

OPINION

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How the SJC emasculated the laws protecting consumers

By C. Peter R. Gossels



On March 12, 2009, the Supreme Judicial Court reversed the judgment of the Appeals Court in *Gossels v. Fleet National Bank*, 69

Mass. 297 (2007). The decision (*Gossels v. Fleet National Bank*, 453 Mass. 366 (2009)) nullified, by judicial fiat, the statutes enacted by the Legislature since 1957 to protect consumers from unfair or deceptive acts practiced by financial institutions in Massachusetts.

The statutes

The first of these statutes — St. 1957, c. 765 — adopted the Uniform Commercial Code. Sections 1, 3 and 4 of G.L.c. 106, as Chapter 765 is now known, imposes a duty of “good faith” on Massachusetts financial institutions that did not exist under the law merchant (common law) or the Negotiable Instruments Law before 1957.

Chapter 106, §§1-103 and 4-201 also strengthened prior statutes that provided that the law of principal and agent shall supplement the provisions of the UCC.

The second statute enacted by the Legislature to protect consumers from unfair and deceptive acts was St. 1967, c. 813. Section 2 of that statute, codified as G.L.c. 93A, provides that “[u]nfair ... or deceptive ... practices in the conduct of any trade ... are ... unlawful” and that “[t]he attorney general may make ... regulations interpreting ... this chapter.”

After the enactment of G.L.c. 93A, the attorney general promulgated regulations that provided that a person who fails to disclose facts that may influence a buyer not to enter into a transaction or who fails to comply with statutes designed to protect consumers shall be deemed to have violated G.L.c. 93A, §2.

Chapter 93A created two new causes of action in Massachusetts: Section 11, which is reserved for persons “engaged in the conduct of any trade or commerce ... who suffers any loss as a result of the use ...

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by another (such) person ... of an unfair act or practice ...” Section 9, the other cause of action, is dedicated to consumers. *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 743 (2008).

Factual background

A customer of Fleet National Bank had asked it to collect a check denominated in euros issued by a German bank. Fleet’s teller gave the depositor a receipt for his check, declaring that it was acting as “an agent” to collect the proceeds of his check and that it would do so in “good faith.”

Fleet’s manual for foreign collection practices required its tellers to inform customers that it would exchange the foreign currency collected into dollars and charge them for their services, but the teller in this case did not do so.

What remedy is there when the SJC engages in unconstitutional judicial legislation to protect Massachusetts financial institutions from the laws enacted by the Legislature to protect consumers?

The depositor expected Fleet to pay him the euros evidenced by his check and would have asked the teller to return his check and gone elsewhere to collect his euros had he known that Fleet would exchange his euros into dollars and charge him a 4 percent commission according to a secret rate sheet that its employees were directed not to disclose to Fleet customers.

When Fleet notified its depositor two months later that it had exchanged his euros into dollars and deposited 96 percent of those dollars into his account, the depositor complained to Fleet about its 4 percent commission; he had expected to use the euro proceeds of his check during his frequent travels in Europe.

The proceeds of the depositor’s check had been reduced by an additional 8 percent by Fleet’s violation of a number of statutes incorporated into G.L.c. 106, which delayed its efforts to collect the proceeds of his check by more than four weeks while the euro lost value.

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Fleet responded to its customer’s complaints by saying that he had not been “shortchanged” and assured him that “the rate of exchange used in this matter is fair.”

As a result, the plaintiff filed a complaint against Fleet to recover the \$10,269.03 that he had lost because of Fleet’s violation of the duties it owed to consumers pursuant to G.L.c. 106, §§1, 3 and 4, and G.L.c. 93A, §§2 and 9.

The Appeals Court

The Appeals Court began its analysis of the undisputed facts in the case by holding that Fleet was the consumer’s agent for collection of his

check as provided in its receipt and the provisions of G.L.c. 106, §4-201.

