Predatory Litigation in the Health Sector: Competition Challenges of Judicial Activism in Brazil

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Introduction

The Brazilian judiciary has long grappled with the issue of hyper-litigation. In recent years, Brazil has witnessed a surge in new lawsuits, with approximately 35 million cases filed in 2023 alone. This influx has resulted in a backlog of nearly 84 million active cases. At first glance, this substantial volume of litigation appears to reflect the expansive access to justice enshrined in the 1988 Federal Constitution. However, beneath these striking statistics lies a troubling body of evidence—documented by both judicial institutions and academic research—indicating that a significant proportion of these lawsuits does not stem from genuine disputes.

Amid this proliferation of repetitive, boilerplate actions, the Brazilian judiciary has been contending with the enduring phenomenon of hyper-litigation. Moreover, mounting indications suggest that many of these claims are fabricated, artificially

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The authors are practicing competition lawyers in Brazil, with both practical and academic experience in the field, having served as regulators and private practitioners. The identification of the issue addressed in this research stems from this professional and academic background. Both authors have worked on cases in the healthcare sector, which contributed to a more comprehensive and well-founded analysis, without compromising impartiality. We declare that this research has received no funding up to the date of submission and is not sponsored by any private organization or governmental entity, being the result of the authors' independent intellectual effort. This work has been approved for presentation at leading international academic forums, such as ASCOLA 2025.

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inflated, or even rooted in fraudulent practices—manifestations of abusive and unlawful procedural strategies designed to secure undue advantages.

In essence, the right to petition is being exploited by opportunistic litigants who initiate lawsuits not with the intent of resolving legitimate disputes but to exert pressure or gain leverage at the expense of their adversaries—or even competitors—particularly in commercial and antitrust contexts. This phenomenon contributes to the mounting burden on the judiciary. Recognizing the severity of this issue, the Brazilian National Council of Justice (CNJ) enacted Recommendation No. 159/2024, which outlines potentially abusive procedural practices, advocates for judicial countermeasures, and encourages courts to adopt systemic monitoring and prevention mechanisms.

Within this context, Brazilian courts have adopted the term "predatory litigation" to characterize lawsuits that do not seek to promote genuine access to justice but instead aim to secure strategic—often anticompetitive—advantages through judicial channels. In practice, this involves the systematic filing of baseless or weakly substantiated claims that lack a sound legal foundation, with the deliberate intention of overwhelming the judiciary and securing unwarranted benefits at the expense of the opposing party or the market at large. Rather than reflecting bona fide disputes, these predatory actions exploit the judiciary as a vehicle for business advantage or regulatory manipulation: the litigant's objective is not to prevail on substantive legal grounds but to achieve success through attrition—by delaying proceedings, inflating litigation costs, or otherwise incapacitating a competitor through judicial means. In this regard, predatory litigation intersects with what legal scholars identify as "sham litigation": the fraudulent or simulated exercise of the right to petition, designed to harm competitors and distort competitive dynamics while disguising private interests as legitimate judicial pursuits

While predatory practices arise across various economic sectors, this article focuses specifically on the health care sector, whose contentious dynamics offer a revealing lens into the problem. The health care field exhibits three characteristics that render it particularly susceptible to predatory conduct: (i) an exceptionally high level of litigiousness, marked by frequent disputes both with the State and among private actors; (ii) regulatory sensitivity, as it constitutes a heavily regulated field linked to fundamental rights, thereby fostering substantial judicial activism; and (iii) a close intersection with intellectual property rights—particularly pharmaceutical patents and trademarks—which generates economic incentives for strategic and abusive recourse to the judiciary. Within this domain, legitimate claims for access to medical treatment coexist with lawsuits filed

by business actors seeking to weaponize the courts to obstruct equally or more efficient competitors. This convergence renders the sector especially fertile ground for the proliferation of predatory litigation.

Under competition law, specific forms of predatory litigation are recognized as "sham litigation"—defined as the improper and malicious use of judicial processes to obstruct or burden competitors under the guise of facially legitimate claims. When such behavior is deployed with the intent to restrain competition or secure exclusive advantages through judicial mechanisms, Brazilian antitrust law permits its classification as a violation of the economic order. Although the Brazilian Competition Defense Act (Law No. 12,529/2011) does not expressly refer to predatory litigation, both doctrinal interpretation and the jurisprudence of the Brazilian antitrust authority—the Administrative Council for Economic Defense (CADE)—support the proposition that initiating litigation without substantive merit, for anticompetitive purposes, infringes the statutory principles of free competition. In essence, legal actions brought without a credible expectation of success—whether to obstruct a competitor or based on false information or fraudulent documentation—do not enjoy "antitrust immunity" merely by virtue of judicial filing and may give rise to antitrust liability

The central hypothesis of this study posits that three institutional factors have facilitated the abusive and strategic use of the justice system: first, the absence of mandatory and uniform criteria for identifying predatory procedural conduct; second, the limited specialization of judicial bodies in regulatory, economic, and competition matters; and third, the imbalanced architecture of litigation incentives in Brazil, marked by low costs, minimal risks, and the improper allocation of procedural burdens. This normative gap, combined with the limited familiarity of many judges with the economic implications of their rulings, creates an environment that enables the phenomenon under examination. In the absence of clear parameters, predatory practices often go undetected and may resemble ordinary claims. Moreover, without sufficient technical expertise, the judiciary struggles to distinguish between legitimate disputes and those filed solely for strategic purposes. Additionally, the widespread practice of judicial activism in Brazil, particularly in the health sector, encourages private actors to exploit the courts as a market strategy, knowing that their conduct is unlikely to be identified as abusive or anticompetitive.

This study combines doctrinal research with exploratory case analysis to examine litigation in the health sector and its competitive implications. The article is structured

into four sections, in addition to this Introduction and the Conclusion. Section I develops a typology of lawsuits in Brazil that may be characterized as sham or predatory, outlining the scope of large-scale judicialization and predatory litigation to contextualize the subsequent analysis. It assesses how Brazilian courts and legal scholarship have addressed the definitions and subcategories of predatory and sham litigation. Section II explores the incentives that support such litigation in the Brazilian judiciary, analyzing the roles of lawyers, judges, parties, and third parties, while evaluating the resulting competitive harms. This section emphasizes that the strategic use of courts fosters opportunistic behavior, favors narrow interests, and disrupts market dynamics. It also examines the complex interaction between predatory litigation and judicial activism. Section III applies these insights to the health sector, which is the article's core focus, and explains why healthcare and pharmaceutical markets are particularly susceptible to predatory litigation and fraudulent tactics. It highlights the importance of industrial and intellectual property rights, particularly drug patents, in enabling practices such as trademark abuse, patent thickets, and the strategic misuse of patent litigation. Finally, Section IV proposes measures to address this impasse. It draws on an assessment of institutional mechanisms already in place and offers new strategies based on the current Brazilian legal framework

I. TYPOLOGY

A. The Historical Context of the Noerr-Pennington Doctrine

The concept of sham litigation originates in seminal U.S. Supreme Court decisions, specifically *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961) and *United Mine Workers v. Pennington* (1965), which collectively form the basis of the Noerr-Pennington doctrine. This doctrine establishes that a "sham" constitutes an exception to the right to petition, meaning that the right does not extend to actions initiated with fraudulent intent or designed to obstruct, suppress, or intimidate competitors.

As articulated by Herbert Hovenkamp, "There is no right to petition if the petition itself is a 'sham'—that is, if the petition is intended not to obtain a favorable response from the government on behalf of the petitioner, but rather to harass or suppress a rival.."[1]

[1] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 235 (Harv. Univ. Press 2005).

Accordingly, the core debate in this area focuses on how to identify violations of antitrust law, given that the right to petition is a constitutionally protected guarantee. It is therefore essential that the characterization of sham litigation align with the broader legal framework to avoid undermining the legitimacy of this fundamental right. As Ricardo Inglez de Souza observes, efforts to suppress abusive conduct must be carefully calibrated to prevent the mischaracterization of lawful actions and to ensure that the legitimate exercise of the right to petition remains fully protected.[2]

Before examining the Brazilian perspective on sham litigation, it is necessary to present the theoretical framework developed under U.S. law—the legal system in which this concept originated and was subsequently refined through judicial precedent. Consolidated by landmark decisions such as *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the U.S. doctrine provides the conceptual foundation on which other jurisdictions, including Brazil, have built their own interpretations.

In this context, the chart below aims to clarify the American doctrine on sham litigation by presenting, in chronological order, the principal precedents that shaped the Noerr-Pennington doctrine. It also outlines the legal tests that emerged from those cases, which remain in use by U.S. courts today.

TABLE 1: Timeline – Sham Litigation – USA

Year	Case	Contribution
1961	Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	In Noerr, the Supreme Court clarified that petitioning the government is protected under the First Amendment and immune from antitrust liability—even when pursued with anticompetitive intent—unless the petitioning is a sham designed to interfere with a competitor. The Court distinguished between protected governmental influence and private anticompetitive conduct, forming the basis of what became known as the Noerr-Pennington doctrine.
1965	United Mine Workers v. Pennington, 381 U.S. 657 (1965)	The Court reaffirmed and extended Noerr, applying it to joint initiatives between unions and businesses aimed at influencing public policy. The right to petition was confirmed to include collective government influence. However, the Court warned that the doctrine does not shield conduct intended to eliminate competition under the guise of petitioning.
1965	Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965)	The Court articulated the Walker Process doctrine, under which enforcement of a fraudulently procured patent may constitute anticompetitive conduct unprotected by Noerr. Such enforcement may lead to liability under Section 2 of the Sherman Act if the fraud and resulting monopoly power are substantiated.

[2] Ricardo Inglez de Souza, *The Abuse of the Right to Petition as an Antitrust Violation (Sham Litigation), in Current Challenges in Economic Regulation and Competition* 123, 123–45 (Pedro Zanotta & Paulo Brancher eds., Atlas 2010) (Braz.).

1972	Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	The Court expressly recognized that while technical access to petitioning forums is protected, the fraudulent or abusive use of that right is not. Sham litigation arises where judicial processes are used not to resolve disputes but to interfere with competitors' market entry.
1993	Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993)	The United States Supreme Court consolidated the two-pronged test for characterizing sham litigation[3], delineating the boundaries of the Noerr-Pennington exception. A lawsuit will only be deemed a sham—and thus unprotected—if (i) it is objectively baseless, and (ii) there is a subjective intent to use the process for anticompetitive ends rather than to win on the merits. This clarified the lawful scope of access to courts versus abusive use of litigation.
1994	USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994)	The court established the POSCO test, holding that repeated legal filings by unions are unprotected if objectively baseless and intended to harass or coerce. This further refined the Noerr-Pennington doctrine and clarified that protection is lost where litigation is a tool to interfere with competitors rather than achieve legitimate outcomes.

Although the landmark cases that defined the tests and shaped the evolution of the doctrine within U.S. jurisprudence do not specifically involve the healthcare sector, they share a common element: the imperative to maintain a careful balance between the legitimate exercise of a constitutionally protected right and the prevention of its misuse as a vehicle for anticompetitive practices.

Although the sham litigation doctrine lacks a precise legal definition within the European context, analogous practices are acknowledged as potential infringements of competition law, particularly under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[4]. Nevertheless, case law remains incipient, with *ITT Promedia v. Commission* (1998) serving as the inaugural case.

In summary, this case involved allegations that Belgacom initiated lawsuits against Promedia with the intent of impeding its competitor's operations. In response to these concerns, the European competition authority, following an investigation into the alleged conduct, formulated a two-pronged test intended to identify abuses in the exercise of the right to petition within the antitrust framework: (i) it was necessary to demonstrate that the right being asserted could not be legitimately claimed by the plaintiff, implying that the lawsuit was filed exclusively to harm the competitor; (ii) the litigative actions must be part of a broader strategy aimed solely at eliminating competition. Consequently,

[3] See *Prof'l Real Est. Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (setting forth a two-part definition of sham litigation requiring both objective baselessness and subjective intent to interfere with competition).

[4] *See Consolidated Version of the Treaty on the Functioning of the European Union* arts. 101–102, Oct. 26, 2012, 2012 O.J. (C 326) 47 (prohibiting collusive conduct and abuse of dominant position in the internal market).

the General Court of the European Union determined that none of the actions satisfied the first criterion of the established test, and thus, the allegation of sham litigation was not sustained.[5]

Another landmark case is *AstraZeneca v. Commission*[6], in which the AstraZeneca group engaged in a series of strategic practices aimed at extending and safeguarding the market exclusivity of its pharmaceutical product, Losec, thereby impeding the entry of generic competitors into the European market. The company implemented two principal tactics: (i) submitting misleading information to national patent authorities to obtain supplementary protection certificates—thereby artificially extending Losec's market exclusivity and delaying the entry of generics; and (ii) requesting the withdrawal of the marketing authorization for the capsule form of Losec after launching its tablet version, thereby hindering parallel imports and limiting competitors' market access.

The European Commission did not characterize the conduct in *AstraZeneca* as an abuse of the right to petition, opting instead not to apply the test articulated in the *ITT Promedia* decision. Rather, it concluded that the conduct could constitute an abuse of dominant position through the deceptive use of administrative and regulatory procedures, even when such conduct may appear legitimate on its face. The Commission ultimately found that AstraZeneca had violated Article 82 of the EC Treaty by providing false or misleading information to manipulate the patent and marketing authorization systems, with the purpose of obstructing competitors and unlawfully extending its market exclusivity.

