

# Ongoing Challenges For Pennsylvania Continuing Care And Life Plan Communities

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## TABLE OF CONTENTS

I. REGULATORY OVERVIEW .....	2	V. RESIDENT/PROVIDER	
II. CCRCs IN PENNSYLVANIA: BY		RELATIONS .....	9
THE NUMBERS .....	3	A. Authority to Transfer .....	9
III. ACCOUNTING RULE CHANGES ..	4	B. Should Pennsylvania Authorities	
IV. MARKETING CHALLENGES .....	6	Have Powers to Investigate Resident	
A. The Importance of Occupancy		Welfare Complaints? .....	10
Rates .....	7	C. Can CCRCs Limit Access for	
B. Rising Costs and Rising Fees for		Impaired Residents? .....	11
Residents .....	7	D. Refundable Fees .....	11
C. Alternate Services: Continuing Care		VI. FINANCIAL SOLVENCY .....	13
at Home Contracts .....	8	VII. CONCLUSION .....	14

## ABSTRACT

*The senior living industry, through a key trade organization, LeadingAge, (formerly American Association of Homes & Services for the Aging or AAHSA), recently organized a national rebranding effort for "Continuing Care Retirement Communities." In 2015, promoters announced "Life Plan Communities" (LPCs) as the choice for a better brand identity. Larry Minnix, the long-time CEO for LeadingAge, observed that a label such as continuing care retirement community is no longer an adequate image, explaining that the name "Life Plan Community" better represents a setting that encourages growth and new experiences, rather than an environment where residents are merely the subject of care.<sup>3</sup>*

*This article tracks developments in the industry, especially those with financial and legal implications for Pennsylvania operations. This article updates Professor Pearson's PBA Quarterly articles on CCRCs published in 2011<sup>4</sup> and*

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3. LeadingAge Press Release, November 1, 2015, available at <http://www.leadingage.org/members/name-change-initiative-leads-new-identity-ccrc-category>.

4. Katherine C. Pearson & Joshua R. Wilkins, *Will Continuing Care Retirement Communities Continue?*, 82 Pa.BarQ. 69 (Apr. 2011).

2006.<sup>5</sup> The title of the 2011 article posed a slightly provocative question: *Will Continuing Care Retirement Communities Continue? It was an allusion to the financial crisis of 2008-2010 that hit the CCRC market hard.*<sup>6</sup>

The good news is the industry in question has survived a global financial crisis, even as it implements a brand identity change and significant new accounting rules. In Pennsylvania, entities continue to be licensed as Continuing Care Retirement Communities, and therefore this article will use that name or the acronym "CCRCs."

**A core challenge:  
CCRC and LPC  
operators must  
generate and  
maintain trust  
among current  
residents and  
future customers.**

## I. REGULATORY OVERVIEW

In Pennsylvania, entities that are organized as CCRCs are subject to regulation by the Pennsylvania Department of Insurance pursuant to the Continuing-Care Provider Registration and Disclosure Act of 1984, as amended.<sup>7</sup> Regulations promulgated under this statute are found at 31 Pa. Code §§151.1-151.14.

Pennsylvania law mandates at Section 3204 of the Act that "[n]o providers shall engage in the business of providing continuing care . . . without a certificate of authority. . . ."<sup>8</sup> The term "continuing care" is defined as:

The furnishing to an individual, other than an individual related by consanguinity or affinity to the person furnishing such care, of board and lodging together with nursing services, medical services or other health-related services, regardless of whether or not the lodging and services are provided at the same location and **pursuant to an agreement effective for the life of the individual or for a period in excess of one year**, including mutually terminable contracts and in consideration of the payment of an entrance fee with or without other periodic charges.<sup>9</sup>

Thus, one of the first lessons about CCRCs in Pennsylvania is that state law does not require entities to guarantee lifetime care (or, for that matter, any particular level of care), but merely to satisfy contractual obligations. The law mandates coverage of core subjects in disclosure statements to prospective residents and annual statements to current residents (§3207), sets minimum liquid reserves (§3209), describes requirements to be addressed in resident agreements (§3214), and grants certain threshold rights to residents (§3215). Pennsylvania law governs both for-profit and nonprofit operations.

Expectations of consumers, as well as IRS expectations tied to tax exemptions for nonprofit CCRCs, put practical pressures on CCRCs to fund life-time care, if not to

5. Katherine C. Pearson, *Continuing Care Retirement Communities, State Regulation, and the Growing Importance of Counsel for Residents and their Families*, 77 Pa.BarQ. 172 (Oct. 2006).

6. See GAO Report, *Continuing Care Retirement Communities Can Provide Benefits, But Not Without Some Risk*, released June 2010, Doc. GAO-10-611, available at <https://www.gao.gov/new.items/d10611.pdf>.

7. 40 P.S. §§3201-3225.

8. In *Moravian Manors, Inc. v. Commonwealth*, 521 A.2d 524 (Pa. Cmwlth. Ct. 1987), the court rejected an operator's argument that it was not required to apply for Department licensure in order to operate. It contended that although it was a retirement community, it was not a CCRC as it merely furnished lodging for the entrance fee, while all meals and medical care were on a fee-for-service basis. The court concluded, however, that both fee-for-service plans and life-care plans are subject to Department oversight, and that in both types of financing structures residents had a reasonable expectation, subject to protection by state law, to receive "board, lodging and all necessary medical care in consideration of the entrance fee, regardless of their subsequent financial status."

9. 40 P.S. §3203 (emphasis provided).

guarantee such care. In states such as Pennsylvania where the regulatory system focuses more on disclosures than substantive financial rules, the providers' contracts remain critically important to the relationship between residents and CCRCs. This is especially important in CCRCs that offer multiple service options and pricing terms, such as refundable, partially refundable, or nonrefundable entrance fees. Any limitations or conditions on lifetime care should be revealed in the contract; however, the maxim *caveat emptor* applies. Such a caveat holds special significance where consumers face complex information.

