

## PA Court Permits Attorney General to Retain Contingency Counsel to Enforce Consumer Protection Laws Against Long-Term Care Facility



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**STATE AND LOCAL GOVERNMENTS WILL INCREASINGLY USE CONSUMER PROTECTION LAW TO REGULATE LONG-TERM CARE FACILITIES, WITH PRIVATE PLAINTIFFS' COUNSEL ADVOCATING FOR A ROLE IN GOVERNMENT ACTIONS.**

Under *GGNSC Clarion LP v. Kane* (available at [http://www.pacourts.us/assets/opinions/Commonwealth/out/165MD15\\_1-11-16.pdf?cb=1](http://www.pacourts.us/assets/opinions/Commonwealth/out/165MD15_1-11-16.pdf?cb=1)), 165 M.D. 2015 (Pa. Cmmw. Ct. Jan. 11, 2016), the Pennsylvania Office of the Attorney General (OAG) may use private counsel to pursue consumer protection law actions against long-term care facilities. This decision will further encourage private counsel to promote their services to state and local

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government attorneys who seek to regulate the health care sector. It also confirms that Pennsylvania's Unfair Trade Practices and Consumer Protection Law (Consumer Protection Law) extends to another heavily regulated area.

## **Background**

Consumer protection laws allow civil penalties, ranging on average from \$1,000 to \$10,000, each time a company makes a misleading statement or advertisement.<sup>1</sup> Pennsylvania increases penalties if the consumer is age 60 or older, similar to rules in other states.<sup>2</sup> Consumer protection laws may also allow restitution, injunctive relief and attorneys' fees.

Some government entities have hired private counsel to pursue consumer protection actions on the government's behalf. Defendants have argued that the practice offends due process rights, the separation-of-powers doctrine and state authorities' governing the expenditure of public funds. Some courts have invalidated contingent fee arrangements with private counsel,<sup>3</sup> while others have permitted them.<sup>4</sup>

## ***GGNSC Clarion Case***

This case came before the Pennsylvania Commonwealth Court after long-term care facilities filed a declaratory judgment action to block the OAG from pursuing an investigation into whether the facilities had fraudulently or deceptively represented their services under the Consumer Protection Law. In 2012, the OAG entered into a contingent fee arrangement with private counsel to conduct the investigation. The facilities contended that the investigation was prompted only by private counsel's insistence that the OAG hire the firm to investigate representations regarding staffing and patient care. There was no consumer complaint.

The long-term care facilities argued that the OAG lacked authority to undertake the investigation. The facilities' key arguments were (1) the Healthcare Facilities Act gives jurisdiction in the matter only to Pennsylvania's Department of Health (DOH) and (2) the OAG is not empowered to delegate its authority under state law and the Pennsylvania Constitution.

The Commonwealth Court rejected these arguments for the following reasons:

- Section 204(d) of the Administrative Code and sections 4, 4.1 and 5 of the Consumer Protection Law authorize the OAG to investigate and litigate illegal consumer marketing and billing practices of skilled nursing and long-term care facilities. Pennsylvania's DOH does not have this authority. *GGNSC Clarion*, slip op. at 12–14.
- Health care services provided by nursing homes are within the ambit of the Consumer Protection Law. *Id.* at 14–16.
- The OAG may enforce any representations, advertisements or agreements that nursing facilities made with respect to staffing through the Administrative Code and Consumer Protection Law. This enforcement does not impinge on the DOH's regulatory authority to set standards for staffing for health and safety purposes. *Id.* at 15–16.
- Section 103 of the Commonwealth Attorneys Act prevents nursing home facilities subject to OAG investigation and litigation from challenging the OAG's contingency fee arrangements with private counsel. The Commonwealth Court followed *Commonwealth v. Janssen Pharmaceutica, Inc.* 8 A.3d 267, 276 (Pa. 2010), which found a pharmaceutical company in litigation with the OAG had no standing to challenge the OAG's contingency fee arrangement with private counsel. *GGNSC Clarion*, slip op. at 18–22.

## Implications

- State and local governments will increasingly use consumer protection law to regulate long-term care facilities, with private plaintiffs' counsel advocating for a role in government actions.
- Compliance with health department regulations will not protect a long-term care facility from state attorney general and local government scrutiny. Facilities are subject to consumer protection law investigations for failing to meet the representations that they have made in advertising, contracts and other public documents.
- Long-term care facilities should review representations made on websites, patient materials and other public communications to ensure that they accurately reflect the current level of staffing and patient care.

## Endnotes

- 1 See, e.g., Cal Bus. & Prof. Code § 17500 (\$2,500 per violation); Fla. Stat. § 501.2075 (\$10,000 per violation); 73 Pa. Stat. Ann. § 201-8(b) (\$1,000 per violation); *see also* Tex. Bus. & Com. § 17.47(c)(1) (\$20,000 per violation).
- 2 See, e.g., 73 Pa. Stat. Ann. § 201-8(b) (per-violation penalty is \$3,000 if the consumer is age 60 or older); *see also* Tex. Bus. & Com. § 17.47(c)(2) (increasing penalty to “an additional amount of not more than \$250,000” if consumer is 65 and older).
- 3 *McGraw v. Am. Tobacco Co.*, No. 94-C-1707 (W.Va. Cir. Ct. Nov. 29, 1995) (holding that a contingency fee arrangement is an unlawful appropriation of state funds, but distinguishing alternative fee arrangements).
- 4 See *City of Chicago v. Purdue Pharma L.P.*, 2015 U.S. Dist. LEXIS 24712 (N.D. Ill. Mar 2, 2015) (hiring contingency fee counsel is not an improper delegation of police power where city retains control over investigation and litigation); *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733 (E.D. Ky. 2013) (hiring contingency fee counsel does not run afoul of Fourteenth Amendment right to due process).