This precedent has been cited by the Brazilian Competition Authority in domestic cases, including the *Eli Lilly* proceeding[7], where the European decision was expressly referenced in the opinion authored by Commissioner Ana Frazão. That case resulted in the imposition of a fine of R$ 36.6 million on the companies involved, based on findings of sham litigation. Additional details concerning this and other relevant cases will be addressed in the following sections, which focus on the Brazilian legal and institutional context.

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[5] Gustavo Santos Diniz & Vicente Bagnoli, *Sham Litigation in Brazil: Development, Standards, and Critique*, 33 Rev. TRF1 130, 132 (2021) (Braz.), https://revista.trf1.jus.br/trf1/article/view/296.

[6] *Case C-457/10 P, AstraZeneca AB & AstraZeneca plc v. European Commission*, ECLI:EU:C:2012:770, Judgment of the Court (Grand Chamber), Dec. 6, 2012.

[7] *Administrative Proceeding No. 08012.011508/2007-91*, Brazilian Administrative Council for Economic Defense (CADE), referencing Eli Lilly do Brasil Ltda. and Eli Lilly and Company, cited in Opinion of Commissioner Ana Frazão (2019).

To conduct a comprehensive analysis of the anticompetitive implications of predatory litigation in the Brazilian healthcare sector, it is necessary first to outline the historical development of the sham litigation doctrine and assess the extent to which it has been incorporated into the national legal framework. This historical and teleological inquiry establishes the criteria for distinguishing the legitimate exercise of the right to seek judicial relief from its strategic misuse for exclusionary purposes. Building on this theoretical foundation, the present study adopts a postmodern comparative methodology to systematically contrast different factual and cultural contexts. This approach enables the deductive formulation of regulatory reform proposals and legal instruments designed to mitigate the incidence of predatory litigation in Brazil.

B. The Paradigm for Identifying Sham Litigation in Brazil

As in the context of the United States, the right to petition is constitutionally guaranteed in Brazil. In this regard, Mendes and Branco characterize the right to petition as a fundamental right of a general and universal nature, applicable to any individual—whether natural or legal, Brazilian or foreign—who seeks, either individually or collectively, to submit complaints or requests to public authorities, either to defend rights or to contest unlawful acts or abuses of power.[8] Nevertheless, it is well understood that rights are not absolute; even fundamental rights may be subject to limitations. Consequently, the abusive exercise of rights must be restrained to avert harmful consequences for other citizens and for the integrity of the legal system itself.[9]

Although not expressly regulated under Brazil's Competition Law (Law No. 12,529/2011), the phenomenon of sham litigation has been examined and sanctioned by the Administrative Council for Economic Defense (CADE) over the past several decades. In 2010, CADE's plenary adjudicated *Comissão de Defesa do Consumidor, Meio Ambiente e Minorias da Câmara de Deputados v. Box 3 Vídeo e Publicidade Ltda. and Léo Produções Publicidade*, a case commonly referred to as the *Shop Time* proceeding. The case raised important questions in legal scholarship and enforcement practice

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[8] Gilmar Ferreira Mendes & Paulo Gustavo Gonet Branco, *Constitutional Law Course* 664 (7th ed. 2012) (Braz.).

[9] Beatriz P. Renzetti, *Tratamento do Sham Litigation no Direito Concorrencial Brasileiro à Luz da Jurisprudência do CADE*, 5 *Rev. Def. Concorrência* 145, 150 (2017).

regarding whether the initiation of lawsuits based on nonexistent or dubious intellectual property rights may constitute an abuse of the right of access to the judiciary.

As a result, following a comprehensive evidentiary proceeding, CADE concluded that there was no legitimate basis for the numerous lawsuits under review. The evidence demonstrated that the underlying motivation for the legal actions—particularly those accompanied by requests for injunctive relief—was to suppress the complainants' sales programs and to create barriers to market entry, thereby violating competition law.[10]

However, it was not until August 2015 that a formal framework for addressing sham litigation was articulated within the jurisdiction of the Brazilian antitrust authority. This occurred in the case of *Associação Brasileira das Indústrias de Medicamentos Genéricos – Pró-Genéricos v. Eli Lilly do Brasil Ltda. and Eli Lilly and Company*. In that proceeding, the General Superintendence (SG) considered both the Noerr-Pennington doctrine and the Brazilian legal framework, which already imposes limitations on constitutional rights related to petitioning and access to the judiciary, as reflected in Article 5, items XXXIV and XXXV, of the Federal Constitution. Additionally, Article 17, item III, of the 1973 Code of Civil Procedure (corresponding to Article 80, item III, of the 2015 Code) prohibits the misuse of procedural mechanisms for unlawful purposes. Article 4 of Law No. 9,784/99, which governs administrative procedures, also establishes a duty of good faith for individuals interacting with public authorities.

Moreover, in the same case, four analytical tests were employed to assess the presence of sham litigation, drawing on legal analogies with U.S. antitrust jurisprudence, which distinguishes between abusive (sham) and legitimate litigation. These included: (i)

[10] Eduardo M. Gaban & Juliana O. Domingues, *Direito Antitruste* 162 (5th ed. 2024).

PRE test[11]; (ii) POSCO test[12]; (iii) Fraudulent Litigation[13]; and (iv) the Existence of Settlement Agreements and Other Lawsuits[14].

TABLE II – CRITERIA UNDER THE DIFFERENT SHAM LITIGATION TESTS

Test	Description	Objective Criteria
PRE	Developed by the U.S. Supreme Court in Prof'l Real Est. Inv'rs, Inc. v. Columbia Pictures, the PRE Test establishes when a single lawsuit may be deemed sham litigation and thus lose Noerr-Pennington immunity. It focuses on objectively baseless claims pursued with exclusionary intent.	1. The lawsuit is objectively baseless (lacks plausible legal merit). 2. The real objective is to exclude a competitor, not to obtain a favorable decision.
POSCO	The POSCO Test, formulated in USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council, extends the PRE Test to situations involving repeated, coordinated, or mass litigation. It emphasizes patterns of abusive judicialization.	1. Pattern of multiple lawsuits. 2. Repeated or coordinated use of the judiciary to achieve exclusionary outcomes.
Fraudulent Litigation	Based on Walker Process doctrine, this category refers to litigation derived from rights acquired by fraud (e.g., fraudulent patent procurement or false statements). In Brazilian law, it includes abuse of procedural rights through bad faith or distortion of facts.	1. Procedural fraud or bad faith (e.g., false evidence, distortion of legal facts). 2. Intent or result of harming a rival or blocking competition.
Judicial Settlements and Other Actions	This approach, derived from empirical analysis by CADE and doctrinal synthesis, evaluates whether settlement behavior and related legal conduct are consistent with anticompetitive strategies.	1. Existence of prior or parallel agreements among plaintiffs. 2. Thematic repetition and coordinated pattern of judicial conduct.

[11] The PRE Test, developed in *Prof'l Real Est. Inv'rs, Inc. v. Columbia Pictures*, is designed to identify sham litigation in the context of a single lawsuit. It focuses on claims that: (a.1) lack standing, omit relevant facts, or violate principles such as *venire contra factum proprium*; and (a.2) are aimed at inflicting collateral harm (e.g., reputational damage or cost increases) rather than obtaining a legal remedy. See Gaban & Domingues, *supra* note 10, at 163.

[12] The POSCO Test, formulated from *USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council*, targets litigation strategies involving repetitive filings with little chance of success, used to harass, coerce, or exclude competitors. Unlike the PRE Test, it evaluates the broader strategic behavior of the plaintiff rather than the merit of each individual suit. See Gaban & Domingues, *supra* note 10, at 164.

[13] Fraudulent litigation, distinct from the PRE and POSCO tests, concerns the use of litigation rights obtained through fraud, such as by enforcing patents procured with false statements or omissions. This doctrine was recognized in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.* and adapted to other abusive institutional practices, including those addressed in *Cal. Motor Transp. Co. v. Trucking Unlimited*. See Gaban & Domingues, *supra* note 10, at 164.

[14] This hypothesis considers whether sham litigation may be inferred from the surrounding context—e.g., strategic settlements with exclusivity clauses or pricing restraints, and parallel lawsuits targeting competitors. Examples include Brazilian cases involving the *Superintendência-Geral* of CADE. See Gaban & Domingues, *supra* note 10, at 165.

However, the most significant precedent involving the full application of the sham litigation doctrine arose in the case of *SETCESP v. ECT* (Brazilian Postal Service).[15] In that decision, CADE recognized the complete configuration of sham litigation, based on the cumulative application of the evaluative criteria derived from the Noerr-Pennington doctrine, as developed under U.S. antitrust law. The authority concluded that the lawsuits filed by ECT lacked legal plausibility, as they directly contradicted settled jurisprudence of the Brazilian Supreme Federal Court regarding the scope and limitations of the postal monopoly. The evidence established that the principal aim of these legal actions was not to resolve legitimate disputes but to exclude competitors from the market or hinder their ability to access it.

The actions in question involved the extensive and recurrent use of both judicial and extrajudicial mechanisms, not for the legitimate protection of rights, but to construct artificial barriers to competition by generating costs, risks, and procedural uncertainty. As a result, this case stands as a precedent in which the three classical elements of sham litigation were confirmed with notable rigor and comprehensiveness: (i) the absence of legal plausibility in the claims, accompanied by instances of fraud; (ii) the presence of an underlying anticompetitive intent; and (iii) a pattern of systematic and repeated conduct aimed exclusively at exclusionary objectives.

Nearly a decade after Brazil first recognized sham litigation as an anticompetitive tactic, the Brazilian Competition Authority revisited the issue in *Associação dos Intermediários Digitais de Jogos Lotéricos (Aidiglot) v. Caixa Econômica Federal & Federação Brasileira das Empresas Lotéricas* (Feb. 2025)[16]. In its accompanying Technical Note, CADE reaffirmed—consistent with U.S. antitrust law—that the constitutional right to petition, while fundamental, is not absolute. When litigants use judicial processes to obstruct competitors or to foreclose market access, that right must be subordinated to broader competition principles established under Brazilian law. Drawing explicitly from U.S. precedent, the authority articulated a set of normative boundaries intended to prevent the misuse of the judiciary as a vehicle for exclusionary conduct.

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[15] *Administrative Proceeding No. 08700.009588/2013-04*, Brazilian Administrative Council for Economic Defense (CADE).

[16] *Technical Note No. 16/2025/CGA11/SGA1/SG/CADE*, within *Administrative Proceeding No. 08700.003430/2023-01*, Brazilian Administrative Council for Economic Defense (CADE).

In this context, the Technical Note identifies a set of normative constraints on the right to petition, drawing from instruments such as the Code of Civil Procedure, the Law on Administrative Procedure, and the Brazilian Competition Law. It notes that, in assessing such conduct[17], CADE has adopted the analytical benchmarks and tests developed by the U.S. judiciary. Nonetheless, the Note emphasizes the essential need for each case to be evaluated under the rule of reason framework, thereby allowing for a contextualized assessment of whether the conduct at issue is lawful or unlawful. The Technical Note also references the concept of bad-faith litigation (*litigância de má-fé*), which—together with predatory litigation—will be examined and contrasted with the doctrine of sham litigation in the following section, in order to prevent conceptual overlap among these distinct legal categories.

Bad-faith litigation (*litigância de má-fé*) constitutes a procedural infraction resulting from the violation of duties enumerated in Article 80[18] of the Brazilian Code of Civil Procedure (CPC). These include prohibitions such as: "asserting a claim or defense against the express provisions of law or undisputed facts," "distorting the truth of the facts," "using the judicial process to achieve an unlawful objective," "unjustifiably resisting the progress of the case," "acting recklessly in any procedural incident or act," "initiating a manifestly unfounded incident," and "filing an appeal with a clearly dilatory intent".[19]

Moreover, as Macêdo explains, it is essential to distinguish bad-faith litigation from other forms of procedural misconduct, such as actions that undermine the dignity of the judiciary or the misuse of procedural rights. According to the author, conflating these categories is a relatively common occurrence. While they may share certain overlapping features, each is defined by distinct doctrinal justifications and operates within a separate legislative framework.[20]

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[17] *Technical Note No. 16/2025/CGA11/SGA1/SG/CADE*, Brazilian Administrative Council for Economic Defense (CADE), § 74 ("To characterize the conduct, CADE has applied, as analytical parameters, the 'tests' developed by the U.S. judiciary to distinguish sham litigation from genuine litigation. In summary, the hypotheses for the configuration of sham litigation that have been considered by this Superintendence in various precedents…").

[18] *Cód. Proc. Civ.* art. 80 (Braz.) ("A party is deemed to litigate in bad faith when they: (I) assert a claim or defense in contradiction with express legal provisions or undisputed facts; (II) distort the truth; (III) misuse legal proceedings to pursue an unlawful objective; (IV) unjustifiably resist the progress of the proceedings; (V) act recklessly in any procedural incident or act; (VI) initiate a manifestly groundless incident; or (VII) file an appeal with clearly dilatory intent.").

[19] Lucas Buril de Macêdo, *Bad-Faith Litigation* 198–99 (JusPodivm 2023) (Braz.).

