

**PECUNIARY JUDICIAL EXECUTIONS ON CLASS ACTIONS: BETWEEN THE
FLUID RECOVERY, THE CY PRES AND THE FUNDS¹**

***EXECUÇÕES JUDICIAIS PECUNIÁRIAS DE PROCESSOS COLETIVOS: ENTRE A
FLUID RECOVERY, A CY PRES E OS FUNDOS***

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RESUMO: O objetivo deste trabalho consiste na análise da existência e do papel de uma reparação fluida dentro da execução de condenações pecuniárias envolvendo processos coletivos. Nesses casos, a legislação brasileira prevê que o montante oriundo deverá ser direcionado a um fundo que, por sua vez, cuidará da recomposição do bem jurídico. Isso tem sido denominado pela doutrina de reparação fluida, ou *fluid recovery*, no original em inglês, em uma alusão à aplicação desse instituto no contexto das *class actions* do direito norte-americano. Assim, no primeiro momento, por meio da metodologia comparada, buscam-se explorar a configuração e aplicação desse instituto no sistema norte-americano, no qual ganha os contornos e denominação de *cy pres*. Também, analisa-se o atual destinatário do montante oriundo das condenações, que são os fundos administrativos, em especial o mais proeminente deles, e paradigma para os demais, que é o Fundo de Defesa de Direitos Difusos (FDD). Estabelecida a necessária diferenciação entre uma *fluid recovery* e uma destinação aos fundos, busca-se analisar as possibilidades que a análise comparada deste instituto pode contribuir para o aperfeiçoamento da tutela coletiva no Brasil.

PALAVRAS-CHAVE: execução de processos coletivos; *fluid recovery*; *cy pres*; Fundo de Defesa de Direitos Difusos (FDD); CERCLA *Superfund*

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ABSTRACT: The aim of this paper is to analyze the existence and role of a fluid recovery within the execution of pecuniary convictions involving class actions. In these cases, Brazilian Law says that the amount should be directed to a fund which, in turn, will take care of recomposing the legal asset. This has been referred by the doctrine as *reparação fluida* or fluid recovery in English originally, in an allusion to its application in the class action context in the United States. Thus, primarily, using the comparative methodology, the configuration and application of this institute in the US system, where it is outlined and denominated *cy pres*, is sought to be explored. The current recipient of the amount resulting from the convictions, which are the administrative funds, are also analyzed, especially the most prominent of them, and a paradigm for the others, that is the Fund for the Defense of Diffuse Rights (FDD). Having established the necessary differences between a fluid recovery and the allocation to the funds, the possibilities that a comparative study of this institute can contribute to the improvement of the protection of collective rights in Brazil is analyzed.

KEYWORDS: execution of class actions; fluid recovery; *cy pres*; Fund for the Defense of Diffuse Rights (FDD); CERCLA Superfund

INTRODUCTION

A lot has been said about the Brazilian system for the protection of collective rights, of its innovations in terms of procedure, and especially the possibility of protecting interests that in the past could not reach the Courts. However, it seems that the effectiveness of its execution is not discussed to the same extent.

In general, the specific injunctions are preferred due to the very nature of the rights involved. However, not rarely it ends up being unsuccessful, so that the pecuniary reparation is the only option.

In these cases, it seems that the system created a safeguard, by predicting that the amount from convictions in class actions, or the leftover values after individual executions are filled should be directed to funds – that, in turn, would be in charge of seeking reparation. This would be a Brazilian fluid recovery, inspired by the US system of fluid recovery. It

seeks to repair the legal asset and, at the same time, prevents the one who practiced the illegal conduct to retain its gains. Problem apparently solved.

However, at the same time, several other questions arise, such as: what are these funds, after all? How do they work? Have they been effective? How is it possible to repair a legal asset that cannot be repaired (since if it were possible, there would be no pecuniary conviction, but a specific injunction)? After all, is it a fluid recovery, according to the US system? Or is it something else? What would that other thing be? What potential does this institute have or can have in the Brazilian system?

Guided by these questions and with a focus on the effectiveness of the class action's execution that this study begins. First, there is an overview of the current situation of class actions in Brazil, with a special focus on their execution, as it is understood that executive provisions are fundamental for the protection of rights.

After that, a comparative analysis of the fluid recovery in the US system is made. In this context, more than the fluid recovery, it is used the institute of the *cy pres* that has its origins in the charitable trusts. Thus, it is fundamental to analyze how it was developed, and the main critics that it has been suffering.

Next, the Diffuse Rights Defense Fund (FDD), a reference for the analysis for funds on class actions, is analyzed, since it is has the most resources and its regulation is the strongest and most unified. It is about analyzing its configuration and operation as well as the origin and application of the amount of money that it is assigned to allocate.

Again, based on the comparative study it is investigated what the doctrine considers an institute closer to the configuration of the funds in class actions, which is the CERCLA Superfund, an USA administrative fund, linked to the Environmental Protection Agency (EPA) created specifically to deal with the issue of toxic waste.

Finally, it is sought to make a comparative balance between the possibilities of the fluid recovery within the executions of class actions in Brazil.

THE EXECUTION AND THE EXECUTION OF COLLECTIVE ACTIONS

Often the judge, in solving the litigation, ends up not granting protection to the right, which means that, even if the author gets a favorable sentence, not necessarily it will have its protection, being necessary also the executive provision. If, on one hand, enforcement is

perceived as the moment in which judicial decision is materialized, on the other hand, it is essential to give the necessary attention and recover the complexity execution as a fundamental point in the judicial protection of rights.²

Then, many doubts arise when it comes to the pecuniary execution of class actions and their effectiveness. This is because the execution process, which, in general, is already quite complicated, since it involves the coercive intervention of the State on the private patrimony, becomes even more complex when it comes to class actions. The amounts are huge, the people involved are many and, most of the time, the pecuniary damages are the worst of the options for repairing the asset.

In the execution of collective processes, it is possible to put side-by-side the execution of diffuse and collective rights due to the similarity of the procedures in both cases. This is because both diffuse rights and collective rights *strictu sensu* have transindividual characteristics, especially because of their indivisibility, their unavailability and their non-patrimonial essence that reflect immensely in their enforcement.³

The best form of protection is the preventive one, that acts in a way to avoid the injury to happen; and specific: if there is a harm it should be repaired *in natura* and as a whole, so as to preserve the nature of asset to all their holders.

