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Exercising Control or Giving It Up? What Elder Law Attorneys Should Know About Continuing Care Retirement Communities

By Yvonne Troya, JD

About the Author

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I. Introduction

> One couple sold their home in Abington, Pa. in just one week and was eager to commit to a CCRC in the region. "Most pick a place they like and say, '[C]an I write a check, Irvin?'"[1]

> The only other decision more important than making a CCRC contract decision is deciding who[m] you are going to marry. It is a lot more difficult to divorce a CCRC.[2]

A prominent theme familiar to elder law attorneys is every client's wish to retain as much control as possible through the aging process.[3] With the shifting of so many life variables, including physical health and sometimes mental acuity, income, and the potential need for future care, aging is anxiety-provoking for most people. As older adult clients think about their options for the future, continuing care retirement communities (CCRCs), also known as life plan communities, can seem like the ultimate beacon of hope.

CCRCs, with their curated campuses and promises of community and access to long-term medical care, are very appealing.[4] The decision to join a CCRC reduces the anxiety of older adults faced with the unknowns of aging in place in their homes and provides them with a welcome sense of control. Joining a CCRC means that older adults will not need to rely on adult children or become a burden to them.[5] Gone is the worry about selecting the right assisted living facility or, God forbid, nursing home if the need were to arise. For elder law attorneys, the CCRC option may also provide us with welcome relief, something positive and hopeful to tell our clients about long-term planning.

Indeed, CCRCs play an important role in the long-term care landscape.[6] Surveys indicate that most CCRC residents report feeling satisfied with their decision to join a CCRC.[7] However, prospective residents

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1 *See* Elizabeth O'Brien, *Know Your Retirement Community's Exit Options,* MarketWatch (June 19, 2013), https://www.marketwatch.com/story/retirement-communities-read-the-contract-2013-06-19 (accessed Nov. 16, 2021) (Irvin Schorsch III is an investment consultant who counsels clients about joining CCRCs.).

2 Interview With Jim Haynes, Pres., Natl. Continuing Care Residents Assn. (NaCCRA) (Dec. 10, 2020).

3 David Solie, *How to Say It to Seniors* 19 (4th ed., Prentice Hall Press 2004).

4 Typically, active older adults enter a CCRC to experience a vibrant independent living community and live in attractive independent units, with assisted living, nursing home care, and possibly memory care available on the premises or nearby to provide for future health and long-term care needs.

5 Mary Anne Erickson & John A. Krout, *Planning and Experiencing the Move to a Continuing Care Retirement Community,* 3 Marq. Elder's Advisor 9, 10 (2001), https://core.ac.uk/download/pdf/148686624.pdf (accessed Nov. 16, 2021).

6 Baker Tilly, *infra* n. 111 (As of September 2019, approximately 1,950 CCRCs existed in the United States.); Cal. Dept. of Soc. Servs., *Non-Profit Providers/Applicants* (Nov. 3, 2020) (According to the California Department of Social Services (CDSS), the state CCRC regulator, as of November 2020, 79 CCRC providers were operating 110 CCRCs in California.). Because the author of this article is a California practitioner, the article will focus on California law where relevant.

7 *See* Mather Inst., *The Age Well Study: Investigating Factors Associated With Happiness & Life Satisfaction in Residents of Life Plan Communities, Year 3 Report* 37 (2020) (The first year of a multiyear study of more than 5,000 independent living residents in 122 life plan communities found that 92% of study participants were "completely" or "very" satisfied with their senior living community.); *see also* Mather Inst., *The Age Well Study: Comparing Wellness Outcomes in Life Plan Communities vs.*

should understand that the stakes in joining a CCRC are high. The decision to enter a CCRC is one of the most important decisions an older adult can make: It may tie up the majority of the senior's assets, sometimes irrevocably; it implicates future health care; and it may bind the senior to a particular community for years and possibly for the rest of their lives.[8]

For many older adults, the CCRC commitment is considered worthwhile as long as it provides them with long-term security and peace of mind. However, many prospective CCRC residents do not understand that the structure of CCRCs, as crafted by market forces, can put residents in a vulnerable position. Additional factors exacerbate this vulnerability and may result in CCRC residents giving up control in ways they had not anticipated.

What is it about CCRCs that places residents in a vulnerable position? As described in Section II of this article, the structure of CCRCs creates an imbalance of power between the resident and the provider. CCRC operations must be carefully calibrated for a CCRC to function properly. In addition, CCRCs are structured such that residents are responsible for providing the revenue needed to sustain the entire CCRC system. Ownership and affiliations of CCRCs, particularly for-profit CCRCs, can make it difficult for residents to know with whom they are contracting, protect the CCRCs from liability, and mask the CCRC's true financial condition. The confusing range of CCRC structures, services, and contract types adds to the difficulty that prospective residents face in understanding the risks and heightens the imbalance that exists in the provider-resident relationship.

As covered in Section III, additional complicating factors include the powerful allure of CCRCs, limited legal protections for residents, and the limited representation of residents in CCRC decision-making. Additionally, it is difficult for residents to determine the financial health of CCRCs before, and even after, they join. Thus, residents face a greater risk of ceding their legal rights and finances in the long term to an entity they do not fully understand and giving up more freedom than they had anticipated.

It is important that we, as elder law attorneys, are prepared to properly counsel our clients about the nature of this power dynamic and how it may affect their CCRC experience. Section IV of this article helps elder law attorneys better understand the unique and complex dynamics at play. This will enable us to be in a better position to educate our clients about how joining a CCRC might impact their sense of control.

II. The Inherent Structure of CCRCs Puts Residents in a Vulnerable Position

A. CCRC Operations Must Be Carefully Calibrated for a CCRC to Function Properly

Like any other business, CCRCs operate in a competitive market and are subject to typical competitive supply and demand economics, including the need to operate

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the Community-at-Large, Year 1 Report 6, 44 (2018) (Participants reported more favorable average scores on almost all measures of wellness compared with a comparable group in the community.).

8 Michael D. Floyd, *Should Government Regulate the Financial Management of Continuing Care Retirement Communities?* 1 Elder L.J. 29, 52 (1993) ("This likely will be the last major financial decision a retiree makes. Unlike many of the other major financial decisions of life, a CCRC resident often does not have the time or resources left to make up for a bad choice.").

on thin profit margins. At the same time, the financial complexity of the CCRC industry differs considerably from that of assisted living and other types of senior housing as a result of the long-term nature of CCRC operations and promises that CCRCs will provide, or provide access to, at least 1 year up to an entire lifetime of health care. Every facet of a CCRC's operations must be carefully calibrated for the CCRC to function properly.[9] Thus, when one or more facets is thrown off, the CCRC may fall out of equilibrium and put the CCRC at financial risk.[10]

The functioning of traditional entrance fee CCRCs is similar to that of insurance programs in that CCRCs receive money up front from residents to help pay for future services, future use of facilities, and future health care services that have been promised under the contract.[11] The financial health of CCRCs depends on proper calculation and recalculation of projections regarding mortality,[12] morbidity,[13] and occupancy.[14] Thus, CCRCs have significant risk characteristics that embody elements of life insurance, annuities, and health benefit programs,[15] although as operating entities they may be even more complex than insurance or other financial products.[16]

CCRCs rely on independent living units with high occupancy rates to bring in needed revenue. High occupancy and the ability to quickly fill vacancies are necessary for CCRCs to fund general operations and build financial reserves, includ-

9 Floyd, *supra* n. 8, at 40–44; *see* U.S. Govt. Accountability Off., *Older Americans: Continuing Care Retirement Communities Can Provide Benefits, But Not Without Some Risk,* GAO-10-611, 8–11 (2010).

10 *See infra* § IV(E).

11 Joe Mulligan & David W. Johnson, *Beyond Blue Plate Specials: Rethinking Senior Care Pricing,* Cain Bros.' Comments 2–3 (June 28, 2017), https://gallery.mailchimp.com/d610d4deb64a452522c5c8e05/files/d3a0eaf0-e2a0-408d-bd5b-e8f4a3d4bab0/CBC_42_062817_v2.pdf?ct=t(CB_Comments_6_28_176_28_2017) (accessed Nov. 16, 2021) ("[R]esidents are effectively buying a comprehensive long-term care insurance policy with a front-loaded real estate and lifestyle benefit."); Floyd, *supra* n. 8, at 37; Jack Barker, *The Looming Crisis in Continuing Care Retirement Communities (CCRCs),* Finance (Toptal), https://www.toptal.com/finance/fundraising/looming-crisis-in-continuing-care-retirement-communities-ccrc (accessed Nov. 16, 2021).

12 Floyd, *supra* n. 8, at 40; *Continuing-Care Communities for the Elderly: Potential Pitfalls and Proposed Regulation,* 128 U. Pa. L. Rev. 883, 898 (1980).

13 Morbidity measures the resident's level of disability, which, as it increases, requires the resident to transition to a higher level of care. *See* Andrew H. Dalton & Gregory T. Zebolsky, *Impacts of COVID-19 on Continuing Care Retirement Communities* 3 (Oct. 2020), https://us.milliman.com/-/media/milliman/pdfs/2020-articles/articles/10-5-20-impacts-of-covid-19-on-continuing-v1.ashx (accessed Nov. 16, 2021). This transition has a definite financial impact on CCRCs since higher levels of care are more expensive; therefore, CCRCs with Types A and B contracts absorb higher costs, some of which can be offset by monthly fee increases. *See* Mulligan & Johnson, *supra* n. 11, at 2; *see infra* n. 77 (defining Type A and B contracts).

14 U.S. Govt. Accountability Off., *supra* n. 9, at 9.

15 U. Pa. L. Rev., *supra* n. 12, at 898 (risk factors are comparable to pension funds); Mulligan & Johnson, *supra* n. 11, at 2.

16 Active Aging Advocs., U. Pac. McGeorge Sch. of L., *Legal Rights and Responsibilities in California Continuing Care Retirement Communities* (Mar. 21, 2013), http://amerage.com/Aging/RetirementLiving/CCRC/McGeorge%20School%20Conference/Panel3A3.html (accessed Nov. 16, 2021) (According to actuary Robert Yee, insurance projects are usually significantly simpler than CCRCs.).

ing reserves to satisfy entrance fee refund obligations, if applicable.[17] CCRC occupancy rates below 85-90% are considered low,[18] and low occupancy is considered an important indicator of financial distress for mature CCRCs. This metric, however, is less meaningful for newer CCRCs (i.e., those in operation 7 years or less) because they inevitably have lower occupancy rates in the years it takes them to get established.[19] Different factors, such as local competition and high mortgage interest rates affecting prospective residents' ability to join the CCRC, can lead to decreases in occupancy rates, which can destabilize the finances of a CCRC.[20]

Many CCRCs that offer life care contracts use flawed pricing models that underestimate the actual cost of providing higher levels of care.[21] Newer CCRCs usually have lower costs associated with new independent living residents, most of whom are in good health. However, as residents age and access assisted living, memory care, and nursing home facilities onsite, CCRC costs increase dramatically.[22] A CCRC may rely on entrance fees from new independent living residents to offset losses from providing skilled nursing care, which can, in effect, be "kicking the can down the road."[23] On their own, pricing flaws do not create material financial problems, however, multiple pricing flaws operating in tandem can result in financial peril for a CCRC.[24]

In addition, other factors, including underestimation of month-to-month operating costs,[25] high debt loads,[26] mismanagement,[27] and unanticipated

17 U.S. Govt. Accountability Off., *supra* n. 9, at 9.

18 *See* Laise, *infra* n. 93; *see also* Alwyn V. Powell, *What Do Prospects and Residents Need to Know About Actuarial Reports?* Vimeo (Mar. 5, 2019) (Unless CCRCs are in start-up mode, they should be at 90% occupancy; otherwise, it could be an area of concern.). *See* Katherine Pearson & David M. Sarcone, *Ongoing Challenges for Pennsylvania Continuing Care and Life Plan Communities,* Pa. B. Assn. Q. 5, 7 (Jan. 2019) (Ninety percent occupancy is considered to be one threshold indicator of financial health for CCRCs.).

