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Artículos

"FUNDS" IN CASE OF MASS TORTS: SOLIDARITY, EFFICIENCY, OR JUST A FICTION?

"Fondos" en el caso de Mass Torts: Solidaridad, eficiencia, ¿o solo una ficción?

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Abstract:

Due to the Covid-19 pandemic, mass tort funds are becoming increasingly important as a form of compensation for civil liability. This quick and easy access solution must be duly regulated to preserve the general and specific aspects of the application of this figure. For this reason, this article focuses on the analysis of mass tort funds for their possible effectiveness in responding to the damage caused by the Covid-19 pandemic to fill the gaps in civil liability through a conceptual, doctrinal, and normative study. What is important is that they do not become tools for escaping liability.

Keywords: civil law, civil liability, legal status, contract law, agreements.

Resumen:

Debido a la pandemia por Covid-19, los fondos en el caso de mass torts toman su relevancia al ser considerados como una forma de compensar a la responsabilidad civil. Esta solución de rápido y fácil acceso deben contar con una regulación debida que permita conservar aquellos aspectos generales y específicos de la aplicación de esta figura. Por eso, este artículo se centra en el análisis de los fondos en casos de agravios masivos por la posible efectividad que podrían tener para responder al daño causado por la pandemia Covid-19 para suplir las brechas en la responsabilidad civil mediante un estudio conceptual, doctrinario y normativo. Lo importante es que no se transformen en herramientas para escapar de la responsabilidad.

Palabras clave: derecho civil, responsabilidad civil, estatus jurídico, derecho de los contratos, acuerdos.

Introduction

Funds as an alternative compensation tool to civil liability in mass torts cases are again central. In the context of the Covid-19 pandemic, they could constitute a useful and flexible solution especially if accompanied by-laws providing for a limitation of liability. The advantages would be found in faster compensation that would be automatic in the presence of predefined requirements and would not be subject to the time, costs, and uncertainty of a judicial process, not to mention that it is very difficult to frame cases of health damage occurring in the Covid19 emergency within the traditional rules of civil liability for various legal and practical reasons. It has been correctly pointed out that in this situation: state of normative regulation, intrinsically private and bilateral, should not be responsible for the regulation of phenomena that, due to their entity and incidence, may, in any case, require 'system' responses" (Scognamiglio, 2020, p. 146).

The essay, therefore, aims to analyze, using a comparative method, the figure of funds focusing on their evolution in the US, which has shown their potential and criticality. Its diffusion stems above all from the disappointed expectations of class actions in mass torts: their abuse and the consequent limits correctly imposed by the jurisprudence of the Federal Supreme Court have reduced their use. In civil law systems, on the other hand, they could be imposed to compensate for the gaps in protection caused by the residual and ineffective use of class actions.

Moreover, the complexity of the current reality shows a change of perspective and a rapprochement between civil law and common law models. Traditionally, in the former, in cases of mass torts, compensation was paid by the state (top-down) while in the latter, the judicial procedure was considered more efficient (bottom-up) (Zimmerman, 2016, p. 1053). Today, however, we are witnessing a blurring of the two approaches and the contextual use of different strategies implemented by different actors that could lead to a complementary and joint adoption of administrative, judicial, public, and private solutions.

Finally, as Nagareda (2008) points out, the transaction is the subject of all mass tort litigation, through funds only anticipated, without aggravating the judicial system and with a balance of interests that might seem optimal.

However, they do not represent a neutral instrument: in fact, their adoption must be based on a clear identification of the policy objectives to be pursued and on careful and transparent preparation of the operational mechanisms. The two aspects are closely linked: once the objectives have been identified, the fund must be shaped in the appropriate way to secure them.

Methodology: the application cases

Departing from comparative private law methodology (a qualitative to study and understanding the Law) this article will introduce a case study approach.