Above all, a fundamental characteristic on the execution of sentences involving diffuse and collective rights is that they are mandatory.⁴ This means that the class representative cannot give up on executing the decision. Even in cases of their omission, there is an express legal provision⁵ that reinforces this special quality, when it determines representative of the Public Prosecution Service must promoted.

Thus, the judicial measures adopted must maintain or restore the fundamental characteristics of the legal asset and guarantee their use in equal conditions of quality and quantity for everyone. The maintenance of these characteristics can only be done through

² TARUFFO, Michele. A Atuação Executiva dos Direitos: Perfis Comparados. In: TARUFFO, Michele. *Processo civil comparado: Ensaios*. São Paulo: Marcial Pons, 2013. p. 86.

³ VENTURI, Elton. *Execução da tutela coletiva*. São Paulo: Malheiros, 2000. p. 94.

⁴ VENTURI, E. *Idem*, p. 106.

⁵ On Popular Action Act: 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 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.

the complete recomposition of the damaged asset; otherwise, it will not contemplate the plurality of interests connected to it.⁶

In this sense, are extremely important the provisions of specific injunctions both in the Consumer Defense Code (Rule no. 8.078/1990), especially in the art. 84 and in the Civil Procedure Code (Rule no. 13.105/2015), in articles 536 to 538. This way, there is the possibility of using injunctions, aiming at a more adequate practical action to protect the legal asset.

Regarding the protection of homogeneous individual rights, the standard procedure is that the sentence should generically establish the responsibility of the defendants for the damages caused. Then, the victims, their successors or others that the law authorizes may promote the liquidation and execution of this sentence.

Thus, it is possible to claim that it consists of a special procedure structured under the division of the judicial activity into two phases: one, that analyzes the factual and juridical issues that are common to defendant's rights, the discovery. The other part of the procedure involves one or more subsequent actions that are proposed in case certification of collective action demanding its execution.⁷

Contrary to what happens in the protection of diffuse and collective rights, the protection of homogeneous individual interests tends to be compensatory, focused on the payment of values and not a specific protection, even though there is also this possibility, as in cases of recall.⁸

However, even with the possibility of promoting a collective execution this biphasic procedure is often preferred. Such an option ends up taking away much of the strength and effectiveness of the class action, undermining the collective technique, precisely because it contradicts a fundamental characteristic: its aptitude for the molecularization of demands.⁹

⁶ SALLES, Carlos Alberto de. Execução específica e a Ação Civil Pública. In: MILARÉ, Édís (Coord.). *A Ação Civil Pública após 20 anos: efetividade e desafios*. São Paulo: Editora Revista dos Tribunais, 2005. p. 86.

⁷ ZAVASKI, Teori Albino. *Processo Coletivo: Tutela de Direitos Coletivos e Tutela Coletiva de Direitos*. 6. ed. rev. atual. amp. São Paulo: Editora Revista dos Tribunais, 2014. p. 151.

⁸ 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.

⁹ GAGNO, Luciano Picoli. Tutela mandamental e efetividade dos direitos individuais homogêneos. *Revista dos Tribunais*, vol. 953, p. 223-257, 2015. p. 224.

Thus, part of the doctrine names this a "pulverization of rights."¹⁰ This term means the individualized analysis by the Judiciary of interests or issues whose assessment could occur together, since there is a factual similarity between them.¹¹

This spraying is very criticized as it opposes an effective jurisdictional provision by generating thousands of litigations where there could be only one. There is a lost in physical and human resources, offending a more practical and efficiency-oriented management that ends up contributing to the exhaustion of the Judiciary.¹²

This helps to demonstrate how the collective protection of homogeneous individual rights has not impacted the Brazilian reality as it could, much due to restrictive interpretations of its legal definitions, as well as the remnants of an individualist attachment that is still very present in the procedural law.¹³

In this sense, there is a tendency to use techniques that precisely seek promote an execution that is more in tune with the fundamental objectives of the class action. Priority is given to those that do not necessarily require an individual action, including encouragement for the defendants themselves to take the necessary measures to repair individuals, when they are easily identifiable.¹⁴ In cases of injury to bank clients, for example, the financial institution itself could make the deposits in the plaintiffs' accounts.

However, if this is not possible, it is necessary to resort to an ordinary technique that is not always efficient, either due to the very nature of the damaged legal asset or due to the flaws inherent to the legal system. Thus, the legislation itself sought to create a safeguard so that, even in this situation, there would be an attempt to fully hold responsible the person who caused the injury and to try to recover the legal good as much as possible.

The Public Civil Action Rule expresses this idea in its art. 13, as it states that condemnations in money must be directed to a fund that will seek the reconstitution of the damaged property. It should be emphasized that this task can often be difficult to achieve,

¹⁰ Trata-se de termo especialmente adotado e justificado por: 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.

¹¹ 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.

¹² MENDES, A. G. C.; OSNA, G.; ARENHART, S. C. *Idem*, p. 47.

¹³ MENDES, A. G. C.; OSNA, G.; ARENHART, S. C. *Idem*, p. 55.

¹⁴ This is defended by Luciano Picoli Gagno in: GAGNO, Luciano Picoli. Tutela mandamental e efetividade dos direitos individuais homogêneos. *Revista dos Tribunais*, vol. 953, p. 223-257, 2015.

especially when there is irreparable damage to legal assets. In fact, it is said that it would not be the case to speak of reparation, since there will only be a reversion of values to the funds. In these cases, considering the impossibility of recovering the damaged asset, it is accepted the amount paid to be used to promote certain activities related to the nature of the injury.¹⁵

For these distributions the legislators created federal or state funds that would be responsible for the management and application of the values for purposes related to the type of injury that originated them.¹⁶ The same fund is also referred in the art. 100 of the Consumer Defense Code that accepts this allocation of resources if the individuals do not present themselves for the reparation – in a number compatible with the severity of the injury.

