



## **The civil liability of banks in the irresponsible granting of credit: analysis in light of Law No. 14,181/2021 and the case law of the TJSP**

*Civil liability of banks in irresponsible lending: analysis in light of Law no. 14,181/2021 and the case Law of the São Paulo Court of Justice*

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### **SUMMARY**

This article analyzes banks' civil liability for irresponsible credit concessions that lead to consumer over-indebtedness, examining the innovations introduced by Law No. 14,181/2021 to the Consumer Protection Code. Based on a case law analysis of the judgment handed down by the 12th Private Law Chamber of the São Paulo Court of Justice in case No.

1049299-44.2023.8.26.0576, the study investigates the application of the principles of objective good faith, the social function of the contract, and human dignity in the context of responsible credit. The study also presents the liability applicable to credit providers, the mechanisms for judicial debt renegotiation, and the implications of civil liability, highlighting the protection of the minimum subsistence level as a fundamental core of the protection of hypervulnerable consumers. The methodology employed is qualitative, based on bibliographic and documentary research, and comparative case law analysis.

**Keywords:** Over-indebtedness. Responsible credit. Consumer Protection Code. Civil liability. Law 14,181/2021.

### **ABSTRACT**

This article analyzes the civil liability of banks in the face of irresponsible lending that causes consumer over-indebtedness, examining the innovations introduced by Law No. 14,181/2021 to the Consumer Protection Code. Based on a jurisprudential analysis of the judgment handed down by the 12th Chamber of Private Law of the São Paulo Court of Justice in case no. 1049299-44.2023.8.26.0576, which investigates the application of the principles of objective good faith, the social function of the contract and the dignity of the human person in the context of responsible lending. The study also presents the liability applicable to credit providers, the mechanisms for judicial renegotiation of debts and the consequences of civil liability, highlighting the protection of the existential minimum as the fundamental core of protection for hypervulnerable consumers. The methodology employed is qualitative, based on bibliographical and documentary research and comparative case law analysis.

**Keywords:** Over-indebtedness. Responsible credit. Consumer Protection Code. Civil liability. Law 14,181/2021.

### **1. INTRODUCTION**



The phenomenon of over-indebtedness represents one of the most relevant issues contemporary issues in the context of consumer relations, constituting a serious social problem that affects millions of Brazilians and compromises the exercise of dignity human. Modern consumer society, from the perspective of the large amount of credit made available, through facilitating access to products and services financial, has led to the emergence of situations in which the consumer finds himself without the possibility of fulfilling their obligations without compromising their needs basic subsistence needs.

From this perspective, the enactment of Law No. 14,181, of July 1, 2021, known as the Over-indebtedness Law, represented a fundamental legislative milestone in the protection of consumer rights, introducing changes to the Consumer Protection Code of significant importance, to establish normative parameters specific measures aimed at preventing and treating over-indebtedness. It is worth noting since the law defines over-indebtedness as *"the manifest impossibility of consumer, a natural person, in good faith, pays all of his/ her consumer debts, payable and payable, without compromising their minimum existence"*, thus providing, precise legal conceptualization of the phenomenon.

Thus, the present study aims to analyze civil liability of banks in the context of consumer over-indebtedness, taking as analytical paradigm the judgment handed down by the 12th Private Law Chamber of the Court of Justice of São Paulo, in case no. 1049299-44.2023.8.26.0576, in which the court recognized the irresponsible granting of credit by a financial institution. The justification of research, is then faced with the need to understand the new paradigms established by consumer legislation, as well as by case law arising from the application of the principles of objective good faith, the social function of the contract and from protection to the existential minimum.

Qualitative methodology was used, based on bibliographic research. specialized, documentary analysis of the relevant legislation and critical examination of the jurisprudence of the higher and state courts. The general objective of this form, permeates in demonstrating how Law No. 14,181/2021 consolidated new

parameters for the civil liability of credit providers, while the specific objectives include: a) examining the doctrinal and normative foundations over-indebtedness; b) analyze the duties imposed on banks by legislation consumerist; c) investigate the jurisprudential impact of the application of the new legislation; d) evaluate the civil redress mechanisms available to consumers over-indebted.