## II. CCRCs IN PENNSYLVANIA: BY THE NUMBERS

According to the Pennsylvania Department of Insurance,<sup>10</sup> there are now roughly 290 licensed CCRCs in the Commonwealth, which is an increase from the 230 operations reported as licensed in 2011. While new construction of CCRCs fell during the financial crisis, and remains relatively slow nationally, the Philadelphia regional market has shown growth.<sup>11</sup> Not all licensed entities, however, are traditional CCRCs.<sup>12</sup> For example, operations licensed as CCRCs in Pennsylvania now include five "Continuing Care at Home" (CCaH) companies. We discuss this trend further below.

Pennsylvania is home to approximately 15% of all CCRCs operating in the U.S. In 2017, just under 2,000 total CCRCs—1,955—operated nationwide; this was a decrease of 8 communities from the previous year. According to Ziegler,<sup>13</sup> a privately-held investment bank specializing in financing for health care and senior living operations, the number of CCRCs increased each year since 2010 *until* the decrease in 2017.<sup>14</sup> This national history, even with the slight, single-year downturn, is more positive than the trends for other aspects of the senior living industry, which report significant decreases both in the number of operations and number of residents in stand-alone skilled care and assisted living facilities. In recent years, operations classified as "independent living" communities have demonstrated the strongest growth for sectors in the senior living market. CCRCs, with their mixture of types of housing and services, appear to be riding smoothly on the coattails of the recent trend by emphasizing amenities in independent living operations rather than more skilled levels of care.

Pennsylvania has rarely amended its Continuing-Care Provider Registration and Disclosure Act since the statute's enactment in 1984.<sup>15</sup> One change arose in 2010,

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10. For many years, Insurance Department oversight for Pennsylvania CCRCs was in the hands of a CPA, Deputy Insurance Commissioner Stephen J. Johnson. With Johnson's retirement from the Commonwealth in December 2015, attorneys have stepped into the review team roles, including Karen M. Feather, Special Assistant, Insurance Company Licensing, and John J. Lacek, Department Counsel.

11. Lana Peck, CCRC/LPC Market Trends: 4Q2017, NIC/Cares Blog, Mar. 28, 2018, <https://www.nic.org/blog/ccrc-lpc-market-trends-4q2017/> (reporting that "more than a third of the [new] construction was located in five markets: Philadelphia, Kansas City, Los Angeles, Dallas and New York")

12. The total number of operations licensed as CCRCs in Pennsylvania is affected by a Commonwealth decision in fiscal year 2005 to impose significantly higher bed taxes for nursing facilities than for beds in the skilled care units of CCRCs. See Pearson, *supra* note 4 at 173. See also, *End User Manual* at page 15, Pa. NF Assessment and Quarterly Resident Day Reporting Form, revised Oct. 5, 2018, available on the PA Department of Human Services website under "Pennsylvania Nursing Facility Assessment."

13. See <https://www.ziegler.com/>.

14. See also Lois Bowers, *Number of CCRCs Decreases for First Time in at Least Seven Years*, MCKNIGHT'S NEWS, February 4, 2018, available at <https://www.mcknightsseniorliving.com/news/number-of-ccrcs-decreases-for-first-time-in-at-least-seven-years/article/741876/>.

15. Many states initiated or increased statutory rules for CCRCs as a result of bankruptcies in the 1970s-80s, including the high-profile failure of Pacific Homes, Inc., a nonprofit operation with multiple facilities in California, Arizona and Hawaii. See *United Methodist Church v. Superior Ct. of California*, 439

when the legislature voted to eliminate the statutory obligation for the Department to visit each facility “at least once every four years” to “examine” the operation’s “books and records.” It also amended Sections 3218 and 3219 to permit discretionary, broad “investigations or examinations” and to eliminate mandatory in-facility books and records examination visits after the first ten years of operation.

Pennsylvania law, at Section 3220, obligates the Department to publish and distribute an annual directory of CCRCs and a consumer’s guide. The Department recently created a more useful, online directory on Pennsylvania CCRCs, including links to recently filed financial reports and disclosure statements. The databank is searchable by name of the operation or by county of locations.<sup>16</sup> In addition, the Department offers web-based consumer guidance on factors for new residents to consider when looking at CCRCs.<sup>17</sup> Making such information available online is useful not just for current and future residents but also for outside analysts. For example, My LifeSite, a consumer-friendly company, based in North Carolina, uses public information from state regulators to support a commercial, online comparative tool about CCRCs.<sup>18</sup>

Additional useful information may be on its way in Pennsylvania. As of May 2018, the Department of Insurance was developing a one-page summary disclosure form for CCRCs. Key information relevant to financial stability, such as occupancy numbers, average daily cash-on-hand figures, and debt-service ratios will be easier to find if providers cooperate with the plans. Pennsylvania’s planned one-page summary is similar to—but possibly more useful than—a summary disclosure form already in use in North Carolina.<sup>19</sup>

### III. ACCOUNTING RULE CHANGES

On May 28, 2014, The Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) completed a joint effort to clarify revenue recognition principles and establish common revenue standards for Generally Accepted Accounting Practices (GAAP). The new standard is documented in Accounting Standards Codification (ASC) No. 2014-09, *Revenue from Contracts with Customers (Topic 606)*, hereafter referred to as ASC 606.<sup>20</sup> The intent is to improve comparability of revenue recognition practices, to remove inconsistencies and weaknesses, and to provide more useful information for people who use financial statements to assess financial soundness or risk. ASC 606 is having an impact on accounting reports for the health care industry, including CCRCs and Life Plan Communities. If implementation of the standards causes a restatement of an operation’s financial position, the question for lenders or residents is whether this is a temporary effect.

In response to the changes, the American Institute of CPAs (AICPA) established a task force on revenue recognition. On February 1, 2018, the AICPA Health Care

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U.S. 1369 (1978) (denying stay of proceedings against a religious organization that asserted it could not be sued as a “legal” entity).