19 In newer CCRCs, occupancy can increase rapidly. One newly expanded CCRC, The Vineyards at California Armenian Home, went from 64% occupancy to 92% occupancy between 2017 and 2019. Cal. Continuing Care Residents Assn. (CALCRA), *CCRC Annual Provider Reports: About These Reports* (2019), https://www.calcra.org/provider-reports (accessed Nov. 16, 2021) (hereinafter 2019 *Annual Rpts.*). The 2017 and 2018 CCRC annual provider reports are on file with the author.

20 For example, these can include changes to the housing market that make it difficult for prospective residents to sell their homes (*see* Baxter, *infra* n. 197) and the effects of the COVID-19 pandemic (*see* Mullaney, *infra* n. 30; U.S. Govt. Accountability Off., *supra* n. 9, at 10).

21 Mulligan & Johnson, *supra* n. 11, at 2–4.

22 McDonald Hopkins News, *Business Restructuring and Bankruptcy: The Challenges of Restructuring Continuing Care Retirement Communities,* Intl. Laws. Network (Apr. 25, 2012), https://www.ilntoday.com/2012/04/business-restructuring-and-bankruptcy-the-challenges-of-restructuring-continuing-care-retirement-communities-2 (accessed Nov. 18, 2021).

23 Tim Regan, *How 'Life Care' Pricing Jeopardizes CCRCs,* Senior Hous. News (June 29, 2017), https://seniorhousingnews.com/2017/06/29/life-care-pricing-jeopardizes-ccrcs (accessed Nov. 18, 2021).

24 Mulligan & Johnson, *supra* n. 11, at 4.

25 McDonald Hopkins News, *supra* n. 22.

26 Levin Assocs., *The Enigma of the CCRC Market: The Care Model That Won't Die,* https://seniorcare.levinassociates.com/1706/enigma-ccrc-market-care-model (accessed Nov. 18, 2021) (Overborrowing is one of the major reasons why CCRCs, especially nonprofits, lose their financial footing; lack of sufficient cash to pay down excessive CCRC debt can lead to a snowball effect.).

27 *Id.*

situations such as the COVID-19 pandemic, can contribute to deteriorating financial conditions,[28] which may affect the quality of life of CCRC residents.[29]

In extreme situations, a combination of these factors can result in the failure of a CCRC.[30] Failure of California's Altavita (formerly Air Force Village West) CCRC in 2019 appears to have been precipitated by financial miscalculations regarding the construction of a new wing.[31] Mismanagement and insufficient oversight by the state regulator over several years likely worsened the situation until the CCRC's finances ultimately collapsed.[32] Similarly, the recent bankruptcy declared by California-Nevada Methodist Homes, the provider of two California CCRCs, appears to have been caused by a misguided growth plan and inability of the CCRCs to maintain sufficient debt repayment.[33]

A CCRC resident's housing stability is inextricably linked to the financial health of the CCRC. Thus, the careful calibration required of CCRC operations makes CCRC residents vulnerable when entering a long-term contract with a CCRC.

B. CCRC Residents Are Typically Responsible for Providing the Revenue to Sustain the CCRC System

A CCRC typically operates as a closed system whereby residents, through their entrance fees and monthly fees, provide all or nearly all of the revenue needed to fund the CCRC's operations.[34] The byproduct of this system is that, unlike other

28 *See also* Paul A. Gordon, *Seniors' Housing and Care Facilities: Development, Business, and Operations* 82–84 (3rd ed., Urban Land Inst. 1998) (provides a detailed list of factors that account for financial failures in some CCRC and other types of senior housing communities).

29 *See infra* § IV(E).

30 *See e.g.* Tim Mullaney, *1,000-Bed CCRC Henry Ford Village Files for Bankruptcy Amid Covid-19 'Perfect Storm,'* Senior Hous. News (Nov. 1, 2020), https://seniorhousingnews.com/2020/11/01/1000-bed-ccrc-henry-ford-village-files-for-bankruptcy-amid-covid-19-perfect-storm/?itm_source=parsely-api (accessed Nov. 18, 2021).

31 Interview With Altavita Village CCRC Resident (Oct. 23, 2020).

32 *Id.*; Mark Muckenfuss, *Why Residents Are Worried About Sale of Altavita Village, a Riverside Retirement Community,* Press-Enterprise (updated Sept. 18, 2017), https://www.pe.com/2017/09/17/why-residents-are-worried-about-sale-of-altavita-village-a-riverside-retirement-community (accessed Nov. 18, 2021); Jack Katzanek, *Sale Complete, Altavita Village To Be Renamed Westmont Village, Converted to Senior Rentals,* Press-Enterprise (Sept. 6, 2019), https://www.pe.com/2019/09/06/sale-complete-altavita-village-to-be-renamed-westmont-village-converted-to-senior-rentals (accessed Nov. 18, 2021).

33 Interview With Cal. Nev. Methodist Homes CCRC Resident (Oct. 23, 2020) (The CCRC's financial troubles were caused in part by bonds taken out to build a new wing in 2008 and the CCRC's inability to pay its debts.).

34 Mulligan & Johnson, *supra* n. 11, at 5 (referring to CCRC residents with Type A contracts as a "capitated eldercare population"); Author's Notes From Cal. CCRC Task Force Meeting (July 29, 2021) (CCRC provider representatives confirmed that operational costs, as well as litigation expenses, must be passed on to residents through monthly fees because CCRCs have no other source of revenue.). This assertion becomes less relevant as the CCRC moves away from the traditional life care model. Some CCRCs may also be able to bring in additional revenue streams by taking nonresidents into its nursing facilities, earning investment income, or accepting donations from outside the resident community. Note also that all businesses operate as a closed system to some degree, but prospective CCRC residents may not have considered how this applies to their own role in a CCRC's structure.

senior rental projects in which the brunt of financial risk is borne by developers and commercial lenders,[35] CCRC residents and bondholders bear the risk to ensure the financial success of CCRCs.

To be competitive, CCRC providers usually carry large debt loads at the outset to cover CCRC construction and other costs and almost always seek financing from secured lenders. Because there are no outside investors in nonprofit ventures, nonprofit CCRC providers do not have funds of their own to contribute.[36] For-profit CCRC providers likewise contribute little equity and seek financing from conventional sources. Thus, resident entrance fees, which range dramatically across CCRCs from a few thousand dollars to more than $5 million,[37] serve as unsecured interest-free loans that enable CCRCs to obtain long-term debt financing[38] to purchase, build, and ultimately operate CCRC facilities.

Resident entrance fees, beyond their use to secure debt financing, are also necessary to ensure the CCRC's financial stability and cash flow.[39] These funds, which are used to partially fund reserves, may become the basis of the CCRC's capital budget to be used for replacement of operating assets and capital improvement projects.[40] They can also supplement the cash needed in the operating budget to cover costs and control rate increases.

In addition to entrance fees, residents pay monthly fees, which cover the basic operational expenses and routine maintenance incurred by the CCRC.[41] As costs rise, resident monthly fees may increase by about 3% to 5% or more per year.[42]

Unfortunately, should the CCRC fall into default and need to pursue bankruptcy, CCRC residents are behind other creditors, such as employees and suppliers, for investment reimbursement. Bondholders, as secured creditors, have a claim to reimbursement of their investment.[43] CCRC residents are unsecured

35 Gordon, *supra* n. 28, at 81.

36 Alyssa Gerace, *On the Record: David Reis, CEO of Senior Care Development,* Senior Hous. News (Mar. 25, 2012), https://seniorhousingnews.com/2012/03/25/on-the-record-david-reis-ceo-of-senior-care-development (accessed Nov. 18, 2021) (Nonprofit CCRCs use their nontaxable status to raise 100% of their financing from the bond market.); *see also* Levin Assocs., supra n. 26 (Usually, little equity is invested in the CCRC structure.).

37 2019 Annual Rpts., *supra* n. 19.

38 R. Gerard Hyland, *The Continuing Care Retirement Community: Financial Models,* Action Aging.com CCRC Learning Ctr., https://www.naccrau.com/RGHyland/HylandCCRCFinancialModels.html (accessed Nov. 18, 2021).

39 *See* Katherine C. Pearson, *What Happens to Upfront Fees Paid by Residents of CCRCs — Especially in Bankruptcy Court?* (June 18, 2014), https://lawprofessors.typepad.com/elde_law/2014/06/what-happens-to-upfront-fees-paid-by-residents-of-ccrcs-especially-in-bankruptcy-court.html (accessed Nov. 18, 2021).

40 Sen. Spec. Comm. on Aging, *Continuing Care Retirement Communities (CCRCs): Secure Retirement or Risky Investment?* 67, 111th Cong. (July 21, 2010); U.S. Govt. Accountability Off., *supra* n. 9, at 9; NaCCRA, *CCRCs from 2010 to 2019 — A Missed Opportunity* 26 (Nov. 9, 2020).

41 Ironically, residents' monthly fees can even include the litigation fees the CCRC assumes in fighting residents' disputes (*see infra* § IV(B)) and the CCRC's membership fee to LeadingAge, the organization that lobbies for pro-industry laws, sometimes at the expense of residents' control. NaCCRA, *supra* n. 40, at 29.

42 Monthly fees can vary substantially by CCRC facility and level of care. *See infra* § IV(B).

43 Security for bondholders is necessary to attract investors in order to secure loans needed to start the CCRC. The unfortunate byproduct is that residents' claims are subordinated to those of the bondholders. *See e.g.* Gordon, *supra* n. 28, at 294 (The Fitch Ratings require that the

creditors and therefore need to stand in line with other unsecured creditors (e.g., the dining service provider) for reimbursement.[44] As noted previously, residents typically do not have equity in the CCRC; they have only a license to live at the CCRC and receive access to care and services from the CCRC in accordance with their contract.[45]

Thus, the structure of entrance fee CCRCs results in residents taking on significant risk in the facility in which they live. Residents are vulnerable because they are responsible for financially supporting the CCRC, yet they do not have security in the event the CCRC fails.

C. The Profit-Generating and Ownership Structures of CCRCs Can Contribute to Residents' Vulnerability

The multibillion-dollar CCRC industry[46] in California consists of for-profit CCRCs (28%) and nonprofit CCRCs (72%).[47] Historically, CCRC providers consisted mostly of faith-based and fraternal organizations.[48] However, since the mid-1980s, for-profit real estate developers have made a concerted effort to enter this space.[49] Nationally, for-profit senior housing providers have been growing more rapidly than nonprofits.[50] For-profit CCRCs are considered to be quite profitable.[51]

As with other aspects of the senior care industry, ownership by for-profit companies creates the inherent conflict of interest between providing sufficiently for aging residents and generating a profit for owners and shareholders. Recent investigations have exposed the trade-offs that

"[r]esident's lien, if any, must be subordinated to lender's lien." The ratings also require that monthly fee increases be made at the manager's sole discretion, and that after a prorated 5-year period, refunds may only be repayable on resale.).

44 *See infra* § IV(E).

45 Floyd, *supra* n. 8, at 46; Gordon, *supra* n. 28, at 83.

46 In 2018, the total operating income reported by California CCRCs was $2,464,742,500. T. Donnelly, *Inside the CCRC Industry* (unpublished manuscript 2018) (copy on file with author) (from analysis of 2018 annual reports submitted to the CDSS from CCRC providers in California).

47 Cal. Dept. of Soc. Servs., *supra* n. 6 (numbers do not include four applications for new CCRCs).

48 Gordon, *supra* n. 28, at 35.

49 *Id.* at 39. There was an influx in California of for-profit CCRCs, which reframed their skilled nursing facilities (SNFs) to become CCRCs to avoid a new quality assurance fee implemented in 2004 for freestanding SNFs. Cal. Dept. of Health Care Servs., *Medi-Cal Update, Provider Bulletin 8-01-2005, Quality Assurance Fee Definitions, Payment Procedures, Reporting Requirements* (Sept. 2005), https://www.dhcs.ca.gov/services/medi-cal/Documents/AB1629/Provider%20Bulletins/Medi-Cal%20Bulletin%20342.pdf (accessed Nov. 18, 2021).

