APPLICATION OF INVERSION OF THE BURDEN OF PROOF IN ADMINISTRATIVE SANCTIONING PROCESSES, FOR VIOLATION OF PROVISIONS OF THE CONSUMER PROTECTION CODE: NOTES TO ENSURE BROAD DEFENSE

A APLICAÇÃO DE INVERSÃO DO ÔNUS DA PROVA EM PROCESSO ADMINISTRATIVO SANCIONADOR, POR VIOLAÇÃO DE DISPOSITIVOS DO CÓDIGO DE DEFESA DO CONSUMIDOR: APONTAMENTOS PARA ASSEGURAR A AMPLA DEFESA

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RESUMO

O artigo analisa a necessidade de inversão do ônus da prova em processo administrativo sancionador das normas consumeristas, para assegurar a ampla defesa, indicando o momento em que esta deve ocorrer, e como deve ser formalizada nos autos processuais. Para tanto, faz-se uma análise perfunctória do Código de Defesa do Consumidor, com relação aos processos administrativos sancionadores que tramitam nas promotorias de justiça de defesa do consumidor do Ministério Público do Estado do Ceará, tendo por base a legislação estadual e federal. A fim de indicar como e quando deve ocorrer a inversão do ônus da prova, fez-se necessária uma análise da definição de processo, da conceituação de processo administrativo e a especificação em um de seus tipos: o processo administrativo sancionador. Apontaram-se, ainda, os princípios da ampla defesa, do devido processo legal e do contraditório, que devem ser observados em conjunto. Sem a observância do devido processo legal, não há como se falar em contraditório, e sem estes não há como assegurar a ampla defesa. Assim, a necessidade da ciência prévia da inversão do ônus da prova, não apenas antes da decisão, mas para possibilitar a ampla defesa, faz-se necessária, para que o fornecedor apresente argumentos que desconstituam os fatos alegados pelo consumidor. Sancionar sem garantir preceitos constitucionais revela um ato ao arrepio do ordenamento jurídico que deve ser combatido e invalidado prontamente.

Palavras-Chave: Processo Administrativo. Ampla Defesa. Inversão do Ônus da Prova.

ABSTRACT
This article analyzes the need to reverse the burden of proof in administrative proceedings to sanction consumer standards, in order to ensure a broad defense, highlighting the moment in which it should occur, and how it should be formalized in the procedural records. To this end, a cursory analysis of the Consumer Defense Code is made, in relation to the administrative sanctioning proceedings that are processed in the consumer defense prosecutors' offices of the Public Prosecutor's Office of the State of Ceará, based on state and federal legislation. In

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order to indicate how and when the burden of proof should be reversed, it was necessary to analyze the definition of a process, the conceptualization of an administrative process and the specification of one of its types: the administrative sanctioning process. The principles of full defense, due legal process and adversarial proceedings were also highlighted, which must be observed together. Without observance of due legal process, there is no way to speak of adversarial proceedings, and without these, there is no way to ensure full defense. Therefore, the need for prior knowledge of the reversal of the burden of proof, not only before the decision, but to enable a full defense, is necessary, so that the supplier can present arguments that refute the facts alleged by the consumer. Sanctioning without guaranteeing constitutional precepts reveals an act that violates the legal system that must be immediately combated and invalidated.

Keywords: Administrative Process. Broad Defense. Reversal of the Burden of Proof.

INTRODUCTION

The current article stems from an experience of acting in administrative processes coming from bodies that make up the National Consumer Protection System (SNDC), with the aim of applying administrative sanctions to legal entities that have violated consumer rights listed in the Consumer Protection Code (CDC).

Law 8,078, of 1990, known as the Consumer Protection Code, establishes consumer protection, recognizing their rights, providing guarantee mechanisms and defining administrative and criminal sanctions for violations.

The National Consumer Protection System (SNDC) and the Public Prosecution work together to protect the rights of the consumers. In the state of Ceará, the State Prosecution, through the State Program for Consumer Protection and Defense (DECON), is part of the SNDC and it supervises consumption relations, applying penalties when necessary.