16. See <http://www.insurance.state.pa.us/dsf/ccfsearch.html>.

17. See [https://www.insurance.pa.gov/Documents/CCRC\\_guide.pdf](https://www.insurance.pa.gov/Documents/CCRC_guide.pdf).

18. See <https://www.mylifesite.net/>. The company was developed in part by Brad Breeding, a financial planning specialist, as a response to client interest; it offers comparative information, including “financial ratios and industry benchmarking numbers,” for a modest monthly or periodic fee.

19. See 2017 North Carolina CCRC Reference Guide at [http://www.ncdoi.com/SE/Documents/CCRC/CCRC\\_Guide\\_2017.pdf](http://www.ncdoi.com/SE/Documents/CCRC/CCRC_Guide_2017.pdf).

20. See [https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176164076069&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176164076069&acceptedDisclaimer=true).

Entities Revenue Recognition Task Force released its working draft on the application of FASB ASC 606 *Revenue From Contracts With Customers* (hereafter referred to as Task Force Draft).<sup>21</sup> The Task Force Draft focused specifically on Type A life-care contracts.<sup>22</sup> The report systematically addressed performance obligation, pricing, and revenue recognition issues associated with the implementation of the five-step revenue recognition model.<sup>23</sup> A review here of three of these steps may help readers recognize the potential complexity and significance of contractual obligations in CCRCs.

For example, in determining how best to account for fees in operations such as CCRCs, step 2 of the Task Force Draft approach requires the accountant (or similar professional, such as an actuary) to identify the contract's performance obligations. A performance obligation is a promise to transfer goods or services to a customer. The Task Force concluded that for CCRC Type A contracts, the promised good or service is a stand-ready obligation to provide a service such that the resident can continue to live in the CCRC and access the appropriate level of care.<sup>24</sup> The Task Force observed that a nonrefundable entrance fee paid by a resident under a Type A life-care contract contains a material right.

As another example, step 3 of the Task Force Draft requires the accountant to "determine the transaction price." Transaction price is defined as the amount of consideration the entity expects to be entitled to in exchange for transferring promised goods or services to a customer, excluding taxes (or other amounts collected on behalf of third parties). The Task Force concluded that *monthly fees* should be included in the transaction price as services are provided. For Type A life care residents, a *nonrefundable entrance fee* generally entitles the resident to the use of residential facilities and other amenities as well as access to health care services and is thus considered a component of the transaction price. *Refundable entrance fees*, however, are not considered a component of the transaction price. These refundable fees are to be recognized as a liability. The liability should be measured at the amount to which the entity does not expect to be entitled.

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21. See <https://www.aicpa.org/content/dam/aicpa/interestareas/frc/accountingfinancialreporting/revenuerecognition/downloadabledocuments/working-drafts/healthcare/health-care-8-3-ccrc-performance-obligations.pdf>.

22. CCRCs often refer to Type A, B, or C labels for types of housing and service-contract in use. Type A was a label associated with contracts covering housing plus life-time care or promises of extensive services and such a label was often associated with a large entrance fee. Type B contracts covered housing with "modified" level of services, with a significant entrance fee, but usually lower in price than a Type A model. Type C was a label used for CCRCs that had a fee-for-service payment system. The increased use of various *refundable fee* contracts, however, has complicated the original labels, and the additional fact that a single community may offer multiple contract types can also cause confusion, especially among consumers. In addition, some communities licensed as CCRCs may be organized as either rental operations or as equity-based, buy-in operations (e.g. condominiums) with separate contracts covering care-related services. See generally, Ziegler and Love & Company Report, *2015 CCRC Consumer Contract Preferences and Buying Behavior Study* (Fall 2015).

23. The core principle of ASC 606 is encapsulated in the revenue recognition model. The principle states that an entity should recognize revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services.

To achieve that core principle, an entity must proceed through the following steps:

Step 1: Identify the contract(s) with a customer.

Step 2: Identify the performance obligations in the contract.

Step 3: Determine the transaction price.

Step 4: Allocate the transaction price to the performance obligations in the contract.

Step 5: Recognize revenue when (or as) the entity satisfies a performance obligation.

24. Further, if an entity grants a customer the option to acquire additional goods or services, that option gives rise to a performance obligation only if the option stated in the contract provides a material right to the customer that would not be received without entering into the contract.

As a final example of complexity, step 5 requires the accountant to recognize revenue when (or as) the entity satisfies a performance obligation. The Task Force concluded that a *nonrefundable entrance fee* including a material right should be allocated to optional future periods covering a resident's life expectancy. At the *discretion* of the CCRC's management, several allocation methods may be used to allocate the nonrefundable upfront fees to the material right. These include the following:

- ∞ Time-based measure that results in an equal amount allocated to each month;
- ∞ Cost-to-cost measure based on when the future estimated costs are transferred to a CCRC resident; or
- ∞ Allocate the transaction price to the option periods by reference to the goods or services expected to be provided and the corresponding expected monthly fee.

The Task Force Working Draft remained open for comment until April 2, 2018. While some CCRCs have already implemented changes in their reporting of revenues,<sup>25</sup> implementation is still underway for many CCRCs. The potential for companies to exercise "discretion" as outlined above will be critical. It may be too early to know the full impact of these accounting rule changes.

## IV. MARKETING CHALLENGES

An ongoing challenge for continuing care providers is to generate and maintain trust among current residents and future customers who would probably prefer not to need this or any senior living option. CCRCs, even with a Life Plan Community label, can be complicated products to market without a reputation for trustworthiness.

On the one hand, operators usually offer attractive, security-conscious campuses with purpose-built housing options. Most communities are designed to encourage residents to take part in social activities, with multiple recreation sites, restaurant-style dining, club rooms and workout or sports options. They may offer educational programs, worship services, banking, dental and daily health services onsite.

