

Product liability Q&A: Brazil

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Brazil-specific issues raised by product liability claims.

This Q&A provides country-specific commentary on *Product liability: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

How a claim is brought in contract

1. Under what conditions can a buyer make a product liability claim in contract law? Can the buyer sue for breach of an implied term of the contract, or breach of express terms only?

Brazilian product liability law is primarily based on the provisions of the Brazilian Civil Code (Civil Code) and the Consumer Protection and Defense Code (Federal Statute n. 8.078) (Consumer Code). Certain aspects of consumer protection legislation are regulated under special rules, such as those established by the National Sanitary Authority (ANVISA) (*Law No.9.782/1999*) and by the National Telecommunications Agency (ANATEL) (*Law No.9.472.1997*).

Under the Civil Code and the Consumer Code, the buyer can sue for breach of both an express and implied term of a contract. Buyers benefit from a general warranty establishing that producers and sellers have strict liability for defective services and products and that they must repair any damage caused by such defective services and products and indemnify any non-pecuniary losses suffered by the affected parties (*Articles 441 to 446 and 931, Civil Code; Articles 12 and 18, Consumer Code*).

The law also distinguishes a simple defect in the product which causes no damage to the consumer or others, and the situation in which a defect in a product causes injuries.

2. Can a claim be brought by someone who is not a party to the contract?

Any person who suffers damage or harm because of a defective product may bring a claim against the supplier, distributor, manufacturer, or any other person directly involved in the chain of sale, regardless of whether or not the injured person is a party to the relevant contract (*Article 931, Civil Code; Article 17, Consumer Code*). Therefore, all the victims of the event that caused damages can make a product liability claim.

If there are simple defects in the product, and no injuries are sustained, only the parties to the contract can file a claim (*Article 18, Civil Code of Procedure*).

3. How does national law regulate consumer guarantees?

Manufacturers, producers, builders (whether domestic or foreign) and importers of products are liable, regardless of fault, for the reparation of harm caused to consumers due to defects linked to product design, manufacture, construction, assembly, formulas, manipulation, presentation or packaging conditions. They are also liable for the failure to provide information or for providing inadequate or insufficient information about the use of, and risks related to, the product or service (*Articles 6 and 12 to 20, Consumer Code*).

There is also a general guarantee about product quantity and quality that establishes strict liability of the supplier for simple product defects, ensuring that, if a defective product or part is not repaired within 30 days, consumers can have the defective products replaced, or can receive a full reimbursement for the product (*Article 18, Consumer Code*).

4. On whom is the burden of proof?

In a civil or commercial contractual claim, the plaintiff bears the burden of proving its claim and the defendant must prove the opposing facts. However, if the claim is brought by a consumer in relation to product liability, the burden of proof is reversed by law so that the defendant must prove that the alleged defect does not exist, or that the event was caused by the consumer or a third party's fault, or that it had not placed the product onto the market.

In addition, the Consumer Code provides for a general consumer right to the reversal of the burden of proof in the consumer's favour in the following cases:

- Verisimilitude of the consumer's allegations.
- Where there is a recognised technical gap between the consumer and supplier's capacity to produce evidence.

(*Article 6, VIII, Consumer Code*.)

5. What is the limitation period for bringing a claim for breach of contract?

In general, the limitation period for claiming breach of contract based on product liability is five years (*Article 27, Consumer Code*).

However, both the Civil Code and the Consumer Code establish different limitation periods for specific situations regarding product defects. For instance, the limitation period for the buyer to obtain redhibition or a reduction in price is 30 days for moveable property, and one year for real property. In both cases the statutory period begins at the moment of transfer of title to the property (*Article 445, Civil Code*).

The limitation period for claims regarding apparent or easily noticeable quality or quantity defects is 30 days regarding services and perishable goods and 90 days regarding services and durable products (*Article 26, Consumer Code*). These limitation periods are counted from the moment of delivery or conclusion of the services. If a consumer suffers damages linked to quality or quantity defects, courts usually grant the consumer the five-year limitation period.

When the defect is not visible, the limitation period for complaints starts when the defect is first noticed (*Article 26, Consumer Code*).

It is important to stress that the contractual warranty is complementary to any legal warranty and will be made available through a written declaration.

Different rules may apply to other contractual claims (such as those relating to the construction sector, for example).

6. Are there any defences to a claim for breach of contract?

Defences for a claim of breach of contract can arise either from the contractual terms or from civil law rules. The defendant will have a defence if it can prove in a consumer claim related to product liability that either:

- It did not put the product on the market.
- Even though the product has been placed on the market, the defect does not exist.
- The damage is exclusively the consumer's fault or the fault of third parties.

(*Articles 12 and 18, Consumer Code*.)

In a civil and commercial claim, the seller must normally prove that the alleged defects do not exist or, if the defect does exist, the defect is not latent, the defect was known by the plaintiff, the defect is not relevant or the defect was caused by the misuse of the product (*Articles 12 and 14, Consumer Code*).

7. What remedies are available for a breach of contract?

The buyer or any other person who suffered damage can file a claim for compensation.

In relation to simple defects in products acquired in civil and commercial transactions, the buyer can claim for redhibition or a reduction in the price. If the seller knows of the defect in the product, it must compensate the buyer for pecuniary and non-pecuniary losses (*Article 443, Civil Code*).