50 In the past decade, for-profit assisted living and independent living construction vs. inventory climbed from 2% to 11% and 13%, respectively. In contrast, the nonprofit construction vs. inventory growth rate remained flat at 2%. NaCCRA, *supra* n. 40, at 13 (citing data released at 2019 LeadingAge conference; nonprofit CCRCs grew mostly through mergers, acquisitions, and expansions of existing campuses).

51 *See e.g.* Gerace, *supra* n. 36 (One for-profit CCRC developer was quoted as saying that "the CCRC model offers the most bang for the buck. It's a stable platform, it's highly successful, and it will continue to be a success."). One reason for its success is its low turnover rates. *See Sudo, infra* n. 201; Chuck Sudo, *Healthpeak Eyes CCRC Expansion, Last $400M in Senior Housing Sales Imminent,* Senior Hous. News (May 5, 2021), https://seniorhousingnews.com/2021/05/05/healthpeak-eyes-ccrc-expansion-last-400m-in-senior-housing-sales-imminent (accessed Nov. 19, 2021).

can occur in for-profit long-term care institutions.[52]

For example, for-profit Brookdale, former operator of 10 CCRCs in California and the nation's largest senior living home operator, was sued for "patient dumping" of its most impoverished CCRC residents for monetary reasons in 2020[53] and has since settled the case. In addition, 100 residents of the high-end Varenna CCRC in Santa Rosa, California, were left behind by skilled nursing facility (SNF) staff during a devastating wine country fire in 2017.[54] As is common in other for-profit SNFs,[55] the Varenna SNF, run by Oakmont Management Group LLC and Oakmont Senior Living LLC, suffered from chronic understaffing. Limited and undertrained staff did not know how to respond to the fire emergency and dispersed, leaving the residents behind.[56] Fortunately, family members and first responders were able to evacuate the residents before the fire reached the facility.[57]

Tangled affiliation structures often mask the identity of those with true ownership shares[58] and can shield the par-

52 Gabrielle Emanuel, *New Studies Show Dire State of Nursing Homes Even Before the Pandemic,* GBH (Mar. 23, 2021), https://www.wgbh.org/news/local-news/2021/03/23/new-studies-show-dire-state-of-nursing-homes-even-before-the-pandemic (accessed Nov. 19, 2021); Dylan Scott, *Private Equity Ownership Is Killing People at Nursing Homes,* Vox (Feb. 22, 2021), https://www.vox.com/policy-and-politics/22295461/nursing-home-deaths-private-equity-firms (accessed Nov. 19, 2021).

53 Lois A. Bowers, *Lawsuit Accuses Brookdale of 'Dumping' Residents of 10 CCRCs,* McKnight's Senior Living (Dec. 6, 2018), https://www.mcknightsseniorliving.com/home/news/lawsuit-accuses-brookdale-of-dumping-residents-of-10-ccrcs (accessed Nov. 19, 2021). Brookdale more recently has been sued by the California Office of the Attorney General for other illegal activity, Annie Sciacca, *California Sues Nursing Home Operator for Falsifying Records, Dumping Patients Without Notice,* Mercury News (Mar. 15, 2021), https://www.mercurynews.com/2021/03/15/california-sues-nursing-home-operator-for-falsifying-records-dumping-patients-without-notice (accessed Nov. 19, 2021).

54 Matthias Gafni & Julia Prodis Sulek, *Stunning Tales of Abandonment: State Moves to Revoke Licenses of Two Retirement Homes Over Santa Rosa Fire Response,* Mercury News (Sept. 6, 2018), https://www.mercurynews.com/2018/09/06/state-probe-two-santa-rosa-assisted-care-living-facilities-failed-to-protect-residents-during-deadly-wildfire (accessed Nov. 19, 2021); Julia Prodis Sulek & Matthias Gafni, *Our Exclusive Look at Police Video From the Wine Country Fires Shows Heroic Rescuers and Harrowing Escapes — and Helps Explain Why People in Danger Sometimes Don't Flee,* Mercury News (May 20, 2018), https://extras.mercurynews.com/wildfirecam (accessed Nov. 19, 2021).

55 Atul Gupta et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence From Nursing Homes,* Becker Friedman Inst. (Feb. 13, 2021), https://bfi.uchicago.edu/working-paper/does-private-equity-investment-in-healthcare-benefit-patients-evidence-from-nursing-homes (accessed Nov. 19, 2021); Rebecca Tan & Rachel Chason, *An Investment Firm Snapped Up Nursing Homes During the Pandemic. Employees Say Care Suffered,* Wash. Post (Dec. 21, 2020), https://www.washingtonpost.com/local/portopiccolo-nursing-homes-maryland/2020/12/21/a1ffb2a6-292b-11eb-9b14-ad872157ebc9_story.html (accessed Nov. 19, 2021).

56 Sulek & Gafni, *supra* n. 54.

57 *Id.*

58 Charlene Harrington et al., *These Administrative Actions Would Improve Nursing Home Ownership and Financial Transparency in the Post COVID-19 Period,* Health Affairs (Feb. 11, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210208.597573/ (accessed Feb. 5, 2022); Debbie Cenziper et al., *Profit and Pain: How California's Largest Nursing Home Chain Amassed Millions as Scrutiny Mounted,* Wash. Post (Dec. 31, 2020), https://www.wastonpost.com/business/2020/12/31/brius-nursing-home (accessed Nov. 21, 2021).

ent and affiliated entities from liability.[59] Sometimes affiliated entities are hired by CCRCs to handle management, dining, building maintenance, and other vendor services in CCRC facilities, at inflated prices negotiated between related parties with no incentive to negotiate cost savings that would benefit residents.[60] These complex structures create a potential conflict of interest[61] although they can also provide cost savings. These affiliation structures can also result in a lack of transparency about the CCRC's financial health.

For example, one multifacility CCRC provider established several LLCs that served as vendors for multiple services, including those for the SNF.[62] The provider refused to disclose any information to residents or the state regulator regarding the SNF's finances, claiming that there was no such requirement because the SNF was owned by a separate company.[63] However, the ongoing long-term financial health and operation of the SNF was critical for the CCRC to be able to honor its resident contracts. In addition, the fees charged by the SNF for its services to the CCRC made up a substantial percentage of the CCRC's budget, yet the residents and the state regulator had no way to determine if the fees were warranted.[64]

In another example, residents of the Vi at Palo Alto CCRC in California sued the CCRC because it directed more than $219 million in resident entrance fees to its corporate parent company in Illinois instead of keeping the funds in trust, as the residents contend is required under state law.[65] The parent company denied any obligation to return funds it received from its Vi at Palo Alto subsidiary if necessary for the subsidiary to comply with the refundable provisions of the contracts should refunds become due.[66]

Nonprofit CCRCs have been facing increasing competition from for-profit CCRCs, which, in combination with other factors, has resulted in a trend of consolidation of nonprofit CCRCs into larger CCRC organizations in order to

59 *See e.g. Fleming v. S-H OpCo Camarillo, LLC,* Complaint for Injunctive Relief and Damages for Violation of Resident Rights, Health & Safety Code § 1430(B) at 4, (Dec. 5, 2018), http://canhr.org/newsroom/releases/2018/PressRelease201801205/BrookdaleComplaint.pdf (accessed Nov. 21, 2021) (In patient-dumping lawsuit against Brookdale, plaintiff alleged that "[d]efendants deliberately structured their business, which is simply a chain of facilities, in a byzantine labyrinth of entities to hide the flow of money and try to evade responsibility for misconduct.").

60 *See e.g.* Ltr. From FGL Residents' Council, *infra* n. 63, at 6–7; Laise, *infra* n. 93.

61 Katherine Pearson, *Modern Face of Senior Living: Residents With a Cause,* Medford Mail Trib. (Sept. 30, 2012).

62 Interview With Margaret Griffin, Pres., CALCRA (Nov. 11, 2020).

63 *Id. See also* Ltr. From FGL Residents' Council to Katie Hernandez, Acting Chief, Cal. Adult & Senior Care Program Off. at 5 (July 31, 2019) (In a separate case, a CCRC's finances were split across four LLCs with the same owner. Residents alleged that, as a result, nearly 50% of expenses were hidden from residents because the company contended it was not required to reveal the finances of all four LLCs.).

64 Griffin interview, *supra* n. 62.

65 This lawsuit has been pending since 2014. *Cork v. CC-Palo Alto, Inc.,* 818 Fed. Appx. 595 (9th Cir. June 8, 2020) (No. 19-15441); Paula Span, *C.C.R.C. Residents Ask, 'Where's the Money?'* N.Y. Times (Mar. 20, 2014, https://newoldage.blogs.nytimes.com/2014/03/20/c-c-r-c-residents-ask-wheres-the-money (accessed Nov. 21, 2021).

66 *Id.* The upstreaming of funds by Vi at Palo Alto, the subsidiary, to its parent company and the parent company's denial of the obligation to return these funds shifted to the CCRC's departing residents the financial risk of the CCRC's default in repaying the entrance fees it had committed to repay.

benefit from economies of scale and purchasing power.[67] About one-third of nonprofit CCRCs in California are currently owned by multisite providers,[68] a growing number of which are large, complex organizations that continue to expand through affiliations and mergers.[69] In 2019, the 10 largest nonprofit senior living providers represented nearly 30% of the total number of units owned and operated by the 200 largest nonprofit providers.[70] Of the 200 largest nonprofit providers, 74% reported intentions to expand through affiliation or new development by 2020.[71]

Larger entities, both for-profit and nonprofit, tend to be politically sophisticated and form lobbying groups to advance their interests.[72] Nonprofit providers are represented by the powerful national organization LeadingAge, which runs its own political action committees in multiple states and lobbies on behalf of its members.[73] Thus, providers wield significant clout, which is beneficial for CCRC residents to the extent that CCRC providers are advancing the shared interests of the CCRCs and their residents. However, when those interests diverge, the providers' lobbying efforts put them at direct odds with less powerful CCRC resident groups seeking consumer-focused reforms.[74]

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67 Procyon Partners, *The Winds of Change: Emerging Trends for Life Plan Communities* 1–2, https://www.procyonpartners.net/wp-content/uploads/2020/02/PROC_19001-9_Winds-of-Change_WP_Final.pdf (accessed Nov. 19, 2021).

68 Cal. Dept. of Soc. Servs., *supra* n. 6 (Out of 108 operating CCRCs, 37 nonprofit CCRCs were owned by multisite providers.).

69 *E.g. Covia, Front Porch and Covia Affiliation*, https://covia.org/affiliation (accessed Nov. 19, 2021) (Covia and Front Porch merged under the Front Porch name.); Cal. Dept. of Soc. Servs., *supra* n. 6 (As of November 2020, Front Porch operated 10 CCRCs in California.). Another example is HumanGood, the largest nonprofit CCRC provider in California, with 13 CCRCs. HumanGood operates more than 100 housing operations, including CCRCs, across six states and grew to its current size by affiliating with three other nonprofits, including the former American Baptist Homes of the West. HumanGood, *Our Story*, https://www.humangood.org/our-story (accessed Nov. 19, 2021). HumanGood is currently the parent organization of 16 subsidiaries, including for-profit management and consulting companies. Dun & Bradstreet, *Humangood*, https://www.dnb.com/business-directory/company-profiles.humangood.4b0dac5e8e68adf0bd385c7f7fc4b550.html#industry-info (accessed Nov. 19, 2021).

70 LeadingAge & Ziegler, *The Nation's 200 Largest Not-for-Profit Multi-Site Senior Living Organizations* 16 (2019).

71 *Id.* at 194.