On the other hand, the pricing, which may involve high entrance fees plus monthly service fees that typically generate annual increases above the CPI, are justified by a core premise, that these communities will be able to meet future needs of their customers as they age. Many offer specific service or housing options for those who develop neurocognitive impairments, including Alzheimer's disease.

The need for substantial operational funds that go far beyond mere maintenance of infrastructure must be balanced against what the market will support. The profile of prospective clients is changing, as future seniors may be less likely to have robust retirement assets, such as defined benefit pensions and high-equity family homes to sell.

Industry-side spokespersons often comment: "If you have seen one CCRC, you've seen one CCRC."<sup>26</sup> This implies that every operation is unique. While this may be true, especially when looking at the different types of pricing and services options, the variation can also cause confusion among consumers, especially those who seek

25. Standard implementation for public entities annual and interim reporting periods began after December 15, 2017, and for all others annual reporting periods began after December 15, 2018.

26. Catey Hill, *The Confusing Costs of Continuing Care*, MARKETWATCH, (Jan. 27, 2013) (quoting Steve Maag, now with LeadingAge) <https://www.marketwatch.com/story/how-to-calculate-costs-of-a-continuing-care-residence-1296022985031>.

transparency in order to evaluate their investment and understand the potential for risk. Here are three of a variety of factors that affect the current market for CCRCs.

### A. The Importance of Occupancy Rates

Occupancy levels, sometimes referred to as census counts, are a recognized indicator for financial health in the overall senior living sector. The National Investment Center for Seniors Housing and Care (NIC) is a self-described leading provider of data for the senior housing and care industry.<sup>27</sup> The organization tracks and provides national reports on occupancy, rental rates, demand, supply, and construction data for a wide range of providers, including independent living, memory care, skilled care, and continuing care communities. In April 2018, NIC reported that occupancy levels across the entire senior housing market fell to 88.3% nationwide. It also observed that “[t]his was the lowest occupancy rate in six years. Notably, assisted living occupancy fell to a record low rate of 85.7% in the first quarter [of 2018].”<sup>28</sup>

In contrast, looking at just CCRCs and LPCs, the national average occupancy rates during the last five years have hovered slightly above the 90% mark. Occupancy in nonprofit operations leads occupancy in for-profits by about 5%. In March 2018, NIC reported the 2017 national average for occupancy in not-for-profit CCRCs was just over 92%, while the national average for occupancy in for-profit CCRCs was just over 87%.<sup>29</sup> Further, NIC reported that “[e]ntrance fee model[s] continue to outperform rental CCRCs” in terms of occupancy.<sup>30</sup>

Most market watchers in this industry look at 90% occupancy as one threshold indicator of financial health for CCRCs. For example, in March 2018, a New York Times reporter, after interviewing a wide range of sources on the senior living industry, identified seven key indicators for financial health of CCRCs. One of the seven was stable occupancy numbers. For occupancy, the writer summarized: “If 90 percent or more of a home’s rooms are full—and have been that way for the past few years—that suggests it’s doing something right. This is especially important at C.C.R.C.s promising refunds. . . .”<sup>31</sup>

At the time of this writing, annual reports available on the Pennsylvania Department of Insurance website include occupancy numbers reported by individual operators. However, there is no public reporting by the Insurance Department of state or regional occupancy statistics, making it difficult for consumers to make comparative assessments of this key indicator.

### B. Rising Costs and Rising Fees for Residents

Investment banking company Ziegler reported in late 2017 that a survey of 160 chief financial officers for nonprofit communities indicated plans to raise monthly fees for existing independent living residents an average of 3.1% during 2018.<sup>32</sup> The “median increase” at CCRCs for each of the past five years has been 3%.<sup>33</sup> Similarly,

27. <https://www.nic.org/about-senior-housing-investment>.

28. B. Mace, *Five Key Takeaways from NIC’s First Quarter 2018 Seniors Housing Data Release* (Apr. 25, 2018) <http://www.nic.org/blog/five-key-takeaways-from-nics-first-quarter-2018-seniors-housing-data-release/>.

29. Peck, *supra* note 11.

30. *Id.*

31. Peter Finch, *7 Ways to Judge a Retirement Community’s Financial Health*, THE NEW YORK TIMES (Mar. 9, 2018) <https://www.nytimes.com/2018/03/09/business/retirement-community-financial-health.html>.

32. See Ziegler Senior Living Finance Z-News, *Resident Monthly Fee Increases* (Nov. 13, 2017) [https://www.ziegler.com/z-media/3705/sl-znews\\_11132017.pdf](https://www.ziegler.com/z-media/3705/sl-znews_11132017.pdf).

33. *Id.*, see also Lois Bowers, *CCRC monthly rate increases for 2018 will average 3.1%*, MCKNIGHT’S NEWS, (Nov. 19, 2017) <https://www.mcknightsseniorliving.com/news/ccrc-monthly-rate-increases-for-2018-will-average-31/article/708436/>.

a national report on senior housing by real estate investment advising company Marcus & Millichap for 2017 concluded that stable occupancy trends in CCRCs “will facilitate another year of 3% growth in the average asking rent.”<sup>34</sup>

Fees and fee increases are also an important indicator of whether a community is doing adequate maintenance and making capital improvements necessary to attract new residents. Lower than average increases or flat spending may create a financial trap for future operations—and future residents.

