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United States Senate Special Committee on Aging

***The Importance of Resident Voices in Regulation of
Continuing Care Retirement Communities***

I am pleased to be invited to speak to the Senate Special Committee on Aging and to have this opportunity to share observations based on several years of research and consultation with residents of Continuing Care Retirement Communities (CCRCs) and Life Care Communities (LFCs) in Pennsylvania and elsewhere in the United States. Thank you.

I am a law professor who focuses on law and aging policy and I am the educational director of Penn State University's Elder Law and Consumer Protection Clinic. Recently, relevant to this topic, I was a visiting scholar at Oregon State University's Gerontology and Family Studies program. During the last dozen years, I have had multiple opportunities to tour CCRC and LFC sites; to read voluminous marketing materials, application forms and contracts; to review several different state regulatory schemes; and to meet with operators and lawyers for CCRCs and LFCs. Most importantly, I have had frequent opportunities to hear from residents about their experiences and their concerns. My testimony here is based on the legal and policy issues that I perceive, from my perspective in listening to the concerns of residents.

I am a supporter of this form of long-range planning and long-term care. For many thousands of people, CCRCs and LFCs provide an active and supportive environment, with essential flexibility in both housing and care arrangements. Well-run operations enhance quality of life and make living long a pleasure. One key to success of such operations is the extent to which they can provide

¹ I am grateful to many for assistance in my research on CCRCs, especially the students at Pennsylvania State University's Dickinson School of Law and the supervising attorneys and legal interns working in Penn State's Elder Law and Consumer Protection Clinic. Special recognition for excellence in research goes to Joshua Wilkins, Penn State Dickinson, and Ryo Hirayama, Oregon State University.

predictability about the future. Peace of mind, particularly in later years, is an important goal, and a recognized marketing concept within the industry.

I. Background for CCRC Regulation

I remember hearing the comments of John Erickson, until recently the head of one of the largest CCRC operations in the country, when he was asked in a televised interview about whether he had competitors in the business. He said, in effect, that the greatest challenge he faced was the unwillingness of people to think early enough about retirement living options, especially about what he called the “second half” of retirement, where personal care needs often increase, even for those in good health. I agree with Mr. Erickson on this point; it is tempting to view elder years from the perspective of an ostrich, with our collective heads stuck firmly in the sand.

At the same time, my research makes me realize that some CCRCs and LFCs have succumbed to ostrich-like temptations of their own, as have some state regulators. This format of collective living -- where retirees often commit their life savings to payment of large entrance fees or hefty future monthly fees, in exchange for promises about housing and services for the rest of their lives -- has existed for decades if not centuries. However, the concept first attracted serious public regulatory attention in the 1980s. Notable failures of communities made residents realize that promises can be illusory and the end-of-life consequences particularly disturbing.

Beginning in the 1980s, many states responded by enacting CCRC-specific regulatory schemes that impose licensing standards, often with rules for financial operations. The financial rules often incorporate one or more of three major themes:

First, mandatory “disclosures” to prospective and actual residents,

Second, mandatory minimum financing terms, such as rules for handling of lump-sum payments (sometimes called entrance fees) and requirements for operating reserves, and/or

Third, legal sanctions for certain prohibited conduct, such as misleading, deceptive or fraudulent business practices.

In addition, some state laws address a *fourth* theme, incorporating lessons learned during the legal reform movements of the nursing home industry, by recognizing and adopting specific legal rights for CCRC residents. CCRC residents are active, engaged adults. Many value the right to organize and participate actively in the governance of their village-like communities. Residents frequently seek to exercise their rights in connection with financial decisions and business practices that affect their daily lives and their investments in the community. While some states recognize specific rights for residents, this is the least developed area of regulation, in my opinion.

By my count, more than 30 states have enacted regulations in some form for CCRC operations. I have attached a chart of state statutes, including notes about recent amendments. There are relatively few cases that are reported; litigation of a CCRC resident's right issue is usually cost prohibitive -- and more importantly -- energy depleting for older adults.

