

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

LEONARD GOLDSTEIN DDS, : JUNE TERM, 2004
: :
vs. : :
: :
DORAL DENTAL SERVICE OF PA : NO. 1649

MEMORANDUM OPINION

Plaintiff brings this class action on behalf of Plaintiff, Leonard Goldstein, D.D.S. Plaintiff filed a complaint on June 17, 2004 requesting an accounting to determine if, Doral Dental Services mismanaged funds owed the Plaintiff Class.

On August 11, 2004, Defendant filed Preliminary Objections to Plaintiff's Complaint. In their Preliminary Objections, Defendant alleged that this case should be before an arbitrator and asked the court to compel arbitration and stay judicial proceedings until the conclusion of the arbitration. On September 30, 2004, Plaintiff filed their Response to Defendant's Preliminary Objections alleging that the arbitration clause found in the contract between Plaintiff and Defendant did not apply and that it would be inappropriate to send this case to arbitration. On October 29, 2004, this court denied Defendant's Preliminary Objections and ordered Defendant to answer Plaintiff's Complaint. Defendant filed this timely appeal that same day.

This is a class action for an accounting only. The Complaint seeks no substantive relief of any kind, no money damages are identified, and no financial relief of any kind is demanded. Only information is sought. In their Preliminary Objections, Defendant claims that under Pennsylvania Rule of Civil Procedure 1530 the court may award money

damages if, after an accounting, money is shown to be due. This argument is irrelevant because Rule 1530 was repealed on December 16, 2003, effective July 1, 2004.

The parties' contract explicitly states that a duty to arbitrate exists only if the dispute "involve[es] a contention by one party that the other has failed to perform its obligations and responsibilities under this Agreement."

The Complaint in this case makes no claim of failure to perform; it does not allege that defendant breached its contract with plaintiff. Instead, the Complaint states plaintiff's basis for being entitled to an accounting is to determine whether or not there has been any breach.

The contract by its clear terms does not require or even permit arbitration of a claim for an accounting, the only claim in this case.

However, in the event that the Appellate Court finds that arbitration is the appropriate forum for an action for an accounting, the case should nonetheless remain with the trial court for class certification.

The decision whether to certify the class must be made in accordance with Pennsylvania Rules of Civil Procedure 1701 to 1716. Since class action litigation involves the rights of citizens who do not know the litigation exists there are public policy implications to the class certification decision. That is why in Pennsylvania, the procedural decision of how the case should be litigated, as a class or as an individual claim, is to be decided in a public court room, by an elected or appointed judge.

In Dickler v. Shearson Lehman Hutton, Inc.¹, plaintiffs filed a securities action against a brokerage firm for breach of fiduciary duty, breach of contract, and tortious conversion. Despite a written agreement to arbitrate all disputes between broker and

¹ Dickler v. Shearson Lehman Hutton, 596 A.2d 860, 865 (Pa. Super. 1991)

client, plaintiffs brought a class action in court. The Superior Court clearly held that when an arbitration agreement for individual claims is silent as to whether class action arbitrations are permissible, they are allowed. The Superior Court reasoned that allowing class actions to proceed in arbitration is an equitable and reasonable result because:

“Compelling individual arbitration would force individuals already straitjacketed by an industry-wide practice of arbitration agreements to fight alleged improprieties at an exorbitant economic cost. Individual arbitration would be a small deterrent to companies certain that few proceedings will be instituted against them. Because the principles of res judicata and collateral estoppel are not applicable to arbitration proceedings, each plaintiff would be forced to fully litigate his complaint.”

Nonetheless, the Dickler court did not compel arbitration!

The Dickler court specifically required the *trial court* to retain jurisdiction over class certification proceedings and to determine the class certification issue. In remanding the case to the trial court, the Superior Court gave the following instruction:

“Arbiters because of their limited subpoena power and their lack of reviewability until final order are probably not equipped or appropriate for the task of class certification.”²

“The trial court in making its determination regarding class certification must take into account the factors normally relevant to class certification, but also the special nature of arbitration proceedings, including the impact that court intrusion into the proceedings may have.”