With regard to the Public Prosecution of the state of Ceará, it is necessary to observe the Complementary Laws no 30 of 2002 and no 72 of 2008, which create the State Program for Consumer Protection and Defense and establish the attributions of the respective prosecutors.

Currently, the State Prosecution of Ceará has three prosecutors with specific competence to act in consumer protection (130a, 131a and 132a), as well as an Executive Secretariat, occupied by a designated prosecutor. Among the various attributions of these prosecutors, it stands out the inspection of consumer relations, with the application of administrative sanctions.

It is essential to emphasize that any analysis carried out in consumer protection offices must be based on the current legislation and the legal principles underlying the rules, especially the broad defense and the adversarial, whose effectiveness must endure throughout the procedure, under penalty of affecting the final decision on the application of the administrative sanction.

The core of the discussion posed in this study is at the moment when the reversal of the burden of proof should be applied in the administrative sanctioning process, when the hypossufficiency of the consumer is found, considering that, according to the CDC, all consumers are considered vulnerable, but not all are hyposufficient.

The importance of this differentiation lies in the fact that the reversal of the burden of proof only applies to the hyposufficient, hence it is incorrect to equate the concepts of vulnerability and hyposufficiency. But still, there is a question: At what point should be determined the reversal of the burden of proof, so that the observance of the principles of contradiction and broad defense remains assured?

From this questioning, the study proposes a critical analysis on the appropriate moment for the reversal of the burden of proof in consumerist procedures, in order to avoid harm to the parties and ensure respect for the principles of broad defense and contradiction.

This study has as specific objectives to identify the principles applied to the administrative sanctioning process; analyze the influence of the principles of contradiction and broad defense in these processes; to identify the opportune moment of application of the reversal of the burden of proof in administrative proceedings and the consequences of its application at a different time, from the perspective of the broad defense.

The academic relevance of this article is in the theoretical contribution about the most appropriate procedural moment to authorize, administratively, the reversal of the burden of proof. In addition, there is a legal and social relevance, because the application of the reversal of the burden of proof at an appropriate time preserves constitutional and administrative principles, preserving the correct application of the legal rule, to ensure the effectiveness of the rights of both parties.

The research was based on judgements of the ministerial bodies of Ceará and decisions of second administrative instance, with the aim of identifying the application of the reversal of the burden of proof administratively.

It is a qualitative research, exploratory and descriptive, with a theoretical-legal approach. The method used is deductive, based on the analysis of constitutional and legal principles to understand the practical consequences of the inopportune application of the reversal of the burden of proof in administrative sanctioning processes, within the scope of consumer protection.

The research is based on bibliographic review, having as bases doctrines of the Administrative and Consumer Law, as well as scientific articles and legislation. In addition, it is adopted as an empirical reference the practical experience of ministerial action in specialized Public Prosecutions for consumer protection.

1 PRINCIPLE OF BROAD DEFENSE APPLIED TO THE ADMINISTRATIVE PROCESS

Our Magna Charter of 1988, when listing the individual and collective rights and duties in the art.5th, specifically in paragraph LV, is incisive in establishing that "litigants, in judicial or administrative proceedings, and the accused in general are assured of the adversarial and broad defense, with the means and remedies inherent to it". Despite the mention in the constitutional text to administrative and judicial processes, in this work we will analyze only the application in the administrative process.

It must be emphasized that there is no way to speak in principle of the broad defense without going through notions of the principles of due process and the contradictory, since the dynamics of these intertwine.

We understand that due process of law would be the primary principle, from which would derive the principles of the adversarial and broad defense, because the broad defense is only observed when the adversary is established, and this is only noted when there is a due process of law.

Thus, as the final goal is directed to the wide defense, in the administrative process that aims at the application of administrative sanctions for violation of consumerist rules, mister makes an overview on the principles highlighted, as well as a construction, although perfunctory, that points to the most viable moment for the reversal of the burden of proof.