Thus, there appears to be a significant difference in the very nature of the values that compose the funds: there are those made available from a compensatory conviction and those who are there due to a repression on the agent's behavior – mostly from the fluid recovery.¹⁷ It seems that the legislator sought to insert a way that even with their inertia or omission seeking individual reparation, the responsible for harmful practice would not left unpunished.

This transfer of resources, from convictions in class actions, to a different use than the direct reparation of the injured individuals, but still being very close to the ideal destination, was called by the Brazilian doctrine of fluid recovery or *reparação fluida*. This term gained notoriety in the book "Brazilian Code of Consumer Protection: Reviewed by the authors of the Draft",¹⁸ with a clear influence of Mauro Cappelletti's¹⁹ introduction of the term in the Brazilian system.²⁰

¹⁵ SILVA, Érica Barbosa e. *A fluid recovery no sistema brasileiro e a efetivação dos direitos coletivos*. In: SALLES, Carlos Alberto. SILVA, Solange Teles da. NUSDEO, Ana Maria de Oliveira (Orgs.). *Processos Coletivos e Tutela Ambiental*. Santos: Editora Universitária Leopoldianum, 2006. p. 87.

¹⁶ VENTURI, Elton. *Execução da tutela coletiva*, p. 115.

¹⁷ VENTURI, E. *Idem*, p. 154.

¹⁸ GRINOVER, Ada Pellegrini. BENJAMIN, Antonio Herman de Vasconcellos e. FINK, Daniel Roberto. FILOMENO, José Geraldo Brito. WATANABE, Kazuo. NERY JÚNIOR, Nelson. DENARI, Zelmo. *Código Brasileiro de Defesa do Consumidor: Comentado pelos autores do Anteprojeto*. 7. ed. rev. amp. São Paulo: Forense Universitária, 2001.

¹⁹ CAPPELLETTI, Mauro. Formações sociais e interesses coletivos diante da justiça civil. *Revista de Processo*, p. 128-159, n. 05, 1977.

²⁰ GOMES, Técio Spínola. *A aplicação adequada da fluid recovery na liquidação e execução de ações coletivas sobre direitos individuais homogêneos*. Salvador, 2013. 126 f. Dissertação (Mestrado) – Universidade Federal da Bahia. f. 102.

Thus, it seems fundamental to analyze the fluid recovery institute and its configuration in the North American legal system in order to better understand the way its application has been made in the context of collective actions in Brazil. As well as, it is necessary to analyze the funds for which these resources are delivered.

THE FLUID RECOVERY AND THE CY PRES

In the American system, a significant number of absent members in class actions may never have their identity known or even have the opportunity to join in the action.²¹ Consider, for example, CD buyers or bus and taxi users. Even if the Court tries to find the best possible way to publicize it, with as advertisements in newspapers, magazines, internet, television or radio broadcasts, there is always a risk that the members of the class will never be aware of the settlements or the class action.

Moreover, even when the identities of class members are known, their demands may be so small that it is not economically feasible to make the payments. For example, a damage of 3 cents for each member of the class does not justify the expenses with the notification and won't even bring some kind of individual benefit.

Third, even when direct payments are economically viable, absent members can give them up. These situations usually involve people who are old or have serious and/or terminal illnesses and there is a great risk that they will pass away before having the opportunity to receive the damages.²² In other cases, the burdensome of making the demand may discourage class members from demanding their share, for example, when some kind of proof of purchase is required to receive compensation.

Finally, even when members of the class are identifiable, have substantial value to receive, can submit their claims to demand their share and the administrator actually sends the check, there is a high probability that some or several of the checks will return as undeliverable or not cashed out.²³

Within this context, the use of fluid recovery or cy pres appears to be no more than a product of the modern class action context and its difficulties. The courts seeking options

²¹ WASSERMAN, Rhonda. Cy pres in Class Action Settlements. *Southern California Law Review*, n. 88, p. 97-164, 2014, p. 104.

²² WASSERMAN, R. *Idem*, p. 104-105.

²³ WASSERMAN, R. *Idem*, p. 105.

for the allocation of these funds are often faced with very limited possibilities. The fluid recovery or *cy pres* ends up being the best of them, rather than denying the class action certification, reversing the funds to the defendant or to the State or even the *pro rata* division among the class members that have already presented themselves.

It is possible to note from both the US jurisprudential analysis and from the doctrinal analysis that *cy pres* and fluid recovery are often treated in the same way, as if they were equivalent and fungible institutes. It seems that this is a consequence of the origin and use of these institutes in the class action context by the courts, mainly to deal with a practical problem that had arisen - the residual funds. However, it did not have a thorough development on its epistemology, which should have been made by doctrine later.

Thus, in the jurisprudence there is a great terminological difficulty. The terms "*cy pres*" and "fluid recovery" have been broadly defined by the Courts to fit the other use of whole injury calculation process itself. In most cases recently reported this "other use" is the transfer of the residual amount to a charity cause related to the source of the damage. In this context the principles of *cy pres* are invoked: when the amount intended for the institution serves the interest of the class, in the same way as a trust - origin and traditional application of the institute of *cy pres*.²⁴

Cy pres is the most widely used term, not only for courts, but also for doctrine: there are a lot more studies dedicated to analyze the application of *cy pres* in class actions than studies on the use of fluid recovery. This is because, it is stated that the term "fluid recovery", itself, is imprecise and can generate double meaning. Other times, "fluid recovery" has been used not as a synonym, but to designate what could be considered as a specific type of *cy pres*: price-rollbacks.²⁵

Nevertheless, there are doctrinators who claim that there are differences, albeit subtle, between the two concepts. According to Martin Redish, Peter Julian and Samantha Zyontz, both institutes refer to the search for a solution in cases where there is a residual fund or when direct division between the victims is not possible. However, it seems that recently the term "*cy pres*" has been used specifically in cases where funds are transferred

²⁴ MULHERON, Rachael. *The Modern Cy-près Doctrine: Applications & Implications*. Londres e Nova Iorque: Routledge Taylor & Francis Group, 2016. p.224-225.