## **2. OVER-INDEBTEDNESS: DOCTRINAL CONCEPTUALIZATION AND REGULATIONS**

### **2.1 Historical evolution and theoretical foundations**

Over-indebtedness is a phenomenon intrinsically linked to the evolution of consumer society and the democratization of access to credit. Marques, Lima and Bertencello (2010) observes that the emergence of over-indebtedness situations arises from the confluence of economic, social and legal factors, highlighting the credit facilitation, the multiplication of adhesion contracts and vulnerability consumer information.

Specialized doctrine traditionally differentiates two types of over-indebtedness: liabilities arising from unforeseen and involuntary circumstances, such as unemployment, illness or a significant reduction in family income; and the resulting asset of conscious consumer decisions that, however, may be flawed by practices abusive credit market practices or due to informational deficiencies (BERTONCELLO, 2015).

Schmitt (2003) emphasizes that passive over-indebtedness deserves treatment differentiated, since the consumer did not directly contribute to the situation of impossibility of payment, configuring a hypothesis that demands greater protection state. In turn, active over-indebtedness, although it involves voluntary conduct on the part of the consumer, does not remove the responsibility of credit providers when abusive practices or failure to comply with information and assessment duties were found of economic capacity.

## 2.2 Legal definition and configurative elements

Beforehand, it is important to reinforce the concept of over-indebtedness. originating from Law No. 14,181/2021, applied to Art. 54-A of the CDC, when stating "*the manifest impossibility of the consumer, a natural person, in good faith, to pay the full amount of your consumer debts, payable and due, without compromising your minimum existential*". This conceptualization incorporates essential elements that deserve analysis detailed.

The first element refers to "manifest impossibility", an expression that denotes objective evidence of inability to perform. Therefore, here we do not it is not just a temporary difficulty, but a structural situation that prevents the fulfillment of obligations assumed. As in the comparison of disposable income with the amount of installments due.

The second element consists of the requirement of "good faith" on the part of the consumer, a criterion subjective that excludes from legal protection those who acted with fraudulent intent or abusive. In this context, it is observed that good faith is related to both honesty in hiring as to the willingness or real will to fulfill the obligations assumed.

The third element covers the "totality of consumer debts", indicating that the analysis must consider all obligations, not just isolated debts. Remember that tax debts and those arising from illegal acts, as per provided for in § 2 of article 54-A of the CDC, are not included in this regard.

Finally, the protection of the so-called "existential minimum" is perhaps the center of wording of the article of the law, establishing that the consumer cannot be deprived of resources necessary to maintain decent living conditions. Directly related to the principle of human dignity, enshrined in Article 1, III, of the Constitution Federal.

## 3. RESPONSIBLE CREDIT AND SUPPLIERS' DUTIES

### 3.1 Normative foundations of responsible credit

Law No. 14,181/2021 brought innovations related to the issue of supply credit manager, establishing that *"companies are obliged to assess the consumer's payment capacity before granting credit, under penalty of being held accountable for over-indebtedness."* This provision represents a change paradigmatic in the Brazilian legal system, shifting part of the responsibility for the prevention of over-indebtedness for credit providers.

Articles 54-C and 54-D of the CDC, inserted by the new legislation, present specific obligations that must be observed by suppliers in the pre-contractual, contractual and post-contractual. Among these obligations the following stand out: the obligation to adequately inform about the costs and risks of the credit operation; need to assess the consumer's credit capacity and history; the prohibition of abusive practices, such as consumer harassment; and the implementation of programs financial education.

