



4-1-2011

## Will Continuing Care Retirement Communities Continue?

Katherine C. Pearson  
kcp4@psu.edu

Joshua R. Wilkins

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### Recommended Citation

Katherine C. Pearson and Joshua R. Wilkins, *Will Continuing Care Retirement Communities Continue?*, 82 *Pa. B. Ass'n Q.* 69 (2011).

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# **SYMPOSIUM ON THE FUTURE OF ELDER LAW IN PENNSYLVANIA**

## **Will Continuing Care Retirement Communities Continue? A Pennsylvania Law Update**

By KATHERINE C. PEARSON, Professor of Law\* and  
JOSHUA R. WILKINS, Cumberland County



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### **INTRODUCTION**

The financial viability of Continuing Care Retirement Communities (CCRCs) and Life Care Communities (LCCs) has attracted both public concern and national investigation.<sup>1</sup> For the last several years, older adults living in CCRCs have contacted Penn State's Elder Protection Clinic about financial and governance concerns. In 2006 our research suggested that while Pennsylvania law requires state officials to collect and review annual CCRC financial disclosures, the extent to which such disclosures were evaluated on a substantive basis was unclear.<sup>2</sup> One recommended change was for Pennsylvania regulators to publish reports on key markers of financial stability in the CCRCs operating in Pennsylvania, to assist prospective and current residents in determining whether facilities were satisfying or exceeding certain

\* Katherine C. Pearson, Professor of Law and Director, Elder Protection Clinic, Pennsylvania State University, Dickinson School of Law. Special thanks go to Chad Zimmerman (J.D. 2012), for assistance with research and Trisha Cowart, Acting Co-Director, Elder Protection Clinic.

\*\* Joshua R. Wilkins, Candidate for J.D., May 2011, Pennsylvania State University, Dickinson School of Law, Student Member, Pennsylvania Bar Association, Cumberland County.

1. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, OLDER AMERICANS, CONTINUING CARE RETIREMENT COMMUNITIES CAN PROVIDE BENEFITS, BUT NOT WITHOUT SOME RISK, GAO-10-611 (June 2010) [hereinafter *GAO Report*]; Anton Troianovski, *Scrutiny Turns to Retirement Centers*, WALL ST. J., July 21, 2010; Elizabeth Olson, *Concerns Rise About Continuing-Care Enclaves*, N.Y. TIMES, Sept. 15, 2010.

2. Katherine C. Pearson, *Continuing Care Retirement Communities, State Regulation and the Growing Importance of Counsel for Residents and their Families*, 77 PA. BAR Q. 172, 182-83 (No.4, 2006).

requirements; the recommendation was ignored. The residents' issues have not disappeared, especially with at least three Pennsylvania CCRCs having filed for protection under the bankruptcy laws since 2008.<sup>3</sup>

In one of these instances, Pennsylvania residents lost the right to "refundable" entrance fees as a condition of the reorganization and sale of the debtor's property to a new owner. In the other two instances, the CCRCs were part of a larger reorganization of facilities developed on a multi-state basis by Erickson Communities, with new owners emerging to take over operations.

On the one hand, no one has "lost their home" in Pennsylvania CCRCs and that fact is reassuring. On the other hand, residents of CCRCs report continuing concerns, including significant increases in monthly service fees, cutting of services, lay-offs of staff members who residents considered to

**With approximately 230 licensed CCRCs in Pennsylvania, the market seems too big to ignore, if not too big to fail.**

be important members of their "continuing care" teams, "slow" refunds of refundable entrance fees, and rising debt on the balance sheets of their institutions.<sup>4</sup> Whether residents' concerns reflect isolated pockets of insecurity or are an indication of a deeper financial problem for the CCRC market is not yet clear, although with approximately 230 licensed CCRCs in Pennsylvania, the market seems too big to ignore, if not too big to fail.<sup>5</sup> At a minimum, these ongoing concerns demonstrate that residents want access to reliable financial information in a troubled economy, and may need objective assistance in evaluating available information.

This article takes an updated look at Pennsylvania's approach to regulation of CCRCs.

## CONGRESSIONAL INVESTIGATION

In July 2010, the United States Senate Special Committee on Aging released an investigative report detailing the investigation it began in February 2010 into the financial health of CCRCs and policies for disclosing information to seniors.<sup>6</sup> Addi-

3. Covenant at South Hills, associated with the Independent Order of B'Nai B'rith, filed for Chapter 11 bankruptcy in 2009. Covenant at South Hills (Bankruptcy No. 90-20121, W.D. Pa). Ann's Choice and Maris Grove, respectively located in Bucks and Delaware Counties, were among the 19 CCRCs affected when Erickson Retirement Communities filed for Chapter 11 bankruptcy. Erickson Retirement Communities, LLC (Bankruptcy No. 09-37010, N.D. Tex).