Then, an example of the the best-known model was the one introduced in the United States to compensate the victims of 11 September 2001. In addition to the need to help those affected immediately, the aim was also to prevent actions taken against airlines from causing serious economic damage or even bankruptcy. It was a fund that was legally approved in a very short time, characterized by the fusion of different elements taken from civil liability, insurance, and the social security system. The doctrine has focused from this case on the hypotheses that could justify the implementation of this tool. As underlined by its administrator Feinberg (2011):

The Fund cannot be justified from the perspective of the victims of such tragedies or disasters. We would have to be able to explain why there was a 9/11 fund for the victims of 9/11, but none for the victims of the Oklahoma City bombing, and why there was no fund for the victims of Katrina in which 1000 people died... (The 9/11 Fund) was a unique program - it will not be repeated. (p. 1115)

It should be noted that it was also a symbolic measure because it was intended to be a unique response, expressing US strength, solidarity, and unity in the face of an unprecedented attack. This could explain, on the one hand, the difficulty encountered in replicating the mechanism with the same success in other situations (Weiss, 2016), and on the other, the criticism directed at companies when they adopted a fund as a compensation tool. A relevant example is the Gulf Coast Claim Facility (GCCF) created by BP with the help of US President Obama, after the environmental disaster caused by the Deepwater Horizon oil rig and administered by Feinberg. Unlike the 9/11 fund, it was a private fund strongly supported by the political establishment. However, several objections were raised to the fund related to the ambiguous role of President Obama, the lack of transparency in its functioning and the criteria adopted, and the smallness of the sums set aside as compensation (Gilles, 2011). Those who acted privately or through class actions obtained more significant compensation. Indeed:

Even with a party like BP able and willing to fund a massive private claims settlement facility and recruit the nation's top administrator with an unquestioned reputation for independence, that approach has failed to recreate the features of the class action that work best-the ability to deliver peace for a premium and the assurances of consistent, transparent, and equitable enforcement to all claimants. GCCF, for all its efforts to quickly provide compensation to a staggering number of claimants in a streamlined, low-cost process, could not live up to the class action settlement's ability to deliver on finality, even at greater cost, fairly and equitably

and equitable manner. In the end, the public dispute resolution system proved to be more effective in serving the public interest in effective dispute resolution. (Issacharoff and Theodore, 2013, p. 431)

Above all, the substantial difference between the two hypotheses arises from the fact that in the first case it was initially not possible to identify the perpetrators with certainty, in the second case the perpetrators were immediately clarified. In the public debate, the GCCF was therefore perceived to escape liability rather than to compensate effectively and quickly. Moreover, it can be seen how a fund can coexist with other instruments to deal with the same damaging event. For example, three different mechanisms were initiated for the Fukushima disaster:

a) A collective action.

b) A compensation scheme administered by Tokyo Electric Power Company; and,

c) An ADR funded by the Japanese government.

However, the practice has shown numerous problems here, especially in coordination (Osaka, 2019). Although the three approaches were not intended to be exclusive but cumulative this did not happen. Above all, to access ADR and the fund, the case had to be waived. Moreover, the compensatory scheme has adopted very strict standards, which has resulted in a protection gap in several scenarios. And lawsuits have not produced significant results.

This allows for two assessments of a different nature. First, in assessing both the preference of the merits over individual and class actions and the most appropriate model, one cannot ignore an examination of the institutional context. And by this, we mean not only the different formal and informal legal norms, but also the number and preparation of lawyers, the familiarity with certain mechanisms, the structure of the trial, the timing of justice. The way judges operate is also decisive. All disputes arising out of *mass torts* in the US have been characterized by a judge-managed approach that does not seem to be found now in *civil law* systems. It was a natural evolution of class actions that later also involved *multidistrict litigation* and is one of the decisive factors for the effectiveness and efficiency of class actions. In a long and cumbersome procedural system, funds could also be the right solution in order not to aggravate the justice system.

The second reflection concerns the objectives pursued. Indeed, after an environmental disaster, it might be more useful to combine damage with recovery or land improvement measures. While in other situations where only compensation or victim support is needed, funds could be effective. The opportunity to obtain effective deterrence or punishment of perpetrators should also be considered: these objectives could not be pursued through compensation schemes. The specific case should therefore guide the choice of mechanism.