²⁵ MULHERON, Rachael. *Idem*, p. 217.

to charities that to some extent relate to the object of class action or the broadly defined interest of the class.²⁶

Fluid recovery, on the other hand, seems to refer to the efforts to direct the funds to those who will be affected by the defendant in the future in order to roughly bring together the category of those who have been harmed in the past. Thus, it is believed that fluid recovery represents a more committed effort to indirectly compensate victims, albeit through future approximations with possible victims, than the *cy pres* that only requires a generic link between the charity that will receive the funds.²⁷

The term "*cy pres*" derives from the Norman French expression "*cy près comme possible*", which means the closest possible. In charitable trusts, in which the doctrine of *cy pres* had its origin, the courts use it when an insurer or testator signs a trust for a particular philanthropic purpose and somehow its original intent cannot be fulfilled. In these cases, in order to save the trust, it is directed to an alternative option that can fulfill the donor's intentions as closely as possible.²⁸

In class actions, even the parties enter into a contract or negotiate an agreement and do not consider and anticipate the allocation of possible residual funds, this responsibility rests on the Courts that must not only distribute these funds, but also resolve any disputes that may arise because of it.²⁹

In the current system, the courts are free to do almost anything with funds coming from *cy pres*. This leads to a number of criticisms by the doctrine that understands that it results in an *ad hoc* system, unpredictable and generally not principle oriented; It is claimed that *cy pres* is almost like a free card for the Courts to do as they please with the residual funds.³⁰

In this aspect, there is a very strong criticism: although it is difficult to determine empirically to which extent the judges' preferences and ideologies determine the distributions of *cy pres*, it is very easy to verify that not all charities are treated equally. For

²⁶ REDISH, Martin H. JULIAN, Peter. ZYONTZ, Samantha. *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*. *Florida Law Review*, Forthcoming, 2009, p. 59.

²⁷ REDISH, M. H. JULIAN, P. ZYONTZ, S. *Idem*, p. 59.

²⁸ WASSERMAN, Rhonda. *Op. Cit.*, p. 114-115.

²⁹ FORDE, Kevin. What Can a Court Do with Leftover Class Action Funds? Almost Anything!. *The Judges' Journal*, vol. 35, n. 3, p. 1-12, 1996. p. 1.

³⁰ JOIS, Goutam. *The Cy Pres Problem and the Role of Damages in Tort Law*. Disponível em: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104468. p. 1-2.

example, most distributions are directed to legal aid societies, associations of lawyers, law schools, etc.³¹ In fact, there are cases in which the judge made gave funds of a consumerist class action to support the Red Cross during the Hurricane Katrina – although it is an admirable cause, it does not offer a real benefit to the originally harmed class.³²

Both the Red Cross and legal aid institutions are clearly deserving. However, assuming that the purpose of cy pres is to indirectly benefit the members of the class, it seems very unlikely that they could be a suitable choice in this context. On the contrary, it gives the appearance of a clear preference by the judges and lawyers involved in the settlement.³³

This leads to another problem that is the creation of a "cy pres industry",³⁴ which means, the creation of a lobby by some groups to get the residual rewards. On the other hand, there is evidence that some Courts have been using a narrower view of what would be the "closely related" for the application of cy pres, rejecting those proposals whose recipients' mission is not sufficiently similar to the underlying purpose of class action.

This is because the Courts use some mechanisms to determine where the distribution should go. Some Courts seeking to eliminate potential biased indications and to ensure that the best possible beneficiaries are chosen, end up carrying out a wide notice of the cy pres distribution in order to allow interested parties to submit their proposals.³⁵ Other Courts have sought to diminish much of the work involved in choosing the recipient by pointing out special committees for it.

However, this kind of verification has become less common³⁶ and, in general, the Courts only verify if they will be used for some socially relevant purpose.

THE FUNDS ON THE EXECUTIONS OF COLLECTIVE ACTIONS IN BRAZIL

In terms of diffuse and collective rights in Brazil, it is known that a condemnatory sentence is generally used when there is no longer the possibility of repairing the damage by

³¹ YOSPE, Sam. Cy Pres Distributions in Class Action Settlements. *Columbia Business Law Review*, vol. 2009, n. 3, p. 1014-1064, 2009, p. 1027.

³² CHASIN, Chris. Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible. *University of Pennsylvania Law Review*, vol. 163, p. 1463-1495, 2015. p. 1477.

³³ YOSPE, Sam. *Op. Cit.*, p. 1028.

³⁴ YOSPE, S. *Idem*, p. 1035.

³⁵ CHASIN, Chris. *Op. Cit.*, p. 1472.

³⁶ DOYLE, Thomas. Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice. *The Federal Lawyer*, jul., p. 26-29, 2010. p. 27.

other provisions. This is because the pecuniary conviction is the least effective in these cases, due to the very nature of the protected legal asset. However, aware of this, the legislation opens up alternatives to seek some compensation for the class, even though in an indirect way.

The provisions in both article 13 of the Public Civil Action Law (Rule no. 7.347/1985) and article 100 of the Consumer Protection Code (Rule no. 8.078/1990) deal with the allocation of this residual value to a fund whose primary purpose is the recovery the damaged assets. Due to this prediction, it has been said that there would be a fluid recovery, in the Brazilian system.

It should be noted, however, that part of the doctrine criticizes this legal provision, since the reparation of the damaged asset would not be possible when there is a reversion to the funds, since if it were possible, the defendant would still remain responsible to repair the asset, providing a specific injunction.³⁷ In addition, fluid recovery should not be confused with the fund – the fund should be considered more as an instrument for its implementation than the institute itself.

The funds brought by the legislation can be created and administered by the states, in which each state is responsible for creating and managing their funds properly, or by the federal government. The fund created by the federal government is the Diffuse Rights Defense Fund (FDD), the object of this analysis.

The Public Civil Action Rule (Rule no. 7.347/1985), although not the first legislation on diffuse rights, was the first one to predict the possibility of allocating the damages in class actions to a fund, in the impossibility to a full recovery.

The FDD was initially regulated by Decree no. 92.302/1986, subsequently repealed by Decree no. 407/1991, which in turn was repealed by Decree no. 1.306/1994, currently in force, with amendments of Decree no. 96,617/1988. The Consumer Protection Code (Rule no. 8.078/1990) again referred to the fund created by the Public Civil Action Rule as the addressee of any amount that may have been left in convictions in class actions.