4. From August 2010 through April 2011, the authors have participated in more than a dozen CCRC resident meetings in several states, with invitations from residents in Pennsylvania, Maryland and New Jersey, as well as western states. In addition, Professor Pearson has participated in discussions with members of the National Continuing Care Residents Association, including subcommittees looking at financial transparency concerns. Notes from these meetings are on file with the authors. [Hereinafter referred to collectively as *Meetings*.] Because some residents have expressed concern about individual anonymity, this article, which is a state-specific component of a larger research project on resident rights, does not identify specific facilities or residents by name.

5. There are approximately 230 licensed CCRCs in Pennsylvania. See Insurance Department Website at <http://www.insurance.state.pa.us/dsfl/cfsearch.html>. Letter from Stephen J. Johnson, Deputy Insurance Commissioner, to Katherine C. Pearson, Professor of Law (Jan. 6, 2011) (on file with author) [hereinafter *Johnson Letter*].

6. UNITED STATES SENATE SPECIAL COMMITTEE ON AGING, CONTINUING CARE RETIREMENT COMMUNITIES: RISKS TO SENIORS (July 21, 2010) [hereinafter *Senate Special Committee Report*].

tionally, the United States Government Accountability Office (GAO) responded to a request by Senator Herb Kohl, Chairman to the Senate Committee, to investigate the state regulatory measures concerning CCRCs.<sup>7</sup> The Senate Committee noted that housing and credit markets have experienced major downturns, which has resulted in financial pressure on the CCRC industry.<sup>8</sup>

The Senate Special Committee on Aging and the GAO reached similar conclusions: with current market conditions the CCRC industry may be on shaky ground, but no federal action was recommended. The Special Committee on Aging compiled several resources and a checklist for state regulators interested in strengthening CCRC regulations, including financial requirements, state examinations, and disclosures to residents.<sup>9</sup>

The Senate Committee's investigation reviewed the financial condition of five selected communities, and the resulting report states that all five are "either experiencing cash flow problems, struggling with debt, or both."<sup>10</sup> The Committee noted that these problems are indicative of the industry in general.<sup>11</sup> Both the Senate Committee report and the GAO study note that the variety of CCRC organizational structures, disparate state regulatory frameworks, and complex financial disclosures make it difficult for residents to evaluate the financial stability of their communities.<sup>12</sup> The reports of the Senate Special Committee on Aging and the GAO stressed the importance of state oversight to promote financial stability of CCRCs.<sup>13</sup>

Currently Pennsylvania receives annual financial disclosures from CCRCs, and may periodically conduct more detailed examinations, but the state does not provide consumers with any tracking or comparative information, nor does it report predictive actuarial information.<sup>14</sup>

## RECENT CCRC FAILURE AND RECOVERY IN PENNSYLVANIA

In January 2009, Covenant at South Hills (hereinafter "Covenant"), a CCRC in Allegheny County, Pennsylvania, filed for Chapter 11 bankruptcy.<sup>15</sup> This bankruptcy highlights the concern that CCRC residents share over the risk of financial loss when a provider fails.

The construction of the Covenant facility was primarily funded by tax exempt bonds.<sup>16</sup> Although the community was "sponsored" by B'nai B'rith, the community could not depend on the organization for funding. Resident statements describe problems the facility faced such as an inability to maintain adequate levels of residency, cost overruns in construction, and the inability to make tax and bond pay-

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7. The GAO reviewed the regulations of eight states, including Pennsylvania. GAO Report, *supra* note 1.

8. Senate Special Committee Report, *supra* note 6 at 3.

9. Senate Special Committee Report, *supra* note 6 at 7-12.

10. Senate Special Committee Report, *supra* note 6 at 4.

11. *Id.*

12. *Id.*; GAO Report, *supra* note 1 at 34.

13. Senate Special Committee Report, *supra* note 6 at 7-12.; GAO Report, *supra* note 1.

14. Pearson, *supra* note 2. Pennsylvania does offer a three page consumer guide, *Choosing a Continuing Care Community*, emphasizing that disclosure statements and resident agreements are important documents that prospective residents "may wish to review . . . with [their] attorney or other advisor." The Insurance Department also offers an online directory listing licensed continuing care communities. Both are available at [www.insurance.state.pa.us](http://www.insurance.state.pa.us).

15. *Madison Inv. Trust v. The Covenant at S. Hills, Inc.*, 410 B.R. 426, 428 (Bankr. W.D. Pa. 2009).

