

EXPERT GUIDE

CORPORATE *LiveWire*

JANUARY 2016

PRODUCT LIABILITY 2016



**PRODUCT
RECALL**



BKBG



EVERSHEDS

**BURNS
& LEVINSON LLP**

**Ricardo Barretto Ferreira da Silva**barretto@bkbg.com.br
+55 11 9 6339 3349**Camila Taliberti Ribeiro da Silva**taliberti@bkbg.com.br
+55 11 3897 0300

Product Liability in Brazil

By Ricardo Barretto Ferreira da Silva, Camila Taliberti Ribeiro da Silva

Overview

Product liability in Brazil is currently governed by Law 8,078 of September 11, 1990, known as the Consumer Defense Code (CDC).

Besides having the character of a juridical micro system, the CDC is both an interdisciplinary and multidisciplinary type of law to the extent that it warrants an effective protection to the

consumer by encompassing several areas of law such as civil, criminal, administrative, and civil procedure. The CDC is also considered a law of public order and social interest, which means that its rules transcend private interests and cannot be annulled by the will of the parties to the consumer relationship.

Some of the most significant aspects of the CDC are the principles which guide the National Policy for Consumption Relationships and the in-

stitution of consumers' basic rights. Its main principle is the recognition of consumer vulnerability in the consumer market, which means that it is initially necessary to recognize an unbalance between consumer and producer arising from the economic

power and financial capacity on the suppliers' side. In this regard, the State may intervene in the consumer relationship with governing actions aiming effectively to protect the

consumer by ensuring products and services with adequate standards of quality, safety, durability, and performance.

With the purpose to provide a whole protection to the consumer, the CDC establishes in its Article 6 several consumer's basic rights, among them: the safeguarding of life, health and safety against risks caused by activities in the supply of products and services considered hazardous or harmful;

the appropriate and clear information on the different products and services, with correct specification of quantity, characteristics, composition, quality, and price, as well as of the risks they entail;

effective prevention and redress of patrimonial and moral, individual, collective and diffuse damages; access to judiciary and administrative instrumentalities, with a view to the prevention or redress of patrimonial and moral, individual, collective or diffused damages, insuring juridical, administrative, and technical protection to those in need;

expediting the defense of the consumer's rights, including the reversal of the burden of proof in his favor in civil proceedings, when at the judge's discretion, the allegation is credible or when he is disadvantaged;

These consumer's basic rights are the fundamental rights which serve as a guideline for the interpretation of all the CDC rules. Accordingly, the product liability is designed by the CDC in view of consumer's vulnerability and with the purpose to ensure a whole protection against damages and product defects to the consum-

er. The CDC establishes, as a general rule, that all the chain of suppliers is subject to the strict and joint liability (from the manufacturer to the final merchant).

Strict liability derives from the Risk Theory introduced by the Civil Code (Article 927) which establishes the obligation to repair the damage, regardless of fault, in the cases specified by law, or when the activity normally carried on by the person causing the damage involves by its nature risk to the rights of others.

From the consumer law perspective, strict liability means that the demonstration of a casual link between the consumer and the defective product or damage caused is sufficient to specify as statutorily described the liability of suppliers, regardless of the existence of culpability.

Such liability encompasses all suppliers involved in the consumption chain, which are equally responsible for repairing damages and product defects. According to the CDC, supplier is *any public or private, national or foreign individual or body corpo-*

BKBG



rate, as well as entities without a legal identity carrying on business in the field of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products.

As an exception, the liability is subsidiary to the final merchant when the manufacturer, constructor, producer or importer cannot be identified by the consumer or in the case of improper handling of perishable goods.

It bears to mention that the CDC establishes the hypothesis of piercing the corporate veil, i.e. in the event of bankruptcy and insolvency. In such hypotheses, companies of the same corporate group and controlled companies are subsidiarily liable for redressing damages and product defects. Companies in consortium are jointly liable for such obligations. Associated companies shall be responsible only for culpability.

