Maine Association of Mediators
February 2008 Bulletin

Conflict? You've got options!

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Professionals Committed to Cooperative Conflict Resolution

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B. The type of dispute involved, such as credit card, personal loan, credit sale or other specified financial product or service;
C. Whether the consumer was the prevailing party;
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H. The percentage of the arbitrator's fee allocated to each party.

Consumer arbitrations include those involving "consumer arbitration agreements," defined as "a standard contract with a consumer concerning the use of, purchase of, acquisition of, attempt to purchase or acquire, offer of or furnishing of credit or a loan for personal, family or household purposes." In other words, these disputes involve *all* consumer loan instruments with arbitration clauses, including credit card agreements, home mortgages, and car loans.

The genesis of this legislation was the concern by some consumer advocacy individuals and groups that arbitration has turned into a for-profit, anti-consumer judicial system. The original bill included many restrictions on providing arbitration services, not only in the credit card industry, but also in non-union employee-employer disputes. Also, committee testimony indicated a concern that there is too much secrecy surrounding arbitration, even though information on arbitration awards is available from the major providers of arbitration services, such as the American Arbitration Association. Nevertheless, the reporting requirement was included in the bill to publicize arbitration awards with detailed information included.

After testimony and comments were received by the Joint Standing Committee on Insurance and Financial Services, including a concern of the constitutionality of some of the provisions in the original bill, as well as whether the legislation would be preempted by the Federal Arbitration Act, the bill was amended to only include reporting requirements by providers of arbitration services concerning disputes of consumer arbitration agreements.

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* L.D. 1489, P.L. 2007, Chapter 250, "Consumer Arbitration Agreements"
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The new rule would state that that a mediator could not be compelled to testify later about a communication between the mediator and a participant in the mediation process that occurs in the mediation process or is related to the subject matter of any mediation, with some exceptions.

As Professor Murray explained, the scope of protection offered by the proposed new Rule 514 would have some significant restrictions. First, it would apply only to confidential communications made in a private session or caucus between the mediating party and the mediator. It would not apply to statements made in a joint session during mediation. *Continued on page 4*

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When It Comes to Pensions, It Is Important to
Mind The p's and q's!

by
Michael E. Gallagher, A.S.A., M.A.A.A.

In the specialized world of actuarial science, two small letters stand out as the central figures in some very basic expressions. The probability that someone (aged *x*) might survive for a particular period (length *t*) is usually represented as ${}_tp_x$. Conversely, the probability that that same person might die within the same period is represented by ${}_tq_x$. Since actuaries tend to appreciate a nice clean equation, and since there really are no other alternatives, ${}_tp_x + {}_tq_x = 1$, or "it is a certainty that the person will either live or die".

What that could mean in the context of divorce mediation and the disposition of the asset representing the interest in a pension plan is that simply deciding what happens to the "pension" is only half of the equation.

Since a pension is only paid if the plan participant is alive (remember the "p"?), it may be a disservice, especially to the non-participant spouse, to ignore what can be a significant benefit that becomes payable only upon the death of the participant. Hence, we must remember the "q"!

Although most pension programs include some type of survivor benefit, they are by no means all the same. And there are two separate periods of time to consider too.

Continued on page 4

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Continued from page 3

In many cases, especially with corporate pension plans, if the plan participant dies prior to retirement, a surviving spouse would at least be entitled to what they would have received if the participant had retired the day before and elected to have the pension paid under the optional form which provides for a continuation of at least 50% of the benefit to that survivor. If the participant was not married at the time of death, there may not be any survivor benefit payable to anyone, especially if the divorce judgment did not include a provision that the former spouse would continue to be treated as a spouse for the purpose of this survivor benefit.

If the participant dies after retiring, survivor benefits depend on the form of benefit payment that was elected at the time of retirement. In corporate plans, the legal spouse at retirement must approve of any form other than the (usually, at least) 50% continuation form. And once payments have commenced, the election cannot be changed. (A major exception to this rule is that some plans (primarily government plans) require that the death of a retiree's spouse negates this election and eliminates the survivor portion of the retirement benefit scheme.)

So, in minding the p's, all that needs to be done is to settle the "pension" asset by allocating the "pension". However, unless the settlement also includes an assignment of the "survivor" benefit, especially if the plan provides for a surviving "spouse" benefit, and considers both the pre- and post-retirement aspects of survivorship, there is no one minding the q's!

Mike Gallagher is an independent consulting actuary specializing in providing expert pension advice to family law practitioners. He can be reached by mail at Gallagher Actuarial Services, P.O. Box 2345, South Portland, ME 04116-2345, by telephone at (207) 885-5600, or by email at actuary@galactser.com.

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A question and answer period followed the presentation. According to Attorney Dyer, the new rule will be submitted to the Maine Supreme Judicial Court next month.

For a copy of the draft of Rule 514, please contact Anita Jones at abjones@maine.rr.com or Diane Kenty at diane.kenty@maine.gov.

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