[20] Id.200.

From this perspective, the distinction between bad-faith litigation and sham litigation is fundamental. Although both pertain to procedural abuses, they differ in nature, purpose, and legal foundation. Bad-faith litigation, as set forth in the Code of Civil Procedure, involves conduct in which a litigant breaches the duties of loyalty, good faith, and cooperation, thereby compromising the integrity of the judicial process. In contrast, sham litigation is primarily a concept of competition law. It refers to the strategic and repeated use of judicial proceedings without credible legal justification, with the intent not to obtain legitimate relief but to impair or eliminate market rivals.

In essence, sham litigation functions as an exploitative mechanism within judicial proceedings, strategically employed to pursue anticompetitive objectives that transcend the immediate scope of the legal dispute. This may include actions intended to obstruct competitors or to limit market access. In contrast, bad-faith litigation is defined by procedural misconduct, such as violations of the principles of loyalty and good faith, occurring within the boundaries of the judicial process itself. Accordingly, it can generally be stated that every instance of sham litigation entails bad-faith conduct, particularly in light of its economic and competitive consequences. However, the inverse does not hold: not every act of bad-faith litigation constitutes sham litigation, which requires a broader strategy specifically directed at restricting competition.

The phenomenon of predatory litigation raises substantial concerns within the legal system. It is characterized by the indiscriminate and large-scale filing of judicial or administrative actions primarily aimed at obtaining unlawful or disproportionate financial gains. These lawsuits often involve similar subject matter and employ nearly identical pleadings, with variations typically limited to the identification of the plaintiffs. This practice exploits structural vulnerabilities in the legal framework, including legislative gaps, procedural delays, and automated decision-making, and frequently relies on tenuous or implausible legal arguments.

The distinction between predatory litigation and sham litigation lies in the fact that the latter constitutes an aggravated form of the former. Sham litigation is defined by a total lack of merit in the underlying claims—cases filed without any reasonable expectation of obtaining a favorable ruling, brought solely to obstruct market competitors or to construct artificial barriers to entry. As noted by Frazão and Vieira de Mello Filho, predatory litigation requires careful scrutiny and public discourse, particularly in cases involving powerful litigants, objective procedural mechanisms, repetitive claims with systemic effects, or large-scale collective actions. This need for vigilance becomes even

more pressing when such practices affect vulnerable populations, implicate diffuse rights, or threaten foundational legal values, including the protection of non-disposable rights and the preservation of democratic integrity.[21]

In conclusion, predatory litigation—particularly in its most acute form, sham litigation—extends beyond abstract legal theory and emerges as a systematic and concrete practice across various sectors of the Brazilian economy. In such cases, the judicial system is co-opted as an instrument for constructing competitive barriers, subverting its fundamental role of protecting rights in favor of strategies designed to exclude competitors or to discourage new market entry. The following matrix offers a structured overview of the predominant forms of predatory litigation observed in Brazil, outlining their typical mechanisms, principal anticompetitive effects, and representative examples from sectors especially susceptible to competitive pressure.

TABLE III – SECTORAL MANIFESTATIONS OF PREDATORY / SHAM LITIGATION

Sector	Strategy	Description	Anticompetitive Impact	Case
Technology and Digital Platforms	Patent litigation over design and utility models	Strategic use of intellectual property litigation to block or delay competitors in the global smartphone market.	Increases entry barriers, suppresses innovation, and raises operational costs.	Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK (N.D. Cal. filed Apr. 15, 2011).
Telecom and Technology (Chips)	Litigation paired with exclusionary licensing	Extensive lawsuits and aggressive licensing aimed at limiting market access to chip and telecom infrastructure.	Excludes rivals, raises switching costs, and consolidates market power.	Fed. Trade Comm'n v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 WL 2774406 (N.D. Cal. June 27, 2017).
Pharmaceutical	Judicial "evergreening"	Legal strategies to delay generic competition by extending exclusivity over already expired patents.	Delays market entry of generics, sustains monopolies, and increases consumer costs.	EMS S.A. v. AstraZeneca Brazil Ltd., Civil Appeal No. 0122812-64.2011.8.26.0000, São Paulo State Court of Justice (TJSP), Sept. 2011 (Braz.).

[21] Ana Frazão & Luiz P. Vieira de Mello Filho, *Predatory Litigation*, JOTA (Feb. 2, 2023), https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/litigancia-predatoria.

Agribusiness	Patent litigation over biotechnology	Claims over genetically modified seeds filed against small producers, even in cases involving reuse or expired patents.	Restricts competition from small farmers and reinforces dominance in seed supply.	Monsanto do Brasil Ltda. v. Farmers' Cooperative, Special Appeal (Resp) No. 1.010.728/RS, Brazilian Superior Court of Justice (STJ), 2012.
Logistics and Transport	Abuse of statutory monopoly through litigation	Use of lawsuits to bar competitors from operating logistics and delivery services under monopoly claims.	Raises legal risks for private operators and reduces consumer alternatives.	São Paulo State Freight Transport Union (SETCESP) v. Brazilian Postal Service (ECT), Administrative Proceeding No. 08700.009588/2013-04, CADE (Braz.).

II. INCENTIVES TO LITIGATE AND COMPETITIVE CHALLENGES

A. The Economics of Predatory Litigation as an Anticompetitive Conduct

From a law-and-economics perspective, sham litigation is best understood as a form of fraudulent or predatory litigation marked by anticompetitive intent.[22] Within this analytical framework, a lawsuit is considered predatory when the initiating firm does not expect to derive profit from a favorable outcome on the merits. Instead, the decision to pursue litigation is motivated by the anticipation that collateral benefits—such as delaying a competitor's market entry or increasing the rival's operational costs—will outweigh the costs incurred through the legal process.

As observed by Judge Richard Posner in his cost-benefit approach[23], a firm may initiate legal proceedings that no rational actor would pursue solely for the purpose of securing judicial relief. If the anticipated monetary gain from a favorable ruling is less than the cost of litigation, such an action is economically rational only if it yields ancillary market advantages—namely, the exclusion or deterrence of competitors—regardless of the case's outcome.[24] In this sense, when the principal value of a lawsuit lies not in prevailing on the merits but in inflicting competitive harm, the action qualifies as predatory litigation, specifically in its anticompetitive form known as sham litigation.[25]

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[22] Christopher C. Klein, *The Economics of Sham Litigation: Theory, Cases, and Policy* 1 (Fed. Trade Comm'n, Bureau of Econ., Staff Rep. 1989).
[23] See *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466 (7th Cir. 1983).
[24] Id. at 22 (citing Richard A. Posner, 2 (1982)).
[25] Lucia Helena Salgado et al., *Study on the Anti-Competitive Enforcement of Intellectual Property Rights: Sham Litigation* 3 (Inst. for Applied Econ. Research, 2010).

Economic theory suggests that sham litigation is analogous to non-price predation, serving as a means to establish monopoly power without resorting to price reductions. Much like predatory pricing aims to eliminate competitors through sustained financial losses, predatory lawsuits endeavor to oust or marginalize rivals by imposing exorbitant legal costs or significant delays. It is important to note that litigation can function as a particularly insidious form of predation; it frequently imposes asymmetric burdens where the targeted party incurs substantial defense costs and experiences market alienation, whereas the aggressor's expenditure is often limited to legal fees. Additionally, such litigation can be perpetuated or extended through the appeals process.[26]

In Brazil, the framework governing civil litigation significantly intensifies the incentives for predatory lawsuits, primarily due to the minimal barriers to litigation and procedural features that facilitate abuse. Specifically, the broad availability of free legal assistance, known as *benefício da assistência judiciária gratuita* (AJG), often allows plaintiffs to initiate and pursue litigation without incurring substantial costs. This dynamic notably increases the attractiveness of predatory strategies, especially in cases involving fraudulent sham litigation, where plaintiffs frequently act through proxies (*laranjas*) who are unaware that legal claims have been filed in their names. Moreover, there are cases in which, beyond the fraudulent use of the plaintiff's identity, there is collusion between the nominal plaintiff and the actual sponsor of the litigation, aiming to secure material or financial gains through judicial channels. As a result, the financial and economic burdens of such litigation are disproportionately borne by the victims of these predatory schemes and, in some cases, by third-party or collateral victims.

Klein and Lucia Helena Salgado et al. articulate this concept through a straightforward incentive model.[27] In this model, let B represent the anticipated benefits of winning the case, X denote extra-market gains (such as a rival's postponed entry), and L signify litigation costs. Even in instances where B is less than L, a firm may opt to initiate litigation if X + B exceeds L. This indicates that the anticompetitive gains (X) can outweigh the costs of litigation. In scenarios of predatory litigation, X—defined as collateral anticompetitive gain—emerges as the primary objective. For instance, a firm may enjoy elevated monopoly prices while its competitor is entangled in legal proceedings or restrained from market participation. Indeed, if the predominant impact of

[26] *Id.* at 45.
[27] Klein, *supra* note 22, at 17–20; Salgado et al., *supra* note 25, at 24, 45.

the lawsuit is to increase market prices or eliminate competition, the litigant's intent can be deemed anticompetitive, rendering the suit predatory in nature.[28]

- B: Expected direct benefit from winning the lawsuit
- L: Cost of litigation
- X: Extra market gains

File suit if: $(X + B) > L$ (*even if* $B \leq 0$)

Empirical evidence supports this reasoning. Predatory litigation tends to occur with greater frequency in markets characterized by concentrated structures and significant barriers to entry, such as those found in sectors heavily reliant on intellectual and industrial property rights, notably the pharmaceutical industry. In such industries, the importance of dynamic competitive advantages creates strong incentives for dominant firms to engage in strategic use of the judicial system, with the aim of raising rivals' entry costs and delaying the onset of effective competition.

Klein delineates the characteristics indicative of sham litigation among competitors as follows: (a) the plaintiff is typically a dominant incumbent firm or consortium; (b) the defendant is a nascent or potential competitor; and (c) the effect of the litigation is to impede the rival's entry or expansion, or to expel them from the market.[29]

These criteria reflect the same economic reasoning underlying the cost-benefit analysis proposed by Judge Posner in the *Grip-Pak* decision (7th Cir., 1982), as discussed by Klein (1989) in the report prepared for the Federal Trade Commission. Under this framework, when the expected benefits from a favorable litigation outcome do not outweigh the costs involved, the motivation behind the lawsuit tends to shift from asserting a legitimate claim to seeking harm against a competitor. As Klein notes, establishing such intent in practice is notoriously complex. Regulatory authorities generally rely on circumstantial indicators, such as repeated filings, inconsistent legal arguments, submission of falsified evidence, or other procedural misconduct, which

[28] Salgado et al., *supra* note 25, at 5, 20.
[29] Klein, *supra* note 22, at 14.

together suggest a systematic effort to harass rather than a bona fide exercise of legal rights.[30]

Importantly, sham litigation imposes a social cost beyond the private dispute. It not only misallocates judicial resources (courts become tools for private rent-seeking) but also distorts competition and innovation incentives. A dominant firm can entrench its market power by suing every would-be competitor, sending a chilling effect to potential entrants[31]. Smaller rivals may settle or refrain from launching new products, knowing they face a gauntlet of legal battles – a phenomenon analogous to how deep-pocketed incumbents deter entry by threatening predatory pricing. In turn, consumers suffer higher prices and less choice as the legal system inadvertently erects entry barriers that the market alone would not sustain.

As articulated in Section III.B, the process of obtaining an *ex parte* preliminary injunction in Brazil is notably expeditious—often granted within a mere seven days—while a first-instance judgment typically requires over two and a half years to be rendered. Moreover, the comprehensive timeframe for a case, encompassing trial, intermediate appeal, superior-court review, and enforcement, frequently extends beyond five years; in more intricate matters, this duration can extend across decades. This significant temporal disparity, when coupled with nominal filing fees and the judiciary's permissive oversight regarding claim valuations, effectively renders the initiation of a lawsuit virtually devoid of financial burden. Plaintiffs, often neglectful of the authentic value of their claims, possess minimal motivation to moderate their damage estimates and are relieved of any financial liabilities until a definitive resolution is achieved—usually only upon the judgment's attainment of transit in *rem judicatam*. Consequently, the prolonged duration and deferred financial responsibilities intrinsic to Brazil's adjudicative process serve to exacerbate the "X" factor within the framework of predatory litigation incentives (X + B > L), thereby converting litigation into a low-risk, high-reward strategy for dominant incumbents.

B. Rent-Seeking through Lawsuits

[30] Id.

[31] According to the Superintendence General of CADE, the case *São Paulo State Freight Transport Union (SETCESP) v. Brazilian Postal Service (ECT)* exemplified the strategic use of litigation to deter market entry in the express and small parcel delivery sectors.

As posited by Stigler, industries frequently exert influence over regulators, prioritizing private interests at the expense of public welfare. He stated, "As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[32] Although this theory was originally formulated to explain the relationship between industries, regulatory agencies, and legislators, its underlying logic may, by analogy, be extended to the judicial context, insofar as judicial decisions likewise affect prices, market access conditions, and burdens on the public sector. This is particularly relevant in cases where judicial decisions directly influence pricing structures, determine market access, or mandate public expenditures. Within this context, litigation emerges as a strategic tool for firms seeking to obtain competitive advantages, often at minimal cost to the opportunistic litigant, depending on the jurisdiction and the strength of its legal institutions.

