

Telos PRIMO PIANO SCALAC

Sanford P. Dumain is the President of the law firm Milberg LLP in New York. Milberg is one of the most important and successful class action law firms in the United States, with a track record of more than \$50 billion awarded in compensation. Renowned in Italy for being lead counsel in the collective action lawsuit in the Parmalat case, today it follows the case of the U.S. Madoff's fraud, as well as the action against JP Morgan Chase & Co, and have prompted an investigation on Nvidia which, according to an accusation filed in California, would allegedly have hidden the presence of significant defects in some of its graphics chips, among others through false testimony and deceptive communication to customers. Milberg also defended the victims of World War II in cases of violation of human rights. Milberg's last success, against Xerox, deserves a special mention. That did not concern a product fraud, but a financial one. The lawsuit began in 1999 and ended only in January 2009 with a compensation of \$750 million. Dumain is specialised in class actions in the fields of finance, insurance and competition law breaches. His most recent success is the lawsuit that the City of San Jose has brought forward against Tyco Securities, which was ordered to pay a nearly \$3.5 billion compensation to investors.

Editorial

Class action: yes? No? Maybe? This could be the title of the Italian saga on the so-called collective action for damages. It was introduced in our legal framework as part of the Consumer Code, but its entry to force has been repeatedly delayed. At first, it was postponed to 1 January 2009 by the Government in its Summer 2008 budget package, with a view to detecting and deploying appropriate regulatory tools to extend the scope of class action to lawsuits against the Public Administration. It was further postponed to 1 July 2009 and again to 1 January 2010, hopefully for the last time. To understand what it means in concrete terms for consumers to have such a tool to leverage, Primo Piano Scala c decided to interview one of the most famous - and successful - American lawyers, Sanford P. Dumain, chairman of the law firm Milberg LLP. Since its introduction in the United States in 1938, collective action has played the crucial political function of driving the evolution of the legal system, statutory provisions and regulatory standards. Class action lawsuits have often been exploited to fill regulatory gaps, to declare certain practices as unlawful or illegal or to define new regulatory standards. The Italian legal framework is obviously very different. A substantial difference is the absence in our system of punitive damages, i.e. additional monetary compensation awarded to the injured party in a civil lawsuit, which can play a very important role especially in actions concerning wrongdoing put in place by financial operators. Still, the class action is indeed a major legal tool to protect citizens/consumers. Basing on his long standing activity in the field, Dumain discloses to us in a clear and accessible way his experiences, tips and suggestions on possible ways forward to make the most out of such an opportunity as class action.

Mariella Palazzolo

Sanford Dumain: Beware! Class action lands in Italy

Telos: Milberg Llp, the law firm which you chair, is following, among others, the Madoff fraud, but in Italy it became famous for the Parmalat class action. We wish that similar cases would not occur again. In your view, to what extent can class action act as a deterrent?

Sanford Dumain: Unfortunately fraud, especially in the financial field, will always be with us, but we have seen repeatedly in our practice that corporate officers are very much aware that there will be a class action if they engage in fraud. It is difficult to measure the number of times that fraud does not happen for fear of a class action, but every day corporate lawyers advising public companies warn their clients that misleading clients/consumers/investors will surely be followed by a class action lawsuit.

In Italy we are a little late on class action. Collective actions for damages will be allowed only starting from 1 January 2010, and they will only apply to few well defined cases in addition to counterfeit goods fraud, such as bus and metro strikes, inefficiency in the provision of services such as electricity, gas, telephone, train delays...stories as Erin Brockovich's appears to be very far away. Moreover the punitive damages clause is not foreseen. Will the Law prove only partially effective or will it retain its function of deterrence?

The answer to that will depend on how effective plaintiffs' lawyers will be in prosecuting class actions against those who commit fraud. It is important that early cases are successful for the class action mechanism to be a deterrent. I would urge lawyers in Italy to seek advice from lawyers in the U.S. with substantial experience bringing class actions for securities fraud. This is currently the case in Canada, which has recently begun to allow class actions. This past week the Ontario Superior Court in the class action against Timmimco Limited, a Canadian mining company, affirmed the propriety of such a collaboration between a local and US law firms. In that case, Milberg LLP is working collaboratively with a Canadian law firm to prosecute that class action. Regardless of the role class



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actions play in the Italian legal system, it's important to recognise that in the global economy, Italian citizens who invest in foreign companies and in stock exchanges around the world should have the right to protection from corporate wrongdoing. There is an evolving body of law that such investors can take legal actions in U.S. Courts, at least in certain circumstances. The barriers between the legal systems in individual countries are becoming more blurred. I do not know the Italian law, but the absence of punitive damages could result in a decreased function of deterrence of illegal conduct, on a local level only.

Securities class actions are a special category of actions promoted to protect a group of investors who suffered economic damages in connection with securities transactions. Do you believe that they could be a regulatory complementary tool?

We know that the SEC and other regulatory agencies simply do not have sufficient resources to investigate every case effectively. The failure at the SEC involving Madoff is just one example. The Courts in the U.S. have repeatedly recognised that private class actions are a necessary part of enforcing the securities laws. My firm, for example, is one of the few that has a large staff of investigators and forensic accountants to assist in investigating possible fraudulent conduct.

Class action was born in the framework of a common law rule, with different roots and opposite developments than our civil law one. Detractors of class action claim that the U.S. model is partially a failure, since "there are real professionals of class action that use this instrument only as a money maker. It was born as a consumers' protection tool but eventually it became a way to make lawyers even more affluent". What is your view on such statement?

Those arguments arise from those who often engage in misconduct. What is not mentioned is that class action lawyers take huge economic risks in bringing these cases. We often advance millions of dollars in time and out-of-pocket expenses and only receive payment if we obtain a successful result. At the end of the case, all fees are set by the Court, which has a duty to ensure that the fees are fair. In these circumstances I can say, without fear of contradiction, the fees awarded to lawyers in class actions are certainly well earned. Because of the large investment of time and money, Milberg is careful to bring forward only those cases that have substantial merit.

Milberg law firm was involved in scandals as well. In 2006 the U.S. Federal Government seemed to be the end of Milberg. Whereas, thanks to your commitment, the renewed Milberg is back to the past splendors. Could you please tell us what to rebuild a lost reputation entails?

Our reputation for high quality work never suffered. The vast majority of our clients remained so loyal to us because we get excellent results. The few people who engaged in wrongdoing are gone from the firm and the prosecutors specifically acknowledged that the wrongdoing was done by only a few lawyers who actively concealed their conduct from the rest of the firm.

We were about changing the name, then we just kept it shortened it in Milberg. Moreover I personally started a road show across the country to reassure our customers on the excellence and reliability of our firm and to answer, in person, to any questions. Being successful again, all together, not only surviving, is the pride of all our partners. Of course, looking back I think that despite the countless sleepless nights, that was the biggest challenge of my life which has given me the most satisfaction. It is for that reason that we continue to be hired by institutional investors to monitor their portfolios without charge to advise them whether significant losses may be attributable to fraud that should be investigated further. Many of those clients are European investors who look to the U.S. Courts for recovery.