³⁷ SILVA, Érica Barbosa e. *A fluid recovery no sistema brasileiro e a efetivação dos direitos coletivos*. In: SALLES, Carlos Alberto. SILVA, Solange Teles da. NUSDEO, Ana Maria de Oliveira (Orgs.). *Processos Coletivos e Tutela Ambiental*. Santos: Editora Universitária Leopoldianum, 2006. p. 88.

However, much remained open about how it operated, especially regarding the duties of its management council. Then, Rule no. 9.008/1995 established, within the organizational structure of the Ministry of Justice, the Federal Governing Council of the Fund for the Defense of Diffuse Rights (CFDD), its main rules and purpose.

Rule no. 9.008/1995, in its article 1, paragraph. 2, specifies the values that can integrate the resources of the FDD. The values are, basically, judicial convictions from actions that seek to protect the environment, consumers, assets and rights of artistic, aesthetic, historical and touristic value, other diffuse or collective interests and the market. In addition, the FDD include fines and convictions from class actions that seek to protect people with disabilities, and fines against breaches of the Market and other types of income.

Although created in 1985, until 2005, the FDD reached negligible grossing levels considering the demands for damages on diffuse rights. This may be due to, not only to the lack of adequate regulation of how the resources are obtained, but also to the lack of knowledge about how the FDD operates.³⁸ However, there has been a gradual increase in the last 11 years.

In addition, it is important to consider the percentage of resources that belong to each category. In this sense, the survey on the collection of the FDD made by professor Albano Francisco Schmidt³⁹ is fundamental.

It can be seen that, regarding the environmental protection, the FDD's raising of fines and damages represented only 0.83% of the fund's total gross in recent years, whereas consumerist law represent approximately 1.25%. This raises many questions on whether the amount adequately represents the judicial reality:⁴⁰ Either the injunctions and damages are highly efficient providing full reparation, or there is a fundamental flaw and cases are not even making it to this stage

On the other hand, the reports of grossing consulted, which are available on the Ministry of Justice website, show that 6.95% of the total, almost fifty million reais are under

³⁸ 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.

³⁹ Professor Albano's research covers the last 10 years from 2005 until half of 2014. Based on the data already brought by the author, we use the same methodology to collect and organize the data, with the full year of 2014 and 2015.

⁴⁰ SCHMIDT, Albano Francisco. *Op. Cit.*, p. 217.

the caption "other collective and diffuse interests". Schmidt criticizes the fact that a large amount is under such a vague caption, which would contradict the FDD guidelines, that the harmed rights must be clearly specified, making it possible to direct resources to their reparation as close as possible. In addition to it, this generic figure offends the transparency of the fund, and the analysis of the compatibility of what is developed with the objectives of its creation.⁴¹

Finally, the data on offenses to the Market show that in the last year, at least 87.53% of the FDD's gross was from that. In particular, in the year 2015, the percentage of 93.02%, was reached. It is possible to affirm, therefore, that the overwhelming majority of the resources of the FDD comes not from judicial convictions in class actions, but above all, administrative infractions determined by the Administrative Council of Economic Defense (CADE).⁴² In addition, it seems important to take into consideration how this influences, or should influence, the performance of fund managers.

It is also worth noting the inclusion of paragraph 2, in article 13 of the Public Civil Action Rule, by Rule no. 12.288/2010. It provides the allocation of resources from damages of ethnic discrimination to be directed to promote actions of ethnic equality, according to the guidelines of the National Council for Promotion of Racial Equality.⁴³

The distribution of resources usually occurs through the signing of agreements or transfer contracts with public agencies, either at federal, provincial or municipal level and non-profit institutions. These collaborations are usually regulated by resolutions that establish the general guidelines for these contracts, their execution, supervision and accountability.

The parties must submit to the CFDD projects, in the form of "consultation letters", according to the criteria and requirements established by the entity. It shall contain the basic data regarding the proponent and the project that the fund will invest. It must contain at least:

⁴¹ SCHMIDT, A. F. *Idem*, p. 218.

⁴² On CADE's work on the economic order: FORGIONI, Paula. *Os Fundamentos do Antitruste*. 8. ed. rev. atual. São Paulo: Revista dos Tribunais, 2015.

⁴³ 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 dessa 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.

(i) the description what will be executed, (ii) the justification containing the reciprocal interests, the relation between the proposal and the objectives and guidelines of the program; (iii) estimative of financial resources, detailing how the transfer to be made will be used; (iv) prediction of the deadline for execution; (v) and information of technical management capacity of the proposer.

Such requirements are set out in art. 19 of Interministerial Ordinance no. 507 of November 24, 2011 of the Federal Council of the Diffuse Rights Defense Fund (CFDD) and aim to instruct the choice of projects that will be sponsored with FDD resources.

The selected projects are submitted to judgment by the CFDD that will analyze both the adequacy of the legal requirements and the merit of it, in public sessions in which the candidate may take part.⁴⁴ It should be emphasized that the limit of FDD resources to be applied in a single project, the priorities in each area, are also defined by the CFDD.

In analyzing its operation, it appears that the FDD, although related to the jurisdictional activity, seems to have an administrative nature. Its management and, above all, the use of its resources are separated from any collective action.⁴⁵

As indicated above, there would be in Brazil a system in which the allocation of residual resources of class actions are directed to a fund entrusted with repairing the damaged legal assets in an indirect way, in the best possible way. Such a technique would be inspired by the US fluid recovery, which was developed precisely in an attempt to offer a suitable allocation to the left over amount in class action convictions.

However, in a more detailed analysis it is possible to verify several points in which the fluid recovery of the Brazilian system is different from the institute in the North American system and, mainly, how the use of funds in Brazil distances itself from the fluid recovery. It is not only an ontological difference, but also the very shape that its application in both systems developed.

Above all, fluid recovery in the United States is jurisdictional. That is to say, the institution that determines how to apply the residual amount is the Judiciary, unlike the

⁴⁴ BADIN, Arthur. O fundo de defesa de direitos difusos. *Revista de Direito do Consumidor*, ano 17, n. 67, p. 62-99, 2008. p. 90.

