MASSACHUSETTS LAWYERS WEEKLY

Print

With 'Moelis,' SJC continues disfavor of state class actions

Published: September 22, 2008

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In *Moelis v. Berkshire Life Insurance Company*, SJC-10067, 451 Mass. 483 (May 22, 2008), the Supreme Judicial Court found deceptive marketing practices, which had survived a summary judgment motion, could not be prosecuted on a class basis.

The court summarily concluded, without considering their contacts with Massachusetts, that members of the putative class were not subject to jurisdiction.

The court also reiterated a "no opt out" rule for state class actions, even after conceding in oral argument (but not in the opinion) the rule's lack of foundation. 451 Mass. at 487-88.

The SJC took a direct appeal apparently to make a statement disfavoring class certification; doctrinal clarity was achieved, but deserving consumers were denied the protections of the deceptive practices statute.

Minimum contacts in class certification

The usual minimum contacts issue is whether a non-resident *defendant* can be sued in Massachusetts by a resident plaintiff. In *Moelis* the defendant was a Massachusetts resident, and the minimum contacts issue was whether jurisdiction could be asserted over non-resident class members.

A state court may certify a class including non-residents beyond its jurisdiction if they are given notice and an opportunity to exclude themselves; not opting out is viewed as consent. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812-13 (1985).

In Massachusetts, however, neither M.R.C.P. Rule 23 nor G.L.c. 93A, §9(2) expressly address this "notice and opportunity to opt out" concept (found in Fed R. Civ. P. 23). The SJC has interpreted this silence as a "no opt out" rule.

Class actions on behalf of non-residents are still viable. The SJC accepted, as contemplated by *Shutts*, that a no opt out class including non-residents can be certified "if the minimum contacts test is satisfied." 451 Mass. at 487-88.

The SJC did not, however, conduct the kind of fact-intensive review of contacts demonstrated by its precedents; doing so and finding no jurisdiction would have made it much more difficult for Massachusetts residents to sue non-residents at home. To avoid this doctrinal uncertainty, the court simply recited a conclusory statement of no contacts.

'Moelis,' 'Good Hope' and 'Tatro'

In *Good Hope Industries v. Ryder Scott Co.*, 378 Mass. 1 (1979), a Massachusetts plaintiff sued a Texas defendant hired to appraise leaseholds in Texas. The Massachusetts plaintiff met with the defendant in Texas, all of the defendant's appraisals were done in Texas and the defendant never went to Massachusetts. The defendant's Massachusetts contacts were sending his reports there, invoicing the plaintiff there and accepting payment from a Massachusetts bank. 378 Mass. at 3-4. These nominal contacts, the SJC found, were sufficient contacts for jurisdiction.

The same approach was taken in *Tatro v. Manor Care*, 416 Mass. 763 (1994). A Massachusetts resident sued for personal injuries suffered at the defendant's California hotel. The defendant was a Delaware corporation doing business in California, with no office or agents in Massachusetts. A California organization arranged for a conference at the hotel and notified the plaintiff, a member, who reserved a

room. The defendant's Massachusetts contacts were that it solicited business nationwide and had direct billing arrangements with and had hosted events for other Massachusetts businesses. 416 Mass. at 766. Once again, the SJC found these nominal contacts sufficient for jurisdiction.

In *Moelis*, the defendant life insurer marketed life insurance using deceptive practices, primarily financial illustrations. The SJC said the only contacts purchasers had with their insurer were "the purchase of an insurance policy from Berkshire ... and their mailing of annual premium payments." 451 Mass. at 488. While purporting to apply "the traditional defendant minimum contacts test," the court did not undertake the fact-intensive approach of *Good Hope* and *Tatro*, which could have revealed:

- Non-residents went outside their home states to purchase insurance from the defendant, a Massachusetts mutual insurer.

- The non-residents became "client/owners" of the defendant.

- These client/owners paid the defendant more than the cost of insurance; the excess became an asset the defendant maintained in Massachusetts and managed for them.

- This asset earned dividends that the defendant also maintained in Massachusetts and managed for its client/owners.

- The defendant's financial illustrations indicated its client/owners would use this value to pay the premium and eventually receive the balance.

The Michigan Court of Appeals found that fewer facts than these justified asserting jurisdiction over non-resident mutual company policyholders. *Insurance Commissioner v. Arcilio*, 221 Mich. App. 54, 561 N.W.2d 412, (1997). Policyholders had sued their directors in Pennsylvania, and a trial court enjoined the litigation. Citing *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), the Michigan court affirmed, finding minimum contacts satisfied because the policyholders had "deliberately reached out beyond their home state's borders and purchased long-term insurance products from [a Michigan] insurer" and had thereby "purposefully availed themselves of the protection of Michigan law." 221 Mich. App. at 73-75, 561 N.W.2d at 421-22.

Arcilio was the most direct authority, and in the *Moelis* oral argument the chief justice even asked how it could be distinguished. The *Moelis* opinion, however, did not even mention it.