72 Procyon Partners, *supra* n. 67, at 3 (As with many large developers, larger CCRCs can hold greater sway and have influence with local officials and regulators.).

73 *See e.g.* LeadingAge Cal., *Political Action Committee*, https://www.leadingageca.org/pac (accessed Nov. 19, 2021).

74 For example, for-profit CCRCs in California retained a lobbying group to oppose a bill calling for resident voting representation on CCRC boards. Donnelly, *supra* n. 46; *see also* ProPublica, *IRS Form 990 for Front Porch Communities and Services* (IRS Form 990) (2013), https://projects.propublica.org/nonprofits/display_990/954538269/2014_03_EO%2F95-4538269_990_201303 (accessed Nov. 21, 2021) (Front Porch paid $145,139 in lobbying expenses in 2013.); ProPublica, *IRS Form 990-EZ for California Continuing Care Residents Association* (2019), https://projects.propublica.org/nonprofits/display_990/943231137/07_2020_prefixes_90-99%2F943231137_201912_990EO_2020070217211630 (accessed Nov. 21, 2021) (In contrast, CALCRA staff, including the president, are unpaid volunteers who had an operating budget of $55,073 in 2019 to advocate for all CCRC residents in California.).

As noted previously, CCRCs were initially founded and operated by non-profit religious organizations (e.g., Presbyterian, Episcopalian, American Baptist) or fraternal organizations (e.g., Masons, Odd Fellows). Today, however, religious or fraternal affiliation is sometimes in name only because the religious or fraternal organization may have no financial obligation to the CCRC and often little or no say in its governance. Nevertheless, according to consumer advocates, residents are more likely to trust a faith- or membership-based non-profit operation, fail to properly scrutinize a contract, and rely on the good will they assume the supposed affiliation provides.[75]

The CCRC industry is made up of powerful entities, with for-profits' inherent profit-generating structure making residents more susceptible to the power imbalance with providers. The ownership and affiliations of many CCRCs, especially for-profits, consist of a complicated network that makes it difficult for consumers to know with whom they are contracting, protects the CCRCs from liability, and sometimes masks their true financial condition. These issues can contribute to the vulnerability of CCRC residents.

D. CCRCs Offer a Broad Range of Contracts and Services

CCRCs can differ dramatically in terms of exactly how they are structured and what services they offer to residents. This, coupled with the fact that many prospective residents do not read or understand their contracts,[76] can ultimately confuse residents and put them in a vulnerable position.

The different types of CCRC contracts are often referred to as Types A, B, and C.[77] These labels, however, are not used in the contracts themselves and are of limited usefulness since residents are often unaware of which type of contract they have. In addition, there are no standard Type A, B, or C contracts, and the increased use of various refundable fee contracts[78] has complicated these original contract labels.

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75 *See e.g.* Interview With CCRC Resident (July 16, 2021) (This dismayed resident assumed that a church denomination was financially backing her distressed CCRC, when in fact the denomination had cut ties with the CCRC years before.). The California statute permits CCRCs to include the name of an otherwise unaffiliated entity, including a religion, in connection with its development, marketing, or continued operation, at the discretion of the state regulator upon written appeal, for good cause shown. Cal. Health & Safety Code § 1772(e) (2020). Clear disclosure regarding the absence of the affiliation is required in the CCRC contract, although not necessarily in the marketing materials. *Id.* at § 1772(d)-(e).

76 *See infra* § III(A).

77 Life care contracts (Type A) reflect the all-inclusive type of CCRC arrangement whereby the provider is taking on the risk of providing housing, food, and medical care for the resident through the entirety of the resident's life at the community. As a result of this high risk to providers, residents with life care contracts typically pay higher entrance fees that may or may not be refundable. Monthly fees stay the same as residents move to higher levels of care, although monthly fees are still subject to overall annual increases. Other contract options provide for independent living and amenities with access to assisted living, nursing home, and sometimes memory care. Access to higher levels of care may be included in the contract as being free or discounted for a certain number of days per year (Type B), or the contract may provide for access to higher levels of care at market rate costs (Type C), with no prepayment or discounts available. *See* Gordon, *supra* n. 28, at 36.

78 *See* Pearson & Sarcone, *supra* n. 18, at 5.

Also, a single CCRC provider may use various contract types and refund provisions.[79]

Further complicating matters, LeadingAge, the national organization that represents nonprofit CCRCs, rebranded CCRCs as "life plan communities," which sounds similar to "life care communities."[80] "Life care" is typically the term used to signify traditional Type A all-inclusive care contracts. Since many consumers do not read or understand their CCRC contracts,[81] the similar terminology can lead to serious misperceptions among consumers.[82]

Consumers and elder law attorneys alike may be inclined to assume prominence of the traditional Type A contract structure of CCRCs when, in fact, for many years, life care contracts have been falling out of favor with CCRC providers.[83] A 2018 nationwide survey of CCRC providers indicated that among the 126 respondents, only 34% offered Type A contracts.[84] The most common type of contract reported was Type C, offered by 35.8% of survey respondents.[85] A range of other types of nontraditional CCRC structures also exists.[86] In California, only about 10% or less of CCRC providers offer life care (Type A) contracts.[87]

The various contract types and different types of services can contribute to consumers' confusion. The bottom line is that there is no standard CCRC residency contract. An elder law practitioner advising a prospective CCRC resident must carefully read and advise his or her client about the precise commitments the provider is making in the residency contract.

III. Exacerbating Factors

A. The "Wow Factor" — The Appeal of CCRCs Can Be Blinding to Prospective Residents

CCRCs are unique in the degree to which prospective residents are wowed at the marketing stage and fall in love with a particular CCRC. Residents are often quick to cast their lot — and entire future — into a CCRC, particularly after touring its independent living grounds and amenities.[88] Interviews with residents and

79 *Id.;* Ziegler/Love & Co., *The Love & Company Report: 2015 CCRC Consumer Contract Preferences & Buying Behavior Study* 4 (Fall 2015), https://www.loveandcompany.com/wp-content/uploads/2016/05/Love-Report-Fall-2015-CCRC-Pricing-Study-FINAL-Report.pdf (accessed Nov. 21, 2021).

80 NaCCRA, *supra* n. 40, at 7.

81 *See infra* § III(A).

82 NaCCRA, *supra* n. 40, at 26.

83 Tel. Interview With Inv. Banking Dir. (of a prominent investment banking firm that underwrites CCRC bond financing) (July 1, 2021) ("Non-profit CCRCs are trying to move away from life care because it is a losing proposition.").

84 Lois A. Bowers, *CCRC Monthly Rate Increases for 2018 Will Average 3.1%,* McKnight's Senior Living (Nov. 20, 2017), https://www.mcknightsseniorliving.com/home/news/ccrc-monthly-rate-increases-for-2018-will-average-3-1 (accessed Nov. 21, 2021).

85 *Id.;* NaCCRA, *supra* n. 40, at 27.

86 Pearson & Sarcone, *supra* n. 18, at 5.

87 2019 Annual Rpts., *supra* n. 19 (Eight out of 79 CCRC providers reported that they had life care contracts in their 2019 annual reports. Some of these providers may have discontinued issuing new Type A contracts but are still serving residents who entered with Type A contracts.).

88 This was a common sentiment from interviews with representatives from CALCRA, California Advocates for Nursing Home Reform (CANHR), NaCCRA, and CCRC residents (on file with author); O'Brien, *supra* n. 1 ("Care managers and other experts say many families don't fully appreciate the commitment that a CCRC involves in the rush to get

consumer advocates indicate that many CCRC residents do not carefully read their contracts or understand what is included in them.[89] This is surprising given the level of education and sophistication of most residents.[90] Their decision to join a CCRC may be emotionally driven and stem from the fact that they consider the CCRC to be the all-inclusive solution to the stressful unknowns of aging.

One resident shared that she was so enchanted by an independent living unit that she decided during her first visit that she wanted to join the CCRC. She did not have a lawyer review the contract because she felt confident enough to handle it on her own after having helped her mother through the process of joining an assisted living community. Her accountant reviewed and rubber-stamped the CCRC financials even though the resident later realized the existence of serious financial deficiencies in the CCRC's structure.[91] Such accounts of prospective residents falling in love with a CCRC are common and can position residents to be locked into an imbalanced relationship with the CCRC provider.

B. Residents Have Limited Protections

Given the power imbalance caused by the inherent structure of CCRCs, administrative, legislative, and other legal remedies might be expected to provide a counterbalance in favor of residents. Unfortunately, these remedies do not sufficiently mitigate residents' vulnerability.

1. Limited Oversight by State Regulators

In the words of one CCRC resident, "I never would have moved to a CCRC if I had known it wasn't regulated."[92] Residents often assume that the government will protect them if things go awry with their CCRC. Such an assumption may or may not be warranted given the disparate scope of CCRC regulations, or lack thereof, across the country and the quality of enforcement of CCRC statutes in states that do provide CCRC resident protections.[93] In some states such as California, this assumption is justifiable given that the state has been one of the most regulated states in terms of CCRCs.[94] However, this does not mean that the state statute or regulator adequately protects consumers.[95]

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a loved one situated … 'People put all their eggs into one basket.'").

89 *Id.;* Haynes interview, *supra* n. 2 ("The relatives I have who have gone into CCRCs really didn't know what they were getting into. But they probably also didn't read the contract very carefully." He also felt like he did not understand his own CCRC contract when he signed it, and he figured that this was "probably true of everyone … everyone should get a lawyer, but hardly anyone does."); U.S. Govt. Accountability Off., *supra* n. 9, at 26 (Advocates state that residents focus on amenities and culture and may not pay attention to other things.).

90 CCRC Task Force, *Today's Continuing Care Retirement Community (CCRC)* 14 (Jane E. Zarem ed., July 2010) (CCRC resident survey respondents were twice as likely to have a college and/or graduate degree compared with the general 65+ U.S. population.).

91 Interview With CCRC Resident (Nov. 9, 2020).

92 Interview With CCRC Resident (Nov. 4, 2020).

93 Eleanor Laise, *Risks and Rewards of Moving to a CCRC,* Kiplinger (Jan. 28, 2013), https://www.kiplinger.com/article/retirement/t037-c000-s000-risks-and-rewards-of-moving-to-a-ccrc.html (accessed Nov. 21, 2021) (The regulating of CCRCs is the "Wild West" compared with the heavily regulated nursing home industry.); U.S. Govt. Accountability Off., *supra* n. 9, at 18–19.

94 *See* U.S. Govt. Accountability Off., *supra* n. 9, at 33, 35.

95 According to consumer advocates, the original

In addition, California CCRC providers contend that the industry in their state is microregulated compared with that in other states[96] and at times fight fiercely against additional statutory reform.[97]

Residents may assume that there is greater oversight from the state, for example, in vetting CCRC contracts. The California statute requires that the contract state that the "continuing care contract form has been approved by the State Department of Social Services" even though the required statutory language goes on to clarify that the state's approval is not an endorsement of the contract.[98] In fact, the state does not review the contract terms or provider-resident relationship for overall fairness or the contract for understandability[99] but merely verifies that the contract disclosures meet the minimum statutory requirements applicable to continuing care contracts.[100]

Like other states that regulate the CCRC industry,[101] in addition to licensing providers, California has focused on mandating disclosures for residents.[102] The California CCRC statute provides for some enforcement role by the state regulator, the California Department of Social Services (CDSS), which delegates responsibility to the Community Care Licensing Division (CCLD). Two CCLD branches handle oversight of CCRCs: the Continuing Care Contracts Bureau (CCCB) and the Adult and Senior Care Program.[103] However, these branches, particularly the CCCB, are chronically understaffed and underfunded.[104] In addition, the CDSS

statute was drafted by the industry and favored providers. The statute was overhauled in 2000 with input from CCRC attorneys; notably missing from the table were consumer advocates. Interviews With CANHR & CALCRA Staff (Oct.–Dec. 2020). Since then, some reform has taken place; however, comprehensive review is still needed. *Id.;* U. Pac. McGeorge Sch. of L., *supra* n. 16 (The CALCRA president opined that "California is on top of a meager heap" regarding regulation of CCRCs across the United States.).