⁴⁵ ALMEIDA, Gustavo Milaré. *Execução de Interesses Individuais Homogêneos: Análise crítica e propostas*. São Paulo, 2012. 247 f. Tese (Doutorado) – Universidade de São Paulo. f. 209.

Brazilian system in which the application of the resources is defined through the management council of a fund connected to an administrative body.

In this sense, some authors claim that, in a comparative study between the Brazilian and the US legal system, through the Diffuse Rights Defense Fund, it would be most accurate to compare it not with the fund recovery, but to a fund created by the environmental legislation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Professor Carlos Alberto de Salles, for example, defends this point and says that the similarity comes mainly from the fact that the CERCLA Superfund is also an administrative fund, linked to a government agency, the Environmental Protection Agency (EPA) that administers it and chooses the allocation of the resources from judicial convictions, and from other sources, in cases of damages to the legal asset.⁴⁶ That is why this legislations must be analyzed.

THE US CERCLA SUPERFUND

The CERCLA Superfund is the administrative fund linked to the Environmental Protection Agency (EPA) and precisely because it's an administrative fund feature linked to a governmental instance it is said to be much closer to the Brazilian's recovery operationalization.

CERCLA had its origin because of the problem the United States were facing in relation to toxic waste. The main barrier to hold the polluters responsible were the existing laws themselves, which were inadequate to deal with the situation. This is because they could not hold the parts responsible for past disposals; in several cases, they had had been perfectly legal at the time. Moreover, even if the rules were broken, judicial measures would not only face the normal barriers to judicial proceedings, but they would also have to be implemented at the national level, so that they could respond fully to the problem.⁴⁷

Thus, there was a general interest in the Congress to create a toxic waste cleaning program considering the national panic at the time. CERCLA added to the existing laws two

⁴⁶ SALLES, Carlos Alberto de. *Execução Judicial em Matéria Ambiental*. São Paulo: Revista dos Tribunais, 1998. p. 309-315.

⁴⁷ KONAR-STEENBERG. Mehmet K. A Superfund Solution for an Economic Love Canal. *Pace Law Review*, vol. 30, p. 310-336, 2009. p. 321.

components: a fund of, at first, \$ 6 billion financed from fees on specific products and a strict liability for the parties to bear the costs of the cleanings. Whenever possible the responsible party should pay for the cleaning and for the potential damage caused by their activities. The fund, administered by the EPA, would be used only if no party could be held liable or had no resources to pay.⁴⁸

In order to meet CERCLA's objectives, the Congress passed a supplementary legislation, the Superfund Amendments and Reauthorization Act (SARA) in 1986. Through SARA, Congress intended to address some of CERCLA's initial limitations, to reinforce some of its components, to focus more on human health issues, and provide ways to allocate enough budget to support the Superfund, since its true costs have begun to become apparent.

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To ensure site cleanliness, the CERCLA statute has two possible types of action: response and removal. The distinction between these two types of action is important, specially, due to the immediacy and capacity of funding that each of these types of action can get from the Superfund.

The fund can finance a removal entirely, without sharing its costs whenever an emergency that requires immediate action occurs. Although the statute requires a standard administrative procedure for the removal's funding, the EPA can file the documents within 60 days after the onsite activities start. Because it is an emergency, a removal can last up to 120 days, but it needs a plan and a local repository of information.⁵⁰

Thus, the removal actions provide a solution for an emergency and the initial cleaning of contaminated sites nationwide. These actions are of short duration and aim, above all, to limit immediate damage.

Response actions, on the other hand, can only be initiated at the contaminated site after a detailed administrative selection process. According to SARA, the selection of a response action is a two-step process: at first, the plan is submitted to public appreciation

⁴⁸ HIRD, John A. *Superfund: The Political Economy of Environmental Risk*. Baltimore: The Johns Hopkins University Press, 1994. p. 10.

⁴⁹ SILECCHIA, Lucia A. *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*. *Harvard Environmental Law Review*, vol. 20, p. 339-395, 1996. p. 342.

⁵⁰ LIGHT, Alfred. *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?*. *Southeastern Environmental Law Journal*, vol. 16, p. 245-289, 2008, p. 259.

with the final selection made and justified. In a second moment, there is the choice of technique to be used on the site.⁵¹

Such safeguards have been developed to a large extent by increased political pressure as a way to try to speed up the Superfund cleanup processes. Thus, the EPA has increasingly formalized the stages of progress between the initial discovery of a site and the completion of its cleanup.

In general, it is possible to state that the first stage of the Superfund process involves the choice of sites that will receive their resources. Sites identified as potential recipients are included in an inventory and studied to determine if they have a sufficient level of risk to be included in the National Priority List (NPL), a list of sites that are able to receive resources for extensive response actions.⁵²

Once a site is nominated for the NPL, decisions on possible actions to be taken begin: EPA may decide to address all of the contamination on the site in one cleanup process, or may separate it in different operational units. The operational units may be different areas of the same site, or different ways to address different types of contamination. For example, groundwater contamination or rainwater contamination. Most site, approximately 75%, have only one operational unit, but it is possible to have up to 29 operating units.⁵³

Once the action is chosen and approved, with a Record of Decision, the action begins: first it is necessary to design and plan of the project, after that the cleaning process actually begins. Upon completion of the cleanup, the site may continue on the NPL for further cleanings if the first one has not been fully effective.⁵⁴ Alternatively, the EPA may decide that sites are able to be classified as "full construction" and to be removed from the NPL. However, it is important to make it clear that often, even if off the NPL, some locations may still require ongoing maintenance.

Thus, it appears that the Superfund offers the EPA the freedom to clean the site on its own, both in an emergency manner and in locations that were abandoned, and it was not possible to find a responsible party. When it is possible to locate the responsible party, they

⁵¹ LIGHT, A. *Idem*, p. 259

⁵² SIGMAN, Hilary. The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence. NBER Working Paper n. 7704, p. 1-36, 2000. p. 13.

⁵³ SIGMAN, H. *Idem*, p. 15.