The 1990s appeared to be a decade of relative stability and gradual but steady growth of the CCRC industry. By the late 1990s, states had reached what might be called the "teenage" years of CCRC regulation, just as the nation's overall economy seemed to permit any high-flying scheme the chance for immediate success, no matter how much leveraging or debt was involved. At the same time, there were subtle and not- so-subtle shifts within the CCRC industry. My research suggests that many states did not keep abreast with changes in the industry. Residents are aware of the challenges within the industry and, in some cases, have tried to communicate with regulators. But frequently there is no effective way for residents to raise concerns.

II. The Importance of Resident Voices in CCRCs

About five years ago, a group of residents of a CCRC asked me for a referral for experienced advice about their concerns about an expansion plan at their CCRC. They believed that the plan was unsound, and they impressed me with the

sophistication of their reasoning. CCRC residents are often a vital group, with a host of specialized backgrounds. In this instance, the group had residents with skills at crunching numbers and the outcome of their analysis was not satisfactory to them. Attempts to communicate with the management of their CCRC had not been successful. I asked whether they had talked to the state department in charge of CCRC regulation and I learned they had tried to do so, but that they had received no substantive assistance.

That intrigued me, and eventually I tried the same, with the same lack of response to my inquiry about CCRCs operating in the state. I sought information about whether there had been any failures, whether there were any facilities with complaints about financial problems or whether the department was aware of other significant management concerns at CCRCs within the state. I was told, bluntly, that the regulatory scheme required “only” disclosures and not state assessment of the financial health of licensed CCRCs.

I went to view the annual reports filed by CCRCs with that state department and discovered that the public reports were nicely stacked. As far as I could tell, they had never been opened. Since then, I have spoken to other residents and to other regulators. In some instances I have heard regulators report that they do “take action” if they receive notice of financial problems in a CCRC, and one regulator reported that he felt the work of his office had prevented bankruptcies. The latter point sounded particularly positive. I became concerned, however, when I realized that there was no system for tracing complaints and no public reporting of actions taken. It was impossible to determine what factors were contributing to any problems. Residents wanted information so that they could compare their own institution with the success or failure of others. But, there was no systemic information available from the state, even though the state was collecting relevant data.

I wrote a short article in 2006, because I was concerned even then that we were operating like proverbial ostriches, ignoring available evidence of good or less-than good CCRC operations, while we buried our heads in the sand and said “the industry looks healthy from here.” In 2006, I wrote that it “seems important

to keep a watchful eye for key markers of a stable or unstable industry in light of the apparent sudden growth in CCRCs.”

In 2010, we are still in need of that information and we have new reasons to appreciate the absence of the information.

I believe that many – and I hope all – CCRCs will emerge from this challenging economic time intact. I hope I am wrong in my concern that some additional CCRCs will fail, or be drastically restructured to avoid failure. My concern, during this challenging time, is that both current residents and prospective residents need information, information that is not merely stacked in dusty shelves in state offices, but that is read and synthesized and reported candidly, so that current and future residents can make appropriate decisions about their end-of-life investments in CCRCs.

I believe that some states are recognizing the need for more proactive approaches to regulatory assessment. Research discloses that at least seven states have amended their regulations since the financial crisis hit, and I have heard from other states considering changes. For example, Oregon has amended its CCRC law to require greater disclosure of the identities of persons who have direct or indirect ownership or beneficial interests in CCRCs within the state and to require resident representation on the governing boards of CCRCs. *See* Enrolled House Bill 2138, 2009 Oregon Laws Chap. 201, amending Oregon Rev. Stat. §§ 101.010-101.160, effective January 1, 2010.

In reviewing submissions filed with the bankruptcy court in Texas during the Erickson Retirement Communities’ bankruptcy case, I have seen a host of objections by non-resident creditors and relatively little from residents themselves. The lack of resident objections is potentially a positive sign as that particular empire emerges from reorganization with new owners. But I also know from years of listening to residents, that some are fearful of speaking out unless they feel someone will listen seriously to their concerns. They fear that they will be shunned, encouraged to leave their homes, or subjected to other negative response if they talk about what they perceive as problems when outside of their campus walls.

State regulators can do a better job of making it safe for residents to speak, and can encourage them to speak while the problems are still solvable. The nation's nursing home industry was changed dramatically, for the better, by adoption of a national bill of residents' rights. See 42 U.S.C.A. § 1396r (c). I believe that a national bill of rights for residents in Continuing Care Retirement Communities is also merited, with a goal of providing residents more effective voices, including greater access to transparent financial information. The nursing home bill of rights was predicated on physical or mental vulnerability of residents. With residents at CCRCs, the concern is financial vulnerability in an older population, people who have limited energy and time.