Although it pointed out that Fleet’s agency status was “limited to collecting items,” the court noted that Fleet’s preprinted receipt stated that it would act in good faith and exercise reasonable care as the consumer’s agent for collection as required by G.L.c. 106, §1-203. Accordingly, it held that Fleet became bound to act in good faith and to exercise reasonable care as agent of its depositor to collect his check. The court then reviewed the provisions of G.L.c. 106, §4-102(b), to determine whether Fleet was liable to the plaintiff for its conduct in collecting his check.

Citing numerous cases, the Appeals Court held that if a person speaks to a given point of information, “he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge ... half-truths may be actionable as whole lies.”

Having made a partial representa-

tion in its receipt concerning Fleet’s service charges, the Appeals Court held, Fleet was required to disclose to its customer that it would pay him substantially less than the euros it had collected, based “on an internal rate sheet that [Fleet] employees were advised not to disclose to the public, and that it would profit by ... keeping the difference.”

Accordingly, the court held that Fleet’s customer was entitled to a judgment under G.L.c. 93A, §9.

The SJC

After accepting a late-filed brief from the Massachusetts Bankers Association, the SJC reversed the judgment of the Appeals Court and held that Massachusetts financial institutions owe their customers no more than a duty of *ordinary care* based largely on the arguments set forth in that brief.

In support of its decision, the SJC pointed out that the UCC was designed to implement a national, uniform system of check collection, which “displaces analogous common law theories of liability” in order to protect financial institutions from “a motley patchwork of liability standards from state to state.”

Having said that, the SJC ignored the provisions of G.L.c. 106, §§1-103 and 4-201, which are identical to the UCC provisions adopted in every other state and provide that banks are the agent of the owner of checks that they have agreed to collect.

The SJC also ignored all the provisions of G.L.c. 106 that provide that “every contract or duty within the [UCC] imposes an obligation of good faith in its performance or enforcement” and the fact that Fleet had accepted those obligations in its preprinted receipt.

The SJC did not cite a single case from any other state to support its decision to ignore Fleet’s written agreement to abide by the provisions of G.L.c. 106 cited above. It relied solely on G.L.c. 106, §4-202(a), and on *Fabens v. Mercantile Bank*, 23 Pick 320 (1839), a case decided on the basis of common law 188 years before Massachusetts adopted the UCC on a totally different set of facts.

The SJC also ignored G.L.c. 106, §4-202(b), which defines “ordinary care” as merely meaning that a bank must take “proper action before its midnight deadline following receipt of an item.”

Since *Fabens* was the only authority cited by the SJC for eviscerating the provisions of G.L.c. 106 (the UCC) adopted by the Legislature in 1957 to protect consumers from predatory banking practices, we can only conclude that it engaged in judicial legislation forbidden by Article 30 of the Massachusetts Constitution.

The SJC then held that Fleet’s conduct in collecting its depositor’s check had not been an “immoral, unethical, oppressive or unscrupulous business practice” declared unlawful by G.L.c. 93A, §2, citing only *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547 (2008), despite the fact that *Milliken* had been decided under G.L.c. 93A, §11 (not §9), on facts entirely different from the Fleet case before it.

The decision of the SJC to protect Fleet National Bank from the consumer protection statutes enacted by the Legislature is especially difficult to understand because it had enforced those very laws against a California bank when it decided *Fremont* three months earlier, based on the provisions of G.L.c. 93A, §§2 and 9.

We can only guess what precedent impact the Fleet case will have on our consumer protection laws.

Conclusion

What remedy is there when the SJC engages in unconstitutional judicial legislation to protect Massachusetts financial institutions from the laws enacted by the Legislature to protect consumers?

I know of no other answer than to bring this important matter to the attention of the governor, the Legislature, the bar and the public. **MMW**

Civility should prevail among judges as well as attorneys

The following letter originally appeared in the Feb. 15 issue and contained a typographical error. A corrected version appears here.

To the editor:

At the heart of our adversary system are conflict and vigorous advocacy. Incivility is nei-