The above discussion is mostly about monthly fees, which are typically viewed as funding daily operations. Many CCRCs also depend on high initial entrance fees and here again prices are rising, with a great deal of variation in the structure of such fees. Some of the variation depends on whether the providers are offering some form of “life care” contracts (sometimes referred to as Type A Contracts) or are offering fully or partially refundable entrance fee contracts (which may be treated as Type C, or fee-for-service contracts, if the refundable fees are not reserved or treated as offsetting future care). My LifeSite reports that in 2016 its database of over 500 providers across the county showed a range of average entrance fees, with \$107,277 on the lower end of the spectrum and \$427,054 on the higher end.<sup>35</sup> Market advising firm Marcus & Millichap reported that average CCRC entrance fees last year were rising at “a healthy clip, ending 2017 at roughly \$330,000, an annual climb of 5.0 percent.”<sup>36</sup>

### **C. Alternative Services: Continuing Care at Home Contracts**

CCRCs are constantly offering different types of contracts, often in response to perceived consumer trends. Some existing CCRCs are developing additional service options, using contracts to offer “Continuing Care at Home” (“CCaH”), alternatively marketed as “Continuing Care Without Walls.” CCaH contracts reflect the understandable desire of many to age in place and not leave home. At their best, CCaH providers draw upon expertise learned in CCRC settings to provide similar care coordination in private homes and serve a much wider pool of potential clients.

Pennsylvania is among the first states to license this concept under the same laws and regulations used for traditional brick and mortar CCRCs. Under this regulatory theory, Pennsylvania has recognized the need for protection against unreasonable risks of loss connected to pre-payment for promised future services, without regard to where the services are provided. As “disclosure” (or lack thereof) is once again important, the contracts are key. Families can benefit from well-prepared attorneys who have taken the time to understand CCaH contracts. Each CCaH provider usually offers a variety of contracts or plans. The overall fees, as one would expect, are lower than for traditional CCRCs.

Under one type of plan, CCaH contracts have an upfront “entry” fee, plus monthly service fees. In some instances, a company may charge annual fees rather than a single, up-front entry fee. In Pennsylvania, each of the CCaH providers also operates CCRCs. Therefore, the CCaH contracts sometimes offer priority admission to the related CCRC if residential care is desired.

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34. Marcus & Millichap, National Report, Senior Housing Research (issued for First Half 2018) <http://www.marcusmillichap.com/research/researchreports>.

35. Brad Breeding, *Senior Living Pricing: Snapshot of Average Cost of Senior Living*, My LifeSite Blog (Feb. 16, 2016) <http://www.mylifesite.net/blog/post/senior-living-pricing-snapshot-of-average-cost/>.

36. Marcus & Millichap, *supra* note 34.



The marketing challenge for CCaH is similar to the marketing challenge for the long-term care insurance industry, asking for prepayment for a product the customer hopes not to need. CCaH contracts can offer something that traditional long-term care insurance did not offer: the “presence” of a vibrant provider of care services near one’s home with hope for the same quality of care; however, CCaH contracts do not necessarily promise to use the staff or services from the related CCRC. They may turn to third parties, such as home care agencies, in the search for workers.

Pennsylvania’s longest licensed CCaH company is *Friends Life Care at Home*, a not-for-profit entity based in Montgomery County.<sup>37</sup> It was organized in 1985 as an outgrowth of a traditional CCRC. Offered services include home care, adult day care, emergency response systems, home-delivered meals, or care if transitioned into a nursing home or assisted living facility. *Friends Life Care at Home* currently offers a variety of plans, including “life care plans,” “home care plans,” and “traditional life care plans.” For the first two types of plans, the client pays annual fees that depend on the benefits “selected” at time of enrollment. The term of benefits chosen, from one to seven years, affects the price. Under a traditional life care plan, the members pay an upfront entry fee, monthly fees, and a portion of their costs of care as copayments. According to documents filed with the Department of Insurance in May 2018, *Friends Life Care at Home* has approximately 2,500 contracts in effect.<sup>38</sup>

Pennsylvania has also licensed the following four CCaH providers: *Longwood at Home, Inc.*, in western Pennsylvania;<sup>39</sup> *SmartLife via Willow Valley* in Lancaster, Pennsylvania;<sup>40</sup> *Phoebe’s Continuing Care at Home Program: Pathstones by Phoebe*, in Lehigh, Northampton, Bucks and Berks counties;<sup>41</sup> and the newest CCaH program, *Meadowood Life Plan at Home, LLC*, in Montgomery County.<sup>42</sup>

## V. RESIDENT/PROVIDER RELATIONS

Legal issues arising between residents and providers in Pennsylvania operations include the following.

### A. Authority to Transfer

Disputes at CCRCs sometimes arise over transitions or transfers between levels of care. Typically, the dispute arises when a provider asks the resident to transition to a new unit with a higher level of care, a move that will also usually trigger higher monthly fees. Sometimes the individual resident or the resident’s family resists, taking the position that additional companionship or support in independent living would be adequate to keep the resident safely at that level.

Where there is a dispute, the contract terms governing transitions are critical. Pennsylvania law merely provides that the continuing care contract shall be written in “nontechnical language easily understood by a lay person and shall . . . [d]escribe the health and financial conditions upon which the provider may have the resident relinquish his space in the designated facility.”<sup>43</sup>

37. See <https://www.friendslifecare.org/>.

38. See also new partnership emerging at <https://www.spiritrustlutheranlife.org/>.

39. See <https://www.longwoodathome.org/>.

40. See <http://www.smartlifefewv.org/>.

41. See <http://pathstonesbyphoebe.org/>.

42. See <http://meadowood.net/meadowood-at-home/>.

43. 40 P.S. §3214(a)(3).

Contracts will sometimes provide that any decision on a transfer will be made in “consultation” with the resident and the family. The facility may also promise to consult with residents’ personal physicians. However, the critical language is the provider’s retained authority to make the ultimate decision. Look for language such as:

Facility may relocate you to another residence, or to assisted living or a nursing care center if it determines, *in its sole discretion*, that such a move should be made for your health and safety or for the general welfare of other residents.

