

Adventures in Law and Aging

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OREGON vs. PENNSYLVANIA: PERSPECTIVES ON CARE

By Katherine C. Pearson
Professor of Law



Penn State vs. Oregon State. Great match-up for the Rose Bowl, right? As I type, the bowl game line-ups are still being decided. Instead, I am focusing on how these two

states are approaching long-term care challenges. This issue of our newsletter is devoted to “consumer protection,” and I consider quality care the ultimate consumer protection challenge.

East Coast officials have long pointed to Oregon as the model for avoiding the high costs of institutionalized care for disabled persons and the elderly. Oregon has the lowest occupancy rates in the country for

nursing facilities. Pennsylvania, by contrast, has one of the highest nursing home occupancy rates. Pennsylvania officials have recently announced a commitment to “rebalance” state funding priorities for long-term care, with a goal of moving residents “back” to home or less costly settings.

But the utilization rate at nursing facilities is only part of the story. Oregon was also the first state in the nation to obtain a waiver from federal regulations that direct public funding to nursing homes. Since 1981, Oregon has been using state-federal Medicaid dollars to support lower-cost and more appealing options, including assisted living or home care providers. Pennsylvania is still working on regulations to implement state-wide Medicaid funding for assisted living or personal care options.

My role as the 2009-10 Visiting Petersen Scholar in Gerontology and Family Services has given me the privilege of residence at Oregon State

University (hence, my Rose Bowl preference!) for the first half of my sabbatical. I have seen firsthand OSU’s important role in evaluating changes in long-term care priorities. OSU’s Center for Healthy Aging Research, under the direction of Professors Karen Hooker and Carmen Steggell (as principal investigator), and with funding from Oregon’s Department of Human Services, will conduct interviews of clients and caregivers who are participating in Oregon’s “Money Follows the Person” project under a federal mandate to make further transitions to lower-cost care. While all participating states collect basic data through a form questionnaire, Oregon is going the extra mile to obtain detailed qualitative data in order to assess the viability of lower-cost care for existing nursing home residents. Let’s hope Pennsylvania will also adopt essential consumer safeguards for its funding decisions.■

Inside this issue —

PENNSYLVANIA ADOPTS NEW LAW TARGETING HOME IMPROVEMENT CONTRACTS.....	2
COMPULSORY ARBITRATION: YOUR CASE MAY TAKE LONGER THAN YOU HOPED	3
SUN ROOM CONTRACT RESULTS IN A STORMY CLOUD.....	3
GLOBAL PERSPECTIVE: AGING TRENDS IN CARE-GIVING IN JAPAN	4
UNDERSTAND YOUR RIGHTS OF RESCISSION..	4

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ELDER CONSUMERS MAY NEED PROTECTION FROM ANNUITY SELLERS

By Jason Mau
Certified Legal Intern

Although we may often refer to the Clinic in conversation or answer the phone simply as the “Elder Law Clinic,” the students in the Elder Law and Consumer Protection Clinic put a

great deal of emphasis on the Consumer Protection portion of our clinic’s title. Nearly 50 percent of the current cases are related in some way to consumer matters.

While working on a case involving the issue of suitability of an annuity

continued on page 2

PENNSYLVANIA ADOPTS NEW LAW TARGETING HOME IMPROVEMENT CONTRACTS

*By Dan Prestosh & Christina Bonne-Année
Certified Legal Interns*

Pennsylvania enacted the Home Improvement Consumer Protection Act which became effective July 1, 2009. This Act, 73 P.S. § 517, is meant to protect consumers from substandard work and scams by contractors. Our Clinic has handled a significant number of home repair contract scams or disputes, as often home-bound elders are the first persons affected by fly-by-night operators. This law requires any contractors who receive \$5,000 or more per year from home improvement work to register with the state. Contractors who receive less income than \$5,000 per year from home improvements or contractors with a net worth of more than \$50,000,000 need not register under this Act. The Act only applies to contractors carrying out home improvements; however, that phrase is broadly defined by the statute.

One problem we encounter frequently is contractors who fail to provide “real” addresses or who abandon mailing addresses when disputes arise. Under the new law, contractors registering with the state must provide information about themselves and their businesses. Contractors must disclose any judgments or disciplinary action against them. The Act also requires liability insurance in the amount of \$50,000. This information is made available to the public for review by consumers.