96 U. Pac. McGeorge Sch. of L., *supra* n. 16 (A CCRC provider's attorney stated, "What other industry has this kind of financial regulation? Do hotels and real estate developers need to [deal with] all this regulation? ... People entering the [CCRC] market don't want to deal with the rules [and] are shocked.").

97 *See e.g. infra* n. 124.

98 Cal. Health & Safety Code § 1788(a)(34).

99 California CCRC residents have the right to receive a "clear and complete" written contract, but there are no additional requirements placed on providers regarding readability, apart from the application being "clearly legible" and printed in at least 10-point font. Cal. Health & Safety Code § 1771.7(b)(5), 1787(f)–(g). By contrast, the more protective statute governing admission contracts for California residential care facilities for the elderly mandates at least 12-point font and requires that the admission agreement be written in "clear, coherent, and unambiguous language, using words with common and everyday meaning." Cal. Health & Safety Code § 1569.882.

100 Cal. Health & Safety Code § 1788(a)(34).

101 *See e.g.* Pearson & Sarcone, *supra* n. 18, at 15.

102 *See* Cal. Health & Safety Code § 1770(c).

103 The CDSS Adult and Senior Care Program monitors CCRC providers for compliance with the community care licensing laws and regulations regarding buildings and grounds, accommodations, care and supervision of residents, and quality of service. The Continuing Care Contracts Bureau (CCCB) is responsible for overseeing resident contracts and monitoring the finances of CCRCs, including their ability to fulfill their long-term contractual obligations to residents. CDSS, *Continuing Care Contracts Bureau,* https://www.cdss.ca.gov/inforesources/community-care/continuing-care (accessed Nov. 22, 2021).

104 In the past several years, the CCCB has had a small staff with enormous responsibility under the statute, including reviewing applications for new and expanding CCRC operations in the state, issuing certificates of authority,

is a large regulatory agency that deals primarily with child care and residential care for adults and the elderly; consequently, it lacks the expertise to deal with the complexities of the insurance-like structure and product of CCRCs.[105]

Indeed, a U.S. Government Accountability Office report noted the need for sufficient expertise at the regulator level in order for the regulator to be effective.[106] Given the sheer volume of its responsibilities, lack of funding, and lack of required expertise, it is impossible for California's regulator to monitor fully the financial health of all CCRCs or to address the fairness of their operations.

Consumer advocates commonly express the concern that the state regulator typically refrains from wielding the additional power at its disposal to properly defend CCRC residents. The statute itself obligates the state regulator to "liberally" construe the statute for the protection of residents.[107] Thus, the state regulator could choose to take action against contract terms it deems unfair and that violate the statute's remedial intention to protect CCRC residents. However, the state regulator rarely, if ever, invokes this additional authority and tends to interpret the statute literally, narrowly, and in favor of providers.[108]

Consumers' belief that they can rely

analyzing the financial health of all CCRCs through complex analysis of each facility's annual report, inspecting each facility at least once every 3 years, and conducting ongoing review of approval requests for alterations to a facility's organizational structure, or physical plant, financing, expansion, etc. CCCB staff are also responsible for reviewing the deposit agreements and contract templates, including exhibits and addenda, for the multiple types of contracts that may exist at each CCRC; maintaining ongoing negotiations and discussions with providers and resident representative groups; drafting personal identification numbers (PINs), regulations, provider guidelines, and consumer guides; and more. Cal. Health & Safety Code §§ 1770 et seq.

105 In addition, the statute does not require CCCB staff to have more than basic financial expertise despite the complex financial and business structures of CCRCs. Cal. Health & Safety Code § 1778(b)(1); *see also* U.S. Govt. Accountability Off., *supra* n. 9, at 21 (Some states regulate CCRCs through the department of insurance.). The most recent efforts in California to transfer financial oversight of CCRCs to the Department of Insurance, California Assembly Bill 748, failed in 2011 due in part to substantial provider opposition. CALCRA, *CALCRA Advocacy*, https://www.calcra.org/calcra-advocacy (accessed Nov. 22, 2021).

106 U.S. Govt. Accountability Off., *supra* n. 9, at 20.

107 Cal. Health & Safety Code § 1775(e).

108 Interviews With CANHR & CALCRA Staff (Oct.–Nov. 2020); Griffin interview, *supra* n. 62 (The CDSS is known to say, "We cannot interpret the statute; if it's not specifically in the law, we can't do it.") Interview With CCRC Resident (Oct. 13, 2021) ("CDSS's 'timidity,' if not actual fear, is the result of relying too much on its 'special counsel' to determine what it has the authority to do, and being unduly influenced by the regulated (who have more power and lobbying clout to challenge a regulator's job) rather than responding to the needs of residents who don't have the same power to challenge its actions as do the well-organized and well-financed providers."); *see also* CANHR, *Should I Really Move Into a CCRC?* CANHR Advoc. (Apr. 25, 2017), http://the-advocate.webflow.io/post/should-i-really-move-into-a-ccrc (accessed Nov. 22, 2021) ("Residents' rights are underwhelming and enforcement of regulatory standards by the Department of Social Services is almost non-existent."). At the same time, the state regulator has been cognizant of the need for administrative, statutory, and regulatory reform, and, of its own accord, convened a CCRC Task Force in 2021 made up of state regulator staff, providers, and consumer advocates, which has been meeting regularly to discuss areas of concern and consider practical reforms.

on state regulators to effectively oversee the CCRC industry and protect them is "dangerous"[109] because it may give consumers a false sense of security when joining a CCRC. In truth, state enforcement hardly mitigates the existing power imbalance between providers and residents.

2. Limited Legislative and Litigative Options

Unfortunately, few options exist for CCRC residents to obtain protection if their state regulator does not come through. Potential statutory reform subjects legislatures and state regulators to hard lobbying by the better-financed provider industry, so any new legislation is likely to be piecemeal and not result in a strong consumer-protective statute.

Residents can always initiate litigation, but litigation is very costly in terms of finances and stress. Residents need to pay for lawyers, and lawsuits can take years to resolve. The suit by residents against the Vi at Palo Alto CCRC was filed in February 2014 and was still ongoing as of February 2022.[110] To date, two of the original six plaintiffs have died. Thus, in the absence of robust administrative, legislative, and litigative remedies, CCRC residents do not have adequate protections to counterbalance the inequity in their relationship with providers.

C. It Can Be Difficult to Determine a CCRC's Financial Health

Even for the most studious prospective resident, it can be challenging to figure out how financially stable a CCRC is at any given time.

A limited number of CCRCs, under 7% nationwide and about 4.6% in California,[111] are accredited through the Commission on Accreditation of Rehabilitation Facilities (CARF). CARF assesses a CCRC's financial strength and uses it as a criterion for accreditation.[112]

CARF uses 17 standard financial ratios that some states, including California, require all CCRC providers to calculate and report annually.[113] These financial ratios measure several aspects of a CCRC's financial health and are useful, indeed critical, for consumers and their advocates to review, assuming they can understand

109 Michael Moline, *Council Sees Breakdown of Trust With Office of Regulation,* Fla. Pol. (Jan. 18, 2017), https://floridapolitics.com/archives/230566-ccrc-reform (accessed Nov. 22, 2021).

110 *Cork v. CC-Palo Alto, Inc.,* 818 Fed. Appx. 595 (9th Cir. 2020) (No. 19-15441).

111 *See* CARF Intl., *List of CARF-Accredited Continuing Care Retirement Communities,* http://www.carf.org/ccrcListing.aspx (accessed Nov. 22, 2021) (There are 135 CARF-accredited CCRCs in the United States, with five in California.); Baker Tilly, *Webinar: Financial Ratios and Trends for Continuing Care Retirement Communities* (Nov. 19, 2019), https://www.bakertilly.com/insights/financial-ratios-and-trends-for-continuing-care-retirement (accessed Nov. 22, 2021).

112 CARF Intl., *Aging Services,* http://www.carf.org/Programs/AS (accessed Nov. 22, 2021).

113 California requires four financial ratios to be provided in the disclosure statement that providers must give to prospective residents and include in their annual reports. Cal. Health & Safety Code § 1789.1. The state requires an additional 11 ratios to be included in a separate document called the Key Indicators Report (KIR). The ratios must be provided for the 4 previous years and projected 5 years into the future. CDSS, *Key Indicators Report,* https://www.cdss.ca.gov/Portals/9/CCLD/CCCS/2019%20Doc%20Updates/key%20indicators%20projected%202020.pdf?ver=2019-06-10-112155-700 (accessed Nov. 22, 2021). Providers must submit the KIR to the state within 30 days after submission of their annual report. Cal. Health & Safety Code § 1792.9.

the predictive value of these ratios. Yet because CCRCs themselves differ so much and have such complex financial structures, even reviewing and understanding the significance of these ratios makes it difficult to get a full picture of a CCRC's financial health.

The significance of each of the 17 CARF ratios differs depending on the age of the CCRC, whether it is a single-site or multisite CCRC, whether it has debt, and several other factors that may vary greatly based on the CCRC's specific structure.[114] For each accredited CCRC, CARF provides median percentages for each ratio,[115] but this information is of limited value due to the small sample size and the good overall financial health of CARF-accredited CCRCs compared with many of the more than 90% of CCRCs that have not sought accreditation. Furthermore, even if CCRCs are required to provide financial ratios to the state regulator, this information is not necessarily accessible to consumers,[116] available in a timely manner,[117] or up to date.[118]

Actuarial studies also produce key information regarding a CCRC's financial health,[119] but many CCRCs do not re-

114 *See* CARF Intl., *Consumer Guide to Understanding Financial Performance & Reporting in Continuing Care Retirement Communities* 12 (June 2016), Consumer Guide to Financial Performance and Reporting of CCRCs - June 2016 (actionaging.com) (accessed Nov. 22, 2021); myLifeSite, *Guide to Evaluating the Financial Viability of a CCRC* 8 (2018), Financial-Viability-Guide.pdf (accessed Nov. 22, 2021); *see also* Baker Tilly, *supra* n. 111 (noting the challenges of benchmarking financial data due to a range of factors).

115 Patrick Heavens, *2020 Financial Ratios & Trend Analysis of CARF-Accredited Continuing Care Retirement Communities: A Joint Project of CARF, Ziegler and Baker Tilly,* Baker Tilly (Nov. 10, 2020), https://www.bakertilly.com/insights/2020-financial-ratios--trend-analysis-of-carf-accredited (accessed Jan. 10, 2022).

116 Providers do not always post their disclosure statements on their websites, and consumers may not think to check the state regulator's website for this information. The author's review of California CCRC provider websites in August 2021 revealed that 22% of CCRCs had not posted their 2020 disclosure reports on their websites despite the statutory requirement to do so. Cal. Health & Safety Code § 1771.8(g). Forty percent of CCRCs had not posted the 2000 Key Indicators Report (KIR), the document that contains the majority of financial ratio data. The KIR is not required to be posted on the provider's website under the CA statute. Cal. Dept. of Soc. Services, *Annual Reports,* https://www.cdss.ca.gov/inforesources/community-care/continuing-care/annual-reports (accessed Nov. 22, 2021).

117 California law does not require CCRC financial information to be disclosed at the marketing stage. The disclosure statement need only be given to the prospective resident as part of the initial deposit agreement *or* prior to execution of the final CCRC agreement. Cal. Health & Safety Code § 1789.1(a); Bruce L. Gitelson, *The Uniform CCRC Provider Disclosure Statement Project* i–ii (unpublished) (Typically, the contract and primary disclosure documents are given to the resident only after the prospective resident has completed the lengthy application process, which involves providing personal financial information to the CCRC. This has the practical effect of discouraging prospective residents from analyzing the complex financial information about the CCRC and engaging in rigorous comparison with other facilities.).