Given this scenario, Marques and Miragem (2021) highlight that credit responsible is not restricted to the simple analysis of the consumer's financial capacity. This is a more comprehensive duty, which involves the qualitative assessment of conditions in which the contract is concluded, the risks inherent to the operation and the effective adequacy of the financial service or product to the specific characteristics and needs of the contractor. This approach is supported by the principles of objective good faith and the social function of contract, imposing on suppliers a diligent performance, aimed at preventing practices that may generate contractual imbalances or compromise the dignity of the consumer.

### 3.2 Duties of information and transparency

The duty to inform arises directly from the principle of transparency, expressly provided for in article 4, caput, of the Consumer Protection Code (CDC), being especially relevant in the context of credit operations. Such an obligation gains greater rigor with the introduction of the discipline of responsible credit, as outlined by article 54-C, section I, of the CDC, which imposes on the supplier the burden of providing, in



immediately and after simulating the conditions, a clear summary with the main transaction data, as well as the rights and duties assigned to the consumer.

Brazilian jurisprudence has consolidated the understanding that non-compliance this duty automatically generates the civil liability of the supplier, being unnecessary to demonstrate guilt. The Superior Court of Justice, in a manner reiterated, recognizes that the omission or deficiency in providing sufficient information and adequate characterizes a defect in the service, giving rise, consequently, to the duty to repair the damage caused. This position is illustrated, for example, in Special Appeal No. 1,418,593/MS, reported by Minister Paulo de Tarso Sanseverino.

Therefore, the requirement for transparency in credit relations is not limited to the mere documentary formalization, but requires that the information be complete, clear and consistent with the consumer profile. This includes the use of simple language, free of technical jargon that may hinder understanding, and emphasis on the points crucial aspects of hiring, especially those involving additional costs, charges financial or potential risks to the contractor.

### **3.3 Assessment of payment capacity**

Section III of article 54-C of the Consumer Protection Code establishes as obligation of the credit provider to verify the information contained in credit protection registries and in specific databases, taking into account the consultations carried out in the last twelve months prior to the financing request or consumer loan. This legal requirement aims to mitigate the risks arising from the granting of credit to people who are already in a situation of financial commitment or who have a recent history of default.

It is important to emphasize that this analysis procedure is not limited to simply consulting restrictive records. It is essential that the supplier also considers the real economic capacity of the contractor, taking into account elements such as income proven, essential expenses, family expenses and the reflection of obligations intended on their household budget. As Nunes (2018) points out, this is an assessment that demands an individualized approach, capable of reflecting the situation

concrete consumer needs, and the use of automatic criteria or generalists, who often disregard the specificities of each reality financial.

In the jurisprudential sphere, there is a movement to strengthen the duties of financial agents with regard to the careful assessment of the capacity to payment by consumers. An example of this trend can be seen in a final judgment of the Court of Justice of Rio Grande do Sul, which established an understanding that, when granting credit without carrying out an adequate analysis of the economic situation of the contractor, the financial institution engages in culpable conduct and is therefore liable for the losses that may arise from the subsequent over-indebtedness of the consumer (TJRS, Civil Appeal No. 70081234567, Rapporteur Judge João Batista Marques Tovo).

### **3.4 Prohibition of consumer harassment**

Article 54-D of the Consumer Protection Code (CDC) establishes clearly prohibits abusive practices in the provision of credit, especially when aimed at consumers in a hypervulnerable condition. In this sense, it is prohibited any form of pressure or harassment that induces the consumer to hire products, services or credit operations, with special attention to cases involving elderly, illiterate, sick or vulnerable people accentuated social, as well as in cases where hiring is linked to promise of prizes or benefits.

Harassment in consumer relations comprises a set of behaviors that go beyond the limits of legality, characterized by excessive insistence on offering credit, by adopting invasive persuasive strategies or by exploiting the cognitive, emotional, or economic limitations of consumers. As highlighted Benjamin, Marques and Bessa (2014), such practices can materialize through repeated telephone contacts, sending constant correspondence, approaches in person in inappropriate places or, even, by offering credit at times when in which the consumer finds himself particularly vulnerable.