16. *Id.*

ments.<sup>17</sup> Additionally, in 2008, after a challenge to the CCRC's real estate property tax exemption on "charitable" grounds, the CCRC entered into a settlement with the local taxing bodies, conceding that the property would remain taxable.<sup>18</sup>

When Covenant defaulted on its bonds, its creditors forced the facility into bankruptcy court. Residents were eager for a sound plan to emerge, but also resisted proposals for sales to CCRC operators with questionable track records at other facilities. Eventually the Covenant operation was purchased by Concordia Lutheran Ministries of Pittsburgh, and early indications are that the new operators are turning the corner. Although the CCRC's residents were able to stay in their units, and kept their life-care contracts, they lost their "refundable" entrance fees and their deposits.<sup>19</sup> Charles Prine, a resident at Covenant who experienced the bankruptcy first hand, described for the Senate Committee members the frustration he and other residents felt about what they viewed as inadequate state oversight for struggling CCRC operations.<sup>20</sup>

### **PENNSYLVANIA STATE EXAMINATIONS: WILL A NEW APPROACH BE EFFECTIVE?**

Enacted in 1984, Pennsylvania's Continuing-Care Provider Registration and Disclosure Act gives the authority to license CCRCs to the Pennsylvania Insurance Department.<sup>21</sup> The decision by Pennsylvania and other states to regulate CCRCs followed a wave of failures in the late 1970s and early 1980s.<sup>22</sup> Pennsylvania's early focus was on mandating disclosures of key information, such as ownership, operational details and financial data and imposing some requirements for escrow of fees and maintenance of minimum reserves. Pennsylvania's law also left prospective operators with room for creativity in determining financial terms with residents. Several models of financing emerged, including so-called "bundled" contracts, often involving large admission fees linked to promises for "life care."<sup>23</sup> It should be

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17. *Continuing Care Retirement Communities – Secure Retirement or Risky Investment?: Hearing Before the Senate Special Committee on Aging*, 111th Cong. (2010) (prepared statement of Charles W. Prine).

18. *The Covenant at S. Hills, Inc. v. Mt. Lebanon Sch. Dist.*, Civ. GD04-28040 (Ct. Com. Pl. Allegheny May 28, 2008). Other CCRCs in Pennsylvania have also faced challenges to charitable tax exemptions for real estate from local authorities. *Compare Alliance Home of Carlisle PA v. Board of Assessment Appeals*, 919 A.2D 206 (Pa. 2007) (concluding that independent living facility regularly used for purposes of charitable institution qualified for property tax exemption) with *Menno Haven, Inc. v. Franklin County Bd. of Assessment*, 919 A.2d 333 (Pa. Cmwlth. Ct. 2007) (holding that operator of two CCRCs was not entitled to real estate tax exemption for skilled nursing facilities).

19. Covenant at South Hills residents were reported to have lost approximately \$26 million when they were determined to be unsecured creditors during the bankruptcy. Troianovski, *supra* note 1.

20. *Id.*

21. 40 PA. STAT. ANN. §§3202-3203.

22. See, e.g., Chapter 1 of PATRICK DILLON & CARL M. CANNON, *CIRCLE OF GREED* (2010) (tracking the history of a class action suit initiated by residents in 1977 against Pacific Homes, a network of retirement facilities using "life care contracts," after Pacific Homes attempted to use bankruptcy court to restructure and increase the residents' financial obligations).

23. Large admission fee contracts, sometimes called "Type A" facilities, have often triggered the greatest consumer protection concerns. There is, however, no single "Type A," "B" or "C" contract, and large admission fees may or may not be described as "refundable," and any refunds may be whole or partial. In Pennsylvania there is no specific limitation on the types of contracts that facilities can offer under the CCRC umbrella. Rather, Pennsylvania law requires licensing and mandatory disclosures for any facility that offers care, lodging and services pursuant "to an agreement effective for the life of the individual or for a period in excess of one year. . . ." 40 PA. STAT. ANN. §3203 ("Definitions").

remembered that the inability of elderly consumers to afford to walk away from a struggling or failing facility helped to motivate the Pennsylvania legislature to regulate CCRCs to begin with, resulting in “minimum” disclosure requirements.<sup>24</sup> Thus, Pennsylvania’s approach can be described as an “informed buyer-beware” model of regulation.

Despite the emphasis on disclosure of information to assist consumers in making appropriate choices, however, Pennsylvania made a potentially important decision by giving oversight authority to the Insurance Department, the Commonwealth department historically charged with financial oversight of long-range financial products that involve substantial potential risk to consumers.<sup>25</sup> The Pennsylvania Insurance Department’s role with CCRCs was not designed to be merely reactive. Section 3219 of the original Disclosure Act was labeled “Audits” and provided that the Insurance Commissioner or his designee shall “visit each facility offering continuing care . . . to examine its books and records at least once every four years.”<sup>26</sup> Copies of the most recently completed examination reports are available (although difficult to find) on the Insurance Department’s website.<sup>27</sup> However, on October 7, 2010, Pennsylvania substantially amended the public examination requirement.<sup>28</sup>

