



CONFERENCE

CLASS ACTION: UNITED STATES, CANADA, EUROPE Comparing notes

Milan - 16 November 2010

Palazzo Turati - Via Meravigli 9/b - Sala Consiglio

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Based on the careful analysis of the legal framework given so far, both in the more “doctrinal” remarks which opened the discussions, as well as those aimed at a more practical assessment of what has emerged so far during this initial year of application, the most critical issues raised by the new law are hard not to notice. This begs an attempt at making a few comparative remarks comparing our new law with the legal frameworks in place in the US and Canada where class actions have been put to the test for many years, which frameworks will be discussed in greater detail this afternoon by our American colleagues.

Indeed, the enthusiastic comments made by a number of senior politicians in the wake of the entry into force of the new law, art. 140 *bis* of the Consumer Code, appear perhaps a bit overly optimistic and blind to the multitude of factors contained within the legal framework which make life quite difficult for those consumers who may consider the possibility of taking legal action in the form of a class action.

To be perfectly honest, if we compare the various draft laws which were presented one after another starting in 2007, it is plain to see that this great new legal tool that has been made available to Italian consumers, theoretically with a view to enabling and empowering them to take on large corporations, or in other words class actions, has gradually morphed into an increasingly duller weapon, until the adoption of the final version which, as we have already seen, is chock full of filters and does not appear at all capable of guaranteeing the safeguard which, in the US and Canadian experience, the class action has always succeeded in guaranteeing, as our colleagues will no doubt confirm.

This observation is also supported by the remarks made so far and by the outstanding analysis of the first class action suit brought in our country, which sadly fizzled out with a ruling of inadmissibility issued by the Court of Turin.

In this brief presentation, I would like to delve into a few of these more critical issues, and especially those which would appear to distance us from the North American experience which will be better described shortly, with a view to comparing models, given that



comparative analysis always serves as a particularly effective tool to help us learn more about ourselves.

1) First of all, let me touch briefly upon the issue raised in paragraph 1 and the **standing to take action**.

Under our new law, standing rests with each member of the class and, therefore, one single individual – the first person who decides to bring the class action - becomes the initial plaintiff in the proceedings and other members of the same class may later “opt in” to the proceedings, provided they have an identical, or at least homogeneous, interest.

The role of consumer associations is therefore, at the procedural level, that of merely secondary parties. Such associations may become eligible to represent the plaintiffs’ class in the proceedings only in cases where a specific mandate is granted by a member of the class, but they may not bring an action on their own initiative in order to safeguard the interests of a class.

In other words, the initiative must be brought in an individual’s own name and it is not possible (as had been originally envisaged in the very first draft law presented back in 2007), for an association to take action on behalf of a group of members (which possibility, as I recall, is envisaged under US law and in fact constitutes one of the strong points of the class action).

In this regard, the choice of giving preference to the individual and the strong limitation imposed upon consumer associations have been the subject of extensive discussion.

2) Another important issue which is included among the legislative “filters” present within the law concerns the question of **costs**.

On this point, let’s ask ourselves: what exactly is supposed to motivate a consumer to bring a class action instead of an individual action if he or she suffers damages?

Of course, taking action together with many other plaintiffs rather than alone against large multinationals or large companies may seem more reassuring, but if we look more closely, we find that our class action can be potentially (and, this begs us to remark, paradoxically) more costly than an individual action!

The original plaintiff must take on the costs of the legal representation (attorneys and consultants). Of course, this is obvious. In addition to those costs, he must also take on the organizational costs related to seeking out other parties who have suffered similar damages and, in particular, costs of advertising/publication, running the risk that if the judge were to rule the claim inadmissible, he or she may even be vulnerable to a court order for payment of compensation of damages for having allegedly attempted to bring a vexatious legal action within the meaning set out in art. 96 of the Italian Code of Civil Procedure and expressly cited in paragraph 8 of art. 140 *bis*.



On the matter of the **public announcement**, the law speaks loud and clear: in the preliminary ruling in which the judge admits the legal action, he also “sets the deadlines and the modalities to be followed for the most appropriate form of public announcement” of the legal action in order to allow for other members of the class who may wish to do so to “opt into” the lawsuit and, this warrants emphasis, such public announcement is “a fundamental condition in order for the claim to proceed” and the related costs are, this goes without saying, borne by the original plaintiff.

And even if the plaintiff has granted a mandate to an association (which is possible, as we have already mentioned), the association would certainly not be in a better position.

The association would also be forced to bear considerable costs for the proceedings, but such costs would be borne in an utterly unstable context if we consider that the consumer can at any time revoke the mandate or enter into a settlement ¹ thereby reaping individual benefits but hardly any at all for the general public.

On this issue, and on this point it will be interesting to hear whether our colleagues can confirm this, I believe that it is not very likely that we will see any change in the practices followed by the major Italian law firms in promoting the pursuit of class actions as occurs in the US (perhaps excessively in some cases), since US lawyers are driven by an economic incentive of obtaining significant damages judgments, while here in Italy this opportunity really does not exist.

Clearly, this consideration is part of the broader issue of the usefulness of contingency fees (in Italy known as the *Patto quota lite*) and the pros and cons that such fee structure brings, which would definitely merit further discussion, but in this context I think it is worth noting just as an aside.

3) Now I'd like to turn to one of the most striking differences that distinguishes our legal framework from the US approach: the decision to include an **opt-in clause rather than an opt-out clause**, on which our colleagues here certainly have more expertise. Together with you, I'd like to try to reflect upon what could be the underlying rationale that led our legislature to make such a very different choice from that made in the US and Canada.