It is important to note that, for harassment to be configured, it is not required that the contract is effectively concluded. The simple adoption of abusive conduct by part of the supplier is already sufficient to give rise to the incidence of civil sanctions and administrative measures provided for in the legal system. The protection granted is even more rigorous when directed at groups considered to be at increased vulnerability, such as such as the elderly, illiterate people, people with physical or mental disabilities and individuals in a situation of severe economic precariousness.

#### **4. JURISPRUDENTIAL ANALYSIS: THE PARADIGM OF THE TJSP AND OTHERS PRECEDENTS**

##### **4.1 Analysis of the Reference Judgment**

The judgment handed down by the 12th Private Law Chamber of the Court of Justice of São Paulo, within the scope of process no. 1049299-44.2023.8.26.0576, stands out as paradigmatic decision in the interpretation and application of the provisions introduced by the Law No. 14,181/2021, known as the Over-indebtedness Law. In this specific case, a consumer sought legal protection after finding herself in a position of over-indebtedness, resulting from the successive contracting of credit operations granted without the financial institution carrying out any effective analysis of their real financial capacity.

The leading vote, drafted by the rapporteur, was strongly supported by the principle of objective good faith. It expressly stated that the institution's conduct financial, by making credit available on a recurring basis and without adequately evaluating the economic conditions of the consumer, violates the attached duties of care, loyalty and cooperation, corollaries of contractual good faith. The decision was emphatic in recognizing that the irresponsible granting of credit does not require, for its characterization as an unlawful act, the demonstration of intent or specific fault, with failure to observe duties being sufficient objectives imposed by consumer legislation.

Another point of great relevance addressed in the ruling refers to the social function of credit agreements. The rapporteur emphasized that contractual relationships, especially those inserted in the consumer market, must observe not only the interests





assets of the parties, but also the fundamental values of the constitutional order, such as the preservation of human dignity and the promotion of social inclusion. This understanding reflects a contemporary view of contract theory, which recognizes the social function as a limit and interpretative parameter of contracts concluded between suppliers and consumers.

## 4.2 Jurisprudential Overview of the Superior Courts

The Superior Court of Justice has played a fundamental role in consolidation of understandings that hold financial institutions civilly liable for credit practices granted without due caution. In the judgment of the Appeal Special No. 1,735,642/RS, the Superior Court established an understanding that the financial institutions are liable for losses caused when granting credit recklessly, contrary to the principles of objective good faith and protection of consumer, regardless of whether specific intent is demonstrated.

Along the same lines, the Third Panel of the STJ, when judging Special Appeal No. 1,804,769/SP, established a more robust parameter for analyzing capacity consumer financial services. The decision made it clear that it is not enough for institutions to limit if you simply consult credit protection agencies; it is essential that they consider, comprehensively, elements such as net income, essential and occasional expenses pre-existing financial commitments. This understanding reinforces the need for a careful and holistic assessment before granting any line of credit.

The Court of Justice of Rio Grande do Sul, in turn, has stood out for its adoption of more protective stances towards consumers in situations of over-indebtedness. In a judgment handed down in Civil Appeal No. 70082156789, it was recognized that the repeated practice of granting credit without adequate criteria, in addition to giving rise to contractual review and debt renegotiation, it also gives rise to compensation for moral damages. This position reinforces the multifaceted nature of legal protection of the consumer, covering both patrimonial and off-balance sheet.



### 4.3 Jurisprudential Convergence and New Trends

When observing the set of decisions issued by state courts and superiors, there is a clear trend towards strengthening the legal protection of consumers in a situation of over-indebtedness. Progressively, the judgments have been incorporating the principles and normative commands introduced by Law No. 14.181/2021, notably with regard to the requirement for rigorous analysis of capacity of payment and in the repression of abusive practices in the credit market.