The new Section 3219, renamed “Authority, Scope and Scheduling of Examinations,” provides for examinations on a “discretionary” basis by the department to “verify the financial condition of the company or person and [to] ascertain whether the company or person has complied with the laws of this Commonwealth.”<sup>29</sup> The Department is required to provide examinations for younger facilities, “at least once in the first five-year period and once in the second five-year period following a provider’s receipt of a certificate of authority,” but the requirement for specific additional examinations after the tenth anniversary is eliminated.<sup>30</sup> At the same time, the new provision provides details about items to be considered in performing any examinations. The new provision specifies that when conducting examinations, the Commissioner “shall” consider “the results of financial statement analyses,” changes in management or ownership, reports of independent CPAs, volume and nature of complaints by residents, length of time a facility has furnished care, changes to disclosure statements or resident agreements, expansion or addition of facilities, and “other information or criteria, which in the sole discretion of the com-

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24. 40 PA. STAT. ANN. §3202.

25. In contrast, New Jersey placed oversight authority for CCRCs with the New Jersey Department of Community Affairs, historically associated with real estate transactions; Maryland placed oversight of CCRCs with the Maryland Department of Aging; and Oregon placed oversight with its Department of Human Services. N.J. Stat. Ann. §52:27D-331; MD. CODE ANN., HUM. SERV. §10-403; OR. REV. STAT. §101.030.

26. The Department was also given broad powers for investigations and enforcement of the law. *See*, e.g., 40 PA. STAT. ANN. 3218-3222.

27. [http://www.portal.state.pa.us/portal/server.pt/community/industry\\_activity/9276/financial\\_examinations/599699#R](http://www.portal.state.pa.us/portal/server.pt/community/industry_activity/9276/financial_examinations/599699#R).

28. 2010 Oct. 7 P.L. 478, No. 66, §1 (effective in 60 days, December 6, 2010) [hereinafter *Act 66 of 2010*]. The amendment was introduced by Representative Eddie Pashinski (D-Luzerne) on April 2009, approved by the House of Representatives in June 2009 and referred to the Senate Banking and Insurance in June 2009, where it remained until late in September 2010, when it was reported out of committee and taken to final vote seven days later, near the end of the Rendell Administration. There were no dissenting votes in either chamber. The bill was presented as having “no significant fiscal impact to the Commonwealth.” Senate Appropriations Committee Fiscal Note for 2009-10 House Bill 1376, Printer’s No. 1677.

29. 40 PA. STAT. ANN. §3219 (a) (reflecting Act 66 of 2010).

30. 40 PA. STAT. ANN. §3219 (b) (reflecting Act 66 of 2010).

missioner, is relevant to the provider's financial condition or compliance with regulatory requirements."<sup>31</sup>

The elimination of mandatory state "audits" at least once every four years appears to be inconsistent with ongoing indications of economic instability, including reported pockets of concern in Pennsylvania's CCRC market.<sup>32</sup> At the same time, there is a question as to whether the former requirement was effective in solving problems, and the state's costs to perform such "audits" were reportedly significant.<sup>33</sup> It does seem likely that the properties most at risk of impact from the 2008-forward financial crisis, whether in Pennsylvania or elsewhere in the nation, are properties without a significant track record.<sup>34</sup> For example, the Covenant at South Hills CCRC struggled from the time it opened its doors in 2002 to fill units. It was in bankruptcy before it reached its tenth birthday. Similarly, several of the most financially troubled Erickson properties were those in early stages of development. However, older CCRCs are not without risk, especially if CCRCs have undertaken expansion or have deferred maintenance or improvements that prove costly in the long run.<sup>35</sup> Meetings by the authors with residents in 2010-11 reveal facilities with occupancy rates as high as 95% and as low as 72%, a percentage that reduces operational budgets in the short run and may prove destabilizing in the long run.<sup>36</sup>

A potentially significant addition to the list of concerns to be addressed by "examinations" is "the volume and nature of complaints by residents." While the Department's obligation to respond to reports of complaints is "discretionary," the express recognition of resident complaints would appear to give well-prepared residents a potential role in triggering a state examination or investigation. According to the Department of Insurance as of January 2011, "the office does not maintain

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31. 40 PA. STAT. ANN. §3219 (c) (reflecting Act 66 of 2010).

32. Meetings, *supra* note 4.

33. *But see* 40 PA. STAT. ANN. §3223 (regarding authority of commissioner to impose fees on providers). *See also* 40 PA. STAT. ANN. §323.7 (regarding examination expenses to be paid by examined companies).

34. Stephen J. Johnson, writing as the Deputy Insurance Commissioner for Pennsylvania explained, "Since the enactment of Pennsylvania's CCRC Act in 1984, there have been very few instances where CCRCs have had financial difficulties. The problems generally result from insufficient cash flow to meet debt obligations for the construction of facilities and occur within the first 10 years of licensure." Johnson Letter, *supra* note 5.