The opt-in clause provides that only those who expressly opt into the class action, which may be done by and no later than a mandatory deadline set by the judge in the ruling on the admissibility of the class action, may participate as plaintiffs in the lawsuit.

It is precisely for this reason that appropriate forms of public announcement are required (with the related costs imposed upon the original plaintiff, as already mentioned): the intention is that those who belong to the same class and have homogeneous interests will choose to opt into the class action so that they are not excluded from it.

¹ As we all know, pursuant to art. 1966 of the Italian Civil Code, a settlement may be reached only by the person who has legal capacity to exercise the rights forming the subject matter of the dispute, and such person is always the individual and not the association which serves merely as a procedural representative.



Therefore, the system calls for active conduct on the part of those who wish to take part, running the risk, however, of sacrificing those who have no idea that they have suffered damages, or those who are not aware of the possibility of taking part in the proceedings or those who may even consider the preparation of the opt-in form an insurmountable obstacle, which form, while hardly onerous, nonetheless constitutes a legal document to be prepared and filed with the court clerk's office of the court, which is something that clearly could present challenges for an average citizen.

If we also consider that only one legal action may be brought in connection with the same facts/circumstances, it is clear that many misinformed consumers or consumers who pay little attention to legal and political current affairs, could remain excluded and relegated to the possibility of raising individual claims.

Precisely for purposes of remedying these difficulties, the US and Canadian systems provide for the opposite mechanism, or in other words, the "opt-out" option, and therefore the judge, during the proceedings must produce the "certification" document, or in other words the formal certification of the class, the most important effect of which is the extension of the effects of the judgment to all of the persons falling within the definition of the class. Essentially, whoever is recognized by the court as falling within the class, even if he takes no action at all, may benefit from the positive results of the class action, while those members of the class who are critical of the legal action or prefer not to participate in it for one reason or another, may exercise their opt-out right which prevents the judgment from becoming final and enforceable for such members of the class.

I'd also like to point out that on the one hand it is true, and obvious, that those who exercise within the established deadline the option to remain excluded, are precluded from raising any objection to any out-of-court agreement that may be reached by the parties, since once they have exercised such opt-out right, they are no longer parties to the lawsuit, whether it results in a judgment or a settlement. On the other hand, the US and Canadian case law, which perhaps our colleague will discuss in greater detail, has clarified that even those who have opted out of proceedings may raise a challenge against an out-of-court agreement if it causes prejudice².

Here in Italy, the attention, and the required pro-active participation, is focused upon those who wish to take part in the class action, rather than on those who don't care about reaping the possible benefits of the lawsuit.

Clearly, this was merely the fruit of a particular decision based upon legislative policy. The US and Canadian approaches are inspired by an attitude showing greater favor towards consumers, in that they seek to avoid any reduction of the classes of consumers who have potentially suffered damaged due merely to a certain degree of inertia or misinformation that is absolutely physiological and to be expected in cases involving high numbers of consumers.

Indeed, as I understand it (and I ask my Canadian colleague to provide greater details on

² The wording in English is "*plain legal prejudice*", *Mayfield*, 985 F.2d at 1093.



this point), the legislation of certain Provinces³, and in particular British Columbia, in the context of a legal framework including the opt-out clause allows certain consumers who are not members of the class to join the lawsuit, on the basis of an opt-in clause, provided that there is “*real and substantial connection*” between the damages.

It is plain to see that the issue of opt-in as opposed to opt-out is the most striking difference between the American legal framework and ours, but as part of my concluding remarks, I’d like to touch upon another element that certainly warrants reflection: the “treble damages” mechanism that is used in the US [and Canada] to impose punitive damages.

We all know that American juries in class action suits can order companies to pay not only full compensation for damages caused, but also much higher amounts which serve as a disincentive against future unfair/unlawful business practices.

The rationale underlying punitive damages has to do with “enforcement” as our American colleagues would put it. This is an element which appears to be lacking in our art. 140 *bis*, since the Italian legislators do not appear to have taken into account the possibility that the law on class action could, and in fact for many reasons, should, be an instrument used to encourage companies to engage in fair and proper business practices.

In this regard, the punitive damages route may constitute the most effective way to achieve enforcement, despite the fact that it is a principle that is extraneous to our civil law system and may well generate a number of doubts as to its consistency with our system.

Indeed, the constant threat of million-euro compensation packages could provide an effective general incentive to companies to improve their practices, with a particular focus on business ethics.

After this brief presentation, and prior to passing the microphone to our foreign colleagues, let us ask ourselves, how far apart are we? How far away are the United States, the unquestioned fatherland of class actions, or Canada?

Their class action tool, as we have seen, appears to be much stronger and more threatening to large companies and multinationals (even though, just like any other tool, it is certainly susceptible to abuse) while our system appears much more fragile.

All things considered, these conclusions may seem obvious, and risk sounding commonplace. We will have to wait and see the actual practical results achieved in the future through the Italian class action and review additional decisions, such as that on the admissibility of the action against self-testing for the flu which was discussed here in Milan on 7 October, in order to understand whether the Italian class action can actually be of some use or whether, as has occurred in the past, consumers will prefer to take action on their own, following our ancient proverb “*chi fa da sé, fa per tre*”, perhaps vaguely akin to

³ In Canada, there is no federal law on the *class action*, but it is governed by the laws of the individual Provinces, in the context of the federal rules of civil procedure.

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your proverb about the little red hen who, at the end of the day, ultimately decides that in order to get the job done, “she just has to do it herself”.