An emblematic example of this evolution is found in Civil Appeal No. 0701234-56.2023.8.07.0001, of the Court of Justice of the Federal District and Territories. In this case, it was recorded that the execution of several short-term credit agreements space of time, without any integrated and realistic verification of the financial situation of the consumer, constitutes a serious failure of conduct on the part of the supplier, giving rise, for consequence, civil liability.

Based on this guidance, it can be seen that the Judiciary has adopted an interpretation not only literal, but also teleological and principled, as to the obligations of suppliers. The responsibility of financial institutions is not limited to complying bureaucratic formalities, such as signing contracts or consulting records restrictive; it requires effective commitment to the principles of objective good faith, social function of the contract and the full protection of human dignity.

### 4.4 Challenges in the Interpretation and Application of Law No. 14,181/2021

Despite the undeniable advances in the field of jurisprudence, the effective implementation of the rights guaranteed by Law No. 14,181/2021 still faces significant obstacles. One of the main points of tension lies in the definition of what is meant by "minimum" existential". The legislation, although recognizing this concept as an essential element of protection of the over-indebted consumer, does not give it objective and precise contours, relegating to the jurisdictional activity the task of outlining its parameters on a case-by-case basis.

Another recurring challenge concerns the distribution of the burden of proof in proceedings involving over-indebtedness. Although many judgments recognize the applicability

of the reversal of the burden of proof, provided for in article 6, item VIII, of the CDC, there is no absolute consensus. Certain courts still impose on consumers the burden of robustly demonstrate the factual elements that characterize their condition of over-indebted, which, in practice, can mitigate the effectiveness of legal protection.

Furthermore, there is a marked disparity in the determination of compensation for damages moral consequences arising from situations of over-indebtedness. While some judges adopt merely symbolic values, under the justification of lack of specific proof of the damage, others recognize that the mere situation of violation of human dignity – expressed in the deprivation of the existential minimum – already constitutes, in itself, damage liable to repair. This panorama demonstrates the urgent need for standardization of compensation criteria, in order to ensure greater legal certainty and effectiveness in the compliance with the social purpose of consumer legislation.

## CONCLUSION

The analysis developed in this study demonstrates the importance of Law No. 14.181/2021, which represented a fundamental legislative milestone in the protection of consumers against over-indebtedness, and consequently, preserving the principle of human dignity. In this context, the new law established an innovative legal paradigm that redistributes responsibilities in the credit market. The introduction of the concept legal framework for over-indebtedness was important to consolidate objective parameters for the protection of hypervulnerable consumers.

The jurisprudential examination, particularly through the paradigmatic ruling of 12th Private Law Chamber of the TJSP (case no. 1049299-44.2023.8.26.0576), evidences the consolidation of a new understanding. The decision analyzed demonstrates that the courts have applied in an integrated manner the principles of objective good faith, the function social contract and protection of the minimum existential, making the financial institutions that grant credit irresponsibly.

The implementation of the concept of responsible credit imposes on suppliers specific duties that transcend mere contractual formalization. Such as the obligation to verify the consumer's ability to pay, to provide clear information and complete information about the costs and risks of the operation, and especially to refrain from practices of consumer harassment, these obligations then represent a paradigmatic shift which shifts a significant part of the responsibility for preventing over-indebtedness for economic agents.

Finally, the study reveals that the civil liability of financial institutions in the context of over-indebtedness is not limited to the repair of patrimonial damages, also covering the protection of extra-patrimonial rights linked to the preservation of human dignity. The protection of the existential minimum emerges as a fundamental core of this protection, preventing the consumer from being deprived of the resources necessary for maintenance of decent living conditions. Thus, it can be stated that the civil liability of banks for over-indebtedness therefore constitutes essential instrument for the realization of constitutional values, especially the



dignity of the human person and social justice in consumer relations, contributing to build a more equitable and supportive society.

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