1.1 Administrative Sanctioning Process

In preliminary lessons of the General Process Theory, it is stated that the process is a sequence of acts, organized and aiming to achieve a specific result, in this case, a decision (Grinover, Cintra, Denmark, 1998).

Didier Jr. (2022) affirms that the concept of process is complex, resulting from this characteristic of its own constitution, since there are multiplicities of acts, facts, subjects, legal situations and because it extends in time.

Despite this complexity, it is deduced that to be characterized as a process there must be a legal relationship between the parties, with the practice of acts, which must be formalized and follow a path previously defined by law, which is called procedure.

This concept is applied to both judicial proceedings and administrative proceedings, and in the first case they process before a judicial unit, with competence for the application of jurisdiction, for the resolution of conflicts, while in the administrative case, proceed before an organ of the Public Administration, this being in one of the poles, and the administered, of the other, in order to confirm or deny a desired right, and most often apply a sanction for violation of legal norm.

Celso Antonio Bandeira de Mello (2023), one of the pillars of the Brazilian Administrative Law, defines administrative process as an itinerant and chained succession of administrative acts that tend to a final and conclusive result.

Cretella Jr. (2003), in the same sense, understands the administrative process as the set of acts and formalities that allows the State to achieve its ends, concretizing the will of the Administration.

It is thus noted that the acts must be formal and sequenced, not being able to be performed in any way, by any person and without a reason, under penalty of nullity before the need for observance of the assumptions of the administrative act (competence, form, reason, object, purpose).

If process is the set of acts, procedure is the rite, the way they are carried out and according to an established sequence.

Meirelles (1995), talking about administrative process and procedure, argues that "process is the set of coordinated acts to obtain a decision on a dispute in the judicial or administrative sphere; procedure is the mode of carrying out the process, ie the procedural rite".

The law must establish the rite, that is, the formalities for carrying out the act that will be incorporated into the process, establishing its entire procedure: how, where, who, for what.

Carvalho Filho (2012) points out that, due to the fact that the procedure is constituted of phases, in each one of these there can be the verification of legality, in order to avoid arbitrariness and promote respect for planning. Thus, the administrative process established on the basis of the Consumer Protection Code (CDC) (Law n° 8.078, of 1990), must follow a rite established in the regulation of this law, which is the Decree n° 2.181, of 1997.

Under the Decon, an organ of the State Prosecution that is part of the National Consumer Protection System (SNDC), the administrative process begins with a complaint by the consumer or resulting from a notice of infringement.

In this article, we will only analyze the verification of compliance with the principle of broad defense in the procedure resulting from the complaint of the consumer, because in addition to the Administration, which appears in all administrative processes, there is also the consumer, who had his right, in theory, violated, and that of the supplier, who, in theory, violated a consumer right.

After the complaint, taken to term, or already duly formalized, it is established, by means of an act of the prosecutor of justice, *ie* a decree, the administrative sanctioning process.

With the information provided, reporting the case, pointing out the right violated, either in relation to the product or in relation to the service, must be provided and joined all supporting documentation, such as invoice, receipt, photos, or any other documents, in order to instruct with minimum elements of preliminary conviction, as established in the State Complementary Law no 30, of 2002, which creates the State Program for Consumer Protection and Defense (Decon) and establishes the general rules of the exercise of the Police Power and the Application of Administrative Sanctions provided for in the CDC.

In sequence, the prosecutor shall determine the notification of the company, in compliance with the principles of adversarial and due process, to present a defense. Commonly, along with the notice for presentation of defense, already communicated the date for conciliation hearing, which, not occurring, inaugurates the stage of due diligence, if any, to be then concluded cases for decision.

It is evident that the above process detailed in its rite is an administrative sanctioning process, as explained by the Decree 2.181 of 1997, in its art.42.

The administrative sanctioning process aims at the application of sanctions for non-compliance with the rules, without the use of the Judiciary, which implies the sanction of both servers, who practice prohibited conduct, being punished, from warning to dismissal, as of third parties, these being natural or legal persons.