35. A detailed historical example is available for Pacific Homes cases, which involved insolvency proceedings for a group of non-profit care facilities that traced their roots to 1929, with support from the United Methodist Church. The nonprofit corporation's financial problems accumulated in the 1970s and were later attributed to "the residents' increasing life spans, the overgenerous impulses of [the corporation's] founders, a flawed business plan, runaway inflation, and bad management – with some graft thrown in." DILLON & CANNON, *supra* note 22 at 16. The unsuccessful business plan included continuing to sign "new residents, using their lump-sum payments on operating costs instead of investing that money for the future." *Id.* at 26. It can be argued that the post-1970s model of contracts, offering refundable entrance fees, was a way to reassure residents about the safeness of the CCRC life-care business plan, as it implies the facility would be limited to using the interest generated by an escrowed or reserved "refundable" portion of the fee. However, most refundable entrance fee contracts make refunds contingent on the resell or turn-over of the specific unit to a new owner or resident. As long as new residents are moving in promptly, there is little concern about how any refundable fees are actually held. The concern about large entrance fee models, especially those promising refunds, led to Covenant Resident Charles Prine calling for refundable fees to be "placed in a true escrow account under the supervision of an independent trustee." Letter of Charles W. Prine, Jr. to Senator Herb Kohl, July 24, 2010 (copy on file with author).

36. Meetings, *supra* note 4.

statistics on requests for information made by members of the public. Very few complaints about CCRCs (estimated at less than 5 a year) are filed with the Department's Office of Market Regulation."<sup>37</sup>

The history of examinations in Pennsylvania conducted under the old statutory language may be a basis for continuing questions about the impact of state reviews. For example, in 1997, a CCRC in eastern Pennsylvania was the subject of a scheduled, periodic state examination. Among several points raised by the examiner was the recommendation that "[b]ecause of the increasing deficit over the last five years . . . the Facility [should] submit a five year profitability plan to the Department [of Insurance]."<sup>38</sup> The recommendation appeared to be an objective response to a serious concern. The next state examination, in 2002, revealed that the CCRC's unrestricted net assets decreased by over \$5 million during the preceding five fiscal years, although "available cash" had increased by almost \$500,000 and the facility had a larger designated "liquid reserve."<sup>39</sup> Also during that period, the CCRC's revenues failed to cover the operating costs, leading to losses. In the 2002 examiner's report, however, there was no description of any action on the 1997 recommendations and the examiner recommended no new actions for the facility. In 2007, the examiner's report showed an additional \$5.5 million decrease in unrestricted net assets, compared to the 2002 report.<sup>40</sup> Again, there were no actions recommended by the Department in the 2007 report. Whether the 1997 recommendation had an effect is unclear from the publically available state examiner's reports; however, the availability of three state reports in ten years, authored by presumably objective state examiners, provided a history that may help then current or prospective residents (or their financial or legal advisors) evaluate any on-going risk and the soundness of the CCRC's business plan. As of 2011, our research indicates the CCRC in question continues in operation, with apparent restructuring of long-term debt.

In January 2011, the Department explained its procedure for public access to facility responses: "As part of the examination process, CCRCs are required to provide the Department with a written response describing corrective actions taken or planned to be taken to address the recommendations. The response is not part of the final public report unless a CCRC requests in writing that it be included. If the response is not included in the final public report, it is considered confidential pursuant to 40 P.S. §323.5(f)."<sup>41</sup> Without automatic five year public examinations, and without routine public reporting of responses to any recommendations, it may be difficult for current and prospective residents to obtain objective accounts of a particular facility's history although all residents of Pennsylvania CCRCs have a right to access the

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37. Johnson Letter, *supra* note 5 at 3. However, according to Johnson, individual complaint records are not available to the public. *Id.*

38. Excerpt of "Prior Examination" Recommendations for 1997, contained in Report of Examination as of June 30, 2002 for Examination Warrant No. 03-CP-526 (public copy "for information only").

39. Report of Examination as of June 30, 2002 for Examination Warrant No. 03-CP-526 (public copy "for information only").

40. Report of Examination as of June 30, 2007 for Examination Warrant # 97-CP-532. It is possible a change in the accounting methods used by facility's accountants explains some changes. The key policy question, however, is why the Department recommended a profitability plan in 1997 but made no such recommendations in 2002 and 2007, despite what appear to be increasing deficits.

41. Johnson Letter, *supra* note 5.



facility's annual disclosure statements, mandated by state law.<sup>42</sup> One of the messages to come out of the 2008-2010 global financial crisis is that relying on company-generated information about financial soundness can be dangerous.<sup>43</sup> Whether public or governmental oversight can overcome the risk of self-justifying commercial behavior is the hot question. Either way, it seems likely that the future of CCRCs will be affected by the extent to which new residents feel safe about investing their substantial life savings in CCRCs.

