In other words, it grants the real beneficiaries of the judicial relief the option to liquidate and execute the judgment in an autonomous individual action (article 97 of the Consumer Protection Code).[4] [5]

In individual actions for liquidation of the collective judgment, the alleged beneficiary presents the elements, evidence, and theories to prove compliance with the generic terms of the judgment and his right to enforce the judicial instrument. The process of individual liquidation of a collective judgment, therefore, is not a simple procedural phase in which a mere arithmetic calculation is performed for direct execution of the obligation determined in the generic judgment provided for in article 95 of the Consumer Protection Code. Quite to the contrary.

Under the rule of law, the defendant is guaranteed the full exercise of its constitutional right to a full defense, an adversarial proceeding, and due process of law in the ordinary liquidation action. The defendant shall have the opportunity to present an objection and produce the evidence provided for by law that guarantees it the unavoidable exercise of an adversarial process, under the exact terms of articles 509, II, and 511 of the Code of Civil Procedure (CPC):

Article 509. When the judgment orders payment of an illiquid amount, its liquidation shall be carried out, at the request of the judgment creditor or debtor: (...)

II - by the common procedure, when there is a need to allege and prove a new fact.

(...)

Article 511. In liquidation by the common procedure, the judge shall order the respondent, through the person of its attorney or of the law firm to which it is bound, to file an answer, if it so wishes, within fifteen (15) days, observing, as applicable, the provisions of Book I of the Special Part of this Code

This is a true trial proceeding, with broad and exhaustive review,[6] in which all facts, allegations, and documents that may effectively legitimize and justify the plaintiff's own claim (i.e., new facts) must be verified and analyzed. The suitability of the claim to the objective limits of the collective judicial relief and all obstacles, objections, impugnations, and defenses raised by the defendant will also be analyzed on this occasion.

This is what the STJ and doctrinal teachings guarantee, highlighting the need for ample review during the individual liquidation of the collective judgment to verify the claim by the party allegedly having standing, under penalty of violation of the constitutional guarantees of the defendant:

"MOTION TO RESOLVE DIVERGENCE. INDIVIDUAL EXECUTION OF COLLECTIVE JUDGMENT. INFLATION ADJUSTMENTS. NEED FOR PRIOR LIQUIDATION. 1. A judgment resulting from a collective decision is certain and precise, considering that certainty is an essential condition for judgments and the judgment clearly establishes the rights and obligations that enable its execution, however, it is not vested with the liquidity required for spontaneous compliance with the decision, and the recipients *(cui debeatur*) and extent of the compensation *(quantum debeatur*) must still be ascertained in liquidation. It is only at this moment, therefore, that individualization of the portion that will fall to the judgment creditor according to the judgment issued in the collective action will take place. 2. The execution of a generic judgment that orders payment of adjustments to savings accounts must be preceded by a liquidation phase through the common procedure, which will complete the partial review of the collective action by proving new facts determinant of the potential beneficiary in the relationship of substantive law, as well as the amount of the payment owed, ensuring the opportunity for the debtor to defend himself fully and in an adversarial process." (STJ, Emb Div no REsp No. 1.705.018/DF, opinion drafted by Justice Luis Felipe Salomão, 2nd Section, decided on December 9, 2020)"[7]

"Nelson Nery and Rosa Nery state that liquidation is an action for review of a constitutive and integrative nature. Luiz Rodrigues Wambier also understands that the liquidation is a new action, although filed in the same case. According to Araken de Assis, there is successive accumulation of claims *in simultaneo processu*, with regard to the original ruling of the case. Considering the purpose of the liquidation, one can state that it has the nature of an action, as do counterclaims, using the same procedural basis as the case that generated the judgment (...) Liquidation via the ordinary procedure calls for a full defense on the part of the defendant, wherein it is possible to perform various means of evidence admitted by law, that is, as stated by Araken de Assis, 'everything that is admitted in the ordinary procedure of the trial phase assumes immediate pertinence (intervention of third parties, evidence, counterclaims, etc.)' (...) If it is necessary to produce evidence, it shall be produced, and an evidentiary and trial hearing shall be scheduled, if appropriate. All evidence, in theory, is admissible, pursuant to article 369 of the CPC."[8]

In the motion to resolve divergence in REsp No. 1.705.018/DF, the majority of the 2nd Section of the Superior Court of Appeals emphasized the need to process actions for liquidation by the ordinary procedure, precisely in order to avoid situations in which the alleged beneficiary claims damages, although he does not present any evidence to this effect. The trial phase is essential to ensure the effectiveness of the generic judgment and direct it to those who actually have the right, as the excerpt from the opinion of Justice Luis Felipe Solomon makes clear:

"The possibility is frightening that people might directly filed for individual execution of a collective judgment although they do not prove their condition as being entitled to the judgment debt being enforced, nor even prove the case with suitable documents to support the breakdown of calculation presented in order to assess the amount due."