Contract language that gives the provider the “sole discretion” to make decisions on transfers in the best interest of the safety of the resident or other residents raises the question about whether there is a corresponding obligation to take protective action. In one Pennsylvania matter, the issue was not whether the decision to transfer was unwarranted, but rather whether the facility failed to make a warranted transition to a more secure level of care for a resident who was experiencing symptoms of cognitive impairment.<sup>44</sup>

According to news reports, in March 2017, 85-year-old Ellen Hinds died of complications of hypothermia after allegedly becoming trapped overnight outside of her “independent living” unit at a licensed CCRC in Valley Forge, Pennsylvania.<sup>45</sup> The facility is large, with more than 700 independent living units, plus assisted living and skilled care units. It also had designated residential facilities for dementia care.

After the death, family members filed suit for wrongful death against the CCRC, the management company for the CCRC, and the private security agency on duty that evening. The family members alleged failure to provide appropriate care coordination for their mother.<sup>46</sup> The plaintiffs pointed to provisions of the contract and argued there was notice to the facility of their mother’s history of worsening dementia with behavioral disturbances, including episodes of wandering and insomnia. The defendants have denied all allegations of liability.<sup>47</sup>

## **B. Should Pennsylvania Authorities Have Powers to Investigate Resident Welfare Complaints?**

What happens at a CCRC if a resident is visibly struggling in small ways, perhaps missing meals, medications, or having problems paying bills? What happens—or should happen—if the resident in question lives in an “independent living” unit rather than in a level offering more assistance with activities of daily living?

A complaint or report of a concern about appropriateness of level of care appears to have been at the heart of an investigation made at the behest of Pennsylvania’s Department of Human Services at a CCRC in Westmoreland County in 2017-18. This investigation, in turn, prompted a state legislator to introduce Pennsylvania House Bill 2291 on April 23, 2018. The stated goal for this bill was to “allow seniors

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44. Stacey Burling, *His Elderly Mother Wandered Out Into the Cold and Died. Whose Fault Was It?*, THE PHILADELPHIA INQUIRER (Feb. 9, 2018) <http://www.philly.com/philly/health/health-news/dementia-and-wandering-can-be-deadly-alzheimers-lewy-body-20180208.html>.

45. *Id.*

46. *Rowe v. Shannondell, Inc.*, Cause No. 7-26212, filed November 2, 2017 in Montgomery County Court of Common Pleas. The suit was pending at the time of preparation of this article.

47. *Id.*

the opportunity to live in conditions that are both more comfortable and inclusive of daily activities, while at the same time preserving their health and welfare.”<sup>48</sup> If passed, the revision would have removed continuing care retirement communities from the definition of “personal care” at 62 P.S. §1001 (governing licensing provisions of the Human Services Code) and thus eliminate state authority to conduct similar investigations in the future.<sup>49</sup> The proposed change would also have affected senior housing in public housing units. The bill was approved by the Pennsylvania House, but failed to reach a vote in the Senate in the waning days of the 2017-18 legislative session.<sup>50</sup>

### C. Can CCRCs Limit Access for Impaired Residents?

A related issue about the authority of CCRCs to take actions affecting the lives of residents can arise when healthier residents object to other residents’ use of walkers, wheelchairs, or other assistance in public spaces. Sometimes residents object to the presence of certain residents in common areas, especially if they are displaying signs of cognitive impairment.

A CCRC’s handling of such concerns can trigger claims of violation of the Federal Fair Housing Act, 42 U.S.C. §§3601-3619, or of discrimination under the Americans with Disabilities Act. Across the country, several such cases involving CCRCs have been filed and (mostly) settled in favor of the residents in need of assistance. In some instances, the U.S. Department of Justice filed the complaints, and the settlements have included consent decrees whereby the facility must provide specific “reasonable accommodations.”

For example, in *USA v. Fort Norfolk Retirement Community, Inc., d/b/a/ Harbor’s Edge*, the Justice Department filed a Fair Housing Act case in federal court in Virginia against a CCRC with 163 independent living units, 33 assisted living apartments, a 33-bed skilled nursing unit and a 17-bed memory support unit. The 2015 consent decree that arose from the settlement required the CCRC to make reasonable provisions for all residents to have access to common areas, including the dining rooms, without intimidation or threats connected to their use of wheelchairs, walkers, or companions to assist them. The CCRC also agreed to payment of \$350,000 as damages for affected individuals and \$40,000 to the government as a civil penalty.<sup>51</sup>

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48. Memorandum from Representative Eli Evankovich, Representative George Dunbar, and Representative Eric R. Nelson to All House Members, dated March 19, 2018, regarding the introduction of the “Independent Senior Living Facility Privacy Act.” See <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=25442>.

49. See e.g., 62 P.S. §1016, regarding DPS’s “right to enter, visit and inspect” facilities defined under section 1001 of the Human Services Code for the “purpose of determining the suitability of the . . . premises.” Compare Older Adults Protective Services Act regarding authority to investigate reports of need for protective services, including investigations involving licensed facilities. 35 P.S. §10225.303.

50. Representative Evankovich’s Memorandum, *supra* note 48, further explains: “To us, it seems like a violation of privacy for the older adults who chose to live out their lives in a planned aging community which suites [sic] their needs. One of the many amenities of living in a CCRC is the oversight, assistance and wellness checks done by dedicated staff members and other residents. After months of talks to resolve the matter, we decided to introduce legislation to ensure these residents can live freely in their apartments on these monitored campuses without fear of inspection from state agencies unless there is a reason to suspect abuse or serious neglect.”

51. *United States v. Fort Norfolk Retirement Community, Inc.*, No: 2:15CV200 (E.D. Va 2015) (Consent Order), copy in possession of author Pearson, and available online at <https://www.justice.gov/file/fort-norfolk-consent-order/download>.

## D. Refundable Fees

CCRCs with large entrance fees often generate questions.<sup>52</sup> Above we identified some of the accounting questions associated with refundable fees. From a resident perspective another troublesome issue can be timing of refunds.

Refundable fees, whether offered as a declining balance refund over a period of years from the beginning of the residency, or as a percentage or full refund at the end of residency, are subject to key contract terms. Typically, the refund is made without interest, and subject to deductions for “costs of cleaning, refurbishing, including but not limited to replacement of carpeting, spackling and repainting of walls and other appropriate repairs.”