## **CAN BETTER INFORMED PENNSYLVANIA RESIDENTS HELP CCRCs CONTINUE?**

Pennsylvania Deputy Insurance Commissioner Stephen Johnson explained to the media in 2010 that the state's current approach to regulating CCRCs had worked well for more than 20 years.<sup>44</sup> Thus, in addition to supporting the elimination of mandated examinations after the first ten years of a facility's licensure as a Pennsylvania CCRC, the Department rejected the need for new regulations that increase the role of state oversight, and seemed to take the position that the failure of Covenant at South Hills was a unique case.<sup>45</sup> This is, perhaps, an expected position in a time of severe constraints on state budgets, especially with other financially-troubled industries demanding attention. However, are there other "zero cost to the state" methods that might offer reasonable checks and balances for Pennsylvanians living in CCRCs?

### **Industry Accreditation**

The Commission on Accreditation of Rehabilitation Facilities (CARF) is an independent, nonprofit accreditor of various health and human service providers, including CCRCs under the CARF-CCAC standard.<sup>46</sup> The organization reviews many aspects of a facility during the accreditation process, including a variety of financial markers.<sup>47</sup> Roughly twenty-two percent of the CCRCs in Pennsylvania currently maintain CARF-CCAC accreditation.<sup>48</sup>

Proponents of accreditation have suggested that the CARF-CCAC accreditation standards represent "best practices and guidelines for CCRCs and they help to assess short- and long-term financial stability."<sup>49</sup> On occasion, provider officials have indicated that the primary value of the accreditation is to attract an initial base of residents for a new CCRC, and thereafter the costs of maintaining the accreditation may outweigh its marketing value.<sup>50</sup> Alternatively, providers may forego accredita-

42. 40 PA. STAT. ANN. §3207.

43. Andrew Ross Sorkin, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM AND THEMSELVES* (2009).

44. Troianovski, *supra* note 1.

45. *Id.*

46. CARF International, *Who We Are*, <http://www.carf.org/About/WhoWeAre/> (last visited April 22, 2011); *see also* GAO Report, *supra* note 1 at 18.

47. GAO Report, *supra* note 1 at 18-19.

48. A review of CARF's website indicates that 51 CCRCs in Pennsylvania maintain accreditation. CARF International, *List of CARF-CCAC accredited Continuing Care Retirement Communities*, <http://www.carf.org/ccrcListing.aspx> (last visited Mar. 8, 2011).

49. The GAO report states that this opinion was repeated by accreditation officials and some CCRC providers. GAO Report, *supra* note 1 at 19.

50. The CEO of a CCRC in southeastern Pennsylvania explained to the authors the reason for not maintaining CARF-CCAC accreditation at the particular facility.

tion because they no longer are willing to provide the necessary financial information, or are unable to meet CARF's financial criteria. One commentator observes that the only public information made available by CARF is the actual provider-accreditation itself, not the underlying information submitted to satisfy the accreditation criteria.<sup>51</sup>

CARF, in cooperation with Beard Miller Company and Ziegler Capital Markets, publishes annual reports on "Financial Ratios and Trend Analysis for CARF-CCAC Accredited Organizations."<sup>52</sup> The reports are based on financial information provided by their accredited CCRC facilities<sup>53</sup> and contain important information that could be useful to both states and individuals as benchmarking tools.<sup>54</sup> However the data may fail to be fully predictive of industry trends because of the limited nature of the data bank, especially if troubled facilities drop accreditation to save expenses.

### Resident Advocacy Organizations

Often the persons in the best position to notice problems with a CCRC are the residents themselves. Some residents have retired from professions requiring business or financial analysis skills and have developed an appreciation for markers that indicate financial soundness or distress. The question, however, is whether residents not only have access to key information, but also have confidence in the information provided. One way to test the information is to share it with other facilities, both in the same state and elsewhere in the nation, thereby providing opportunities for evaluation of trends.

Pennsylvania residents have organized the Pennsylvania Alliance of Retirement Community Residents (PARCR), with full membership open to resident councils of CCRCs and associate memberships available to individual residents.<sup>55</sup> In addition, the National Continuing Care Residents Association (NaCCRA) is dedicated to the promotion of CCRCs "as a humane, cost-effective long-term care model for elderly individuals."<sup>56</sup> NaCCRA "encourages the development of minimal federal standards for provider performance, allowing ample opportunity for each state to utilize policies, which contribute to the welfare and financial security of their residents."<sup>57</sup>

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51. Lillian L. Hyatt, *Accreditation of Continuing Care Residential Communities Revisited: What Does it Mean?* CANHR Advoc. (Cal. Advocates for Nursing Home Reform), Fall 2008, available at [http://www.canhr.org/CCRC/CCRC\\_Corner2008Q4.html](http://www.canhr.org/CCRC/CCRC_Corner2008Q4.html).