After the trial court determines if a class should be certified and after there has been the constitutionally required notice and a court supervised opt-out procedure, the court must compel arbitration for the class. Should certification be denied the case must

²Id., at Footnote 5

be arbitrated individually. In either case, the certification decision is for judicial determination.

Because class actions involve the rights of non-represented citizens, citizens who have never chosen the lawyer “representing” them and citizens who may not even know the lawsuit exists, a trial court, not an arbitrator, must make class certification decisions and retain ultimate jurisdiction over settlement and other post decision proceedings. In explaining the decision that class certification is to be decided by a judge before the court compels arbitration, the Superior Court said: “Class-wide arbitration is a different animal than individual arbitration. In addition to the need for a trial court to initially certify the class and to insure that notice is provided for, the trial court will probably have to have final review in order to insure that class representatives adequately provide for absent class members. . .”

The Due Process safeguards on class litigation are well established. In 1940 The Supreme Court of the United States in Hansberry v. Lee³ reviewed the seminal concept of justice: “It is a principal of general application in Anglo-American Jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.” For important reasons, class actions are exempt from the general rule on which judicial authority is grounded.⁴ Because the rights of an absent plaintiff can be determined by a class action judgment, public policy and basic due process embodied in the United States Constitution and the

³ Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (U.S., 1940)

⁴ Id.

Pennsylvania Constitution require that a court ensure that adequate notice be given to all class members who will be affected by the outcome of the proceeding.

The Supreme Court of the United States in Phillips Petroleum Co. v. Shutts⁵ set forth the absolute minimum procedural due process protections which must be afforded absent plaintiffs in a class action lawsuit. The Court held that at a minimum, the absent plaintiffs must receive adequate notice, an opportunity to “opt out”, and the court must insure that both the named plaintiff and the appointed counsel do adequately represent the interests of all the absent class members.

“If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”

Without these minimal safeguards the lawsuit does not have class action effect.

The Notice requirement of due process is the American concept of fairness.⁶ Binding an individual to a judgment he knew nothing about nor had any opportunity to oppose, offends the most basic notions of fairness. The Supreme Court of The United States held in Mullane v. Central Hanover Bank & Trust Co held that: “The fundamental

⁵ Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (U.S., 1985)

⁶ Picard v. Connor, 404 U.S. 270, 279, 92 S. Ct. 509, 30 L. Ed. 2d 438 (U.S., 1971)

requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”⁷ The Pennsylvania Supreme Court calls notice: “the most basic requirement of due process.”⁸ Both the Federal Rules of Civil Procedure, Rule 23(c)(2) and the Pennsylvania Rules of Civil Procedure, Rule 1712 require trial judges to approve class notification to ensure that absent plaintiffs receive notice of a pending class actions. It is the publicly elected judiciary which must protect absent plaintiffs by controlling class action notice.

The United States Supreme Court in Phillips Petroleum Co. v. Shutts described the opt out provision needed in class notification to satisfy due process. The court in Shutts held that: “the procedure. . . where a fully descriptive notice is sent first class mail to each class member, with an explanation of the right to “opt out”, satisfies due process.” Both the Federal and Pennsylvania Rules of Procedure have been enacted solely to protect plaintiff’s who wish to opt out of the class. Federal Rule 23(c)(2) and Pennsylvania Rule 1711 allow individuals to opt out of the class. It is the publicly elected judiciary which must protect absent plaintiffs by allowing them to opt out of the proceeding.

In addition to notice of pending litigation, due process requires notice of settlement as well. This year the Pennsylvania Superior Court in Wilkes v. Phoenix Home Life Mut. Ins. Co.,⁹ held that: “Adequate notice of a class action settlement is required by the constitutional mandate of due process. . . To satisfy due process, notice

⁷ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (U.S., 1950)

⁸ Pennsylvania Coal Mining Ass’n v. Insurance Dept. of Pa., 471 Pa 437,452 (1977).