III. Challenges Arising from CCRC Industry Developments

I believe that we must recognize that the CCRC industry is indeed a national industry, even though many CCRCs are still run as individual operations. Residents (and prospective residents) across the nation want more information about financial decisions that affect their communities. There are several key developments that concern residents across the nation.

First, although religious and fraternal organizations continue to have high-profile positions within the CCRC industry, in some instances the "church" or "lodge" in question has little involvement in the daily operation of the facilities. Some non-profits distance themselves from management decisions, decisions that have financial impact on residents. This was once an industry of mostly non-profit operation facilities managed by their own staffs, and certainly there are many CCRCs that are entirely locally owned and operated. I perceive a trend, however, toward non-profit "affiliation" of facilities. Ownership is still in the hands of non-profits, but management is increasingly "contracted out," and in the hands of management companies (which are often for-profit companies). Residents indicate to me that they would like greater accountability from non-profit affiliates for the management issues *and* financial operations of their facilities.

Second, for-profit companies in some instances have recognized the benefit of non-profit structures and have created elaborate tiers of for-profit and not-for-

profit companies, including development companies, ownership companies, and management companies. These are often tied together with contracts that permit substantial profits to be harvested. Financial instability of any component of these systems affects the overall system. This trend poses unique challenges for anyone attempting to determine financial soundness and accountability. Residents indicate to me that they are often unable to pierce the veils of elaborate structures to get information from the people with the power to make key financial decisions.

Third, residents are concerned about trends in taxation that affect their communities, a concern that is undoubtedly shared by the operators of CCRCs. While not strictly speaking a residents' rights issue, I believe that the soundness of the industry may depend on better guidelines for what will or will not qualify for non-profit consideration in the operation of CCRCs. Residents should not be hit with bad news after their investment decisions are already made. This is a challenge for states (and local taxation authorities), to coordinate their tax collection goals with other regulatory goals for the industry, while still fostering a climate that supports sound growth of a valuable industry.

Finally, the boom in the real estate market that allowed many to reap substantial increases in value from the sales of their homes coincided with abundant creativity and expansion on the part of the CCRC developers. For example, as recently as May 2008, one CEO of a CCRC community operation predicted that his then-current empire, with 20 facilities serving 22,000 residents in 12 states, would grow in the "next couple of years" to serve more than 50,000 residents. This was an interstate operation, even though it had state-specific legal structures. As you may be aware, it was John Erickson who made that prediction, less than 18 months before his communities filed for protection and reorganization under the bankruptcy laws. Erickson Retirement Communities is probably a dramatic example of a uniquely complex structure, but my sense is that other facilities have been moving in the direction of complexity, sometimes driven by the need for more cash or resources to stay solvent. We are seeing, and I believe will continue to see, CCRCs consolidating or joining together, and thus creating more co-dependent entities.

One couple expressed their concern during Erickson Communities bankruptcy case about fees paid to one facility that were used for construction of apartments in other Erickson facilities. They were concerned because they did not know about the leveraging until after the bankruptcy case had been filed. See Document 354, Erickson Retirement Communities et al, Case No. 09-037010, U.S. Bankruptcy Court, Northern District of Texas.

Whatever the reasons for the increasing complexity of the structures, it seems wise to recognize that increased complexity contributes to the need for regular reassessment of the industry. Financial decisions in one CCRC unit potentially affect the financial stability of other units within that same ownership group, and ownership can cross state lines. Regulators need to think beyond the borders of a single CCRC campus and beyond the borders of a single state system of regulation. National guidelines are needed. I am aware that the industry itself is preparing new “best practice” guidelines. That is very encouraging; however, I believe this does not eliminate the need for public regulation.

Many in financial circles have had to reconsider their exuberance in predictions. We need to recognize that difficult financial circumstances will not be cured by punitive measures, but also, that the challenging financial climate for CCRCs should not be viewed as an excuse for non-regulation. It is not satisfactory to residents when someone says, “the CCRC industry is too complex” or “too sophisticated” to permit effective state or federal regulation. We need sophisticated regulatory professionals who can and will listen to residents.