Klein posits that predatory litigation can be conceptualized as a form of rent-seeking behavior.[33] This perspective implies that, rather than channeling resources toward productive activities such as research and development or engaging in price competition, a firm may redirect those resources to litigation, with the objective of extracting wealth through prolonged exclusivity or by diminishing overall social welfare. The opportunity cost of this conduct is considerable: the resources consumed by legal proceedings produce neither innovation nor consumer benefit and ultimately weaken competitive conditions.

Consider, for example, a prominent technology firm holding a patent nearing expiration for a widely used smartphone component. Instead of investing in technological improvements or engaging in price competition to retain market share, the firm initiates a series of costly lawsuits against emerging competitors offering more affordable, compatible alternatives.

Each additional month that a competitor remains entangled in litigation results in sustained elevated prices for consumers, thereby enriching the monopolistic firm at the expense of market efficiency. From a social welfare perspective, this scenario constitutes a clear instance of economic waste, as judicial resources are deployed solely to secure temporary monopoly rents rather than to generate tangible value or innovation for products and, by extension, for society.

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[32] George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3, 3 (1971), https://doi.org/10.2307/3003160.
[33] 33 Klein, *supra* note 22, at 20.

An additional factor reinforcing the rent-seeking logic underlying sham litigation is the inherent difficulty of detection by antitrust authorities. As Judge Bork noted as early as the late 1970s, sham litigation frequently occurs in forums beyond the direct purview of competition regulators, which creates particular obstacles to effective enforcement due to the limited visibility of such conduct. This low detectability fosters a strong incentive for firms to pursue predatory litigation strategies, given the substantially diminished likelihood of regulatory scrutiny.[34] Companies adeptly exploit information asymmetries and institutional limitations to maximize economic gains, despite the reduced probability and severity of penalties. These incentives are especially pronounced in complex sectors such as healthcare, where the interplay of intellectual property protections and regulatory regimes creates fertile ground for the strategic misuse of litigation to obstruct competition and sustain monopoly profits.

While litigation is inherently a mechanism for parties to pursue legitimate redress, the specific incentives underlying sham litigation can convert judicial proceedings into strategic business tools, thereby distorting competitive dynamics instead of promoting market fairness. From an incentives-based perspective, predatory litigants weigh the low probability of detection and minimal penalties against the substantial financial gains attainable by obstructing rivals and extending monopoly power. Baumol and Ordover further argue that the inherent ambiguity and complexity of legal standards regarding predatory conduct foster an environment that facilitates strategic litigation. These uncertainties enable firms to enhance the profitability of abusive lawsuits while simultaneously increasing legal ambiguity and reducing perceived risk.[35]

The logic outlined above may also apply to the current Brazilian antitrust regime. Despite legislative initiatives such as Bill No. 02/2023—which proposes the explicit inclusion of "sham litigation" or abusive petitioning among the list of anticompetitive practices under Law No. 12.529—Brazilian law has yet to articulate clear criteria or definitive legal standards for identifying such conduct. As a result, enforcement depends heavily on the evolving and often case-specific jurisprudence of Brazil's antitrust authority, CADE. This reliance introduces significant uncertainty, as the council's interpretations and enforcement actions may be influenced by political considerations

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[34] Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 *Ariz. L. Rev.* 837, 902 (2007).
[35] William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 *J.L. & Econ.* 247, 254–55 (1985).

associated with commissioner appointments and terms, potentially leading to inconsistent treatment of non-price predation cases.

The calculus of incentives is substantially influenced by institutional characteristics, particularly in jurisdictions marked by fragmented judicial and regulatory structures, procedural advantages that facilitate the issuance of injunctions for plaintiffs, and weak enforcement against abusive practices. A comprehensive understanding of these structural incentives is essential for policymakers and regulators aiming to address not only the legal manifestations of predatory conduct but also the economic rationales that sustain it. In this respect, the Brazilian judicial system provides a compelling case study, illustrating how systemic features and procedural complexities may inadvertently promote, rather than deter, opportunistic and anticompetitive litigation strategies.

C. Strategic Litigation in the Brazilian Judicial System

Brazil provides a fertile ground for examining the failure of institutional incentives to deter predatory litigation. Several features of the Brazilian civil justice system—some well-intentioned, others structural—distort the cost-benefit calculus in favor of aggressive litigation strategies.

The cost of litigation for plaintiffs in Brazil remains comparatively low. Court fees and related expenses may be waived for individuals who declare financial hardship under the provision of *gratuidade da justiça* (Article 85 of the Brazilian Code of Civil Procedure – CPC). In practice, this benefit is frequently granted, often without rigorous judicial scrutiny. Justice Villas Bôas Cueva, speaking at the Opening Panel of the Seminar on Judicial Policies for Improving the Free Access to Justice System, underscored a significant concern: "In Brazil, universal and comprehensive access to justice is often conflated with subsidizing litigation." He further warned that "the indiscriminate granting of free access to justice ultimately leads to the opportunistic and predatory exploitation of the justice system."[36]

Well-resourced entities have been known to exploit individuals or proxy organizations as nominal plaintiffs in order to benefit from fee waivers and favorable standing—for example, by supporting patient associations or trade groups in initiating

[36] Villas Bôas Cueva, *Remarks at the Seminar on Judicial Policies to Improve the Legal Aid System* (Conselho Nacional de Justiça, Apr. 12, 2023), https://www.cnj.jus.br/aperfeicoamento-da-gratuidade-de-justica-demanda-padronizacao-e-dados-estruturados/.

litigation on their behalf. Although Brazil applies the loser-pays rule, which entitles prevailing parties to recover attorneys' fees, in practice, fee awards are often capped or reduced at the judge's discretion and are frequently unrecovered. As a result, a firm orchestrating fraudulent litigation through intermediaries faces minimal financial exposure even in the event of an unfavorable ruling. This asymmetry creates incentives for speculative litigation and intentional harassment suits.

Furthermore, Brazil's judicial framework permits a broad array of early relief (*tutelas de urgência* and *tutelas de evidência*) to be granted upon summary review. In sectors such as healthcare and intellectual property, this expedited mechanism can be strategically weaponized. For example, a substantial number of health-related cases are filed annually with requests for *ex parte* injunctions compelling the State or private insurers to provide specific medications or treatments. A study conducted by Insper in partnership with the National Council of Justice (CNJ) found that a significant share of preliminary injunctions in health-related cases—particularly involving nutritional products, pharmaceuticals, and medical supplies—are granted based on limited preliminary evidence (*cognição sumária*).[37] While this judicial responsiveness may address urgent health needs, the high volume of cases and the frequency of injunctions issued without robust evidentiary review raise concerns regarding legal certainty, equitable resource allocation, and the long-term sustainability of the public healthcare system.

In addition, the fragmented structure of Brazil's judiciary allows litigants to engage in venue selection. Corporations may file identical or overlapping claims across multiple jurisdictions, anticipating that at least one court will issue a favorable ruling. A notable example involves Eli Lilly, which filed an action before the Federal District court while simultaneously litigating the same matter in another jurisdiction that had already ruled against its interests. This tactic—known as forum shopping—has been identified by Brazil's competition authority as part of a broader pattern of procedural abuse intended to manipulate the judicial system for anticompetitive purposes.[38] Such practices

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[37] *Judicialization of Health in Brazil: Profile of Claims, Causes, and Proposed Solutions* 83–85 (Nat'l Council of Justice [CNJ] & Insper 2019) (Braz.), https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2019/03/f74c66d46cfea933bf22005ca50ec915.pdf.

[38] Pablo Leurquin, *Competition Law and Intellectual Property: A Study Drawing from the Eli Lilly Case on 'Sham Litigation' in Brazil*, SouthViews No. 240, at 8 (South Centre, Sept. 1, 2022), https://www.southcentre.int/southviews-no-240-1-september-2022/.

undermine the principle of one case, one judge and force competitors to defend themselves on multiple fronts, significantly increasing their litigation costs.

Moreover, enforcement and deterrence against abusive litigation remain inadequate. Although the Brazilian Code of Civil Procedure explicitly authorizes sanctions against bad-faith litigants—Articles 79–81 empower courts to penalize parties who assert false claims, obstruct discovery, or abuse procedural mechanisms—such sanctions are rarely imposed and typically modest in scope. Litigators operate under the widespread understanding that even blatant abuses seldom result in meaningful penalties. While courts frequently invoke the doctrine of bad-faith litigation, only a small proportion of abusive filings lead to substantive consequences. As a result, institutional conditions in Brazil generally fail to internalize the broader societal costs associated with predatory litigation. On the contrary, they may inadvertently encourage an "entrepreneurial" model of litigation, whereby firms perceive courts and regulatory bodies as alternative arenas for competition, marked by low risk and high reward.

D. Judicial Activism in the Health Sector

The dynamics within Brazil's healthcare sector are particularly notable, marked by the emergence of judicial activism that has positioned courts as central actors in the allocation of medical resources. The phenomenon known as the "judicialization of health" refers to the substantial rise in litigation brought by patients seeking access to medicines, treatments, or healthcare services—often involving high-cost, advanced pharmaceuticals not readily available through the public health system (*Sistema Único de Saúde* – SUS). This trend originated in the late 1990s with litigation initiated by HIV/AIDS patients seeking access to antiretroviral therapies. It has since expanded into a widespread practice in which patients—often supported by advocacy organizations and legal counsel—invoke their constitutional right to health before the judiciary.[39]

Recent data reflect a sharp increase in health-related litigation. According to Miranda and Rocco, drawing from the National Council of Justice's DataJud platform, approximately 39,600 new health cases were filed in January 2025, up from 20,600 in

[39] Ricardo Eccard da Silva et al., *The High "Cost" of Experimental Drugs Obtained Through Health Litigation in Brazil*, 11 *Front. Pharmacol.*, art. 752, 2 (2020), https://doi.org/10.3389/fphar.2020.00752; Iara Veloso Oliveira Figueiredo & Nilson do Rosário Costa, *The Right to Health in Brazil: Between Judicialization and De-Judicialization*, 11 *Ibero-Am. J. Health L.* 142, 145 (2022), https://doi.org/10.17566/ciads.v11i4.785.

January 2020. In total, around 661,000 new cases were reported in 2024, compared to 343,000 in 2020.[40] Moreover, approximately 870,000 health-related cases were pending as of early 2025. A 2023 report by the National Supplementary Health Agency (ANS), also based on CNJ data, indicated that 460,000 new health-related cases were filed in 2022, with 164,000 involving private insurance claims. The report also noted that approximately 60 percent of these cases resulted in favorable rulings for the plaintiffs.[41] These statistics underscore the significant litigation burden placed on both the judiciary and private health insurers.

Motivated by the constitutional guarantees of the rights to life and health, Brazilian judges have increasingly shown a willingness to grant injunctions requiring public health authorities to provide specific medications—regardless of whether such drugs are included in the official formulary, allocated in the budget, or even approved for use in Brazil. This form of judicial activism has, perhaps unintentionally, created opportunities for private pharmaceutical companies to benefit in at least two key ways: by expanding their market presence and by strengthening their competitive position.

Judicial mandates have placed significant pressure on public health budgets. According to data from Oncoguia, in 2020, approximately half of Brazil's municipalities and 13 states allocated up to 10 percent of their health budgets to comply with court-ordered treatments.[42] Notably, nearly 5 percent of municipalities—approximately 270 cities—dedicated between 30 and 100 percent of their health expenditures to address such lawsuits. At the federal level, the National Council of Municipal Health Secretaries (CONASEMS) reported that annual spending on court-mandated pharmaceuticals rose from R$26.4 million in 2007 to R$1.3 billion in 2016, representing an approximate 5,000 percent increase.[43] This expenditure has been heavily concentrated on a limited number of high-cost drugs, with just ten medications accounting for 91 percent of total judicial spending in 2016. These figures underscore both the magnitude and the concentration of court-driven healthcare expenditures.

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[40] Loyanna Andrade Miranda & Victória Rocco, *Judicialization of Supplemental Health: A Warning About Sustainability Risks*, Migalhas (Apr. 8, 2025), https://www.migalhas.com.br/depeso/427887/judicializacao-da-saude-suplementar-riscos-a-sustentabilidade.

[41] See Agência Nacional de Saúde Suplementar (ANS), *A Judicialização da Saúde Suplementar* 10 (Feb. 2023), https://www.gov.br/ans/pt-br/assuntos/noticias-1/relatorio-judicializacao-da-saude-suplementar-2023.pdf.

[42] Instituto Oncoguia, *Lawsuits Consumed Between 30% and 100% of Health Budgets in Over 250 Brazilian Municipalities*, Instituto Oncoguia (May 22, 2024), https://www.oncoguia.org.br/conteudo/judicializacao-consumiu-de-30-a-100-da-verba-da-saude-em-mais-de-250-cidades-brasileiras/17178/7/.

[43] Conselho Nacional de Secretarias Municipais de Saúde (CONASEMS), *Challenges of the Phenomenon of Health Judicialization – Vol. 2* 55 (2019) (Braz.).