Further, typical language, as demonstrated in a contract for a Montgomery County, Pennsylvania CCRC, provides: “You are entitled to a refund of the Entrance Fee you paid for your Residence after the termination of this agreement, under the following circumstances. . . .” The contract then describes refunds available under different circumstances, such as a seven-day initial rescission period, or after payment of the first monthly fee following death or other departure. More subtle language comes later, providing the company “will pay any refund to which you are entitled under this agreement upon the reassignment of the Residence and the receipt of the new Entrance Fee for the Residence.”<sup>53</sup> The former resident, or her estate, however, will not be in control of how or when the apartment is to be marketed or “reassigned” to a new resident, and Montgomery County, near Philadelphia, is one of the most highly concentrated CCRC markets in the nation.

In one well-publicized dispute over timing of refunds, a 79-year old resident of a New Jersey CCRC was finally repaid more than eight years after vacating her apartment.<sup>54</sup> Delays in refunds have led some states to regulate the timing and amount of refunds.<sup>55</sup> In 2018, responding in part to advocacy by ORANJ, the Organization of Residents Associations of New Jersey,<sup>56</sup> the governor of New Jersey signed hard-fought legislation mandating that refundable fee contracts in the future must be paid according to a preference list based on a “first out, first repaid” system.<sup>57</sup>

Absent legislation mandating time limits for refunds, CCRCs may have few incentives to market units that are subject to refundable fees. This can be especially true when providers are expanding operations and they have new, unencumbered units to offer. The market may be soft for the size and type of the “old” apartment and any “resell” would require the provider to lose money on the refund transaction.

Some may be tempted to argue any refund delay would be similar to delays in liquidating an estate for heirs or beneficiaries of a deceased benefactor. The deceased’s

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52. See Paul Gordon, *SENIORS’ HOUSING AND CARE FACILITIES: DEVELOPMENT BUSINESS AND OPERATIONS*, 3d Ed., Vol. I and II, pp. 395-96 (1998). Gordon is an experienced California attorney who has represented many CCRCs and senior living providers.

53. Residence and Care Agreement for a CCRC located in Montgomery County, Pennsylvania, copy on file with authors.

54. Karin Price Mueller, *Retiree Gets Her Money, But What About Everyone Else?*, NEW JERSEY BUSINESS, published Feb. 1, 2018, at [https://www.nj.com/business/index.ssf/2018/02/retiree\\_gets\\_her\\_money\\_but\\_what\\_about\\_everyone\\_els.html](https://www.nj.com/business/index.ssf/2018/02/retiree_gets_her_money_but_what_about_everyone_els.html).

55. “Florida, Maine, and Massachusetts require entrance fees to be amortized with the unamortized portion refunded according to a set schedule.” Gordon, *supra* note 52 at 395.

56. <https://www.oranjccrc.org/>.

57. N.J.S.A.52:27D-360.7 (as amended June 25, 2018, effective Nov. 15, 2018). See also Katherine C. Pearson, *New Jersey Governor Signs New Law Helping CCRC Residents Get More Timely Refunds*, ELDER LAW PROF BLOG, Aug. 27, 2018, [https://lawprofessors.typepad.com/elder\\_law/2018/08/new-jersey-governor-signs-new-law-helping-ccrc-residents-get-more-timely-refunds-of-refundable-fees.html](https://lawprofessors.typepad.com/elder_law/2018/08/new-jersey-governor-signs-new-law-helping-ccrc-residents-get-more-timely-refunds-of-refundable-fees.html).

home may be difficult to sell. However, in such circumstances the house could be rented or occupied by a successor in interest, or the executor will be expected to use best efforts to sell the property.

Pennsylvania law does not currently regulate timing of refundable fees for CCRCs. Pennsylvania's common law does, however, recognize an implied obligation of good faith and fair dealing for contractual parties.<sup>58</sup> The classic contract case of *Wood v. Lucy, Lady Duff Gordon*,<sup>59</sup> comes to mind, where Cardozo upheld a contract against an allegation that any marketing obligation was illusory, finding an implied promise the agent would use reasonable efforts to market the goods in question.<sup>60</sup>

## VI. FINANCIAL SOLVENCY

As described in the 2011 Quarterly article on CCRCs in Pennsylvania,<sup>61</sup> the financial crisis of 2008-10 hit the CCRC industry fairly hard, especially as it coincided with a phase of expansion by some of the nation's larger CCRC developers. Residents typically use the equity from the sale of their long-time homes to cover large entrance fees for CCRCs. When homes were not selling, new residents were slow to move into CCRCs. In 2009, Pennsylvania witnessed CCRC residents losing their "refundable" entrance fees during the bankruptcy of Covenant of South Hills Inc., near Pittsburgh.<sup>62</sup> Fortunately, that CCRC reorganized with a new company in control, and residents were not also forced to move. Individual residents made separate claims against the former parent company (B'nai B'rith International), certain directors, and the management company, alleging fraudulent misrepresentation and other theories; the claims were eventually the subject of financial settlements on confidential terms.<sup>63</sup>

Review of more recent financial disclosure documents for CCRCs in Pennsylvania shows that some operations have reorganized (both within and outside of bankruptcy courts). The market has been strong enough to absorb troubled operations, especially as the financial crisis began easing in 2011. Consolidations, mergers, and acquisitions continue nationally and in Pennsylvania.<sup>64</sup>

One recent Chapter 11 reorganization in Pennsylvania, filed in 2017, involved interesting facts:

∞ Village of Laurel Run<sup>65</sup> was a fee-for-service, for-profit CCRC;

58. *Orbisonia-Rockhill Joint Municipal Authority v. Cromwell Township, Huntingdon County*, 978 A.2d 425, 429 (Pa. Cmwlth. 2009) ("In the absence of an express provision, the law will imply an agreement by the parties . . . to do and perform those things that according to reason and justice they should do to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.") (citations omitted).