IV. A National Bill of Rights for CCRC Residents

The CCRC industry should not be surprised or even upset about federal inquiry into the CCRC industry and the concern for greater financial accountability. The regulation of CCRCs, even those with financial ties that cross state borders, has been largely a function of state regulators. But the industry benefited when Congress adopted federal legislation to assist CCRCs, tied to internal financing questions. In 2005, Congress amended the Medicare and Medicaid laws to require residents at Continuing Care Retirement Communities to spend declared resources before applying for Medicaid for nursing-care needs,

thus potentially limiting the healthier spouse's use of the couple's savings. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 2006 Stat. 1932, codified as 42 U.S.C.A. § 1396r (c) (5) (B) (v). *See also* 42 U.S.C.A. §1396p. Thus, CCRC owners have already benefitted from federal regulation.

I am aware that there is little appetite for regulation that will cost additional money to implement. Therefore, with my testimony here I am focusing on a single recommendation, and I believe it is cost efficient, although not cost free to implement properly. I recommend providing residents of CCRCs with a national set of threshold rights, a national bill of CCRC resident rights, geared to their particular concerns about financial accountability and transparency in operations. Many CCRCs already provide, by contract, guaranteed rights to residents. The question is whether such rights adequately address the concerns of residents who want greater financial accountability.

In conclusion, just as the CCRC industry benefitted from federal legislation to address financial concerns, so it is reasonable to expect residents – voters – to be given similar consideration. I believe the first important step is a national bill of rights for residents of Continuing Care Retirement Communities. Providing a national base-line for recognition of the voices of CCRC residents will encourage states and state regulators to work together, will encourage the industry's best practice guidelines to be nationalized, and will help residents enjoy CCRCs for many years to come.

Continuing Care Retirement Community (CCRC& LFC) Statutes – 50 State Survey (updated 7/15/2010)

State	Statute	Cases of Interest	Last amended	Amendments added
Alabama				
Alaska				
Arizona				
Arkansas	Continuing Care Provider Registration Act, ARK. CODE ANN. §§ 23-93-101 to 23-93-114.		2003 & 2009.	Technical changes.
California	CAL. HEALTH & SAFETY CODE §§ 1770-1793.84.	Matthews v. State, 163 Cal. Rptr. 741 (Cal. Ct. App. 1980) (CCRC debtor lacked standing to assert claim that state failed to revoke license when debtor failed to maintain statutory reserve levels).	Minor amendment in 2009.	Indicates that no reimbursement charges are required by this act.
Colorado	COLO. REV. STAT. § 10-16-413.5 (slight application to CCRCs).		Effective 1999.	
Connecticut	Management of Continuing Care Facilities, CONN. GEN. STAT. §§ 17b-520 to 17b-549.		Amended 2008 & 2009.	2008: clarified application to in-home services; 2009: Technical changes.
Delaware				
Florida	FLA. STAT. §§ 651.011 to 651.134.	Clearwater Land Co. v. Koepp, 778 So.2d 1022 (Fla. Dist. Ct. App. 2000) (residents could convert "free" nursing center care into home care services on the basis of the daily charges for nursing home care, not assisted living care).	Amended 2010.	Provided further direction for annual reports; provided for non-refundable escrow fees; clarified rights to rescind residency contract; strengthened "residents' council".
Georgia	GA. CODE ANN. § 31-6-47; Ga. Code Ann. sec. 33-45-1 to 33-45-12.		Effective 1990.	
Hawaii	HAW. REV. STAT. § 431:10H-219.		Enacted 1999.	
Idaho	Idaho Continuing-Care Disclosure Act, IDAHO CODE ANN. §§ 26-3701 to 26-3715.		Enacted 2005.	
Illinois	20 ILL. COMP. STAT. 3960/12.2 (permits State Board to collect fees from CCRCs).		Enacted 1995.	
Indiana	IND. CODE §§ 23-2-4-1 to 23-2-4-24.		Amended 2009.	Rewrote significant portions (largely definitions and scope).
Iowa				
Kansas				
Kentucky	KY. REV. STAT. ANN. §§ 216B.015, 216B.040, 216B.330-216B.339.		Amended 2007.	Changed name of state agency to which certain reports are submitted.