As a result of this piecemeal adjudication process, Brazilian courts have effectively established a parallel distribution mechanism for pharmaceutical products and therapeutic interventions across various price points. Even when the National Health Surveillance Agency (ANVISA) denies marketing authorization or the Unified Health System (SUS) declines to fund investigational treatments, individual plaintiffs—often advised or discreetly financed by manufacturers—continue to file lawsuits seeking compelled access to (i) drugs for which equivalent alternatives are already available on the market or (ii) experimental or scientifically unverified therapies. In some cases, a small number of interlocutory injunctions may compel public authorities to procure treatments from abroad and assume their associated costs. As similar rulings accumulate, a cascade effect is triggered: the Judiciary, rather than regulatory agencies, becomes the de facto gatekeeper, enabling pharmaceutical companies or proprietary clinics to bypass the standard approval process and place their products on the market at public expense.[44]

Silva et al. report that between 2010 and 2017, 812 unregistered or experimental drugs were supplied to patients through judicial orders, with 78 of these cases incurring costs exceeding R$1 million each. These actions contributed to a total public expenditure of R$3.2 billion on court-mandated pharmaceuticals.[45] The economic distortion is evident: public funds are diverted to comply with judicial demands for specific medications, frequently acquired at monopoly prices set by a single supplier. This diversion undermines the availability of funding for routine pharmaceuticals and broader public health initiatives. In 2019, approximately 25 percent of Brazil's specialized high-cost medicine budget was allocated to drugs obtained through court rulings.[46] These figures illustrate how judicial activism—particularly when shaped by industrial influence—can significantly distort market demand and strain competitive conditions by privileging certain products through legal mechanisms.

The judicialization of health also creates an asymmetrical information environment that can be exploited by sophisticated private actors. Judges, though experts in legal reasoning, are not typically trained in pharmacology or health economics. In

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[44] Octávio Luiz Motta Ferraz, *Addressing the Judicialization of Health in Brazil*, 15 *Rev. Direito GV* e1934, 16 (2019) (Braz.), https://doi.org/10.1590/2317-6172201934; Conselho Nacional de Justiça (CNJ), *Health Dashboard – Justice in Numbers* (2019) (Braz.), https://justica-em-numeros.cnj.jus.br/painel-saude/.

[45] Rodrigo E. da Silva et al., *The High "Cost" of Experimental Drugs Obtained Through Health Litigation in Brazil*, 11 *Front. Pharmacol.* art. 752, 3 (2020), https://doi.org/10.3389/fphar.2020.00752.

[46] Conselho Nacional de Justiça (CNJ), *Health Dashboard – Justice in Numbers* (2019) (Braz.), https://justica-em-numeros.cnj.jus.br/painel-saude/.

litigation, especially in proceedings involving urgent relief (*tutelas de urgência*), outcomes often depend on the prescriptions issued by the plaintiff's physician and the scientific evidence submitted by the parties. This dynamic places considerable weight on unilateral clinical assessments and fragmented technical data, which can obscure broader cost-effectiveness considerations and regulatory standards

Consequently, the unethical apparatus that sustains predatory and anticompetitive conduct in the healthcare sector becomes evident. Identical drugs or treatments are frequently pursued through serial litigation by the same attorneys and law firms. Investigative journalism and academic studies have linked the proliferation of such lawsuits to exorbitantly priced therapies for rare diseases, particularly in jurisdictions where manufacturers have implemented so-called "patient support programs."[47] These patterns reveal the existence of organized schemes that support and operationalize predatory litigation practices. Ultimately, the criminal structures underlying such conduct are brought to light and cannot remain concealed indefinitely.

Imagine a scenario in which a pharmaceutical company owns the exclusive patent for a high-cost medication designated for the treatment of a rare disease—let us refer to it as Drug X. Despite the fact that Drug X has not yet been integrated into Brazil's official public formulary due to inadequate evidence regarding its cost-effectiveness, the company ardently supports a network of patient associations and legal teams that instigate lawsuits demanding judicial access to the drug. These lawsuits are often accompanied by prescriptions from sympathetic medical professionals and bolstered by selectively presented (and typically biased) scientific literature. Consequently, judges across various jurisdictions routinely grant urgent injunctions that compel the government to purchase Drug X at its full list price.

Over time, the repeated issuance of such rulings establishes a pattern whereby Drug X is consistently ordered by the courts, effectively bypassing standard regulatory and economic controls. In stark contrast, competing firms that provide therapeutically comparable or even more cost-effective alternatives find their products systematically disregarded. Health managers are legally compelled to prioritize Drug X, leaving them with minimal incentive to negotiate or consider alternatives such as Drug Y or Z, which

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[47] Vera Lucia Edais Pepe et al., *Characterization of Lawsuits Demanding "Essential" Medicines in the State of Rio de Janeiro, Brazil*, 26 *Cad. Saúde Pública* 461, ___ (2010), https://doi.org/10.1590/S0102-311X2010000300004; Ana Lucia Chieffi & Rita Barradas Barata, *Judicialization of the Public Pharmaceutical Assistance Policy and Equity*, 25 *Cad. Saúde Pública* 1839, ___ (2009), https://doi.org/10.1590/S0102-311X2009000800020.

do not enjoy judicial support. This circumstance not only secures public expenditure to a monopolistic supply chain but also dissuades companies from targeting innovations that offer broader benefits. As a result, the market increasingly favors legal strategies over actual therapeutic efficacy. In this environment, while judicial determinations are intended to safeguard individual rights, they are repurposed as instruments to fortify market dominance, effectively transforming the courtroom into a strategic leverage point for sustaining monopoly status.

The Brazilian healthcare sector exhibits several structural conditions that make predatory litigation particularly attractive: a broadly defined constitutional right to health that incentivizes prompt judicial intervention, a high-value pharmaceutical market with limited competition, significant information asymmetries between pharmaceutical firms and non-specialist judges, and procedural rules that allow for the swift issuance of injunctions at minimal cost to plaintiffs. Taken together, these elements permit firms to leverage the judicial system as a strategic instrument to acquire or protect market share. For regulatory authorities, the challenge is twofold: they must safeguard the judiciary's essential role in protecting individual rights while also curbing its misuse as a tool for suppressing competition. Addressing this dual imperative requires a clearly articulated law-and-economics framework. Policymakers should begin by identifying the incentives that make frivolous or abusive litigation financially viable and then recalibrate those incentives through targeted legislative reforms and CNJ-issued guidelines designed to increase sanctions for abusive filings and to raise evidentiary thresholds for health-related injunctions. In parallel, competition authorities should monitor patterns of "judicial dominance" as a potential form of anticompetitive conduct. By aligning legal incentives with pro-competitive outcomes, Brazil can ensure that judicial activism promotes the public interest rather than reinforcing private monopolies.

Despite the potentially well-meaning motivations that may underlie judicial activism, its adverse consequences often outweigh its intended benefits. As articulated by Thomas Sowell, one of the principal dangers of judicial activism lies in its tendency to erode democratic governance, by removing key decisions from the political arena while still producing significant political and social effects.[48] Sowell further argues that vague justifications, such as implementing the "will of the people," are inherently unstable and, if taken seriously, risk undermining the very foundation of the democratic electoral

[48]See generally Thomas Sowell, Judicial Activism Reconsidered (Hoover Inst., Stanford Univ. 1989).

system. In this sense, when courts overreach in ways that shift decision-making authority away from elected institutions, judges effectively assume powers that constitutionally belong to the legislature and the electorate.

In the Brazilian context, the strategic use of the judiciary by companies within the healthcare industry to judicially enforce preferences for public consumption further exacerbates this risk. Abstract invocations of the right to health often serve to obscure the legitimate resource allocation choices made by public administrators. As a result, when judges mandate the compulsory procurement of specific medications or treatments—without the requisite technical expertise and under the influence of predatory litigation—they effectively assume functions constitutionally assigned to the Executive and Legislative branches, thereby displacing essential allocative decisions from the democratic sphere to the judicial forum.

III. THE HEALTH SYSTEM UNDER LITIGATION

The incentive structure that facilitates predatory litigation is particularly well aligned with the characteristics of the healthcare sector. The 1988 Brazilian Constitution enshrines health as a fundamental right and a duty of the State, leading to the creation of the Unified Health System (*Sistema Único de Saúde* – SUS), which is governed by Laws No. 8,080/1990 and No. 8,142/1990. While essential to ensuring universal access, this public system operates in parallel with economically significant and well-organized private markets, including pharmacies and private healthcare services. The unique features of these markets, combined with the legal protections afforded by industrial property rights, contribute to conduct that distorts competition. As a result, the strategic use—and frequent misuse—of tools such as patents, trademarks, and litigation has become a recurring tactic to delay market entry, unjustifiably extend exclusivity, and thereby impair both competitive dynamics and access to essential health goods and services.

In a country spanning approximately 8,510,000 km², the healthcare sector faces persistent challenges related to access, governance, and service quality—issues also encountered in other essential sectors such as sanitation and telecommunications. It is worth emphasizing that health is a financially robust sector. In 2024, for example, the National Supplementary Health Agency (*Agência Nacional de Saúde Suplementar* – ANS) reported that within the supplementary health market, data submitted by insurers

and benefits administrators showed a net profit of R$11.1 billion, representing a 271 percent increase over the previous year.

Given the sector's centrality in the allocation of both public and private financial flows, the high incidence of litigation in healthcare is unsurprising. Available data reflect a significant rise in health-related litigation over the past decades; between 2008 and 2017, the number of such lawsuits increased by approximately 130 percent.[49]

This upward trend is not confined to the early decades of the 2000s; rather, it has continued unabated throughout the 2020s. In 2024 alone, Brazilian courts recorded over 154,857 new lawsuits related to hospital treatments, with 57,052 cases—approximately 37 percent—filed in the state of São Paulo. Moreover, private health insurance providers reported a 37.6 percent increase in legal expenditures in 2023, reaching R$5.5 billion.

Ultimately, predatory litigation strategies in the healthcare sector elevate systemic costs and undermine public access to essential services and products. Accordingly, this study aims to assess the extent of the harm caused by predatory litigation and judicial activism in Brazil's health and pharmaceutical sectors and to identify legal and institutional tools capable of mitigating these adverse effects..

A. Overview of Predatory Litigation in the Healthcare Sector

According to Fleury, the recognition of health as a universal right and a duty of the State, as enshrined in Article 196[50] of the 1988 Federal Constitution, conferred upon the health sector a distinct dimension of citizenship.[51] Additionally, Article 198[52], - which ensures comprehensive healthcare provision, albeit with a focus on preventive measures - has reinforced the principal legal foundation for converting individual grievances into judicial claims.

Empirical data suggest that constitutional guarantees alone have proven insufficient to fulfill the promise of access to healthcare. This is evidenced by the growing number of lawsuits addressing both systemic deficiencies and highly specific demands.

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[49] *Judicialization of Health in Brazil*, *supra* note 37, at 13.

[50] Const. art. 196 (Braz.) ("Health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of illness and other hazards, and at universal and equal access to actions and services for its promotion, protection, and recovery.").

[51] Sonia Fleury, *Judicialization Can Save SUS*, 17 *Ciência & Saúde Coletiva* 1445, 1459 (2012), https://doi.org/10.1590/0103-110420129302.

[52] Const. art. 198, II (Braz.) ("Public health actions and services form a regionalized and hierarchical network and constitute a unified system, organized according to the following guidelines: II – comprehensive care, with priority given to preventive activities, without prejudice to assistance services.").

A salient example is the case of fosfoethanolamine, colloquially known as the "cancer pill," which generated approximately 13,000 injunctions over an eight-month period, compelling the University of São Paulo to distribute a substance not yet approved by ANVISA and whose efficacy remains unsupported by technical studies.[53]

This litigation trend has yielded several adverse consequences: (i) significant public expenditures associated with demands for treatments, medications, or procedures not explicitly covered by the Unified Health System (SUS); (ii) increased judicial congestion, affecting not only health-related adjudication but also other areas of litigation; and (iii) extended waiting periods for essential care, as the prioritization of transplant cases, experimental therapies, and high-cost drugs displaces patients awaiting basic services such as medical consultations, diagnostic exams, or routine surgical procedures.

In this context, increased public spending predominantly stems from judicial rulings mandating the provision of medications or procedures excluded from the official SUS lists. Ventura et al., referencing Barroso (2009) and Baptista (2009), assert that "the combination of these elements can lead to a type of 'system dysfunction' (Barroso, 2009), with 'the risk of the judicial route becoming the predominant means to ensure access to medication' (Baptista 2009, 836)[54]." The result is a pattern of unintended resource allocation that departs from established technical protocols, thereby adversely affecting public budgets and undermining the distributive logic that underpins SUS. In parallel, it weakens the practical realization of the right to health and compromises the principle of equity.

By shifting the financial burden to public budgets and private insurers—who must absorb monopoly-level prices for interventions of contested clinical value—such rulings diminish the authority of expert regulatory bodies, most notably CONITEC (National Commission for the Incorporation of Health Technologies) and the *Rol da ANS* (the mandatory list of benefits issued by the National Supplementary Health Agency). In effect, these decisions reverse years of evidence-based, incremental policymaking

The ensuing fiscal and actuarial disruption constitutes a major deterrent to long-term investment by reputable domestic and international firms, which depend on a predictable, transparent reimbursement landscape to sustain innovation, expand service

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[53] Dallari-Bucci & Duarte (2017), quoted in *Judicialization of Health in Brazil*, *supra* note 37, at 13.