In relation to simple defects in products acquired in a consumer transaction, if the defect is not solved within 30 days, the consumer may demand either:

- Substitution of the product for another product of the same nature, in perfect condition.
- The immediate return of the money paid, with any monetary adjustments, with no loss due to the eventual losses or damages.
- A discount proportional to the defect.

(*Article 18, Consumer Code*.)

In a contractual claim, other remedies may be available such as penalties, a statutory or contractual interest rate or an obligation to perform.

8. To what extent can liability for breach of contract be excluded?

Under civil and commercial contracts liability may be limited, but this is not possible in consumer contracts. In other words, in consumer claims the supplier must be liable for breach of contract. Also, note that any clause that excludes or limits the supplier's liability for damages is considered null and void (*Article 51, I, Consumer Code*).

How a claim is brought in negligence

9. Under what conditions can a buyer make a product liability claim under negligence law?

Anybody who causes damage to another party due to negligence is liable to provide compensation in respect of such damage (*Articles 186 and 927, Civil Code*).

A manufacturer's liability is not based on negligence; it is a strict liability that depends solely on the existence of a defect in the product that causes damage to another person and on the link between the defect and the alleged damage. Therefore, the existence of negligence is not a requisite for the manufacturer's liability.

On the other hand, the liability of self-employed professionals (such as doctors, engineers or attorneys) will depend on the assessment of fault, with the burden of proof falling on the party alleging damage (*Article 14, Consumer Code*).

10. Against whom can a claim in negligence be brought?

A negligence claim can be brought against the party who caused damage through its actions or failure to act. In the event of product liability involving consumers, the offending party is normally the manufacturer, but it can be the seller of a defective product if either:

- The manufacturer, builder, producer or importer cannot be identified.
- The product is being supplied without clearly identifying its manufacturer, producer, builder or importer.
- The seller does not adequately conserve perishable products.

(*Article 13, Consumer Code*.)

11. On whom is the burden of proof?

In a civil or commercial negligence claim the plaintiff bears the burden of proof of the constitutive facts of its rights and the defendant has to prove the opposing facts. If the claim is brought by a consumer under the Consumer Code the burden may be reversed and the defendant would have to prove the product is not defective (*Article 6, VIII*,

Consumer Code). In addition to the possibility of reversing the burden of proof in any kind of consumer transaction, the defendant may be able to exclude product liability by demonstrating that either:

- They did not put the product onto the market.
- The defect does not exist.
- The damage is exclusively to consumer's fault or the fault of third parties.

12. What is the limitation period for bringing a claim in negligence?

A person has three years in which to bring a claim in cases of negligence; in cases of product liability the limitation period is five years (*Article 27, Consumer Code*).

13. Are there any defences to a claim in negligence?

There are various possible defences in a negligence product liability claim. The most commonly used are:

- Contributory negligence.
- Absence of fault (in certain claims only where the liability is subjective and not objective).
- Force majeure.
- Improper use of the product.

Note, however, as mentioned in Question 9, that a manufacturer's liability is not based on negligence; it is a strict liability that depends solely on the existence of a defect in the product that causes damage to another person.

14. What remedies are available for a claim in negligence?

The innocent party can file for compensation for damage, including pain and suffering.

In consumer cases, in case of a simple defect that did not cause damage to the consumer or others, if the problem is not solved within 30 days, the consumer may demand either:

- Substitution of the product for another product of the same nature, in perfect condition.
- The immediate return of the money paid, with any monetary adjustments, with no loss due to the eventual losses or damage.
- A discount proportional to the defect.

(Article 18, Consumer Code.)

15. To what extent can liability in negligence be excluded?

Liability cannot in general be excluded for negligence in a product liability claim. However, there are various possible defences (see [Question 6](#)).

In a product liability claim, the defendant can also claim that:

- It did not put the product on the market.
- Even though the product has been placed on the market, the said defect does not exist.
- The damage is exclusively the consumer's fault or the fault of third parties.

(Articles 12 and 18, Consumer Code.)

Strict liability claims

16. How is strict liability implemented in national law?

In certain cases specified by law, or when the activity normally carried out by the person who caused the damage entails risks to the rights of others, such person must repair all the damage it caused, regardless of fault (*Article 927, Civil Code*).

Product liability is also based on a special type of strict liability grounded in the defects of the products, meaning that a supplier of goods or services will be held liable even without fault when a product is defective and causes damage. A product is defective when it does not offer the safety that would generally be expected from it, taking

into consideration the relevant circumstances, among which are the product's presentation, the use and risks that are reasonably expected from the product and the date when it was released. Note that a product may be deemed defective if it does not provide information or sufficient and adequate information about the use of, and risks related to, the product or service.

17. To what extent can strict liability be excluded?

Strict liability rules cannot be excluded. Any clause that excludes or limits the supplier's liability for damages is considered null and void (*Article 51, I, Consumer Code*) (see [Question 8](#)).

However, the defendant can allege in a product liability claim that:

- It did not put the product in the market.
- Even though the product has been placed in the market, the said defect does not exist.
- The damage is exclusively the consumer's fault or the fault of third parties.

(*Article 12, Consumer Code.*)

18. What remedies are available for a strict liability claim?

The victim could claim reparations for harm caused, including pain and suffering.

Article 6 of the Consumer Code sets out the basic consumer rights including the right of effective prevention and reparation for any damage suffered against pecuniary, non-pecuniary, individual, collective (regarding an identifiable category or class of persons) and diffuse (regarding an unknown group of individuals) damage.

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