Pestana (2021) sees the sanctioning administrative process as a kind of administrative process marked by the divergence and confrontation of its partners, in which the Public Administration seeks to scrutinize and identify a practice considered as infringing certain values protected by the legal order, with a previously established sanction.

The sanction may occur for a traffic violation, for non-compliance with prohibited rules of conduct, for degradation to the environment, for harm to public health, and, which is adapted to this study, for violation of consumerist rules.

Therefore, when the analysis of the set of evidence of the administrative process sanctioning, to verify the violation to the CDC, it must be identified if there was non-compliance with any of the consumer rights, duly listed in the art. 6o of the Law no 8.078, of 1990, or liability for vice or fact of products or services.

If the complaint of the consumer is recognized as well-founded, which is equivalent to the terminology used in judicial proceedings, it is up to the adjudicating body to apply the sanction previously provided for by law, in the case of administrative nature, without forgetting civil and criminal sanctions, that will be evaluated and imposed in competent courts.

Despite the wide range of sanctions applied in consumer protection, it is observed, almost in its entirety that is, resulting from a complaint, the application of a fine, which should vary, according to the case, from 200 to 3,000,000 of Ufirces.

It occurs that, to be consummated in the application of the administrative sanction for violation of consumer rights, duly proven, one must have in mind, and properly materialized, the observance of due legal process.

1.2 Principle of Due Process

This principle, already recognized as metaprinciple, proto-principle and principle of principles, owes its origin to the protection of the citizen against the will of the State. Thus, according to Da Costa (2005), the State must base its performance on constitutional principles and laws in the exercise of its administrative powers.

It is attributed its origin in England, dating back to 1215, when the Magna Charter, granted by John Landless, assured that no one would be deprived of his rights without a fair trial and within the terms of the law, result of insurrection of the nobles against the abuses of the Crown. This principle is also evidenced in the famous 5th Amendment of the American Constitution by providing that no one will be deprived of life, liberty or property without due process of law, which was ratified and expanded in the 14th Amendment (Mello, 2023).

The positive Constitution of Brazil referred to principle in its art. 5th, LIV, by ensuring that no one will be deprived of his or her liberty or property without due process of law, fair and materializing a fundamental right (Didier, 2022).

Bastos (2010) argues that the right to due process is more a guarantee than a right, because it aims to protect the person from arbitrary action of the State.

In a broader view, Antonio Carlos de Araújo Cintra, Ada Pellegrini Grinover and Candido Danese (1998) teach that due process is not just a guarantee but a set of guarantees:

> Entende-se, com essa fórmula, o conjunto de garantias constitucionais que, de um lado, asseguram às partes o exercício de suas faculdades e poderes processuais e, do outro, são indispensáveis ao correto exercício da jurisdição. Garantias que não servem apenas aos interesses das partes, como direitos públicos subjetivos (ou poderes e faculdades processuais) destas, mas que configuram, antes de mais nada, a salvaguarda do próprio processo, objetivamente considerado, como fator legitimamente do exercício da jurisdição (Grinover, Cintra, Dinamarco, 1998).

Obedience to due process pervades all state activity, in any of its powers, and must be observed in the drafting of laws (due legislative process), in the prolatation of judicial decision (due judicial process), in law enforcement and decision-making in the public interest (due administrative process).

Thus, this principle must be applied to any and all proceedings, whether criminal, civil or administrative, regardless of whether they are before the Judiciary, the Public Administration or a condominium proceeding, it must always be observed the existence of the process, with its constitutive acts, with its formalization, with reflexes in the guarantee of the contradictory and wide defense.

Aims to ensure fundamental rights, such as life, liberty, property, presumption of innocence, intimacy, among others, in addition to the observance of other principles in decision-making, such as legality, publicity, equality, reasonableness, proportionality, contradictory, broad defense, legal certainty, trust, loyalty, good faith, efficiency, morality, no surprise.