[54] Maria Ventura et al., *Judicialization of Health Care, Access to Justice, and the Effectiveness of the Right to Health*, 20 *Physis: Rev. Saúde Coletiva* 77, 80 (2010), https://doi.org/10.1590/S0103-73312010000100006 (citing Luís Roberto Barroso (2009); Baptista, 829–839 (2009)).

capacity, and ensure competitive quality. These distortions erode the incentive structure designed to reward therapeutic efficacy, suppress rent-seeking conduct, and preserve the cross-subsidization model that balances preventive and curative care. Ultimately, the integrity of the broader healthcare ecosystem—encompassing public, supplemental, and private actors—is compromised as rising premiums, expanding public deficits, and the strategic withdrawal of responsible market participants converge, thereby jeopardizing universal access and the progressive improvement of health services.

In a similar vein, Floriano et al. underscore this argument by noting that "Federal Government spending in Brazil on health-related litigation surpassed 1.3 billion reais [...]"[55]. They further emphasize that such lawsuits are often associated with market interests of industries within the healthcare production complex, which adversely affect public health policies—often facilitating the inclusion of technologies without robust technical support validating their effectiveness. This situation is further exacerbated by the fact that some medications pursued through litigation are neither registered with ANVISA nor incorporated into SUS's clinical guidelines. Additionally, as evidenced by data cited by Freitas, Fonseca, and Queluz, a study conducted by Figueiredo et al. revealed that 66.6% of medications sought via litigation were not listed in the official catalogs and were frequently high-cost products with limited scientific backing.[56] This underscores the disparity between judicial decisions and the technical standards established by the public health system.

When examining judicial overload, it is imperative to recognize that it arises not solely from the elevated volume of lawsuits but also from the process of adjudicating these cases. A comprehensive study conducted by Ventura et al. (2010) examined 289 cases in Rio de Janeiro, revealing that an injunction (*tutela antecipada*) was requested in each instance, with a 100% approval rate.[57] Furthermore, decisions in 96.9% of these cases were rendered without the necessity for rebuttal evidence, technical reports, or

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[55] Fabiana R. Floriano et al., *Strategies to Address the Judicialization of Health Care in Brazil: An Evidence Synthesis*, 28 *Ciência & Saúde Coletiva* 181, 182 (2023), https://doi.org/10.1590/1413-81232023281.09132022.

[56] Beatriz Cristina de Freitas, Emílio Prado da Fonseca & Dagmar de Paula Queluz, *Judicialization of Health in the Public and Private Health Systems: A Systematic Review*, 24 *Interface – Commun., Health, Educ.* e190345, 6 (2020), https://doi.org/10.1590/Interface.190345 (citing Tatiane A. Figueiredo, Célia G. S. Osorio-de-Castro & Vania L. E. Pepe, 29 *Cad. Saúde Pública* (Supp. 1) 159 (2013)).

[57] Ventura et al., *supra* note 54, at 92.

expert opinions, relying solely on the documentation submitted by the plaintiff, which typically comprised a prescription or a medical certificate.[58]

Moreover, a quantitative analysis of appellate court decisions involving lawsuits seeking treatment coverage from private health insurance providers in Brazil between 2012 and 2018 revealed a striking figure: 83.6 percent of such cases were decided in favor of the patient-plaintiffs. The success rate was even higher in cases where insurers denied coverage on the grounds that the requested treatment was not included in the benefits list established by the National Supplementary Health Agency (ANS).

This pattern points to a degree of automatization in judicial decision-making, which may erode the individualized assessment of claims and place undue strain on judicial resources. In many instances, courts are required to adjudicate matters that are primarily clinical or administrative in nature, thereby diverting attention from other claims and threatening the foundational principle of equitable access to justice. As noted by Freitas, Fonseca, and Queluz, "these lawsuits are predominantly individual and do not yield collective benefits."[59]

Furthermore, with respect to the prolongation of waiting lists and its implications for essential treatments, it is critical to recognize that the judicialization of healthcare substantially disrupts the prioritization principles embedded within Brazil's Unified Health System (*Sistema Único de Saúde* – SUS). Judicial decisions often mandate the provision of experimental therapies, high-cost medications, or complex procedures that lie outside the system's established guidelines, thereby necessitating the reallocation of human and material resources. This diversion delays care for patients awaiting fundamental services, such as diagnostic tests, consultations, or surgical procedures.

Broadly speaking, studies analyzing the judicialization of healthcare suggest that such interventions tend to exacerbate inequalities in access to services by privileging individuals or groups with greater capacity to litigate, to the detriment of more vulnerable populations. This occurs when court decisions prioritize individualized claims over collective needs, thereby distorting the distributive logic that sustains SUS.[60] Additionally, research by Freitas, Fonseca, and Queluz—drawing on studies by Lopes et

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[58] Ventura et al., *supra* note 54, at 93.

[59] Beatriz Cristina de Freitas et al., *Judicialization of Health in the Public and Private Health Systems: A Systematic Review*, 24 *Interface – Commun., Health, Educ.* e190345, 13 (2020), https://doi.org/10.1590/Interface.190345.

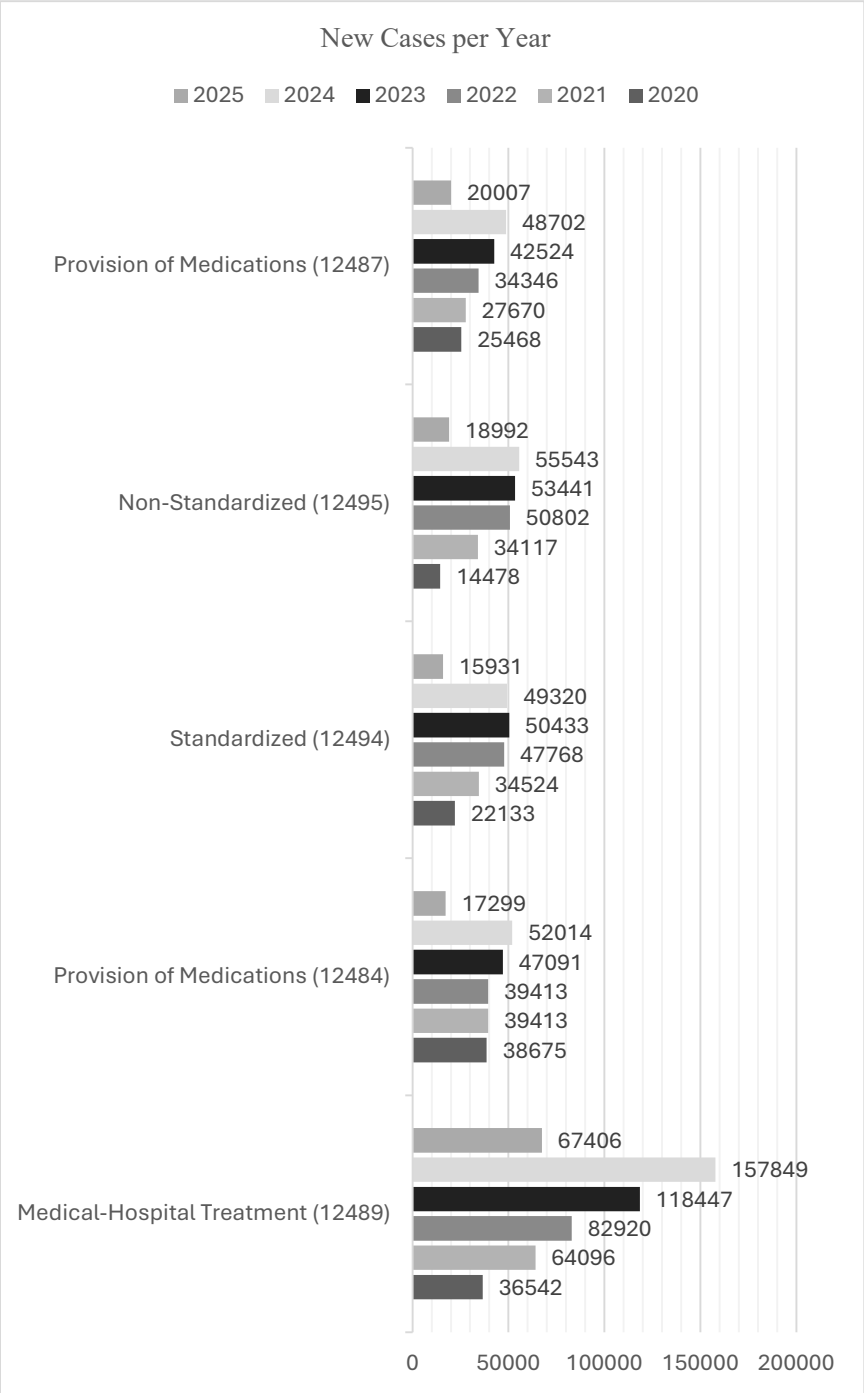
[60] Ventura et al., supra note 54, at 92 (citing Rita B. Barata & Ana L. Chieffi, 25 Cad. Saúde Pública 1839, 1839–49 (2009); Rosa M. Marques & Sueli Dallari, 23 Ciência & Saúde Coletiva 101, 101–07 (2007); Sonia R. Vieira & Paola Zucchi, 16 Rev. Adm. Saúde 214, 214–22 (2007)).

al. and Sant'Ana et al.—indicates that judicial acceptance of claims unsupported by clinical validation undermines standard pharmaceutical protocols and contributes to the irrational use of medications.[61] hese findings highlight the frequency of rulings that lack grounding in evidence-based medicine. By focusing on isolated prescriptions and individualized therapies, the judicial process fails to respond systematically and effectively to the broader healthcare demands of the population. As a result, uncoordinated enforcement of court orders disrupts waiting lists, treatment protocols, and service workflows, ultimately compromising the principles of universality and comprehensiveness that define the SUS framework.

The following data further illustrate the legal characteristics of such claims and the persistence of their proliferation in recent years.

FIGURE 1 - New Cases per Year by the 5 Main Topics (Pending Cases)[62]

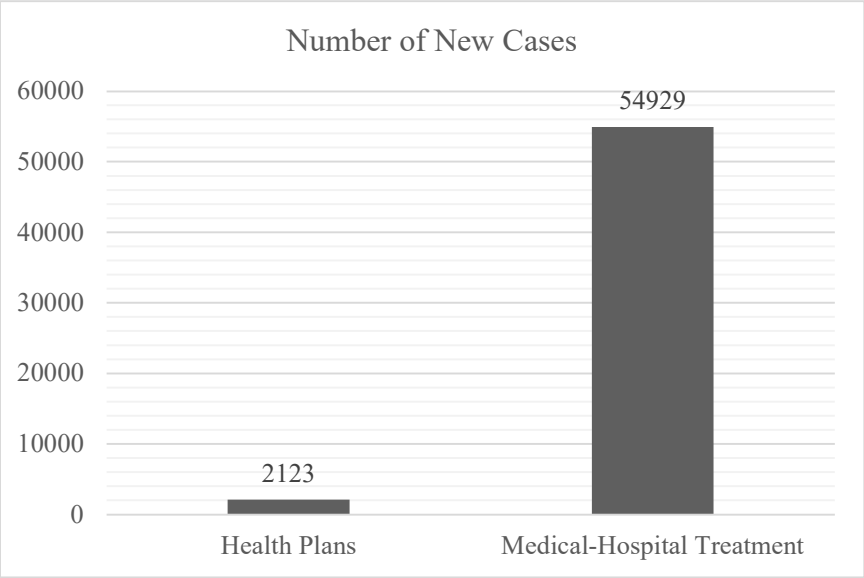
[61] Freitas et al., *supra* note 59, at 5–6 (citing Lopes et al., 651–61 (2014); Sant'Ana et al., 714–21 (2011)).
[62] The chart presents data as of January 21, 2025, based on information received from the courts and processed through January 17, 2025. The data refer to procedural events recorded up to December 31, 2024.