52. See, e.g., FINANCIAL RATIOS AND TREND ANALYSIS FOR 2010, available for purchase on the CARF website at <http://www.carf.org/home/>.

53. "The purpose of this publication is to provide, in summary form, for 1991 through 2008 the financial ratio quartiles of the CARF-CCAC accredited organizations . . . that were accredited by CARF-CCAC as of December 2008. This year's publication, with 18 years of data, provides valuable industry benchmarks, allowing readers a unique opportunity to view the financial trends . . . including provider growth, accounting changes, operating challenges, and regulatory changes." CARF PUBLICATION, FINANCIAL RATIOS AND TREND ANALYSIS FOR 2009 at 3.

54. Additional information of potential use in evaluating financial status of CCRCs may come from Form 990 IRS Tax Reports filed annually by nonprofit organizations, which may duplicate much of the information contained in state disclosure statements, but using more consumer-friendly language.

55. Pennsylvania Alliance of Retirement Community Residents website at <http://www.parc.org/> (last visited April 22, 2011).

56. National Continuing Care Resident's Association website at <http://www.naccra.com/index.htm> (last visited April 22, 2011).

57. *Id.*

The NaCCRA website identifies additional state associations of residents in California, Connecticut, Florida, Maryland, Massachusetts, New Jersey, New York, North Carolina, Virginia, as well as in the District of Columbia.<sup>58</sup> NaCCRA publishes a bimonthly newsletter, the “NaCCRA Life Line: The Resident’s Watchdog . . . The Industry’s Friend.”

CCRC resident groups in New Jersey take a particularly active approach to evaluating both financial information and operational decisions of CCRCs, with well established lines of communications between New Jersey’s regulatory authority, the Department of Community Affairs, and the Organization of Resident Associations of New Jersey (ORANJ). ORANJ represents more than 10,000 CCRC residents at 24 facilities.<sup>59</sup> A unique tool developed by ORANJ is a detailed guide book for members of CCRC Resident Finance Committees, first released in 2007 and updated in 2010.<sup>60</sup> The guide book notes that a 2006 survey of residents of New Jersey CCRCs by the ORANJ Finance Committee “found the primary financial concerns of Residents to be (1) Rising Monthly Service Fees and (2) The Continued Long-Term Financial Stability Of Their Own Community.”<sup>61</sup> In addition, the survey concluded that residents desired “more financial information, in understandable terms.”<sup>62</sup>

The New Jersey organization’s most recent report is on their study of “transparency” in CCRCs.<sup>63</sup> The November 2010 report highlights responses collected from resident associations at 22 of 24 CCRCs operating in New Jersey about whether residents feel they “enjoy candid and open communication from boards and managements,” and concludes with suggestions for how communities can improve transparency and enhance the relationships between boards, management and resident committees. The transparency study also reportedly helped state officials identify two CCRCs in New Jersey that were not complying with New Jersey law mandating inclusion of residents on governing boards.<sup>64</sup> ORANJ relies on volunteer help from residents to conduct such surveys and shares results widely, demonstrating a potential partnership between residents and public authorities to develop reliable and useful information. For Pennsylvania, using PARCR for a similar partnership may depend both on the openness of the Insurance Department to information sharing, and the fact that Pennsylvania is much larger, in terms of physical distance and number of CCRCs operating within the state.

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58. The NaCCRA website provides links to community resident associations and state associations at <http://www.naccra.com/members.html>.

59. Organization of Residents Associations of New Jersey web page at <http://oranjccrc.org/> (last visited April 22, 2011).

60. The 2010 version of CCRC FINANCES: A GUIDE BOOK FOR MEMBERS OF CCRC RESIDENT FINANCE COMMITTEES, prepared by the Finance Committee of the Organization of Residents Associations of New Jersey, is available in PDF format on the ORANJ website at <http://oranjccrc.org/2010FCguidebookTOC.htm> (last visited April 22, 2011).

61. *Id.* at 1.

62. *Id.*

63. ORANJ Transparency Study Report (November 2010), available at <http://oranjccrc.org/research2/2010%20TRANSPARENCY-Report.pdf>.

64. Interview with Peter Desch, Chief of Bureau of Homeowner Protection, New Jersey Department of Community Affairs, April 20, 2011 in Denville, N.J. during ORANJ meeting (notes of meeting on file with author).

## Resident Members of CCRC Governing Boards

Pennsylvania, as with many states that regulate CCRCs, mandates that residents have a right to “self-organization.”<sup>65</sup> Pennsylvania further requires that the board of directors or a “designated representative” of the CCRC’s governing body must meet with the residents on at least a quarterly basis for “free discussion of subjects which may include income, expenditures and financial matters.”<sup>66</sup> During meetings by the authors with residents in Pennsylvania and other states between August 2010 and April 2011, however, one of the most frequent inquiries was about whether residents can and should be represented “on” the governing boards of CCRCs. Residents point to this opportunity as among the most important ways for residents to develop trust for the information and decisions coming from their communities’ leadership, whether that leadership is connected to nonprofit or for-profit organizations.