The Home Improvement Consumer Protection Act also has requirements about contracts for the

protection of consumers. Contracts are required to contain estimated starting and completion dates. The contract must describe the work that will be done and set forth specifications for it. Contact information for any known subcontractors must be given in the contract.

Contractors who are exempt from registration must still follow many of the contract requirements set forth in the Act. The Act also provides that if the price of the contract is over \$1,000, the deposit required may be no more

than one-third of the contract price plus the costs for certain materials.

The Home Improvement Consumer Protection Act provides stiff penalties for violations of the law, including criminal sanctions. Penalties are stiffened if the victim is 60+ years. Under this Act, a court may also revoke the violating contractor’s license, and the contractor must then wait five years before petitioning for reinstatement. This Act is a step forward in the protection of the consumers in the Commonwealth of Pennsylvania.■

ELDER CONSUMERS MAY NEED PROTECTION FROM ANNUITY SELLERS

continued from page 1

sold to an elderly individual, I have come to see how sales of certain types of financial products, especially sales of so-called “deferred annuities,” can involve deception or manipulation on the part of the salesman, who may be more interested in a big commission than the client’s financial needs and goals.

For example, I have seen a situation where an elderly individual was solicited at home by such a salesman and sold a product that was similar to one that the individual had previously purchased. The individual was sold an annuity that now has, after the first year, a rate of return that is lower than the previous annuity, has a penalty period for early withdrawals that extends longer than the previous annuity, and has an annuity date that will not start to make monthly annuity

payments to the then 83-year-old individual until twenty years after the date of purchase. The salesman was able to realize a commission on the total amount of money that was transferred from the previous annuity to the new annuity, just as if he had sold a new product.

The Clinic has associated with Joseph K. Goldberg, Esq., the former Director of the Bureau of Consumer Protection for the Attorney General’s office in Harrisburg to litigate these kinds of cases. Similar cases are being pursued nationwide, and much of the Clinic’s strategy has been influenced through meetings with counsel on class-action suits targeting similar practices by annuity salesmen. Thus, the case that I have had the privilege of working with is only a small part in the bigger picture, yet plays an important part of the Clinic’s desire to protect the interests of every elderly individual.■

COMPULSORY ARBITRATION: YOUR CASE MAY TAKE LONGER THAN YOU HOPED

*By Christopher J. Demetriou
Certified Legal Intern*

When a consumer seeks legal protections available under Pennsylvania law, the most frequent recourse is in a court of law, either in the state or federal system. A common client question is “How long will the process take?” While the answer may be speculative, the attorney should not answer without taking into account whether the case may be required to be arbitrated before the jury or non-jury courtroom trial.

If the case is with the Federal Court in the Eastern District of Pennsylvania, local rules require that most cases go to mandatory, non-binding court-annexed arbitration. PA Eastern District, Local Rule 53.2. For example, such arbitration is required for cases involving a claim for damages of \$100,000 or less, as long as the case does not involve prisoner claims or allegations that a constitutional right has been violated.

Cases in Pennsylvania state court get similar treatment. With the exception of cases which involve title to real property, courts may, by local rule, send any civil case to compulsory arbitration, so long as the amount in controversy, exclusive of interest and costs, does not exceed \$50,000. 42 Pa. C.S.A. § 7361(a).

While arbitration before a panel of three arbitrators may seem like an expedited process, the case is not necessarily over when the panel issues its decision and award. Following the compulsory arbitration hearing in

state courts, any party has “the right to appeal for trial de novo in the court.” 42 Pa. C.S.A. § 7361(b). In effect, this means that when a client wins at arbitration, the court will not issue a judgment adopting the award of the arbitrators until the period for appeal is over. This also means that should one party appeal the decision,

the case is set for trial in accordance with the relevant state and local rules as if the arbitration never occurred.

Therefore, before answering the question “How long will this process take,” the attorney should consider whether the case will involve compulsory arbitration. ■

SUN ROOM CONTRACT RESULTS IN A STORMY CLOUD



*By Matthew Noumoff
Certified Legal Intern*

Client P is an elderly woman who signed a home improvement contract with a local contractor to build a sun room onto her mobile home. After signing the contract, the client paid 50 percent of the contract price. The client relied on the contractor, who had done other work in the mobile home development, to seek approval from the development’s management. The management refused to permit installation of the sunroom in light of the type of materials the contractor planned to use. After the refusal was announced, the contractor kept the client’s payment. Our research indicated issues involving breach of contract, unjust enrichment, and conversion.