59. *Otis F. Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (N.Y. 1917).

60. See also Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§201-1 *et seq.*

61. Parson and Wilkins, *supra* note 4.

62. Elizabeth Olson, *Concerns Rise About Continuing Care Enclaves*, NEW YORK TIMES, Sept. 14, 2010, <https://www.nytimes.com/2010/09/16/business/retirementspecial/16CARE.html>.

63. Brian Bowling, *Lawsuit Against Mt. Lebanon Retirement Community Settled*, TRIBLIVE, Mar. 28, 2011, [https://triblive.com/x/pittsburghtrib/news/pittsburgh/s\\_729507.html](https://triblive.com/x/pittsburghtrib/news/pittsburgh/s_729507.html).

64. *Levin Associates* publishes quarterly and annual reports on M & A activity in "seniors housing," as well as health care. See e.g., Steve Monroe, *Seniors Housing and Care Mergers & Acquisitions Volume Slumped in Q4, 2017*, published January 12, 2018, <https://products.levinassociates.com/aboutus/press-releases/seniors-housing-care-ma-volume-slumped-q42017pr1122018/>.

65. Jim Hook, *Village of Laurel Run Operator Files for Bankruptcy*, PUBLIC OPINION (part of USA TODAY NETWORK), published December 17, 2017, reporting on the bankruptcy filed in the Southern District of West Virginia, <https://www.publicopiniononline.com/story/news/2017/12/11/village-laurel-run-operator-files-bankruptcy/942082001/>.

- ∞ It was operated by Passage Healthcare, based in Puerto Rico, and its insolvency emerged even before the September 2017 hurricanes;
- ∞ The property's owner, Welltower, Inc., is a real estate investment trust (REIT) in Ohio that requested a receiver to take over operation of Village of Laurel Run and other Passage properties in West Virginia;
- ∞ Paramount Health Resources took over management in February 2018; and
- ∞ As sometimes happens with a reorganization, the operation changed names, from Village of Laurel Run to Paramount Senior Living in Fayetteville.<sup>66</sup>

A fee-for-service CCRC, such as *Village of Laurel Run*, that winds up in trouble suggests operational management issues rather than deeper solvency problems for CCRCs overall; however, an insolvency in any individual CCRC can have ripple effects in the industry. Either way, it seems likely that future prospective residents of CCRCs will expect greater transparency from operators, even as existing residents, facing higher service fees and questions about capital adequacy, also seek greater transparency and better accountability for use of such fees.

More open access to financial information for all CCRCs in Pennsylvania, made possible by the Pennsylvania Department of Insurance with its new online directories and its plans to implement standardized information summaries, creates an opportunity for more complete analysis of key measures of solvency, and for comparative financial analysis.<sup>67</sup> Until recently, such multi-site data has tended to be in the hands of actuaries,<sup>68</sup> attorneys or accounting professionals hired by CCRCs for internal purposes, and thus not widely available to outside researchers nor easily available to consumers. The authors of this article look forward to undertaking a deeper review of this public information for future research and publication.

## VII. CONCLUSION

At the October 2018 annual meeting for LeadingAge held in Philadelphia, a keynote speaker addressed the audience of senior care professionals on how "trust" is an essential element of any business. Harvard Business Professor Frances X. Frei described a triangular model for trust, with three components; "authenticity" was at the top, and "logic" and "empathy" held the wing-points.<sup>69</sup> Professor Frei directed the audience to participate in pairs of two in an exercise. She asked the audience to describe an instance where trust was missing in a key business transaction or relationship, and then to identify whether the trust involved a "wobble" of one of the three elements. Professor Pearson's seatmate, someone she did not yet know but who happened to work for a CCRC, described an instance where a lack of logic contributed to a negative vote on a proposed business plan by the CCRC's governing

66. Jim Hook, *Paramount Health Takes Over the Village of Laurel Run*, PUBLIC OPINION (part of USA TODAY NETWORK), published February 8, 2018, <https://www.publicopiniononline.com/story/news/2018/02/08/paramount-health-takes-over-village-laurel-run/320711002/>.

67. See Jack Cumming, *Straight Talk*, a presentation evaluating publicly available information on non-profit Massachusetts CCRCs for an annual meeting of the Massachusetts Life Care Residents Association, on Mar. 23, 2018 (copy of presentation materials on file with authors). Mr. Cumming is an experienced actuary and a resident at a CCRC in California.

68. See e.g., website for A.V. Powell & Associates, <http://www.avpowell.com/>. See also Gregory T. Zeblosky, *An Introduction to Continuing Care Retirement Communities*, July 28, 2014. This article is by an experienced actuary discussing the significance of the actuarial balance sheets, actuarial pricing analysis, actuarial cost flow projections, and the importance of financial standards for determining solvency, <http://www.milliman.com/insight/2014/An-introduction-to-continuing-care-retirement-communities/>.

69. See faculty profile for Frances X. Frei, <https://www.hbs.edu/faculty/Pages/profile.aspx?facId=6587>.

board. She summarized, “We wanted a better, actuarial study of our financial plan for the future. The original plan wasn’t trustworthy—it seemed deficient in logic.” The exercise was a reminder that all three components of trust are needed for CCRCs and Life Plan Communities to thrive. “Trust” is needed by governing boards and is even more important for residents.

Pennsylvania has assigned regulatory oversight for the financial operation of CCRCs to the Department of Insurance. Pennsylvania, in large part, uses a “disclosure” approach to oversee risk for CCRCs, which puts consumers and their advisors into the shoes of first-line evaluators. In the last three years, the Department appears to be newly committed to using statutorily-mandated disclosures to provide the public with more transparent information, permitting public review, comparison, and consideration of the different business models at work in Pennsylvania. Such a path to greater transparency, if supported by the industry, should help continuing care retirement communities, by any name, attract new clients, younger clients, and more diverse clients.