Source: https://justica-em-numeros.cnj.jus.br/painel-saude

FIGURE 2 - New Health-Related Cases by Subject in São Paulo - 2024[63]

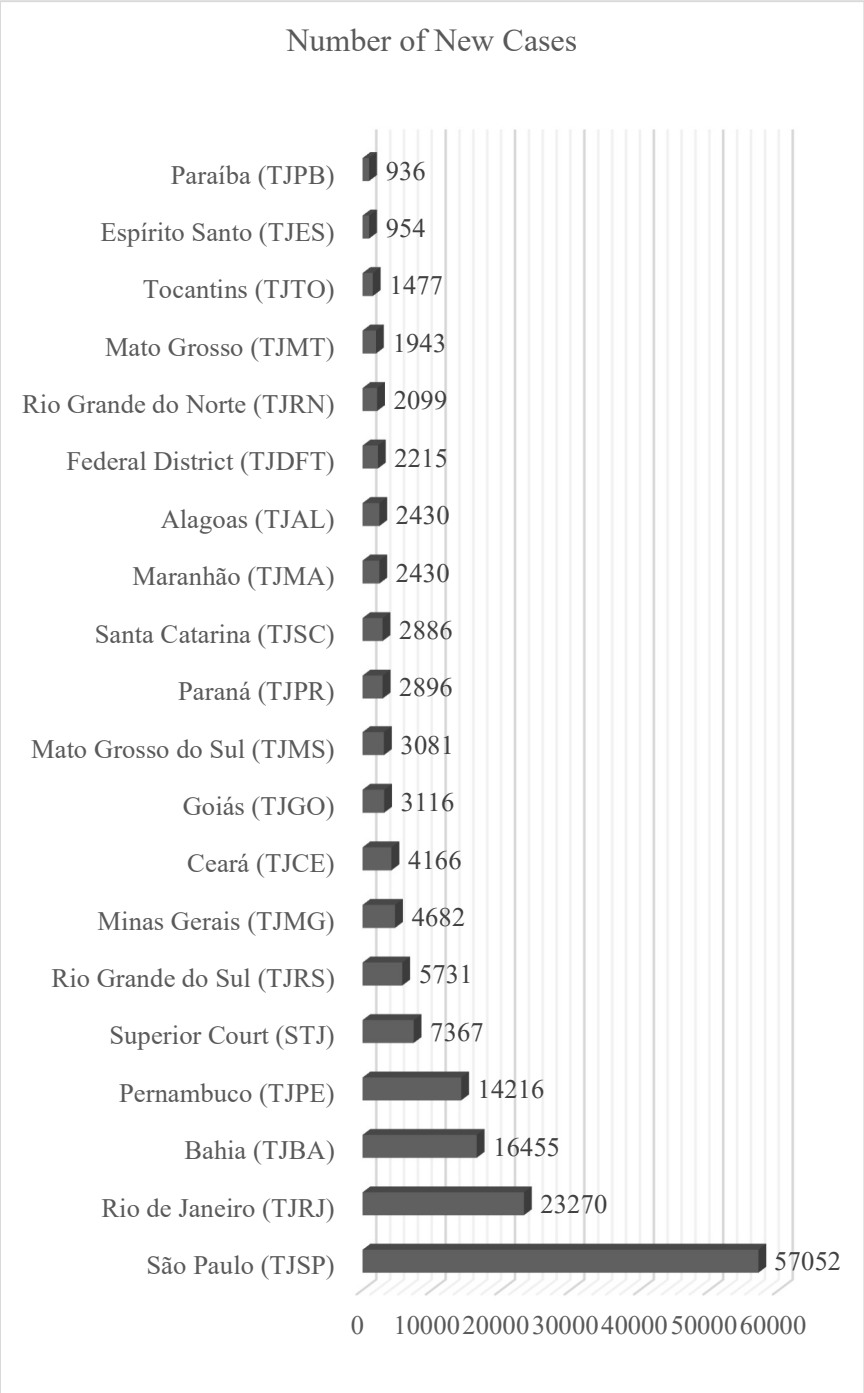
[63] The horizontal bar chart details the volume of newly filed health-related cases in São Paulo state courts, disaggregated by thematic categories such as “Medical-Hospital Treatment,” “Health Insurance Plans,” and “Medication Provision.”



Source: https://justica-em-numeros.cnj.jus.br/painel-saude

FIGURE 3 - New Health-Related Cases Across Brazilian Courts – 2024[64]

[64] The vertical bar chart compares newly filed health-related lawsuits across various courts in Brazil, highlighting the number of filings per jurisdiction—including TJSP (São Paulo), TJRJ (Rio de Janeiro), TJBA (Bahia), and others.



Source: https://justica-em-numeros.cnj.jus.br/painel-saude

The data delineates the increase in healthcare litigation and its distinct characteristics within Brazil. This phenomenon largely reflects the structural deficiencies inherent in the public healthcare system, which has been inadequate in fulfilling the needs of the population, leading many individuals to seek recourse through the judiciary to assert their rights. In this framework, the conceptualization of health as a universal and unconditional right, as articulated by Fleury and Oliveira et al., imposes upon the State

the obligation not only to formally guarantee this right but, more significantly, to ensure its practical enforcement.[65] Consequently, the judicialization of healthcare in Brazil has intensified, with citizens increasingly approaching the Judiciary to uphold constitutional rights that are frequently overlooked by public policies.

In response to this context, the creation of the National Judicial Forum on Health (*Fórum Nacional do Judiciário para a Saúde* – FONAJUS) by the National Council of Justice (CNJ), pursuant to Resolution No. 107/2010, represents an institutional initiative to confront the growing judicialization of healthcare in Brazil. One of the Forum's primary goals is to foster coordination among various segments of the Judiciary and the administrators of the Unified Health System (*Sistema Único de Saúde* – SUS). This initiative seeks to promote the development of more effective, technically grounded, and contextually appropriate judicial policies that reflect the operational realities of public health administration.

Resolution No. 107, in turn, assigns to the Forum the responsibility of "conducting studies and proposing concrete and normative measures to improve procedures, enhance the effectiveness of judicial processes, and prevent new conflicts" (Art. 1). Among FONAJUS's enumerated functions are the "monitoring of lawsuits involving the provision of healthcare services," the formulation of measures to optimize procedural routines, and the "prevention of judicial conflicts" (Art. 2, items I, III, and IV)[66]. Although the Resolution does not explicitly reference the Technical Support Centers (*Núcleos de Apoio Técnico* – NATs), it authorizes the Forum to collaborate with officials and experts from other institutions—such as the Public Prosecutor's Office, Public Defender's Offices, and academic institutions (Art. 4)—a provision that, in practice, has legitimized the integration of NATs into judicial operations.

The National Council of Justice (CNJ) has issued guidelines aimed at improving judicial performance in health-related matters, with the dual objective of mitigating the systemic effects of judicialization on the Unified Health System (*Sistema Único de Saúde*

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[65] Sonia Fleury, *Judicialization Can Save SUS*, 36 *Saúde Debate* 159 (2012); Mariana R. M. Oliveira et al., *Mediation as a Means of Preventing the Judicialization of Health Care: Narratives from Judiciary and Health System Actors*, 23 *Esc. Anna Nery* e20180363, 6 (2019).

[66] Resolução CNJ No. 107, de 6 de abril de 2010, art. 2 (Braz.) ("The responsibilities of the National Forum shall include: I – monitoring judicial actions involving the provision of healthcare services, such as the supply of medications, medical products, or treatments in general, and the availability of hospital beds; II – monitoring judicial actions related to the Unified Health System (SUS); III – proposing concrete and normative measures to optimize procedural routines and organize specialized judicial units; IV – proposing measures to prevent litigation and define strategies in health law.").

– SUS) and safeguarding the constitutional right to health, pursuant to the principles of universality, comprehensiveness, and equity. The creation of the National Judicial Forum on Health (*Fórum Nacional do Judiciário para a Saúde* – FONAJUS) represents a key institutional effort to reconcile individual rights with public policy frameworks, thereby encouraging decisions that are not only more technically robust but also fiscally and institutionally sustainable.

However, this institutional arrangement remains insufficient to resolve the broader challenges posed by the judicialization of healthcare. The increasing complexity of claims in this domain has revealed underlying tensions between constitutional guarantees and public policy objectives, while simultaneously exposing the risk that judicial mechanisms may be appropriated for anticompetitive purposes. This reality necessitates a reframing of the analytical perspective—one that incorporates a competition-focused lens to examine the extent to which predatory litigation compromises fair market dynamics and erodes competitive neutrality.

B. Harmful Effects of Predatory Litigation in the Health Sector

In addition to the collective transfer of inflated costs resulting from predatory litigation to consumer-patients, a particularly harmful consequence arises from the misuse of judicial proceedings involving essential services: namely, the exclusion of individuals from supplementary healthcare coverage and the indebtedness of patients and their vulnerable family members. This dynamic is especially pronounced in the healthcare sector, where critical medical treatments often serve as grounds for the granting of preliminary injunctions (tutelas antecipadas), which may remain in effect for extended periods based on the urgency and essential nature of healthcare services—even when such injunctions are ultimately overturned on the merits.

An additional feature of the Brazilian judicial system that compounds the harm caused by predatory litigation relying on summary adjudication is the protracted duration for which such preliminary injunctions remain in force. Empirical analyses of health-related litigation in the state of Rio de Janeiro indicate that preliminary injunctions—originally conceived as provisional, cautionary measures—frequently remain in force long enough to disrupt market functioning. The median time from case filing to the issuance of an interim order is only seven days; yet, an additional 218 days typically elapses before a first-instance ruling is delivered, resulting in a total median duration of

239 days from filing to judgment. Moreover, the median time to a final appellate decision extends to 478 days.[67] For illustrative purposes, consider the following hypothetical scenario:

Hypothetical Case – The "Hub's" Trademark Trap and the False Innovation Conundrum
A dominant company (hereinafter referred to as the "hub") possesses exclusive branding and trademark rights pertaining to a purportedly innovative oncology treatment. This company promotes its therapy as a revolutionary and highly effective approach to cancer treatment. Nonetheless, the therapy is fundamentally an experimental protocol, with its efficacy and superiority over existing, scientifically validated treatments and drugs remaining unproven. In collaboration with regional clinics and hospitals, the cancer treatment hub engages in exclusive licensing agreements that compel medical providers to prescribe and endorse this specific treatment to cancer patients—often at inflated prices—regardless of the availability of less costly, equally effective, and scientifically validated therapeutic alternatives that are fully covered by either private health insurers or the Brazilian public health system (*Sistema Único de Saúde* – SUS). In this hypothetical scenario, attorneys affiliated with the licensed clinics directly engage vulnerable patients and their families, who are understandably experiencing substantial emotional and financial distress following a cancer diagnosis. These families, unaware of the full legal and financial ramifications, are persuaded to initiate judicial claims against private health insurers or the SUS, seeking immediate provisional judicial relief (preliminary injunctions) to compel coverage for the expensive, purportedly innovative treatment.

In analogous real cases, Brazilian courts consistently grant such relief without extensive examination under constitutional health rights and precautionary doctrines. They frequently reference São Paulo's "*Súmula*"[68] 102 of the TJSP which prohibits the denial of insurance coverage even for "experimental" treatments not listed by the National Supplementary Health Agency (ANS). Although this *súmula* was likely intended to safeguard patient access, it fails to account for its potential misuse by economic actors seeking to impose financial and competitive harm. As a consequence, both private insurers and public health systems are compelled—under judicial mandate—to absorb the elevated costs of these therapies or medications. Initially, these inflated expenses—artificially heightened by the absence of genuine market competition and the improper

[67] Vera Lucia Edais Pepe et al., *Characterization of Lawsuits Demanding "Essential" Medicines in the State of Rio de Janeiro, Brazil*, 26 *Cad. Saúde Pública* 461 (2010), https://doi.org/10.1590/S0102-311X2010000300004.

[68] In Brazilian law, *súmulas* are concise legal propositions derived from repeated court decisions on similar matters. They do not bind lower courts unless issued as *binding súmulas* (*súmulas vinculantes*) by the Federal Supreme Court (STF). Other forms of *súmulas*—such as those from the Superior Court of Justice (STJ) or regional courts—are merely persuasive and may be disregarded by judges if properly reasoned.

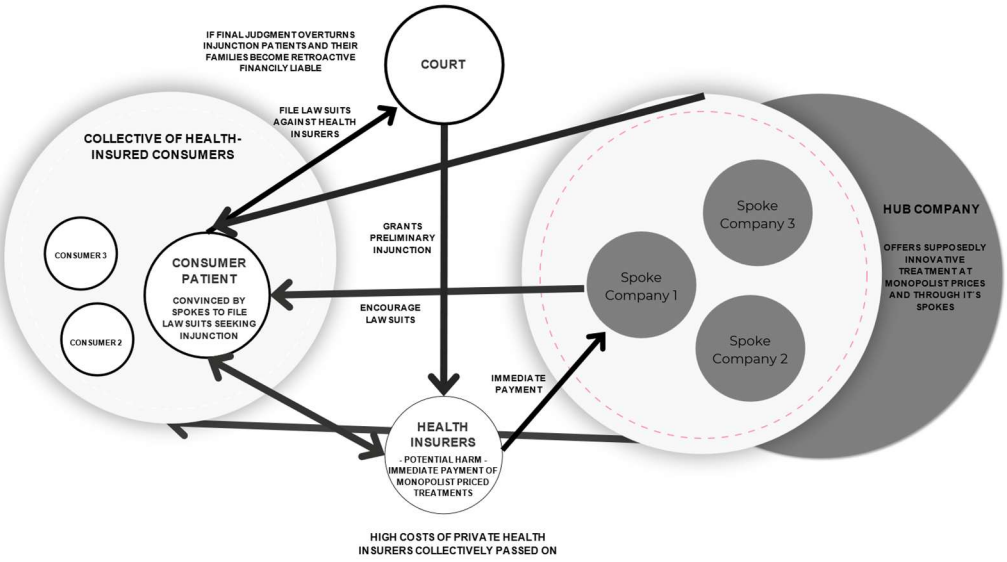
invocation of intellectual property protections—are distributed collectively among all insured parties or taxpayers, manifesting as increased insurance premiums or reduced public health funding.

When courts subsequently adjudicate the merits of such claims, one would reasonably expect that a more rigorous evidentiary review would reveal the inadequacy of the documentation submitted in support of the therapy's purported superiority or necessity when compared to available market alternatives. On one hand, a study by Wang et al. found that 96 percent of judicial petitions seeking insurance coverage for a specific treatment in Brazil are decided in favor of the petitioner.[69] However, to date, no empirical study has undertaken a stratified statistical analysis of success rates in cases presenting clear indicators of standardized claims or predatory litigation—a gap that the present research intends to address in its forthcoming development phase.