There is no doubt that a judgment in a public civil action constitutes a judicial enforcement instrument. However, although such judgment cannot be modified in the liquidation proceedings (article 509, paragraph 4, of the CPC), there is still the need for establishment of the adversarial process, under penalty of suppression of rights and basic guarantees of civil procedure.

The adjudicatory body cannot disregard the collective judgment and simply relegate the new trial phase to the time of filing of the action for liquidation judgment, when, in fact, new facts must be analyzed.

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[1] MARQUES, Claudia Lima; BENJAMIN, Antonio Herman V.; and MIRAGEM, Bruno.*Comments on the Consumer Protection Code*. 4th ed. São Paulo: Revista dos Tribunais, 2013 p. 1552

[2] TUCCI, José Rogério Cruz e.*Limites subjetivos da eficácia da sentença e da coisa julgada civil*["Subjective

limits of the effectiveness of judgments and civil *res judicata*"]. São Paulo: Revista dos Tribunais, 2006, p. 313/314.

[3] Consumer Protection Code: Article 95. If the claim is granted, the judgment will be generic, establishing the liability of the defendant for the damages caused.

[4] Consumer Protection Code: Article 97. The liquidation and execution of judgment may be procured by the victim and his successors, as well as by the legal entities referred to in article 82.

[5]"Among the cases of generic judgment provided for in our legal system is the one that judges collective actions for the defense of homogeneous individual rights (Law 8,078/1990, article 95). In this case, as seen, judicial review is limited to the homogeneous nucleus of the subjective rights presented in the claim. There is no determination of the amount of the payment due or identification of the potential plaintiffs of the substantive law relationship, which leaves the concrete legal rule undefined to a high degree. A generic judgment, for this very reason, is not amenable to judicial execution. To reach this point, it will have to be supplemented by another one, which will result in identification of the missing elements of the individualized legal rule. This supplementation activity takes place in an autonomous procedural phase, generally called liquidation of judgment. With regard to the generic judgment in collective actions, liquidation thereof is also called an enforcement action. It is an action intended eminently for judicial review, aimed at defining the amount of the payment to be enforced, or its object or the holder of the right, thus forming, integrated into the prior judgment, the instrument that enables the judgment creditor to seek judicial execution." (Zavascki, Teori Albino. *Processo coletivo: tutela de direitos coletivos e tutela coletiva de direitos* ["Collective procedure: protection of collective rights and collective protection of rights"], 7th ed., revised, current, and expanded, São Paulo: Editora Revista dos Tribunais, 2017. P. 186)

[6] "Here, each judgment creditor, in the liquidation process, must prove, in a full adversarial process and with exhaustive review, the existence of his personal injury and the etiological link with the damage globally caused (that is, the an [sic]), besides quantifying it (that is, the quantum)." (GRINOVER, Ada Pellegrini; WATANABE, Kazuo; NERY JUNIOR, Nelson. *Código Brasileiro de Defesa do Consumidor comentado pelos autores do anteprojeto* ["Brazilian Consumer Protection Code commented on by the authors of the draft bill"]. Vol. II. Rio de Janeiro: Editora Forense, 2011, p. 154)"

[7]See also: "The individual execution of a collective judgment cannot be considered a mere phase of the previous proceeding, since a new legal procedural relationship is established, as occurs with the execution of foreign, arbitral, or criminal judgments. Thus, it is necessary to summon the judgment debtor, pursuant to article 475-N, applicable to the case by extension" (STJ, REsp. No. 1.091.044/PR, opinion drafted by Justice Nancy Andrighi, 3rd Panel, decided on November 17, 2011).

[8] PIZZOL, Patricia Miranda. *Collective Relief: collective cases and techniques for standardization of decisions*. São Paulo: Thomson Reuters Brasil, 2019, pp. 454-457. See also: "During the collective proceeding, the evidentiary aspects of specific and individual situations of the savers are not examined, since the documents that prove ownership of the credit are only submitted in the execution phase (fulfillment) of the judgment. For this reason, in the individual executions of judgment issued in collective actions, there is a clear need to procure liquidation of the amount paid and individualization of the damages, with a demonstration of ownership of the judgment creditor's right. This is because the judgment granting collective relief has a generic nature, the fulfillment of which, in relation to each of the individual holders, presupposes the suitability of the judgment creditor's condition to the legal situation established therein." (Demócrito Reinaldo Filho, *Cuidados em execuções individuais de sentenças coletivas sobre expurgos* ["Care in individual executions of collective judgments on write downs"]. Consultor Jurídico, February 8, 2015).