118 The information provided in the annual reports is due within 4 months after the end of the provider's fiscal year. Cal. Health & Safety Code § 1790(b). However, many providers request extensions.

119 myLifeSite, *supra* n. 114, at 11; Floyd, *supra* n. 8, at 42; Alwyn V. Powell , *supra* n. 18 (An actuarial study is the only tool that entrance fee CCRCs can use accurately to assess their solvency regarding annual pricing. It costs less than one-tenth of 1% of CCRC operating budgets annually to conduct these studies.).

quest these studies or make their actuarial reports available to consumers. Without an actuarial study, a CCRC may appear financially stable in the short term yet still face threats to its long-term viability.[120] One prominent CCRC actuary argues that this applies to any CCRC that uses entrance fee contracts,[121] including those that use Type B and C contracts. But actuarial reporting is required in California only for CCRCs that use Type A contracts and only every 5 years.[122] In California, advocates pushed to mandate actuarial studies for CCRCs that use Type B and C contracts as well,[123] but CCRC providers, and ultimately the state regulator, were opposed to this.[124]

Actuarial studies are most useful if performed every 2 to 3 years. This is because a CCRC's financial stability depends on so many factors, each of which is subject to change from year to year.[125] However, even if actuarial studies are undertaken every couple of years, they can be flawed in their analyses because they may be based on incorrect assumptions or interpretations.[126]

Even standard accounting may not present a clear picture of a CCRC's financial health. It can be difficult to determine a CCRC's financial health because the accounting principles universally used by CCRCs, called "generally accepted accounting principles," can mask financial weaknesses even when the most updated version of the principles are used: Accounting Standards Update (ASU) 2014-09 also known as Accounting Standards Codification (ASC) 606.[127]

120 U.S. Govt. Accountability Off., *supra* n. 9, at 13.

121 Alwyn V. Powell, *supra* n. 18; Alwyn V. Powell, *Actuarial Risks Are Not Limited to Type A and B Contracts,* Ziegler (July 30, 2010), https://www.avpowell.com/wp-content/uploads/2012/08/Essay-on-actuarial-risks-published-in-Z-news-7.30.10.pdf (accessed Nov. 22, 2021); *see supra* n. 77 (noting the different types of CCRC contracts).

122 Cal. Health & Safety Code § 1792.10. Providers only need to submit the actuarial opinion, not the entire report. *Id.* There may be good reasons for this. *See* Alwyn V. Powell, *supra* n. 18 (It is standard practice for actuaries not to release the entire report; actuarial assumptions can easily be taken out of context.); U. Pac. McGeorge Sch. of L., *supra* n. 16 (A senior staff person at the California state regulator's office acknowledged that when actuarial reports were required to be made public, providers adjusted the actuarial assumptions "so that the end result was the best possible for the provider.").

123 CALCRA, *CALCRA Advocacy*, https://www.calcra.org/calcra-advocacy (accessed Nov. 23, 2021) (Assembly Bill 3088 was vetoed by the governor.).

124 *Legislative Update*, XIV(3) CALCRA News 2 (Fall 2018), https://static1.squarespace.com/static/5898f6e4e6f2e17c07ec6bbf/t/5ba100b803ce64f152f144ae/1537278137800/Fall+2018.pdf (accessed Nov. 23, 2021); LeadingAge Cal., *Ask Governor Brown to VETO AB 3088*, https://p2a.co/gtqAypU (accessed Nov. 23, 2021).

125 U. Pac. McGeorge Sch. of L., *supra* n. 16 (According to actuary Robert Yee, 5 years is too long between CCRC actuarial studies; he believes that every other year is better.).

126 Alwyn V. Powell, *supra* n. 18 (An actuarial study will not prevent bankruptcy if there are bad assumptions.); Floyd, *supra* n. 8, at 85 (Seemingly small changes in actuarial assumptions can result in substantial differences in projected costs.).

127 Alwyn V. Powell, *supra* n. 18 (Even though the new standard incorporates an actuarial survivorship curve, it does not truly measure the entrance fee CCRC's financial obligation to provide future services or measure its solvency.); *see also* Jack Cumming, *The Challenge of Not-for-Profit CCRCs* (Mar. 2, 2017), https://www.seniorlivingforesight.net/the-challenge-of-not-for-profit-ccrcs (accessed Nov. 23, 2021) (a scathing rebuke of CCCRs' reliance on generally accepted accounting principles (GAAP); *but see* CFI,

In addition, a dispute is underway about how concerning it should be that so many CCRC providers exhibit negative net income and/or negative net assets on their balance sheets. A review of 2017 annual reports submitted to the CDSS by CCRC providers in California reveals that 37.5% of California CCRC providers reported either negative net income as high as $90 million or negative net assets as high as $317 million.[128] Such numbers typically would be alarming for any other type of entity. Negative net income and negative net assets are considered by some CCRC observers,[129] although not by others,[130] to have negative implications for a CCRC's financial future. Such "impaired" balance sheets[131] appear to be indicative of the CCRC industry in general, as noted during a U.S. Senate Special Committee on Aging investigation in 2010.[132]

An established CCRC with a combination of negative income, negative assets, and low occupancy rates may indicate that the CCRC is experiencing acute financial distress. Of the four CCRC providers that reported all three of these factors in 2017 (5%), two had declared bankruptcy by 2021.[133]

For these myriad reasons, it can be difficult for a prospective resident to determine the financial health of a CCRC. However, even a prospective resident's complete understanding of a CCRC's current financial health will not guarantee that the CCRC will remain stable and that the resident's investment will be safe in the long term. As with all other large, complex financial investments, there will always be some continuing risk for the investor. Thus, the elder law practitioner advising a prospective resident will need to help the client weigh out the client's level of risk tolerance given the unknowns regarding the CCRC's financial health.

Hidden Values, https://corporatefinanceinstitute.com/resources/knowledge/valuation/hidden-values (accessed Nov. 23, 2021) (GAAP financial statements may undervalue assets because the statement of real estate assets may not reflect the current market value.).

128 A review of 2017 annual reports is on file with the author. Twenty-one CCRC providers reported negative net income before accounting for entrance fees, amortization, and depreciation in their 2017 annual reports, with the highest net negative income listed at $90,605,820. Nine CCRC providers reported negative net assets without donor restrictions in their 2017 annual reports. The highest negative net asset figure reported was $317,245,460. At least 11.4% of providers in this subset also exhibited occupancy rates under 90%, one as low as 51%.

129 Laise, *supra* n. 93; myLifeSite, *supra* n. 114, at 6; Cumming, *supra* n. 127.

130 Tel. Interview With Inv. Banking Dir., *supra* n. 83 (Neither net negative income nor net negative assets are meaningful measures for CCRCs for purposes of assessing CCRC eligibility for bond financing. Instead, the debt-service coverage ratio and days cash on hand are more important indicators of financial stability for nonprofit CCRCs. Both factors often will be present for newer CCRCs.); Alwyn V. Powell, *supra* n. 18 (CCRCs can run an inflationary balance and be underfunded indefinitely without necessarily running out of money.); CFI, *supra* n. 127.

131 Cumming, *supra* n. 127.

132 U.S. Sen. Spec. Comm. on Aging, *supra* n. 40, at 73.

133 2019 Annual Rpts., *supra* n. 19. By 2019, one provider had recovered, and one had increased its CCRC's occupancy rate from 58% to the still-low figure of 72% and shed its negative income while retaining negative assets of $4.6 million. By 2019, however, two additional CCRCs began displaying signs of potential distress, with occupancy rates dropping below 82% along with negative income from operations before accounting for entrance fees, amortization, and depreciation.

D. Resident Participation in CCRC Governance May Be Insufficient to Recover Residents' Sense of Control

Under California law, residents also have the right to organize resident councils consisting of residents elected by their fellow residents to represent them and their concerns and make recommendations to management.[134] In addition, California law requires providers to appoint at least one voting and one nonvoting resident representative to the CCRC provider's governing body.[135] Most importantly, residents also have the right to semiannual meetings with the provider, including one meeting in which the provider explains the reason for monthly fee increases for the following year.[136]

The extent to which residents feel as if they are meaningfully engaging with providers on these matters depends on the provider's willingness to share information with residents in a good faith attempt to meet the disclosure standards of applicable regulations and to solicit residents' views and concerns about the provider's decision-making. Many providers may only perfunctorily follow the procedures laid out in the statute,[137] which can leave residents feeling frustrated and powerless despite their efforts to engage. Some providers, however, do meaningfully engage with residents in the spirit of the law.[138]

The overall power dynamic between residents and providers can affect the extent to which resident advocates are willing to escalate issues to management. Resident advocates report that resident councils are often timid in their communications with management. Frequently, the resident representatives on these councils may see themselves primarily as a buffer between the residents and management and may be reluctant to engage in conflict. Further, resident advocates report that the resident representatives may be surprisingly uninformed about resident rights and provider-mandated reporting and fail to require that providers follow proper procedures.

This reluctance may stem from an

134 Cal. Health & Safety Code § 1771.7(c)(9), (d) (Management is required to support and encourage these activities.); *Id.* at § 1771.8(b).

135 *Id.* at § 1771.8(i)–(s).

136 *Id.* at § 1771.8(c)–(f).

137 For example, the provider is required to convene a meeting with residents at least 30 days in advance of a monthly fee increase "for the purpose of discussing the reasons for the increase" in the next year's budget. Cal. Health & Safety Code § 1771.8(d). However, residents commonly complain about providers presenting PowerPoint slides full of graphs and figures that are presented too quickly for residents to understand and ending the meeting without actual discussion. *See* Ltr. From CALCRA to Jennifer Walden, Continuing Care Contracts Bureau, *The Need for a "Timeline and Summary of Best Practices" in Providing Timely, Meaningful Financial Information to CCRC Residents and Prospective Residents* 2 (Apr. 19, 2021); Interview With CCRC Resident (July 17, 2021). The statute requires that providers "make available" the materials "upon request" (Cal. Health & Safety Code § 1771.8(e)), but residents report feeling intimidated approaching the provider for the materials.

138 *E.g.* Ltr. From CALCRA, *supra* n. 137, at 3 (Detailing one CCRC provider's best practice of organizing a series of meetings with residents, members of the Resident Financial Committee (RFC), beginning early in the budget development process for the upcoming year. At the first meeting, the participants discussed a list of assumptions that would underlie anticipated drivers of the following year's budget increase/decrease and general issues related to planning the budget. The provider held a second similar meeting further along in the budget development process with materials distributed in advance. Next, the provider held one to two intense meetings with the RFC during the final stage of budget finalization.).

overall confrontation aversion that resident advocates have noticed on the part of many residents. In the words of one resident, "Nobody moves into a CCRC to fight with the management/owner," especially since residents typically join CCRCs seeking "financial and personal security, peace and freedom from anxiety."[139] The last thing many residents want is to have a dispute with management that could damage their standing as a "good resident."[140] Once an individual joins a CCRC community, "the order of the day is to be quiet and not complain (other than perhaps about the food, which is permitted resident conversation)."[141]

In fact, outspoken residents can be at risk for retaliation.[142] CCRC advocates have been approached by residents who felt antagonized by providers for speaking out to the public through writing or other means of communication about problems with their CCRCs. While the current California CCRC statute does not wholly prevent the provider's unilateral termination of a resident's contract, it does require good cause, and it expressly precludes the provider from retaliating against a resident for filing a formal complaint, contacting a government entity, or participating in a resident association.[143] But resisting an attempted termination by a provider requires the resident to appeal to the state regulator and perhaps even to sue the provider, actions that can lead to uncertain results. Accordingly, regardless of whether they are justified, residents who consider speaking out may feel that they are not clearly protected from contract termination. In the context of fear of losing their home, residents' perceived risk of speaking out can create a chilling effect on outspoken residents who would otherwise complain internally and, if necessary, file a complaint with the state regulator.

