Who is liable for damage to consumers?

The challenges of joint and several liability in business chains

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In a recent decision, the Superior Court of Justice set aside the liability of a bank for delay in the delivery of a property, on the grounds that financing and supervising the construction works do not render the financial institution liable for the execution of the development. This is Embargos de Divergência em Agravo em REsp 2.422.743, reported by Justice Isabel Gallotti, the headnote of which reads as follows:

> "EMBARGOS DE DIVERGÊNCIA (MOTION FOR DIVERGENCE REVIEW). INTERLOCUTORY APPEAL IN SPECIAL APPEAL. ACTION FOR TERMINATION OF CONTRACT COMBINED WITH INDEMNIFICATION FOR MATERIAL DAMAGES AND COMPENSATION FOR MORAL DAMAGES. PROMISE OF PURCHASE AND SALE AGREEMENT. DELAY IN THE DELIVERY OF THE PROPERTY. FINANCIAL AGENT IN THE STRICT SENSE. LACK OF STANDING TO BE SUED OF THE FIDUCIARY CREDITOR OF THE CONSTRUCTION WORKS. DIVERGENCE ESTABLISHED. EMBARGOS DE DIVERGÊNCIA GRANTED.

1. Where the bank acts as a financial agent in the strict sense, in the capacity of fiduciary creditor of the real estate development, it has no standing to be sued in actions brought by purchasers of the units for defects in or delay of the construction works.
2. The mere supervision of the construction works by the financial agent – by virtue of the contractual provision linking the release of the loan installments to the progress of the development – does not, in itself, allow it to be presumed that the bank acts as executor and assumes joint and several liability for defects in and delays of the construction works.
3. Embargos de divergência granted, in order to dismiss the proceedings without a decision on the merits with respect to the financial agent, for lack of standing to be sued."

The challenged decision, handed down by the 3rd Panel, although it had applied Súmula 7, ended up recognizing the correctness of the position of the court *a quo*, to the effect that the liability of all suppliers that benefit from the consumption chain in the purchase and sale of a property is joint and several, under the terms of the Consumer Protection Code. The main ground was the fact that the financial institution supervised the construction works and linked the financing to the progress of the development, which was deemed sufficient to regard the financing entity as the executor of the works and not as a mere financial agent.

On account of divergent decisions of the 4th Panel, the matter was brought to judgment before the 2nd Section, which adopted, under the terms of the Reporting Justice's vote, the understanding that the bank lacks standing to be sued.

In her prevailing vote, Justice Isabel Gallotti found that there was the factual similarity that justifies the embargos de divergência, considering that the contractual structure of the case at hand was similar to that of the precedents relied upon: fiduciary assignment of the receivables of the real estate development, which would allow the bank to supervise the progress of the construction works for the purpose of releasing the installments and to notify the purchasers to make payments directly to it, taking over the issuance and sending of the payment slips.

Thus, as she goes on to explain, “the divergence lies in the legal classification of the fiduciary creditor that supervises the progress of the construction works in order to release the loan: the Third Panel sees in this an interference in the execution of the development; the Fourth Panel sees it as a legitimate exercise of the fiduciary security interest of a financial agent in the strict sense.”

According to the Reporting Justice, the understanding of the Fourth Panel is the correct one. To that end, a distinction was drawn between the two types of conduct of the bank within the scope of the real estate development, recalling that, when the financial institution assumes the role of co-executing agent of the construction works, effectively interfering in the execution of the development – through measures such as the choice of materials, the definition of the construction plan, etc. – there is no doubt that it is liable for delays of the development.

However, when the bank acts as a financial agent in the strict sense, by granting financing without intervening in the execution of the construction works, liability should be set aside.

This is an interesting precedent in that it shows that the general rule of the Consumer Protection Code may not be applied to economic agents whose participation in the consumption chain is not direct, especially when, as in the case at hand, there is a specific liability rule.

This is not the first time that the Superior Court of Justice has discussed the question of the extension of the consumption chain for the purposes of joint and several strict liability. At the end of 2025, in the judgment of REsp 2.228.759, reported by Justice Antônio Carlos Ferreira, the Court set aside the liability of the carrier for adulterated milk, on the grounds that its participation had been limited to the transport of raw milk between the rural producers and the processing industry.

On that occasion, the Court stated that “joint and several liability presupposes that the agent functionally forms part of the consumption chain, contributing to the placement of the product or service on the consumer market and directly or indirectly deriving economic benefit from that activity”. Therefore, a service provider “that has no functional link with the good to be supplied to the final consumer, even if it provides services to a supplier involved in the production chain” would not be considered a supplier for the purposes of joint and several strict liability.

The precedent also poses an additional challenge because, besides functional integration, it also mentions the absence of a causal link, in stating that “there is no adequate causal nexus between the transport service and the adulteration of the milk, which resulted from conduct carried out by third parties and was extraneous to the activity performed by the carrier.”

As can be seen, the subject is more than interesting and timely, especially when one notes that problems of this nature will become increasingly frequent in the context of the de-verticalization of productive activity, of progressively more complex contractual chains and of digital platforms. It will therefore be essential to establish the scope of the consumption chain for the purposes of the joint and several strict liability provided for in the Consumer Protection Code.

To that end, care must be taken with the precedents mentioned, so that excessive generalizations are not drawn from them, extending the specific understanding to other cases which, as is

the case with digital platforms, require different treatment, in which an adequate understanding of the consumption chain is called for.

Indeed, in situations in which the platform assumes the business direction and has control over the central aspects of the contracting, including pricing, there is no reason whatsoever to set aside its joint and several liability. Should the understanding of Justice Isabel Gallotti's vote prevail, since the platform does in fact interfere in the undertaking, it cannot be removed from the consumption chain.

In other words, joint and several liability should not indiscriminately reach all agents that maintain economic relations among themselves, but neither can it be set aside merely because a given agent performs a specialized function or acts through separate contracts. By the same reasoning, in no case may liability be set aside in relation to the agent that exercises the business direction of the consumption chain.

The lesson of the precedents analyzed is that the delimitation of the consumption chain requires a functional and substantive analysis of the conduct of the different economic agents. While it is necessary to avoid the indiscriminate expansion of joint and several liability so as to reach agents whose conduct bears no relation to the risks that materialized as harm to consumers, it is essential to prevent the contractual fragmentation of business activities from being used as an instrument for setting aside or mitigating the responsibilities of those who effectively organize, direct and control the supply of products and services.

Published on 22/10/2026

Link: https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/quem-responde-pelos-danos-ao-consumidor

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