If the *Moelis* approach had been taken in *Good Hope* or *Tatro*, the plaintiff's claims would have been dismissed because "all defendant did was send reports and bills to a Massachusetts company," or "all defendant did was host a Massachusetts resident at its facility in California."

Massachusetts residents instead benefit from SJC decisions that require only the minimal jurisdictional contacts of *Int'l Shoe*. Many years have passed since those decisions, but it is difficult to accept that the judges who sat on the SJC then could accept the casual, result-oriented approach taken in *Moelis*.

Judicial gloss on a silent statute

Having found no minimum contacts with Massachusetts, the court then said neither Mass. Rule 23 nor §9 (2) provides an opt out procedure. 457 Mass. at 487. At oral argument, however, the chief justice admitted that the no opt out rule was imposed only by the SJC's "judicial gloss." This gloss was probably an incorrect interpretation of Mass. Rule 23. It was certainly an incorrect construction of §9(2).

Mass. Rule 23 was promulgated in 1973. Section 9(2) was enacted four years earlier. St. 1969, c. 690. Substantial portions of the federal rule were omitted from both - an earlier SJC emphasized that the state rules were intended to be *less restrictive. Baldassari v. Public Finance Trust*, 369 Mass. 33, 40 (1975).

Two of these omissions illustrate the SJC's inconsistency:

- Neither Mass. Rule 23 nor §9(2) has the language of Fed. R. Civ. P. 23(c)(1) providing that "the

court shall determine by order," implicitly on motion, that a class is certified.

- Neither Mass. Rule 23 nor §9(2) has the language of Fed. R. Civ. P. 23(c)(2) that the notice sent to class members must offer to exclude the class member who opts out.

An earlier SJC found that the first omission did not prevent a court from requiring a certification motion:

"Mass. R. Civ. P. 23, unlike the corresponding Federal rule, Fed. R. Civ. P. 23(c)(1), does not provide for a motion to certify that an action may proceed as a class action, but ... such motions are often necessary and desirable for the efficient handling of class actions. It was therefore properly *within [the trial court's] discretion to* postpone discovery and to make an early ruling on the class action issues." 369 Mass. at 39 (emphasis added).

The holding is not controversial. A Massachusetts trial court "[i]nherently has wide power to do justice and to adopt procedures to that end." *Fanciullo v. B.G. & S. Theatre Corp.*, 297 Mass. 44, 51 (1937); 9 Mass. Prac. Series, Civil Practice §1.17 (2004). Trial courts are limited only where their procedures are "inconsistent with any general rule made by" the SJC. *Collins v. Godfrey*, 324 Mass. 574, 579 (1949).

Ten years after *Baldassari*, however, a later SJC took an inconsistent approach, finding that the second omission *prohibited* Massachusetts trial courts from including an opt out provision in a class certification order. *Fletcher v. Cape Cod Gas*, 394 Mass. at 595, 602 (1985).

In other words, while the silence of Mass. Rule. 23 and §9(2) did not prevent trial courts from requiring certification motions and orders, it did prevent trial courts from including opt out procedures in those orders. *Id.*

The only authority the court cited for this inconsistent ruling was a comment in the 1973 Reporter's Notes to Mass. Rule 23, stating that the new rule did not provide for opting out. 394 Mass. at 602. These notes did not speak in terms of a prohibition, but only that the rule did not provide the procedure.

Putting aside Rule 23 (since *Moelis* dealt with certification under §9(2)), using a 1973 reporter's comment to find a no opt out rule in a 1969 statute is simply inexplicable as a means of statutory construction. The reporter's comment was written in 1973 in connection with rules promulgation, rules for which the SJC has some responsibility. Section 9(2), however, was a *legislative* enactment, four years earlier, and reading the reporter's comment into it ignored statutory language, legislative history and the common law backdrop against which the Legislature drafted it - the traditional authority of Massachusetts trial courts illustrated by *Baldassari* and *Fanciullo*.

The briefing and oral argument for plaintiffs proposed that the no opt out rule be changed, and the chief justice noted that the rule could be changed without modifying Rule 23 or §9(2). Once again, however, the court's opinion did not even mention it.

Continued disfavor of state class actions

In *Moelis,* the SJC was presented with two opportunities to address the efficacy of Massachusetts' class action rules. For reasons unexplained, the court avoided both of them. It denied class certification on the basis of no minimum contacts without considering facts and documents in the record and relevant caselaw, and it refused to reconsider a no opt out rule added to the statute by judicial gloss without regard to customary rules of statutory construction.

Where the *Moelis* opinion speaks the loudest is not in its result, but in the approach taken to reach it. The often-quoted language from *Baldassari* has not been overruled; §9(2) was "designed to greet a pressing need for an effective consumer remedy, and ... traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." 369 Mass. at 49-41.

As a practical matter, however, the unmistakable message the court sends with this opinion is that it disfavors state class actions and, the 30-year-old salutory language from *Baldassari* notwithstanding, it will read §9(2) so as to make it essentially ineffective.

Such a reading not only disregards the legislative directive embodied in §9(2), it leaves victims of deceptive practices with the same "pressing need for an effective private remedy" that an earlier SJC recognized.

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