However, some possible hypotheses of application can be identified. It should be noted that the use of a fund is recommended precisely if some injured parties cannot be compensated or only to a negligible extent or it is difficult to identify clearly and precisely the possible perpetrator of the offense:

They are not considered sufficient to overcome this limit, precisely because 'in the view of liability the protection of the victims of the harm is achieved by placing the cost at the expense of another partner and therefore cannot absorb the social function of the institution. (Salvi, 2019, p. 24-25).

This argument has led to the consideration of useful funds in natural disasters. One doctrine has pointed out how they could be used, for example, to compensate victims of climate change. Indeed, it has been observed how:

Certain types of disasters or mass damage seem more appropriate for a resolution of such claims through funding. These would be catastrophes imbued with community consequences, thus supporting community responses to help affected victims. As a corollary, such claims would also not support recourse to retributive justice. (Mullenix, 2015, p. 27)

In the Covid-19 case, we see many actors involved, but none can be identified as the real culprit. In fact, what is required especially when it comes to public funds such as 9/11 or a Covid fund case, is transparency, political unity, and a favorable public opinion. The US experience shows that while the 9/11 fund was

successfully received, it was not possible to repeat the same mechanism in the case of Hurricane Katrina because it was a single state event, but above all with clear political responsibilities.

The problem profiles

Despite possible limitations, one aspect should not be underestimated: the damage seems to favor these tools. An empirical study has found that in opt-in class actions, which are the most widespread model in civil law, the adhesion rate is around 10-20% and never higher than 30%. In the case of funds, on the other hand, the percentages are as high as 95% (Dodge, 2014, p. 347). This determines the importance of delineating their characteristics.

Fact, different models are possible: they can be fully state-run, developed by companies, implemented by non-governmental organizations, or hybrids. While public funds are intended for compensation, private funds are transactions and:

As a result, plaintiffs will likely need to hire and pay their lawyers to evaluate the fund's offer. For example, plaintiffs would likely need advice from a lawyer on whether to accept a Vioxx deal offered by Merck and perhaps negotiated by other plaintiffs' lawyers. Similarly, claimants would understandably question offers from asbestos companies seeking to settle their claims, believing that the asbestos companies and their claims fund staff serve the interests of the asbestos companies, rather than public justice, and disputes could arise not only as to the amount of compensation but also as to the types of injuries compensated. Concerning the noncontractual goals of deterrence and compensation, the success of the private fund, which amounts to a massive settlement, depends on the agreement reached. But we might expect that properly incentivized lawyers competing in an adversarial system against the backdrop of torts law and the ever-present threat of trial would result in settlements that would generally deter wrongdoers appropriately and that might or might not compensate plaintiffs' needs, depending on the merit of their claims. (Stier, 2011, p. 268)

They can be created because of one event or to respond to all cases that fit a general hypothesis. An example is the compensation schemes introduced in Italy for personal injuries resulting from compulsory vaccinations, transfusions, and administration of blood products. Finally, they can also be established for different purposes: for example, some have been created for restorative purposes such as for the Holocaust. Clearly, as always, with such a wide variety of models and uses, the evaluation of the tool becomes complex. What matters is the appropriateness to the context and above all the criteria with which it is designed. Experience shows that a standard model is not always effective, and it is preferable to structure it each time in a specific and detailed way.