Hypothesis of product liability in the CDC

The CDC distinguishes the liability

for damages and for product defects. The liability for damages is provided by Articles 12 through 17 of the CDC, which establish that all suppliers are liable for redressing damages caused to consumers by defective products as well as for improper or incomplete information about their use and risks, regardless of the existence of culpability.

Such rule takes into account damages to the physical, moral, and health integrity of the consumer caused by any defective product introduced into the market (i.e., from manufacture or information). Accordingly, the suppliers will not be deemed liable only in the case they are able to prove they did not introduce the defective product into the market or the fault is solely of the consumer or a third party.

It bears to mention that the CDC also protects the bystander consumer, i.e., any person affected by the damage caused by a defective product is equivalent to consumer, even if such person is not the product purchaser.

The liability for product defect, on

the other hand, concerns quality and quantity defects of products that make them unfit or inappropriate for the use they are designed for, or even diminish their value, as well as for those resulting from any discrepancy with the particulars shown on containers, packages, label or advertisement, with due regard to possible variations in view of their nature.

The CDC defines as improper for use and consumption (i) products with expired validity; (ii) products that are deteriorated, altered, adulterated, damaged, falsified, tainted, deceitful, harmful to life or health, hazardous or even those that do not comply with the regulations on manufacturing, distribution or presentation; (iii) products that for any reason show to be inadequate for the use they are intended for.

In other words, there is established a normative impropriety which perhaps does not correspond to real impropriety as recognized by the consumer. Occasionally, a product may meet the needs of its consumers, but the mere non-compliance with standardization rules turns the product

improper for use and consumption.

Article 18 of the CDC provides a legal guarantee under which the defect must be solved within thirty days by the suppliers. If such term is not complied with by the supplier, the consumer is entitled to demand alternatively and at his/her choice (i) the replacement of the product by another of the same type and in perfect conditions; (ii) immediate return of the amount paid, with corresponding adjustments; or (iii) a proportional reduction in the price. All alternatives can be requested without prejudice to a demand for any possible losses and damages.

Any contractual clause that makes such legal guarantees impossible, or exempts or diminishes the supplier's obligation is banned by the CDC.

Statutes of limitation

As for claims against product defects, the CDC adopted the criteria of the product's useful life in fixing the limitation of actions. The right to claim against apparent or easily identifiable defects as well as hidden defects

BKBG



expires within thirty days, in the case of supply of non-durable products; or ninety days, in the case of supply of durable products. The limitation period reckons from the actual delivery of the product as for apparent or easily identifiable defects. In the case of a hidden defect, the limitation period shall commence upon said defect being evidenced, no matter how much time it may take.

Such periods are interrupted when any verifiable complaint is formulated by the consumer to the supplier until receipt of the relevant negative reply; or the establishment of a civil investigation, until it is concluded. The civil investigation is an administrative proceeding conducted by the Public Prosecutor Office with the purpose to verify violation of collective rights, prior to the filing of a col-

lective lawsuit (class action).

It bears to mention that the Brazilian courts, based on Article 50 of the CDC, establishes that contractual warranties are complementary to the legal guarantees, thus the limitation periods for claiming product defects will run from the end of the contractual warranty period.

As regards the indemnity claim for damages arising from a defective product, the consumer's right of action is statute-barred after five years.

Defenses

The consumer's claims against damages and product defects can be filed at either administrative or judicial level. The claim at administrative level is placed before the Consumer Protection Agency (Procon), which acts as a mediator of conflicts in con-

sumption relationships, but is also in charge of assessing administrative fines against product suppliers.

The consumer defense in court is regulated by a micro-system which encompasses the CDC, the Civil Procedure Code, the Civil Class Action Act (Law 7,347/1985), and the Writ of Mandamus Act (Law 12,016/2009).

Article 81 of the CDC establishes that consumers' best interests and rights can be claimed in court individually or collectively. The collective lawsuit is provided for upon occurrence of violation of trans-individual rights (i.e. diffuse and collective rights) and homogeneous individual rights. In these cases, consumers in general are represented by legitimated entities from either government or civil society associations engaged in de-

fending consumers' rights.