Thus, despite resident participation and representation in some aspects of CCRC governance, power imbalance is often the backdrop for provider-resident engagement and can affect the extent to which resident advocates and residents themselves are willing to act to enforce their rights.

IV. Residents' Ceding of Control

The combination of factors described above positions CCRC residents into an imbalanced relationship with the CCRC provider. This can result in a resident giving up control in ways that the resident may not have anticipated.

A. Giving up Legal Rights Through the Contract

Once residents sign the CCRC contract, they are locked into a binding contract of adhesion with the CCRC provider. Upon signing, residents face a loss of legal control over whatever they gave up through the contract terms.[144] Mov-

139 Interview With CCRC Resident (July 20, 2021).

140 *Id.*

141 *Id.*

142 *See e.g.* Lisa Kopochinski, *Feature: An Interview With Elder Care Advocate Professor Lillian Hyatt,* Natl. Assn. of Soc. Workers Cal. News (Dec. 1, 2017), https://naswcanews.org/feature-an-interview-with-elder-care-advocate-professor-lillian-hyatt (accessed Nov. 26, 2021).

143 Cal. Health & Safety Code § 1788(a)(30)(A)–(C).

144 California offers a 90-day contract cancellation window for new CCRC residents. Cal. Health & Safety Code § 1788.2. However, usually by the time a resident joins a CCRC, he or she has sold her home, has gotten rid of his or her belongings, and is not in a strong position to seek another place to live. Practically speaking, unless the resident has other

ing forward, nearly all the resident's legal rights will be bound by the details of the contract. This is most significant for residents who are contracting for the broadest range of services, paying entrance fees, and seeking some manner of entrance fee refund.[145]

CCRC contracts are called "adhesion contracts" because they are one-sided nonnegotiable contracts in which the power rests unequally with the provider.[146] Because the California statute requires disclosure of most important contract terms,[147] the contracts are very lengthy, typically more than 30 pages long not including appendices, and are generally written in legalese, which serves as an additional barrier to residents.[148] Typically, there is no bargaining power between the provider and resident before contract signing.[149] Given that many residents do not appear to carefully read their CCRC contracts prior to joining a CCRC or hire an advocate to do so,[150] they may be blindsided as matters unfold during their time at the CCRC.[151]

By signing a contract with a CCRC, residents often transfer significant legal rights to the CCRC provider without realizing the extent of the control they are relinquishing. It is critical for elder law practitioners to carefully review the contracts of prospective residents so that prospective residents can be fully informed about the choices, and trade-offs, they are making in joining the CCRC.

B. *Yielding Financial Control: Monthly Fee Increases*

As described above, CCRC residents are typically responsible for funding most or all CCRC operations through their fees,[152] including monthly fees subject to annual increases. Because CCRC operations must be carefully calibrated[153] for a CCRC to function properly, imbalance of one or more factors over time can lead to deficits, which residents may need to cover through increased monthly fees.[154] Apart

significant assets, the resident may be locked in.

145 *See* Pearson & Sarcone, *supra* n. 18, at 3.

146 Leg. Info. Inst., *Adhesion Contract (Contract of Adhesion)*, https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) (accessed Nov. 26, 2021).

147 *See* Cal. Health & Safety Code § 1770(c).

148 *See e.g.* Cal. Health & Safety Code § 1788(a)(34).

149 The author, however, spoke with two residents who were able to have the arbitration clause removed from their contracts.

150 *See supra* n. 89.

151 In one example, a couple, the author's own relatives, joined a California CCRC, and two years into their residence in an independent living unit were told by the provider that they needed to move out because one spouse had transitioned to using a portable feeding tube. Under California law, this required care was beyond the CCRC's licensing because the CCRC's nursing home had not yet been built. This situation caused the couple much stress because they had moved into the CCRC precisely because they believed it offered the range of care the husband would need as his Parkinson's disease progressed, and both expected to live there for the rest of their lives. The contract, indeed, contained language notifying the couple that they would need to transfer offsite in the event they needed a higher level of care. Fortunately, before the couple moved out, the CCRC provider was able to obtain a hospice waiver from the state to offer this higher level of care. However, the couple otherwise would have had little legal recourse because the CCRC had made proper disclosures in the contract and was thereby shielded from liability; the couple also had no marketing materials from the CCRC that backed up their erroneous understanding of the level of care they expected.

152 *See supra* § II(B).

153 *See supra* § II(A).

154 Providers may try to avoid large monthly fee

from persons with life care contracts,[155] residents who become unable to afford the monthly fees over time may eventually need to leave the CCRC.

Even short of this drastic outcome, prospective residents need to understand that they are subject to the CCRC providers' decision-making regarding the amount by which residents' monthly fees will increase year after year. Thus, by joining a CCRC, residents cede control to the provider to determine how much the resident owes each month for the license to live at the CCRC.

According to the California Continuing Care Residents Association (CALCRA), rising monthly fees are consistently the #1 concern of California CCRC residents. Typically, residents enter a CCRC in their 70s or 80s and expect to live in the CCRC for 15 years or more. CCRC monthly fees increase at a compounded rate. Once monthly fees increase, the new monthly fee serves as the base amount for the next annual increase. This can be problematic for individuals with fixed incomes and without sufficient means to pay the increased fees over time.

Although CCRCs may be reluctant to raise fees too much out of fear of turning off prospective residents, annual increases of more than 5% were reported at some CCRCs in 2019 for one or more unit types.[156] Monthly fees also typically increase as a resident moves up to a higher level of care.[157] In addition, increases may fluctuate from year to year, which can make it difficult for residents to plan for them.[158]

Non-life-care residents[159] are at risk of having to move out of their CCRC if the monthly fee becomes unaffordable.[160]

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increases by reducing amenities, which can result in a decline in the quality of service and deterioration of the physical plant. *See* Ltr. From Geraldine Bellush Goldberg, Executor of Bellush Est., to Michael Wiles, Bankr. J., S.D.N.Y. 1–2 (July 5, 2020), https://hhshlitigation.files.wordpress.com/2020/07/2020-07-06-1067-letter-from-geraldine-goldberg.pdf (accessed Nov. 26, 2021) (letter from residents' children describing the residents experiencing over the years decreases in hours, and long and frequent closures of the pool; reduction in exercise programs and supervised gym hours; elimination of daily free continental breakfast; significant cutbacks in maintenance staff; and deterioration of the physical plant, including dangerously broken sidewalks, leaking roofs, and major boiler issues).

155 Cal. Health & Safety Code § 1788(b)(5) (CCRCs are required only to subsidize residents with life care/Type A contracts.).

156 2019 Annual Rpts., *supra* n. 19. Increases of more than 5% in one or more types of living unit or level of care were reported in 24 out of 110, or 22%, of CCRCs. Ten out of 110 CCRCs, or 9%, increased monthly fees over 8% in one or more types of living unit or level of care in 1 year, as reported by California CCRC providers in their 2019 annual reports. The highest increases ranged from 10% to 16.3%. These analyses considered all types of living units and levels of care. Considering independent living units only, 11 out of 110 CCRCs, or 10%, increased monthly fees by more than 5% in one or more types of independent living unit (e.g., two-bedroom), with four CCRCs, or 3.6%, raising monthly fees in one or more types of independent living units by over 8% in 1 year. *Id.*

157 *See e.g.* 2019 Annual Rpts., supra n. 19 (The average monthly fee for a one-bedroom unit at nonprofit CCRC California Home for the Aged cost $2,976, assisted living cost $4,942, and skilled nursing cost $9,435 per month in 2019.).

158 *See e.g.* 2019 Annual Rpts., supra n. 19 (The average monthly fees for a two-bedroom at for-profit CCRC Watermark Carlotta increased by 6.8% in 2016, decreased by 0.7 in 2017, and increased by 8.4% in 2018.).

159 *See* Cal. Health & Safety Code § 1788(b)(5). (CCRCs are only required to subsidize residents with life care/Type A contracts.).

160 *See e.g.* U. Pac. McGeorge Sch. of L., *supra*

Nonprofit CCRCs may have some type of benevolence fund to help offset the monthly fee hike. However, they are not required to guarantee access to such a fund[161] or make any financial details of such a fund available to the CDSS or residents.

Some CCRC contracts require that the resident refrain from giving away significant assets that could be used to pay monthly fees; if this occurs, the CCRC provider can block the resident's access to the benevolence fund. Of course, the CCRC needs to protect itself against a resident gaming the system by gifting assets to family and then asking the CCRC to support him or her. However, litigators acting on behalf of disgruntled residents have recounted troubling stories, including one about a long-time resident who was denied access to the benevolence fund and was forced to move out of the facility at the age of 101.[162] Such incidents do not appear to be common.[163] CCRC providers' willingness to provide access to a benevolence fund, if one exists, varies by the provider and contract terms.[164]

The California statute permits CCRCs to raise monthly fees at the provider's discretion with the requirement that changes in monthly fees be based on projected costs, prior-year per-capita costs, and economic indicators.[165] Residents must be given at least 30-days' written notice of the change.[166] At least 30 days before the increase, a meeting must be held with residents to discuss the reason for the increase, the basis for determining the amount of the increase, and the data used for calculating the increase.[167] The provider not only must make available comparative data showing the budget for the upcoming year, the current year's budget, and actual and projected expenses for the current year, but also post a copy of these materials.[168]

Even though these requirements may sound robust, the requirement that the fees be based on projected costs and economic indicators is actually vague. Advocates report that provider explanations usually lack detail and leave residents uncertain about why their fees are being raised.[169] In fact, CCRC providers can add

n. 16 (One resident reported that she had to move out of her CCRC within 6 years because fees had doubled.); Laise, *supra* n. 93 (quoting one concerned CCRC resident whose monthly fees had climbed nearly 60% in the years since she joined the CCRC); Lillian L. Hyatt, *Protecting CCRC Prospective Residents,* XXIX(3) CANHR Advocate 8 (Fall 2017), http://canhr.org/publications/newsletters/Advocate/PDFs/Advocate_2017Q3.pdf (accessed Jan. 11, 2022) (Over 17 years, monthly fees went from $1,777 to $5,583, an increase of more than 200%.).

161 Cal. Health & Safety Code § 1788(c).

162 Anne Maria Murphy & Joseph J. Wiseman, *CANHR Webinar: What Estate Planners Should Know About CCRCs* (May 21, 2021) (Other stories involve residents and/or their families suspected by the CCRC of misspending funds and thereby being denied access to the CCRC's benevolence fund.).

163 *Id.* (CCRC litigators reported a "fair number of incidents."); *but see* Griffin interview, *supra* n. 62 (Benevolence fund access has not been a common complaint.).

164 Some CCRCs, including for-profits, plainly include in their contracts the provider's obligation to underwrite the resident's costs, including the costs of his or her care, if the resident becomes unable to pay. In the end, the scope of protection granted to the resident comes down to the contract language.

165 Cal. Health & Safety Code § 1788 (a)(22)(B).

166 *Id.* at § 1788(a)(23).

167 *Id.* at § 1771.8(d).

168 *Id.*

169 Interviews With CANHR and CALCRA Staff (Oct.–Dec. 2020); Interview With CCRC Resident (July 17, 2021), *supra* n. 137.

nearly any expense to justify permanent monthly fee increases. For example, providers across California appear to be folding COVID-related operating expenses for personal protective equipment (PPE), meal delivery, and other expenses into their monthly fee increases. Even with the hope that COVID pandemic expenses will not become a permanent fixture in CCRC budgets, the additions of these expenses for just 1 year, due to the annual compounding of monthly fees, will contribute to fee increases for all residents' remaining years at the CCRCs.

Litigation costs can also be passed on to residents as part of monthly fee increases.[170] These litigation costs include attorneys' fees incurred by a CCRC to defend itself from a lawsuit brought by one of its residents, and even to defend itself against state wage and hour labor laws of which the CCRC may have run afoul, with some limitations.[171] Thus, if the CCRC is indeed culpable, residents may need to pay for the CCRC's own failure to follow the law. The byproduct can have a chilling effect on residents' efforts to protect themselves through litigation.