⁹ Wilkes v. Phoenix Home Life Mut. Ins. Co., 2004 PA Super 188, P16 (Pa. Super. Ct., 2004)(citations omitted)

of a class action settlement must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ Mullane, 339 U.S. at 314. Although the notice need not be entirely comprehensive, the notice must not be misleading or materially incomplete. Weinberger v. Kendrick, 698 F.2d 61, 70 (2d Cir. 1982). The notice must contain an adequate description of the proceedings written in objective, neutral terms that may be understood by the average absentee class member. In Re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104 (5th Cir. 1977). The notice also must ‘contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.’ Id. at 1105.’ Settlement must be approved by the court to prevent collusion between defendants and the named representative plaintiff. Federal Rule of Civil Procedure 23(e) and Pennsylvania Rule of Civil Procedure 1714 require the court to approve any settlement and to make sure that absent plaintiffs are adequately notified. It is the publicly elected judiciary which must protect absent plaintiffs by controlling class action settlement notice.

The Supreme Court of the United States in Hansberry v. Lee held that due process allows an absent plaintiff to be bound by a judgment only if he has been adequately represented.

“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason

the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit”¹⁰

Likewise, The Pennsylvania Superior Court requires that for the named plaintiff to adequately represent the class: “[A] litigant must be a member of the class which he or she seeks to represent at the time the class is certified by the . . . court”¹¹

Adequate representation of absent plaintiffs is ensured by both the Federal and Pennsylvania Rules of Civil Procedure in two ways. Federal Rule 23(a) and Pennsylvania Rule 1702 require that “there are questions of law or fact common to the class” and that “the claims and defenses of the representative party are typical of the claims and defenses of the class” These two provisions mandate that “the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.”¹² Secondly, Federal and the Pennsylvania Rules require the judge to make sure that the attorneys representing the class are competent to handle complex class action litigation. Federal Rule of Civil Procedure 23(g) requires the judge to look at experience, knowledge of the law and the resources counsel will commit to representing the class. Pennsylvania Rule of Civil Procedure 1709 sets forth the factors to consider when considering fair and adequate representation such as conflicts of interest and attorney resources. It is the publicly elected judiciary which must protect absent plaintiffs by ensuring adequate representation.

¹⁰ Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (U.S., 1940)

¹¹ Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 135 (Pa. Super. Ct., 1982)

¹² Id.

The above rules are in place to protect the due process rights of absent class members. These rules ensure that the court be an advocate for those who will be affected by the outcome of a class action proceeding. The Supreme Court in Phillips v. Shutts required a system where courts as well as the named plaintiffs and appointed counsel protect the interests of the absent class members. Judges are public officials who are publicly charged with the duty to ensure that the rights of the individuals before them and the public at large are not compromised. In contrast, arbitrators are private individuals paid by the parties before them and controlled by the rules of different various arbitration organizations. An arbitration does not demand a public hearing nor is it necessarily controlled by public rules of civil procedure. Arbitrators have no duty to the public at large. Arbitration does not necessarily serve the public interest, it is only designed as an expeditious economic process for the parties who have paid and selected the arbitrator. An arbitrator may not afford the same guarantee that absent plaintiffs will be provided the procedural safeguards demanded by the Constitution of the United States and the Pennsylvania Constitution, codified in Federal Rule of Civil Procedure 23 and Pennsylvania Rules of Civil Procedure 1701 – 1706. These rules insure that absent class members receive their constitutionally required, adequate notice, be given an opportunity to opt out and receive fair and adequate representation.

Public policy mandates that the due process rights of the absent plaintiffs be protected by a public official and not a private arbitrator. The Pennsylvania Superior Court clearly held in Dickler v. Shearson Lehman Hutton that it is the trial court, not an

arbitrator, who must preside over the class certification process and must publicly ensure that absent plaintiff receive adequate notice.¹³

For the reasons set forth above the ruling of the Court should be affirmed.

BY THE COURT

DATE

MARK I. BERNSTEIN, J.

¹³ Dickler, 596 at 865.