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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
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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.¹ 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.² 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

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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 2008.³

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,

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

lay-offs of staff members who residents considered to be important members of their "continuing care" teams, "slow" refunds of refundable entrance fees, and rising debt on the balance sheets of their institutions.⁴

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.⁵ 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.

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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.⁶ 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/dsf/ccfsearch.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.⁷ The Senate Committee noted that housing and credit markets have experienced major downturns, which has resulted in financial pressure on the CCRC industry.⁸

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.⁹

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."¹⁰ The Committee noted that these problems are indicative of the industry in general.¹¹ 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.¹² The reports of the Senate Special Committee on Aging and the GAO stressed the importance of state oversight to promote financial stability of CCRCs.¹³

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.¹⁴

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.¹⁵ 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.¹⁶ 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-

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.

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

16. *Id.*