Because they are mentioned almost logically in sequence, both by the doctrine and by the implementers of the Law, there is therefore, how to guarantee and recognize a due process only with the existence of the acts and following a rite, without guaranteeing the contradictory and the wide defense.

1.3 Principle of the Contradictory and the Wide Defense

Due to the principle of due process, failure to observe the adversarial principle invalidates the proceedings.

It happens that the conceptualization of this principle also demonstrates a dynamics with time.

Previously, its observance occurred by the opportunity of the party to manifest, an understanding defended by Liebman (1954), in which offering their reasons or remaining inactive depends on their free determination, since they had been given the opportunity of defense.

Didier (2022) brings a more current connotation in the observance of the contradictory, in which it is evidenced by the opportunization of the opposition, but also by the possibility of influencing the decision. Without allowing the presentation of arguments, ideas and facts, the contradictory is not effective.

However, the broader concept of the observance of the contradictory arises from a judicial decision in the proceedings of RMS 64.494/DF, by the minister Marco Aurélio Bellizze, *in verbis*:

> A perfectibilização do contraditório e da ampla defesa, no bojo do processo judicial, dá-se a partir da cientificação das parts a respeito de todo e qualquer ato processual, perpassando pela concessão de oportunidade de manifestação e termina com a possibilidade de influir na vindoura decisão do magistrado.

Bringing such definitions to the administrative seara, it is not enough to notify the possible sanctioned, but must be provided with its defense, granting time, receipt of the documents, as well as enabling him to influence the decision, both by the presentation of arguments and documents, as well as the possibility of hearing with the judge, in addition to an impartiality of this in search of the real truth.

In order to broadly respect the aforementioned principle, it is not admitted that the judge, whether member of the Judiciary or the administration, delivers any decision without clearly demonstrating to the parties that his statements were relevant in the decision (Damasceno, 2010).

The existence of a process, whatever the cause, without the observance of the contradictory, is void, because there is no way to guarantee a due legal process without effective participation of the opposing party.

If there is no evidence of due process without the contradictory, there is no evidence of the contradictory without the broad defense. In this regard, Mendonça (2001) states that contradictory and broad defense are related figures, so there is no contradictory without defense, and there is no defense without contradictory.

In that despite the mention of these two principles almost always together, becoming almost a logical consequence, leading often to be treated as synonyms, or as the broad defense being part of the contradictory, they have and maintain their independence, either in conceptualization, in the configuration of its observance, despite certain interdependence.

The contradictory is based on action and reaction, that is, to the movement of one party are given science, opportunity and possibility of influence to the other, several times, and with possible alternances, now one part acts, and the other reacts, and at a given moment, the one who reacted previously, acts so that the other can react. While the contradictory could be visualized as a pendulum, here and there, the broad defense refers to the amplitude of the action or reaction.

When the Administration is requested together with the request, the greatest amount and quality of evidence must be presented to support a favorable decision, whereas if required by the Administration, in order to establish a punishment or ignorance of a right, it is up to the interested party to present evidence as broadly as possible.

Broad defense, this time, is not reduced to a principle, posited as a fundamental right, in favor of those who figure in the passive pole, but it stands out as an unquestionable right whether the part figure in the passive or active pole of the claim, judicial or administrative.

So much so that in the consubstantiation of the broad defense, it is up to the party to present reasons, arguments, documents, to list witnesses, all in order to convince the judge that he has reason.

Bastos (2010) argues that, with this device, the Constitution ensures litigants, indicted or accused, conditions that enable them to bring into the process all the elements aimed at clarifying the truth.

It should be noted that the defense of interests, in the midst of the process, must be conditioned not only to the knowledge of its existence, but also of access to its content, both facts and evidence, because without this access, the exercise of broad defense would be mitigated, when not violated.

It must also, in perfect harmony of obedience to the principles of due process, the contradictory and the broad defense, provide an opportunity for the presentation of this, through science, and with the possibility of influencing the decision, at a time before this.