The Elder Law and Consumer Protection Clinic filed suit and obtained a default judgment in District Justice Court and the con-

tractor appealed. The Clinic then learned that the contractor was in the middle of a Chapter 13 bankruptcy and that required us to file a “Motion for Relief” from an automatic stay of pending litigation. Our grounds for relief were that the contractor’s misappropriation of the down payment was for a contract that had been negotiated after the contractor had filed his bankruptcy case and already knew he was insolvent, while our client was not aware of those facts. In other words, we pointed out that the contractor should not be entitled to the protection of bankruptcy laws under the facts of our case. The Bankruptcy Court agreed and granted our requested relief.

The case ultimately settled for less than the full amount of the client’s deposit, but the client was satisfied and grateful to get part of her money returned. ■

GLOBAL PERSPECTIVE: AGING TRENDS IN CARE-GIVING IN JAPAN

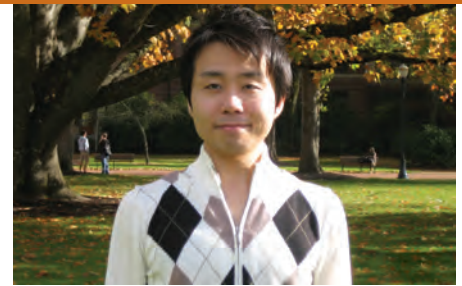
By Katherine Pearson
Professor of Law

Ryo Hirayama is a Ph.D. candidate in Human Development and Family Sciences at Oregon State University and my research assistant while I am visiting in Oregon. Ryo is from Japan, where he holds undergraduate and graduate degrees in Social Psychology from the University of Tokyo. Ryo's research interests are in masculinity and gender issues, focusing on the last half of life.

Historically, elder care in Japan was provided in the home by daughters or daughters-in-law. Ryo reports a surprising modern statistic that suggests a global impact of "aging"

populations. A 2004 study by Japan's Ministry of Health, Labor and Welfare revealed that while most in-home care of older adults is provided by spouses, when adult children are providing the care, approximately 40 percent of the care-giving is now provided primarily by adult sons. Ryo is researching the impact of this trend, and recently interviewed a 69-year-old Kyoto man who is providing personal care at home for his 100-year-old father and 98-year-old mother. The son assists with everything from medications and meals, to the most intimate of care necessary for management of his mother's incontinence.

World-wide, the longer lives of adults and the smaller sizes of fami-



lies mean that both husbands and wives are called upon for care-giving to elders. Financial support from the government is available in Japan, but Ryo reports that several factors affect access to support, including a stigma associated with dementia that may cause families to be reluctant to seek outside help. Ryo is working with medical doctors in Japan to identify male caregivers in Japan for his research, with a goal of providing a better picture of how this emerging trend affects the quality of care and the quality of life for both elders and their caregivers.■

UNDERSTAND YOUR RIGHTS OF RESCISSION

By Abby Warren & Jessica Fisher
Certified Legal Interns

The doorbell rings one sunny afternoon. A young and energetic salesperson is standing on the front stoop with a brand new bread maker. He shows you the features of the bread maker, even conducting a demonstration in your kitchen. You are so enthralled by the bread maker that you have to have it. The next day you wonder why you bought a bread maker that you neither wanted nor needed. Can you return it?

The answer in Pennsylvania for many such purchases is "Yes." The Unfair Trade Practices and Consumer Protection Law allows for certain purchases that are made from door-

to-door salespeople to be returned within three business days, if the transaction meets three conditions. See 73 P.S. § 201-7. First, the good or service in question must have a sale price of \$25 or more. Second, the good or service must be either sold or contracted to be sold to the buyer. Third, the sale must be a result of a contact or call with the buyer at his residence, such as an in-person solicitation.

If these three conditions are met, the buyer can avoid the contract or sale by doing two things. First, the buyer must give written notification to the seller within three business days following the day when the sale or contract was made. Second, the buyer must return the merchandise

or hold it available for return to the seller. This right to return the merchandise, such as the bread maker, is called the right of rescission.

In an effort to make it easier for the buyer to know his rights, the law requires that the seller provide the buyer with a receipt for the transaction and with a specific form about the buyer's cancellation rights. The three-day cancellation or rescission period does not begin until the buyer receives this receipt and form.

This right to return merchandise serves as a protection to buyers who are under added pressure to buy a certain product, like a bread maker, because they are persuaded to make the purchase in their own home by a fast-talking salesperson.■