Louisiana	Louisiana Continuing Care Provider Registration and Disclosure Act, LA. REV. STAT. ANN. §§ 51:2171-51:2188.		Enacted 1987, portions amended in 1989.	Minor textual revision.
Maine	Continuing Care Retirement Communities, ME. REV. STAT. ANN. tit. 24-A §§ 6201-6228.		Portions amended in 2003.	Minor textual revision.
Maryland	MD. CODE ANN., HUM. SERV. §§ 10-401 to 10-499.		Enacted 2007.	
Massachusetts	MASS. GEN. LAWS. ch. 93 § 76.		Amended 1996.	Added additional provisions for "long term care services" and other continuing care facilities.
Michigan				
Minnesota	Continuing Care Facility Disclosure and Rehabilitation Act, MINN. STAT. §§ 80D.01-80D.20.		Amended 1981.	
Mississippi				
Missouri	MO. REV. STAT. § 198.048 (brief treatment of CCRCs).		Enacted 1984.	
Montana				
Nebraska				
Nevada				
New Hampshire	N.H. REV. STAT. ANN. §§ 420-D:1 to 420-D:27.		Amended 2010.	Significant changes indicated within NEW HAMPSHIRE 2010 SESSION LAWS 2010 REGULAR SESSION Ch. 144
New Jersey	Continuing Care Retirement Community Regulation and Disclosure Act, N.J. STAT. ANN. §§ 52:27D-330 to 52:27D-360.	Seabrook Village v. Murphy, 853 A.2d 280 (N.J. Super. Ct. App. Div. 2004) (resident discharged from continuing care facility has a right to a hearing, and discharge must be based upon "just cause").	Enacted 1986.	
New Mexico				
New York	Continuing Care Retirement Communities, N.Y. PUB. HEALTH LAW §§ 4600-4624; A-Fee-For-Service Continuing Care Retirement Communities Demonstration Program, N.Y. PUB. HEALTH LAW §§ 4650-4676.		Amended 2003.	Minor additions.
North Carolina	Continuing Care Retirement Communities, N.C. GEN. STAT. §§ 58-64-1 to 58-64-85.		Amended 2003.	Interchanged terms.
North Dakota				
Ohio	OHIO REV. CODE ANN. §§ 173.13, 173.42.		No recent amendments.	
Oklahoma				

Oregon	Continuing Care Retirement Community Provider Registration Act, OR. REV. STAT. §§ 101.010-101.160.		Amended 2009.	Permits establishment of Resident Councils; mandates registration, disclosure, and reporting to state.
Pennsylvania	Continuing-Care Provider Registration and Disclosure Act, 40 PA. STAT. ANN. §§ 3201-3225.	Moravian Manors v. Commonwealth, 521 A.2d 524 (Pa. Commw. Ct. 1987) (court interpreted Continuing-Care Provider law in determining operation was a "continuing care provider").	No recent amendments.	
Rhode Island				
South Carolina	State Continuing Care Retirement Community Act, S.C. CODE ANN. §§ 37-11-10 through 37-11-140.		Amended 2000.	Limited scope of act.
South Dakota				
Tennessee				
Texas	Texas Continuing Care and Disclosure and Rehabilitation and Disclosure Act, TEX. HEALTH & SAFETY CODE ANN. §§ 246.001 through 246.117.		Portions amended 1993, 1995.	Altered terms.
Utah				
Vermont	VT. STAT. ANN. tit. 8 §§ 8001-8018.		Amended 2010.	Added further provisions for "Resident assistance fund."
Virginia	VA. CODE ANN. §§ 38.2-4900 to 38.2-4917.		Last amended 2010.	Technical changes.
Washington	State Health Planning and Resource Development Act, WASH. REV. CODE §§ 70.38.015-70.38.920 (sections not limited to CCRCs).		Portions amended 2005.	Added provisions pertaining to record keeping.
West Virginia	Residential Care Communities, W. VA. CODE §§ 16-5N-1 to 16-5N-16.		Effective 1997, amended 2005.	Added section for visitation; modified minimum standards.
Wisconsin	WIS. STAT. §§ 647.01-647.08.		Portions updated in 2004 & 2007.	No significant changes
Wyoming				
West Virginia				
Puerto Rico				
District of Columbia	D.C. CODE §§ 44-151.01 through 44-151.18.		Effective 2005.	