⁵⁴ SIGMAN, H. *Idem*, p. 16.

are forced to do the cleaning of the sites. It should be noted that most cleanings are the result of an agreement in which the parties reimburse the EPA for their cost recovery, or pay and carry out cleaning themselves, or even both.⁵⁵

Superfund is an expensive program. According to the US Congressional Research Service, the average cost of cleaning a facility is approximately \$20 million. This ends up making potentially responsible parties to litigate extensively seeking means to lower or divide the costs with other parties.⁵⁶

With this in mind, Congress has provided two types of mechanisms to feed the cleanups of contaminated sites: dedicate a trust fund to CERCLA and develop a liability system that encourages those responsible for hazardous waste dumps to make settlements with government authorities.

Officially called the Hazardous Substance Response Trust Fund and the responsible for CERCLA's nickname of Superfund, the trust fund provides resources for removal, study, and cleaning-up at the sites. This is a way to provide the EPA with resources to pay directly for them, thus, the Government can quickly make emergency and contingency cleanups in cases of accidents, spills and improper disposals, as well as address abandoned sites where the responsible parties cannot be found. It is also possible to speed up activities when responsible parties have been identified, but they fail to do the cleanings on their own.⁵⁷

The trust fund is auxiliary financed through 3 types of fees charged on petroleum products, chemicals and the general profit of petroleum industries that finance the Superfund.⁵⁸ The intention of Congress in creating this system was to ensure that the economic sectors responsible for creating the greatest environmental risks are also hold responsible for some of the costs of the cleaning up and the dumping of toxic substances in order to internalize a fraction of cleanings' cost in between certain industries.⁵⁹

⁵⁵ JUDY, Martha L. PROBST, Katherine N. Superfund at 30. *Vermont Journal of Environmental Law*, vol. 11, p. 191-247, 2009. p. 194.

⁵⁶ ADLER, Jonathan H. Reforming our Wasteful Hazardous Waste Policy. *N.Y.U. Environmental Law Journal*, vol. 17, p. 724-756, 2008. p. 735.

⁵⁷ JUDY, Martha L. PROBST, Katherine N. *Op. Cit.*, p. 213.

⁵⁸ REVESZ, Richard L. STEWART, Richard B. The Superfund Debate. In: REVESZ, Richard L. STEWART, Richard B. (Ed.). *Analyzing Superfund: Economics, Science and Law*. Washinton: Resources for the Future, 1995. p. 7. No original: "Curently, three separate taxes are levied on chemicals, petroleum products, and general corporate profits to finance the trust fund."

⁵⁹ HEALY, Michael P. Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach. *Case Western Reserve Law Review*, vol. 42, p. 65-146, 1992. p. 102.

However, the CERCLA's liability regime is the primarily responsible for preserving and restoring the trust fund resources through fines and cost recovery actions against violators. The liability system appears as a way to induce agreements with the EPA and provide incentives for pollution prevention and voluntary cleanup of sites that are not listed on the NPL.⁶⁰

Thus, if the trust fund gave the statute the nickname of Superfund, the liability system conferred on it the reputation of the "polluter pays".⁶¹ Superfund's broad liability system extends to owners, one-site operators, generators, and some haulers who have chosen dump sites. However, this responsibility under some circumstances extends beyond polluters to include those who have benefited from clean sites such as current owners and operators – even though they had no involvement in the original contamination. Thus, the parties subject to Superfund responsibility, rather than polluters, came to be known as Potentially Responsible Parties (PRPs).⁶²

This system not only allows the government to reach agreements with the PRPs to clean the sites but also generates an indirect source of income for the program since the work done by the PRPs is not paid by the fund, preserving its resources.⁶³ By imposing liability on those parties, who have caused and profited from past improper disposals, CERCLA seeks to ensure that these are ultimately responsible for the cleanup costs.⁶⁴

Another aspect that the responsibility imposed by the Superfund has gained attention in recent years. One of them is the high transaction costs, which often make you spend more on lawyers and consultants than on the cleaning itself.⁶⁵ With this in mind, one of the most important measures taken by the Government on SARA was to limit the time frame for judicial review of cleanups. Thus, were added provisions that have seriously limited the litigation on the liability before the removal or remediation actions were completed. These limitations reflect the philosophy of "clean up first, litigate later", which is the basis of toxic waste legislation.⁶⁶

⁶⁰ JUDY, Martha L. PROBST, Katherine N. *Op. Cit.*, p. 195.

⁶¹ Connected to the polluter pays principle in the Brazilian Environmental Law.

⁶² JUDY, Martha L. PROBST, Katherine N. *Op. Cit.*, p. 214.

⁶³ JUDY, Martha L. PROBST, Katherine N. *Op. Cit.*, p. 227.

⁶⁴ HEALY, Michael P. *Op. Cit.*, p. 82.

⁶⁵ JUDY, Martha L. PROBST, Katherine N. *Op. Cit.*, p. 236.

⁶⁶ SILECCHIA, Lucia A. Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm. *Harvard Environmental Law Review*, vol. 20, p. 339-395, 1996. p. 342-343.

BALANCING THE POSSIBILITY OF THE EXECUTION'S RETURN TO THE COURTS IN BRAZIL

After all, what is the role that fluid recovery plays in the Brazilian system? What are its potentialities? What are the advantages that a comparative analysis of this institute can bring to the Brazilian legal system? Will fluid recovery always be an imperfect alternative in the execution of class actions?

Professor Neil Komesar argues that most of us live in very complex societies that rely on abstract-based decision-making processes: amorphous institutions determine how much we earn and pay. The decisions made by anonymous bureaucrats, distant legislators, and isolated Courts that shape many of our opportunities.⁶⁷

These decision makers are not individuals or even a small group of individuals. Most often the analysis of complex processes is involved, characteristic of the political arena, the market and the adjudicatory processes. This way, it is the interactions between the many participants that shape the result.⁶⁸

It would not be different regarding the decisions made within the execution of the class actions: many people involved, huge sums of money and complex interests influence the selection of the procedures to be adopted. Above all, the option to elect as recipients of residual damages in class actions the administrative funds, reveals a fundamental choice.