At this stage, the adverse spillover effects become evident: patients and their families, having relied on provisional judicial relief, may suddenly face retroactive personal liability for the amounts disbursed by insurers during the injunction period. As illustrated in the figure below (derived from the hypothetical case), these already vulnerable households—emotionally and physically strained by illness—are further burdened with substantial, unexpected medical debts. These costs are artificially inflated by anticompetitive practices and strategic branding embedded within the healthcare delivery structure.

FIGURE 4 – Mapping Theories of Harm in Predatory Litigation in the Health Sector

[69] Daniel W. L. Wang et al., *Judicial Claims for Access to Treatment in the Private Health Insurance Sector in Brazil*, *Health Econ., Pol'y & L.* 1, 10 (2025), https://doi.org/10.1017/S1744133125000106.



Source: Authors.

This dynamic is not confined to the legal or healthcare sectors; rather, it exemplifies a structural market failure as theorized by George Akerlof in his seminal work *The Market for Lemons*. Akerlof posits that markets subject to pronounced information asymmetries are prone to deterioration. As he succinctly explains, "it is impossible for a buyer to tell the difference between a good car and a bad car; only the seller knows."[70] When applied to the healthcare sector, this insight suggests that when the buyer—whether a patient, health insurer, or judge—lacks access to sufficient technical information regarding the quality of goods or services, the resulting informational gap facilitates opportunistic behavior by economic actors. These agents may promote inferior, overpriced products that offer no genuine technical or therapeutic superiority.

This pattern extends to other sectors similarly affected by information asymmetries. Akerlof also observed that in the insurance market, when insurers cannot distinguish between high-risk and low-risk individuals, they price policies based on average risk. This pricing structure disincentivizes low-risk clients—who perceive the premiums as excessive—thereby increasing the proportion of high-risk individuals in the

[70] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 *Q.J. Econ.* 488, 490 (1970).

insured pool. The outcome is a classic adverse selection spiral: rising premiums, declining participation by low-risk clients, and eventual market failure.[71]

A comparable dynamic is observable in the education sector, particularly within private education, where employers encounter difficulties in distinguishing between high-quality and low-quality institutions. Consequently, the signaling value of academic degrees diminishes with respect to candidates' actual qualifications. This phenomenon facilitates the proliferation of diploma mills and institutions that emphasize credential issuance over academic rigor, ultimately diluting the value of educational credentials in the labor market.

Returning to the healthcare sector, informational degradation manifests with greater intensity and more far-reaching societal consequences. Following Akerlof's reasoning, the inability—or even impossibility—for buyers to assess product quality accurately leads to a dynamic in which inferior products crowd out superior ones. This degradation process occurs when the prevalence of goods or services in the market is driven less by intrinsic quality and more by the ability of economic actors to exploit informational asymmetries.

A salient example of this dynamic involves a cancer treatment center that, leveraging both the emotional vulnerability of patients and the judiciary's good faith, promotes a purportedly "revolutionary" immunotherapy through litigation. Operating within an environment marked by informational uncertainty and asymmetry, the center secures judicial mandates compelling private insurers or the public health system (*Sistema Único de Saúde* – SUS) to cover the therapy, absent a comprehensive cost-effectiveness assessment. This practice inflates systemic healthcare costs and accelerates the erosion of market sustainability. As insurers confront rising expenditures, they are compelled to increase premiums, thereby prompting the exit of healthier policyholders and intensifying the adverse selection spiral previously described by Akerlof.[72]

This constitutes a deficient economic mechanism—sustained by informational asymmetry and intensified by the strategic manipulation of judicial processes. Such a dynamic not only undermines market efficiency but also threatens the long-term sustainability of the system. In light of this scenario, it becomes imperative to examine the regulatory, institutional, and procedural instruments available to mitigate these

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[71] Id. 490–91.
[72] Id. 492–93.

adverse effects and to reestablish a baseline of competitive integrity and distributive balance within the sector.

IV. PROPOSALS

In light of the historical nuances and legal-regulatory challenges surrounding the judicialization of healthcare, this section aims to advance concrete proposals to mitigate the systemic dysfunctions identified. These recommendations are grounded both in mechanisms already implemented by public institutions and in novel strategies that operate within the current boundaries of Brazil's legal framework.

Building upon the diagnostic analysis presented in earlier sections, the proposed responses to predatory healthcare litigation are organized into two principal categories. The first focuses on procedural reforms designed to recalibrate litigation incentives. Key proposals include: reexamining the valuation of the amount in controversy (*valor da causa*)—a figure that directly affects filing fees, jurisdictional thresholds, and ancillary procedural costs; accelerating compliance and payment timelines; and revisiting the constitutional principles of *juiz natural* (natural judge), *promotor natural* (natural prosecutor), and territorial jurisdiction, particularly in the context of the National Council of Justice's Justice 4.0 digital transformation initiative. Together, these proposals aim to foster economically rational and systemically beneficial litigation practices.

The second category targets fraudulent or opportunistic conduct, particularly instances of conspiracy and forum shopping. Recommended safeguards include the development of sophisticated digital mechanisms such as: the mandatory use of official litigation platforms; two-step expert validation protocols for medical prescriptions; and geolocation and biometric authentication tools to verify litigant identity and informed consent. These measures are intended to reduce duplicative filings and deter procedural abuse.

This chapter does not purport to offer a fully detailed implementation blueprint. Rather, its objective is to assess the feasibility of proposed measures, acknowledging that their adoption will require a spectrum of institutional adjustments—ranging from internal court directives to procedural reforms, and potentially extending to legislative or constitutional amendments. Accordingly, the discussion below lays the conceptual groundwork for technical solutions to be further developed in subsequent phases of this research.

As an initial step toward mitigating the adverse effects of excessive judicialization in healthcare, the measures proposed herein are premised on the recognition that widespread, instrumentalized litigation erodes the integrity of the healthcare system and the operational efficiency of the Judiciary. One salient procedural reform involves recalibrating the monetary value attributed to claims. This would deter litigants from arbitrarily inflating claim values in order to obtain undue procedural advantages—such as reduced filing fees or the facilitation of mass litigation—by mandating a more accurate and enforceable valuation standard.

Moreover, the imposition of procedural or financial sanctions for the deliberate misrepresentation of claim values would reinforce this disincentive structure. The overarching aim is to equilibrate litigation risks, preserve the economic rationality of the adjudicative process, and protect the Judiciary's institutional legitimacy as an instrument of rights enforcement—thereby shielding it from strategic misuse.

Analogous mechanisms already exist in Brazilian law. In labor disputes, for example, Article 899 of the Consolidation of Labor Laws (CLT) requires employers to post a judicial deposit (*depósito recursal*) as a precondition for appeal—functioning as a procedural filter against frivolous or dilatory appeals. Adapting this rationale to civil procedure at the trial-court level in health-related claims could justify the imposition of similar obligations, such as judicial guarantees or advance security (*caução*), particularly for specific requests or for filing interlocutory appeals.

Furthermore, legislative reform should be pursued in conjunction with active judicial engagement through resolutions issued by the National Council of Justice (CNJ) and normative acts promulgated by individual courts, aimed at establishing uniform procedural standards. A preliminary measure would involve the nationwide harmonization of claim-valuation criteria, including the automatic imposition of procedural sanctions for unjustified discrepancies and the mandatory submission of technical justifications for deviations from standardized parameters. In this regard, Carlini, Ryngelblum, and Bazanini emphasize that the absence of clear governance frameworks and ongoing disputes over the structure of technical advisory services remain significant barriers to the consolidation of specialized and rational approaches to health-related litigation.[73]

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[73] Ana L. Carlini, André Ryngelblum & Rodrigo Bazanini, *Deliberation on Specialized Health Courts as a Means of Mitigating Judicialization*, 38 *Rev. Just. Dir.* 138, 139–40 (2024), https://seer.upf.br/index.php/rjd/article/view/15121/114118276.

With respect to the deployment of emerging technologies, the integration of artificial intelligence (AI) presents a promising avenue for procedural screening—especially in domains marked by high volumes of repetitive or unfounded claims. In this context, the adoption of an AI-assisted judicial decision model, governed by an opt-out mechanism, is recommended. Under such a regime, judges who elect not to follow the AI's recommendation would be required to provide an express justification. This model preserves human oversight and judicial discretion while improving procedural efficiency, ensuring adherence to the principles of adversarial proceedings and full defense.

AI technologies can also be leveraged to enhance the reliability of medical evidence submitted in court. One concrete proposal is the creation, within the official *www.gov.br* platform, of a secure portal dedicated to the issuance of digital prescriptions. This system would produce a standardized electronic document that plaintiffs must present when requesting urgent injunctions for coverage or co-payment of medications or treatments. To ensure authenticity and prevent fraud, the issuance process would require two-factor authentication: (i) verification of the prescribing physician's professional registration and identity; and (ii) confirmation by a physician affiliated with the Judiciary's Technical Support Center (NATJus), who would assess compliance with clinical protocols and applicable regulations of the National Health Agency. If validated, a technical note would be issued, serving as qualified documentary evidence for judicial consideration. This mechanism would allow judges to incorporate verified medical assessments directly into the *ratio decidendi*, thereby enhancing evidentiary reliability, accelerating adjudication, and improving legal certainty by minimizing the submission of forged or unsubstantiated materials. These preliminary "filtering layers" would ensure that only duly substantiated cases—those supported by technical-scientific criteria for efficacy and cost-effectiveness—advance in the judicial pipeline.

To operationalize these reforms, the authors have developed a compendium of actionable measures, identifying the competent institutions for implementation and oversight, as well as the projected outcomes associated with each proposal.

Action Plan to Address the Issue		
Measure	**Responsible Entity**	**Expected Impact**
Calibration of Claim Value (Valor da Causa): Establish standardized criteria for the assessment of the monetary value associated with lawsuits, to prevent the inflation of claim amounts beyond reasonable levels.	National Council of Justice (CNJ) and the Judiciary	Mitigate opportunistic or speculative litigation and diminish the widespread filing of strategic or unmeritorious claims.

Penalties for Bad-Faith Valuation: Implement procedural or financial sanctions for the deliberate assignment of claim values that are either unrealistic or misleading.	CNJ and the Judiciary	Enhance economic efficiency in judicial proceedings while bolstering the legitimacy of the judiciary.
Advance Enforcement of the "Loser Pays" Principle at the Trial Level: The proposal aims to apply the "loser pays" principle earlier in the judicial process. Specifically, the losing party would be required to post a security deposit equivalent to the judgment amount as a condition for filing an appeal. This mechanism seeks to safeguard the enforcement of trial court decisions, particularly in cases involving expensive therapies not covered by Brazil's public healthcare system (SUS).	CNJ and the Judiciary	Avert unwarranted litigation pertaining to experimental or unapproved treatments and safeguard public healthcare budgets.
Nationwide Standardization of Valuation Criteria: Establish uniform rules for assessing claim values across the country. For example, if a claim is filed with an undervalued amount, the proceedings should be paused until the valuation is corrected and fully justified with technical documentation. (The exact procedural consequences will be refined and expanded at a later stage of the research.)	CNJ or the Legislature	Promote uniformity in legal practice, deter the manipulation of claim values, and mitigate the practice of jurisdiction-shopping.
Opt-out framework for AI-assisted judicial decisions: Facilitate the utilization of artificial intelligence in the processes of case triage and decision-making, while mandating comprehensive judicial reasoning whenever a deviation from AI recommendations occurs.	CNJ and the Judiciary, or the Legislature and court technology departments	Enhance the efficiency of processing repetitive or unfounded claims while preserving human oversight and ensuring due process protections.
AI for the analysis of medical records and the automated referral to judicial health advisory bodies (NATJus): Employ artificial intelligence to assess medical documentation and initiate expert reviews, which are to be conducted within a timeframe of 48 hours**.**	CNJ and the Judiciary, or the Legislature and court technology departments	Restrict judicial review to claims that are scientifically and technically substantiated and enhance the efficiency of case management processes.
Anti–forum shopping mechanisms Implement technology-driven safeguards, including geolocation and facial recognition, to mitigate the ability of plaintiffs to select jurisdictions that may be favorable to their interests.	CNJ, the Judiciary, and court technology departments	Enhance the precision of judicial decision-making and mitigate jurisdictional manipulation within the healthcare sector.
Specialized digital health courts (Justice 4.0 track): Provide an optional, fully digital pathway for health disputes — e-filing to virtual hearings — with lower costs, faster timelines, specialized health-law judges, integrated medical-data access, and automated checks for undervalued claims.	CNJ, the Judiciary, and court technology departments.	Accelerate case resolution, reduce litigation costs, improve technical accuracy, and curb predatory practices in healthcare litigation.
Judicial Scoring System and Incentives for Evidence-Based Decision-Making: Develop performance metrics and procedural incentives designed to motivate judges toward issuing rulings that are firmly based on scientific and technical evidence. This approach should be analogous to the standards employed in arbitration settings**.**	CNJ and Judicial Inspectorates (Corregedorias)	Enhance the precision of rulings, mitigate judicial bias, and elevate the quality of judgments in public health litigation.