Pronounce the decision without first having access to the arguments and proofs brought to the record by the party, through the appropriate procedural part, circumvents the right, the guarantee, as pointed out by the doctrine, of the effective exercise of the wide defense.

The broad defense, thus, is composed by the set of arguments that the accused gathers in his favor, supplemented by documents and witnesses (Cretella Jr., 2003), as well as it must ensure that the party brings to the process all the elements tending to clarify the truth (Bastos, 2010).

However, there is a limitation to the exercise of broad defense, as expressed in the constitutional text itself: the legality and legitimacy of the evidence must be observed.

If evidence is permitted and obtained by legal means, it is acceptable. If evidence is not allowed, it cannot be accepted. If permitted, but obtained by illegitimate means, it cannot be accepted; there is even an express restriction in the constitutional text, as well as in Law n° 9.784 of 1999, which regulates the administrative process within the Federal Public Administration.

For Chaveiro (2015), the right of defense is linked to the evidentiary system, understanding the right of the parties to prove by all appropriate means in the process.

An effective demonstration of such positioning is observed in the Decree no 2.181, of 1997, when, in its art.45, §1, it establishes that the proofs proposed by the representative that are illegal, impertinent, unnecessary or dilatory will be dismissed by reasoned order.

Because it is a matter of evidence, the question of burden of proof assumes a crucial role for the reasoning of the decision, but mainly to ensure the correct observance of the broad defense.

2 NEED TO REVERSE THE BURDEN OF PROOF PRIOR TO THE DECISION IN ORDER TO ENSURE A BROAD DEFENSE

The burden of proof is understood as the responsibility assigned to each of the parties to demonstrate the reasoning of the defendant, in order to obtain a favorable decision.

For Sá (2025), the evidentiary burden is not a duty, an imposition on the party to present proof of the facts it has alleged, but rather the assumption of the risk of not doing so. Pleading without proof is the same as not pleading.

Both in the judicial process, as in the administrative process, the burden of proof, the burden to prove what is alleged, falls to the party who claims, which initiates the process. It happens that, in a consumer matter, this burden can be reversed, but, unlike what is thought and verified through the documents of the administrative process, such reversal is not automatic, and must be preceded by the verification of the hypo sufficiency of the consumer.

2.1 Principle of vulnerability and hyposufficiency

The principles, first degree standards, in their fundamental function, constitute the root from which derives the validity of the content of legal norms (Rocha, 2006).

Thus, every branch of law has a fundamental principle on which it is based. Criminal law, in the principles of legality and precedence, because it can only be punished for the practice of a crime if this is defined by law, and is prior to the act. Environmental Law, in the principles of prevention and sustainable development, must be adopted measures avoiding environmental damage and must reconcile economic development with environmental protection.

In the Consumer Law, despite the application of several principles, one becomes a key piece that supports the entire national consumerist micro system: the principle of vulnerability. This principle aims to establish a rebalancing in the consumer-supplier relationship, with a view to being the most fragile part of the relationship.

Almeida (2024) teaches that consumer vulnerability is presumed, becoming the guiding principle of material equality between subjects in the consumer market. In this rebalance, it aims to establish material equality, treating the unequal in an unequal way according to their inequalities, as the concept of Aristotle.

Such vulnerability can translate into: a technical vulnerability, resulting from the lack of technical knowledge; legal vulnerability, weakness of legal knowledge; economic vulnerability, translating a financial imbalance; and informational vulnerability that is important in the recognition of consumer manipulation by advertising (Almeida, 2024).

Even if the vulnerability is absolute, without needing proof for it, the same does not happen with the hypo sufficiency, which is relative and depends on demonstration. While vulnerability is a universal trait to all consumers, hypo sufficiency is personal, limited to some (Benjamin, Marques, Bessa, 2010). If the vulnerability aims to balance the material relationship, the hypo sufficiency aims to bring a procedural balance.

Hyposufficiency can be understood as the impossibility of bearing the procedural costs, a more widespread conceptualization, but it can also be understood as an unfavorable position with difficulty in producing evidence.