New Jersey is among the leaders in the country in requiring a role for residents on boards of directors. New Jersey law provides that the governing bodies of their CCRCs must include “at least one resident as a full voting member.”<sup>67</sup> The procedure mandated by New Jersey law for selection of a representative allays the concerns expressed by some governing bodies about hostile or disruptive members, by providing that the resident members “shall be nominated by the elected representatives of the residents and selected by the board of directors.”<sup>68</sup> During a meeting with more than 150 CCRC residents at the state-wide meeting of ORANJ in April, 2011, the authors heard from a number of attendees who spoke eloquently about their experiences as resident members on CCRC governing boards in New Jersey.

New Jersey’s adoption of the resident-board member law in October 2007 was the direct result of advocacy by the state-wide residents’ organization, ORANJ.<sup>69</sup> The recent transparency study by ORANJ also demonstrated that the longer residents serve on boards, the greater the acceptance by the nonresident members, often resulting in increasingly active roles for resident-members.<sup>70</sup> Other jurisdictions that require residents to be represented on governing boards of CCRCs include Maryland,<sup>71</sup> Washington D.C.,<sup>72</sup> California,<sup>73</sup> Ohio,<sup>74</sup> and Oregon<sup>75</sup> although in the latter three states, the residents have non-voting positions.

One objection sometimes raised to resident membership on boards of directors is a concern for conflict of interest, pointing out that board members have a fiduciary duty to the “organization,” rather than to fellow residents who are merely customers. However, Pennsylvania already recognizes that members of boards of directors for corporations are permitted to consider the “effects” of any corporation

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65. 40 PA. STAT. ANN. §3215 (“Right of Organization”).

66. *Id.*

67. N.J. STAT. ANN. §52:27D-345 (e).

68. *Id.*

69. *Success in Trenton – Residents Inclusion On Boards of Trustees Has Graduated From a Hope to a Reality*, <http://oranjcrc.org/action.htm>.

70. ORANJ Transparency Study Report, *supra* note 63.

71. Md. CODE ANN., HUM. SERV., §10-427 (mandating inclusion of “subscribers” as “full and regular” members of governing bodies).

72. D.C. CODE §44-151.10(d).

73. CAL. HEALTH & SAFETY CODE §117.8(i).

74. OHIO REV. CODE ANN. §173.13(B).

75. OR. REV. STAT. §101.112(6).

decision on “any or all groups affected by such action, including . . . customers” when determining what is in the best interest of the corporation, and board members may do so without breaching their duty to the corporation.<sup>76</sup> For CCRCs, there is a close alliance with the mission of the organization and the interests of the residents, although resident-members will need to understand that their fiduciary duties to the organization may trump individual interests or short-sighted concerns of fellow residents.

## CONCLUSION

Pennsylvania’s long-time administrator in charge of regulatory matters relating to CCRCs, Stephen J. Johnson, observes that based on his “extensive experience in the regulation of CCRCs operating in Pennsylvania, [he] believe[s] the Commonwealth’s laws and regulations provide a balanced, sufficient regulatory framework for the licensing of continuing care providers, on-going monitoring of their financial viability and the protection of CCRC residents.”<sup>77</sup> At the same time, it is apparent that CCRCs in Pennsylvania and elsewhere in the country are experiencing serious financial challenges. Whether Covenant of South Hills was an isolated instance or the first ripple of a larger financial wave is not clear. In the meantime, current residents want reliable information about the finances of their communities and prospective residents need reassurances about the financial stability of a community they are considering for their last years, months and days on earth. While the Commonwealth offers an explanation for eliminating regular state audits of CCRC operations after the first ten years of operation, it seems reasonable, at a minimum, to balance cost efficient-changes in regulation with efforts to provide current and future residents with other means of gaining understandable answers to key financial questions.

If Pennsylvania does not want to provide trend analysis based on the information it already collects and stores annually, perhaps the most cost efficient alternative is to provide residents with the opportunity for better self-representation within their communities, including voting membership on their governing boards.

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76. 15 PA. STAT. ANN. §1715 (a)(1) and (b). See also Barnali Choudhuy, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 644 (discussing “constituency statutes,” such as Pennsylvania’s law, that modify the traditional business judgment rule.) See also ELIZABETH SCHMIDT, *NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION* 124 (2011) (discussing whether directors/trustees of nonprofit organizations owe any fiduciary duty to the “community,” and analyzing this question in the context of *In re Milton Hersey Sch. Trust*, 807 A.2d 324 (Pa. Cmwlth. Ct. 2002)).

77. Johnson Letter, *supra* note 5.