Indeed, it has been observed that in the United States we are now seeing an evolution from funds established as part of legally approved and administered collective actions to those taxed and overseen by Congress to direct and administer funds created essentially without legal restrictions. These are broad forms of transaction that nevertheless require some precautions precisely to prevent them from becoming abuses. Moreover, Redish (2009) had already pointed out the potential risks present in funds created within class actions. This leads to the question of whether they are always a legitimate tool or whether they may instead represent a way for the perpetrator of the wrongdoing to escape liability, partially repairing the damage on his terms and protecting his interests. This is how the GCCF perceived that:

It represented an inadvertent incremental trend towards unlawful private resolution of mass claims, whose resolution was created by a guilty defendant, unfettered by legal standards, and administered by a heroic special administrator with unlimited and unreviewable discretion who was also in the employment of the wrongdoer. (Mullenix, 2012, p. 558)

When we talk about fund efficiency, we can say that a fund is efficient only if it is well constructed, it is necessary that the structure is flexible, that all relevant factors are evaluated (Hensler, 2004). For example, concerning funds created ex-ante, it is necessary to:

1) understand all relevant factors driving the success of the accepted norm to be changed in the new design; 2) make assumptions about the uncertainties emanating from the accepted norm3) identify and disaggregate the variables of the new design; 4) identify stakeholders and their preferences in reacting to the design5) select short- and long-term goals to achieve; 6design a plan and 7) anticipate resistance; and 8) revise the plan and add continuous feedback loops. (McGovern, 2004, p. 1375)

In any case, it is decisive to identify the actors, the damages, select the measures, design a plan and an end, review the plan, but specifically what is important is to see the extent and duration of the fund, the methods of financing, the categories that can be compensated, the criteria, the methodology used for quantification, the relationship with civil liability and other methods of compensation, whether it is possible to combine civil liability with the funds, the possibility of reviewing the decision. It is known that in the case of 11 September the administrator had almost absolute discretion, but this choice, although motivated by reasons of urgency and simplification, does not seem advisable, especially when the funds are public.

Above all, an analysis of the cases in which it has been adopted shows how the quantification of compensation is particularly delicate. Although de facto funds are often based on the assumption of a waiver of the claim for full compensation in the absence of costs, expectations uncertainties, they cannot even be translated into a symbolic instrument. Furthermore, the definition of the damages baseline is important. For example, in the 9/11 fund, Feinberg had set it at 250,000 dollars to be satisfactory for all parties involved. They should be examined:

(1) whether the procedures allow individuals the opportunity to state their case.

(2) whether the authorities are seen as neutral, impartial, honest, and principled in their decision-making.

(3) whether the authorities are considered benevolent, caring, and trustworthy.

(4) whether the persons involved are treated with dignity and respect. (Mullenix, 2012, p. 564)

If these instruments were to be widely adopted in Italy by companies, for example, the recourse regime established for the transaction could be considered too limited because it would not allow for verification of the transparency, validity, and homogeneity of the criteria adopted. The objection could be overcome because membership always remains a voluntary choice (Grabbill, 2012). Part of the doctrine has pointed out that

Although distributive and procedural justice are viewed independently, they are interrelated and address similar values. Therefore, fund designers who start from the first principle of distributive justice are likely to adopt values that address procedural problems. (Mullenix, 2015, p. 28)

It can also be seen how the choice depends on the event and the type chosen. What is relevant, on the one hand, is the adequacy of the assets made available for compensation, on the other hand, transparency, especially if public money is used. In the case of Covid, one could think of public or hybrid funds, e.g., with limited involvement of insurance companies or health structures. Another financing solution may be the use of percentages of the punitive damages awarded or, according to Italian doctrine, even moral damages (Maggiolo, 2020).

The thesis raises innumerable doubts arising from the very function of extra-pecuniary damage. While it can also be used for deterrent and punitive purposes, it should not be forgotten that it tends to compensate the injured party for losses that are not economically quantifiable, but often serious. It seems questionable to assign a duty of solidarity to a person who has already been affected when he might need it. The first duty of solidarity, precisely in the terms of art. 2 of the Italian Constitution, belongs to the State which has or should have the instruments to fulfill it.

Conclusions

Funds are an exceptional tool and may represent an effective solution in some exceptional scenarios, but they cannot become routine. They should only serve to fill the gaps of civil liability, not to limit it. However, what

seems essential is to outline an efficient, transparent, and fair mechanism. Its transformation into fiction or abusive instrument must be avoided.

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Información adicional

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