Andrade (2002) points out that hyposufficiency would be a measurable condition within a concrete consumption relationship, which, due to the flagrant imbalance, it would not be reasonable to require proof of the truthfulness of the constitutive fact of their right. This difficulty in the production of evidence is the bias that is adopted in administrative processes sanctioning for violation of consumerist norms.

Stand out, reinforcing all the doctrinal teachings of Consumer Law, that if for vulnerability is not necessary its express recognition, because it is already presumed, as for hyposufficiency, necessary its recognition, so that, from this, if procedural measures are adopted, with repercussions on the procedural duties.

2.2 Reversal of the burden of proof and appropriate timing for its application

With the recognition of the under sufficiency of the consumer, in the administrative sanctioning process, the member of the State Prosecution can adopt a procedural measure: the reversal of the burden of proof.

According to the content of the art.6o, VIII, of the CDC, it is deduced that the reversal of the burden of proof is a faculty and can only be established if the hypo sufficiency of the consumer or likelihood of the claim is recognized.

The Superior Court of Justice, in the proceedings of REsp 241.831/ RJ, whose rapporteur was the minister Carlos Filho, 3rd Class, understood that the reversal is not mandatory, stating that "the reversal of the burden of proof provided for in paragraph VIII of the Article 6 of the Law no 8.078, 1990, is not mandatory, but rule of judgment, *ope judicis*, as long as the consumer is hypos sufficient or is credible his claim".

It should be noted that, despite the faculty of reversal, this, in some cases, will be mandatory, as in the examples of arts.12, §3rd, 14, §3rd, and 38, all of the CDC, and such inversion is not at the discretion of the judge, but stems from the law itself (*ope legis*).

Following the normal course of the process, with the burden of proof according to the art. 373 of the Code of Civil Procedure, the author must demonstrate the constitutive fact of his right, while the defendant must demonstrate impeding, modifying or extinguishing the right of the author (Didier, Braga, Oliveira, 2022).

Bringing these definitions to the administrative sanctioning process in Decon, there would be two possibilities: 1st - without reversal of the burden of proof; 2nd - with reversal of the burden of proof.

Without the reversal of the burden of proof, it would be up to the consumer to present evidence, in a broad manner, in order to demonstrate his right violated by the supplier, while the supplier would have to demonstrate an impending, modifying or extinguishing fact of the alleged right.

With the reversal of the burden of proof, although the consumer-claimant need to bring minimum elements of evidence of its right violated, does not need to fully demonstrate the constitutive fact, so the supplier would have the assignment to demonstrate non-constitutive fact of the right pointed. This measure is necessary to establish a balance in the production of evidence, and should be adopted in obedience to the principles so far exposed.

It is certain that the supplier holds information that is often inaccessible to the consumer, or with immense difficulty could bring them to the records of the administrative process, but such a situation does not allow a tacit recognition of the reversal.

In order to defend and protect the vulnerable part of the relationship, the consumer sometimes, because it does not always say, adopts the reversal of the burden of proof so as to violate the principle of broad defense, since this procedural measure is applied only at the time of the decision.

By applying reversal only in the decision, the adjudicator of the administrative process does not establish a balance, but violates a principle.

When the supplier is notified to present a defense, this, following the procedural rule, is restricted to bring facts, arguments and evidence that prevent, modify or recognize the extinction of the right, whereas, with the reversal of the burden of proof, it would be up to him to bring elements that would disprove the facts.

In judicial proceedings, much has been discussed as to the appropriate moment for the reversal of the burden of proof, whether in the summons, in the sanitation or in the sentence (Almeida, 2024).

The Superior Court of Justice and the majority current of consumerist doctrinators have positioned themselves in the sense that the appropriate moment to reverse the burden of proof would be the sanitizing order, as it is a rule of procedure (Almeida, 2024).