As a result of a collective lawsuit, suppliers may be subject to several penalties, in addition to compensation for losses and damages to the consumers affect. The judge is charged with imposing fines and other measures to ensure the effective protection of consumers' rights, viz. search and seizure, removal of objects or persons as well as the banning of harmful activities.

The compensation for losses and damages may be paid to each consumer affect provided he can be identified, or may be allocated to the Fund of Diffuse Rights Defense, which is engaged in the drafting of bills in the areas of the environment, consumer protection, and free competition defense, among others.

BKBG

Ricardo Barretto Ferreira da Silva has been practicing business law for 41 years. He is a founder, senior and managing partner at **Barretto Ferreira e Brancher – Sociedade de Advogados (BKBG)** (www.bkbg.com.br). He graduated from São Paulo University (USP) Law School and was admitted to practice in São Paulo, Brazil, in 1973. In the same year, he attended the Institute of World Affairs, Connecticut, USA, and, between 1974 and 1975, he undertook graduate research work in taxation and corporate laws at the University of North Dakota, USA.

His practice focuses on Corporate Law, Tax Law, International Law, Technology, Media and Telecommunication Law, Foreign Investment, E-commerce and Internet Laws, Privacy and Data Protection Laws. He is the editor and co-author of numerous publications, including **“Handbook for Foreign Investment in Brazil,”** published by

the Government of the State of São Paulo, Brazil, in 1977; **“Computer Law in Latin America,”** published by the Computer Law Association Inc. (www.itechlaw.org) in Washington, D.C., USA, in 1977. He is co-editor and co-author of the book **“Doing Business in Brazil,”** published by the American Bar Association in Washington, D.C., USA, 2002. He is the leading editor and co-author of the book **“A Guide to Doing Business in South America,”** published by the American Bar Association in Washington, D.C., USA, in 2011, the Second Edition been published in June, 2015. He has been the author of the “Brazil chapter” of the series **“Getting the Deal Through: Telecoms and Media”** (2000 to 2015), as well as the author of the “Brazil Chapter” of e-Commerce of the same series for many years, including 2009 and 2010. He is a co-author of **“International Telecommunications Law,”** Editions 2008-2015 - Chapter on Brazil, published by Editor Dennis Campbell

– CILS – Center of International Law Studies”, in Austria, of the **“Journal of the International Law and Medicine”**, 2014, Chapter on Brazil, published by Editor Dennis Campbell – CILS – Center of International Law Studies” and of the **“Digest of the Commercial Laws of the World”**, published by Thomson Reuters in 2014, edited by Dennis Campbell, Chapter on Brazil. He has been the author of the “Brazil chapter” of the series **“Getting the Deal Through: Telecoms and Media”** (2000 to 2015), as well as the author of the **“Brazil Chapter” of E-Commerce** of the same series for many years, including 2009 and 2010.

Camila Taliberti Ribeiro da Silva Graduate studies in Diffuse and Collective Rights, Catholic University of São Paulo. Bachelor of Laws, Catholic University of São Paulo. Member of the Brazilian Bar Association (OAB), São Paulo Chapter.

Currently, a member of BKBG – Barretto Ferreira e Brancher Sociedade de Advogados working in the practice areas of Regulatory Law; Technology, Media and Telecommunications; and Consumer Law.

Member of the Brazilian Institute of Consumer Defense – IDEC.

Co-author of the article *Foreign Investment in Brazil’s Healthcare Sector with Ricardo Barretto Ferreira da Silva*, published in *The Comparative Law Yearbook of International Business*, by the Center for International Legal Studies.

Co-author of *Communications: regulation and outsourcing in Brazil: an overview with Ricardo Barretto Ferreira da Silva and Paulo Brancher*, published by *Practical Law*, a Thomson Reuters Legal Solution.