Institutional choices are difficult but essential, and they are always between highly imperfect alternatives. The benefits and failures of one institution versus another that may vary depending on the circumstances and aspects highlighted in the analysis.⁶⁹

Thinking specifically about the execution of class actions, it is possible to say that initially there were three possibilities: the allocation of the residual amount by the Judiciary itself, by the market or by an administrative structure. All the options are imperfect, with their advantages and disadvantages. Moreover, the generic pecuniary reparation itself – and the existence of a residue – seems to be an imperfect alternative for diffuse, collective and homogenous individual rights.

⁶⁷ KOMESAR, Neil K. *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*. Chicago e Londres: The University of Chicago Press, 1994. p. 3.

⁶⁸ KOMESAR, N. K. *Idem*, p. 3.

⁶⁹ KOMESAR, N. K. *Idem*, p. 5.

The choice made in the US legal system was by the Courts' discretion in allocating this residual amount, while the option made by the Brazilian legislature was to allocate the funds in an administrative fund.

Due to this, the design of fluid recovery in Brazil was reduced mostly to the transfer of resources to specific funds, which, in turn, allocate the amount in previously determined areas. In fact, the legal provisions that authorize a fluid recovery in the Brazilian legal system refers emphatically to the funds.⁷⁰ However, it is not desirable to reduce an institute to its mere legal definition, especially when there is a potential to be so much more.

This is not only due to the numerous criticisms made about the fund's operation and the critics of their need in the current context of the Public Administration, but above all because of the need to rethink the way that executions of class actions in Brazil are being carried out and the importance of instruments that aims the protection of the rights.

Thus, the Judiciary is undoubtedly an imperfect institution for the allocation of the residual damages in class actions. This is reinforced by a comparative analysis of the US experience with the fluid recovery and *cy pres* and problems that are linked to the biases of judges for specific recipients that will not necessarily benefit the injured class.

Above all, it is perceived that the Courts seek to solve the problem of residual damages in class actions, and the class actions themselves, as soon as possible so as unburden its structure – constantly clogged with actions and having their performance monitored mostly by a quantitative standard.⁷¹

At the same time, the alternative to the Courts is the current situation, with the allocation of resources to administrative funds. It is a choice that, in theory, would be more democratic and efficient because it is a structure linked to the Administration itself. It would

⁷⁰ In particular: BRASIL. Act n.º 7.347/1985. Art. 13. Havendo condenação em dinheiro, a indenização pelo dano causado reverterá a um fundo gerido por um Conselho Federal ou por Conselhos Estaduais de que participarão necessariamente o Ministério Público e representantes da comunidade, sendo seus recursos destinados à reconstrução dos bens lesados. And BRASIL. Act n.º 8078/1990. Art. 100. Decorrido o prazo de um ano sem habilitação de interessados em número compatível com a gravidade do dano, poderão os legitimados do art. 82 promover a liquidação e execução da indenização devida. Parágrafo único. O produto da indenização devida reverterá para o fundo criado pela Lei n.º 7.347, de 24 de julho de 1985.

⁷¹ Especially the researches made by Conselho Nacional de Justiça (CNJ). Their most famous one, “*Justiça em Números*” demonstrates this point because of its methodology. Even though it is a fundamental empirical and statistic research to diagnose the situation of the Brazilian Judiciary it focus on just one of the many aspects that should have been taken into consideration.

relieve the Courts of this troublesome management and would be direct it to a supposedly democratic instance.

However, in materiality it is extremely inefficient. The lack of transparency of the applications and the inconsistency of their actions with the purpose of the Public Civil Action Rule (since the application of resources is not necessarily linked to the collective action from which they originated), has been jeopardizing its usefulness and credibility. So, also, a very imperfect alternative.

In addition, there is the fact that the current situation reinforces the idea of separating executive provisions from the jurisdiction. This idea, typical of a thinking that assumes that all legal assets can be reduced to values, assimilates recovery to money, and does not concerns about the development of procedures that are capable of allowing the recovery in the specific form.⁷²

Thus, through a comparative analysis and understanding of the need to unite execution to the jurisdiction, it seems that the Courts, even with all the flaws and institutional limitations, are still a valid bet as institution to determine the destination of these resources.

It should be emphasized that judges, in particular, must be careful to avoid the temptation of single institutionalism. Thus, they must consider their own abilities and the impacts of their actions in society, in addition to always balancing the need of a certain adjudicatory activity considering the institutional limitations.⁷³

The Courts are constantly faced with very complex cases and continually have to manage make judgments, in spite of their scarce resources, systemic preferences and limited knowledge.⁷⁴ This is not going to change. It is also not possible to change the fact that a compensatory protection and pecuniary convictions in class actions will always be imperfect alternatives. What can change, however, is the configuration that the execution of the class actions can have with the use of the *cy pres* or the fluid recovery allowing the judges to

⁷² MARINONI, Luiz Guilherme. *Técnica processual e tutela dos direitos*. 4. ed. rev. atual. São Paulo: Revista dos Tribunais, 2013. p. 64.

⁷³ KOMESAR, Neil K. *Op. Cit.*, p. 149.

⁷⁴ KOMESAR, N. K. *Idem*, p. 149. In the original: “Judges must balance the need for a given adjudicative activity, often defined by the severity of the malfunction in the usually more dominant market or political processes, with the costs of that activity, defined by the severity of the strain on limited judicial resources and on judicial abilities constrained by systemic biases and limited expertise. The courts must continuously juggle a series of important and credible claims on severely constrained judicial resources.”

approach the jurisdiction to the executorial provisions and become oriented to a recovery that is committed with the case that originated the resources.

CONCLUSIONS

It seems that in the end of this study there are more questions than answers, mainly about the operation and the limitations of the fluid recovery in the Brazilian system, considering the funds. It is possible, however, to point out the possibility of the return to the Judiciary of the execution of pecuniary convictions in class actions.

In this sense, it is important to emphasize the possibility of the application by the Courts themselves of the values derived from class action actions, rather than their automatic allocation to federal or state funds. It is about the use of a real fluid recovery, operated by the Judiciary and adequate with the need to promote the reconciliation of executive procedures with the judicial action.

However, such an option should always be considered with the institutional capacities of the Brazilian Judiciary to deal with this task. This involves not only the judge, but also the very structure of this institution, its limited technological and human resources, as well as the scarce time that will be spent in properly applying, supervising and publicizing the acts that this action would involve.

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