If in the judicial process there are such questions, the same occurs when the administrative process, in order to establish the appropriate moment for the application of the reversal of the burden of proof. Because it is a rule of procedure, we understand that, undoubtedly, the inversion cannot be applied when the administrative decision, as it is.

The absence of prior communication of the reversal of the burden of proof would imply that the supplier is unaware that it would be up to him to refute the claims made by the consumer (Andrade, 2002). Applying the reversal of the burden of proof in the decision, despite respecting the due process and the adversarial, the broad defense is not observed.

As stated elsewhere, the reversal of the burden of proof influences the procedural behavior of the supplier, since it would not be restricted to defend itself, but would have the obligation to "attack", demonstrate that did not occur the fact, that the product or service provided did not violate any consumer rights, that the vice will result from misuse or exclusive fault of the consumer.

The approach, the argument, the evidence, everything is different if the burden is reversed. And if this reversal occurs only in the decision, we understand that the supplier does not exercise the fullness of the broad defense because he is not aware of his real position in the evidentiary set.

By the rite already described of the administrative process sanctioning for violation of consumerist norms, in theory does not have a moment of sanitation of the process, because with the complaint there is already the notification, for presentation of defense and participation in conciliation hearing, and after, or performance of due diligence, which almost never happen, or already occurs the decision.

Thus, we argue that the ideal and correct moment to apply the reversal of the burden of proof would be an order, to the similarity of the initial order of the judge in judicial proceedings.

In that order, it should be pointed out the vulnerability, which is already presumed and absolute, and, with due motivation, recognize the hyposufficiency, by difficulty of the consumer in evidentiary production and, therefore, apply the reversal of the burden of proof, with the consequent determination of supplier notification.

Thus, the supplier would already have prior knowledge that there is vulnerability of the consumer, whose hyposufficiency was declared, and the application of the reversal of the burden of proof, which influences his defense. Already aware of the reversal, your procedural part will be different than it would be if you did not have the burden reversed.

Even with the practice of reversing the burden only in the decision, such positioning does not seem to be the most correct, since it can not assume that the consumer is always hyposufficient, as it is vulnerable, nor that the supplier must always bear the evidentiary burden, without prior science to avoid violation of the principle of no surprise.

CONCLUSION

The observance of constitutional precepts, in particular positive principles, is of paramount importance for the support of any and all proceedings, judicial or administrative.

Regarding the administrative procedure, although it is objective to sanction the legal entity that violated a consumer right, which is punishable with educational (not to transgress anymore), corrective (ensure the violated right) and convicting (through the transfer of assets), even so it must comply with the limits established by the legal system.

With the establishment of an administrative sanctioning process, in the organs of the National Consumer Protection System (SNDC), especially the Public Prosecution, it is not enough to ensure the due legal process, but also ensure the adversarial and broad defense.

In addition to the materialization of the process, in physical or digital files, with the performance of acts duly formalized, following a pre-established rite, always carried out with publicity and by competent authority, in order to respect and ensure fundamental rights, mister that the principles derived and arising from due process of law are observed.

It is essential for normality and procedural validity to observe the contradictory, in all its developments, with science and the opportunity of argumentation and possibility of influence on the decision, as well as the wide defense, with the possibility of presenting all possible means of proof.

Thus, there is no way to ensure the observance of the principle of broad defense in the administrative process sanctioning for violation of consumerist rule, if it is not provided to the legal person the science and access to the process, but, primarily, inform him the reversal of the burden of proof.

Such information is substantial for the direction of the defense, because without the burden reversed the argument is to demonstrate fact modifying, extinguishing and impeding the right, whereas with the reversal of the burden of proof, the defense must be based on presenting a fact that deconstitutes the right allegedly violated.

Therefore, in order to ensure a broad defense, it would be reasonable for any reversal of the burden of proof to be analyzed beforehand and, if necessary, referred by way of an order recognizing the lack of sufficiency of the consumer. Not being in this way, the broad defense in all its breadth and content is prejudiced, perhaps violated, which makes, therefore, subject to nullity the respective procedure.

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