The California statute does not give the state regulator permission to delve deeply into monthly fee increases. The state regulator learns the amount of a CCRC's monthly fee increase for a particular year only after the increase has been implemented.[172] By then, the new monthly fee has already become part of the new base monthly fee to be increased during the next annual budget cycle.

When residents join a CCRC, they are delegating authority to the provider to make financial decisions about how much they must pay each month to support the entire CCRC system. This can be an anxiety-provoking arrangement to the extent that residents feel disempowered by the arrangement and are concerned about the affordability of future fees.

C. Ceding Decision-Making Control

Potential CCRC residents may not appreciate the extent of control they have transferred to the provider until after they have begun living at the CCRC. As a current resident articulately observed:

> Many prospective and "newbie" CCRC residents often don't realize that they are proposing to enter into or, more concerning, that they have already entered into a legal contract that provides for and, in its implementation, results in their giving up a good deal of control — by transferring decision making about numerous aspects of daily living to the provider and to the inherent limitations of communal living.
>
> We've seen many new residents be surprised to realize that they can't always do what they want as they did living in their own homes. Their decision to elect this retirement option transfers some (sometimes a significant amount of) control to the provider and fellow residents, including from decorating the exterior and immediate outside environment of their new home, to "regulations" about their behavior and

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170 *See* Author's Notes From Cal. CDSS Task Force Meeting, *supra* n. 34; *see supra* § II(B).

171 *Id.; see also* CCRC Resident Stakeholder Meeting Minutes 4 (Oct. 13, 2021) (In a recent opinion, the state regulator clarified that the cost of defending a labor suit and paying back wages and attorneys' fees, but not state fines and penalties, can be included in monthly care fee increases.).

172 Providers in California turn in their annual reports, including information about monthly fee increases, about 4 or more months after the close of their fiscal year, which is at least 16 months after the monthly fees are implemented. Cal. Health & Safety Code § 1790(b).

> dress, to annually passing a test of their continuing mental suitability to remain living independently — and particularly, to the determination about the amount they will pay for continuing to live in their home and receive meals and amenities if they want to remain in the CCRC community.
> Those entering residents who haven't previously lived in condo or other communal living environments that exhibit some of the same — but far less rigorous — restrictions and limitations are apt to be far more concerned about the degree of control they have given up that they didn't realize.[173]

1. Decisions About Transitions to Higher Levels of Care

Upon joining a CCRC, residents often have not carefully considered the process of transitioning to higher levels of care at some point in the future. While potential residents are attracted to the notion that higher levels of care will be available if they need them, they may not consider that the provider may initiate such a move, possibly against their wishes. For residents, being required to move from independent living to a higher level of care can cause them to feel marginalized and result in a kind of "social death" typically not anticipated when they joined the CCRC.[174]

The California statute permits the provider to initiate the process to determine whether a resident's health has declined enough to transition him or her to assisted living or the SNF. Providers are required to follow rigorous procedures laid out in the statute[175] and detail the process in the contract.[176] Residents can appeal to the state regulator if they disagree with the provider's decision.[177] Despite these statutory protections, some residents have complained that the provider did not inform them of their rights, charged more if they wanted to stay in independent living, or required that they hire 24/7 in-home care out of pocket in addition to paying the regular independent living fee.[178]

Some residents may be dismayed to learn that their contract may not permit them to bring in outside caregivers instead of using the CCRC's own staff or contracting agency. In one unpublished case about a CCRC resident fighting transfer out of her independent living unit, the U.S. District Court, which ruled against the resident, affirmed that permitting residents to stay in independent living with intensive caregiving rather than transitioning them to higher levels of care would be a fundamental alteration of the CCRC's business model.[179] The CCRC business model de-

173 Email From Buzz Gitelson, CCRC Resident Advoc. & Sec. Atty. (July 17, 2021) (Gitelson has experience with CCRCs, having lived at three.).

174 Tetyana Pylypiv Shippee, *"But I Am Not Moving": Residents' Perspectives on Transitions Within a Continuing Care Retirement Community,* 49(3) Gerontologist 418 (Apr. 16, 2009), https://academic.oup.com/gerontologist/article/49/3/418/746894 (accessed Nov. 26, 2021); Laise, *supra* n. 93.

175 The California statute provides for involvement of the resident and others, including the resident's physician; use of assessment tools; a care conference; 30 days' written notice before transfer; access to documentation used as the basis for the CCRC's decision; and appeal rights. Cal. Health & Safety Code § 1788(a)(10).

176 *Id.*

177 The CDSS must review a disputed transfer decision and determine whether the transfer was appropriate and necessary. Cal. Health & Safety Code § 1788(a)(10)(C–E).

178 Email From Pat McGinnis, Exec. Dir., CANHR (Oct. 29, 2021).

179 *Id.; Herriot v. Channing H.,* No. C 06-6323,

pends in part on existing residents transitioning to higher levels of care and new residents moving into independent living units and bringing in new entrance fees.[180] At the same time, the business model depends on providers not developing a reputation for being too heavy-handed in their approach to moving residents to higher levels of care.

Residents may have misperceptions about where they will receive nursing home care if needed in the future. Most residents assume they will be placed in the CCRC's onsite SNF, if one exists. However, the contract may not guarantee placement in that particular SNF; placement may depend on whether there is space or even whether priority is given to CCRC residents over other members of the larger community. In addition, given the high expense of operating an SNF, CCRCs are currently moving away from offering skilled nursing care onsite.[181] Thus, residents may not have any guarantee that they will continue to age in place if they need a higher level of care, that spouses will be able to remain in close physical proximity to each other if one requires nursing home care, or even that the fee for the outsourced nursing home will be covered if the onsite nursing home is full.[182]

2. Decisions About the CCRC's Direction

As a business operation, CCRCs may unilaterally decide to make changes to their structure and direction, which can affect residents' sense of control.

Despite California's procedural rules concerning semiannual meetings with residents and resident involvement in CCRC governance,[183] CCRCs are permitted to take actions or make decisions at any time without consulting residents.[184] Consumer advocates have reported complaints from residents regarding unanticipated changes to their CCRCs that are beyond their control. One recent example includes new additions and separate buildings being added to a CCRC's physical plant, which not only will significantly increase the density of residents at the CCRC, but also will reduce the views and landscapes that made up much of the initial allure of the CCRC. In addition, such changes will subject current elderly residents to 3 to 6

2008 U.S. Dist. LEXIS 65871 at 7–10 (N.D. Cal. Aug. 26, 2008); Paula Span, *Limited Mobility of Another Sort,* N.Y. Times (Oct. 28, 2009).

180 Mulligan & Johnson, *supra* n. 11, at 2.

181 *See* Tel. Interview With Inv. Banking Dir., *supra* n. 83 (confirming a trend of CCRCs decommissioning their SNFs); ElderLawAnswers, *What Are Continuing Care Retirement Communities (CCRCs)?* (last modified July 20, 2021), https://www.elderlawanswers.com/continuing-care-retirement-communities-ccrcs-12050 (accessed Nov. 27, 2021); LeadingAge & Ziegler, *The Nation's 200 Largest Not-for-Profit Multi-Site Senior Living Organizations* 16 (2020) (reporting decline in SNF beds and the growth of nonprofit CCRCs primarily through expansion of existing campuses); Tel. Interview With CDSS Staff Person (Aug. 6, 2020) (also confirming CCRC movement away from SNFs but seeing CCRCs contracting with other CCRCs and health entities to access SNFs; some CCRCs are repurposing their SNFs to provide instead memory care to keep up with demand.).

182 Interviews With CANHR Staff (Oct.–Nov. 2020) (The latter issue is determined by the contract terms. CANHR has reported complaints by consumers regarding unexpected fees at outsourced SNFs not being covered by the terms of their CCRC contracts. Residents discovered this only once they needed SNF care and were sent off campus.).

183 Cal. Health & Safety Code § 1771.8.

184 *Id.* at § 1771.8(c).

years of loud construction.[185]

The California CCRC statute does not prohibit a CCRC from modifying its structure due to changes to its financial model. A California CCRC provider is allowed to change its operations, switch management, and sell the entity as long as the CCRC continues to provide the services listed in residents' contracts.[186] (As noted previously, some CCRC providers have been closing down their SNFs.[187]) If the provider chooses to permanently close the CCRC, residents and the state regulator must be given at least 6 months' notice and, in addition to other requirements, residents must either be relocated to a comparable facility or compensated pursuant to their contracts.[188] Such changes are understandably stressful for residents.[189]

Of course, given the complexity of CCRC structure and finances, even the most mission-driven CCRCs must be pragmatic in their decision-making to ensure their long-term survival in the face of market pressures.[190] This is true even if residents disagree with certain decisions.[191] As law professor Katherine Pearson points out, both the resident and provider have a shared interest in the CCRC remaining successful.[192] It is important for prospective residents, however, to understand that upon joining the CCRC, they are transferring control to the provider to make significant decisions about the CCRC's direction.

D. Giving Up the Ability to Leave: Repayable-on-Resale and Nonrefundable Entrance Fees

Many residents in entrance fee CCRCs lock their major assets into the CCRC and may effectively give up the freedom to leave the CCRC if, after some initial period, their entrance fee is not repayable.

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185 Debby Rice, *Saratoga Retirement Community's Expansion Plans Rankle Some Residents,* Mercury News (updated Sept. 15, 2020), https://www.mercurynews.com/2020/09/05/retirement-communitys-expansion-plans-rankle-some-residents (accessed Nov. 27, 2021); Email From Pat McGinnis, Exec. Dir., CANHR (Feb. 10, 2021) (Affected residents reported that when they signed their CCRC contracts, they were told that no new future construction was anticipated. Residents paid $500,000 to $1 million in entrance fees. New construction will include five new buildings and four underground parking lots.).

186 Unfortunately, as long as the CCRC nominally honors the contracts, the quality of services can decline. *See supra* n. 154; *see also* Amir Gamliel, *A Spotlight on Continuing Care Retirement Communities in Financial Distress,* Thomson Reuters (Jan. 23, 2020), https://www.perkinscoie.com/images/content/2/2/v3/227853/A-Spotlight-on-Continuing-Care-Retirement-Communities-in-Financi.pdf (accessed Dec. 1, 2021) (According to a law firm that regularly represents CCRC residents in bankruptcy proceedings, some CCRCs may actually choose bankruptcy in order to replace their CCRC structure with a more traditional, all-rental senior living facility to improve their marketability.).

187 *See supra* n. 181.

188 Cal. Health & Safety Code § 1793.82.

189 *See e.g.* John Ramos, *Los Gatos Seniors' Home Closure Leaves Residents Scrambling to Relocate,* KPIX CBS SF BayArea (Mar. 10, 2019), https://sanfrancisco.cbslocal.com/2019/03/10/los-gatos-senior-residence-closing (accessed Dec. 1, 2021) (documenting the stress of CCRC residents scrambling to relocate when their California CCRC closed in 2019).

190 *See e.g.* Procyon Partners, *supra* n. 67, at 6 (Life plan communities may need to reposition themselves to better compete with new marketplace offerings, which will pressure margins in the near term.).

191 Pearson, *supra* n. 61 (For example, residents may prefer to defer renovations, but such a decision might not be in the CCRC's best interests in the long run.).

192 *Id.*

Even if their fee is partially repayable, residents may not be entitled to the repayable portion until their unit is resold.

Because CCRC contracts offer various entrance fee repayment arrangements, it is essential that the prospective resident and elder law attorney read the contract very carefully to understand the circumstances in which the resident would be entitled to a return of a portion of the entrance fee. Some CCRC contracts provide no right to repayment of entrance fees, at least not after the 90-day cancellation period has expired. However, a common provision in CCRC contracts is an upfront right of return whereby the resident has an initial right to a return of a portion of the entrance fee even after the 90-day cancellation period. This "at-the-start-of-the-contract" repayable portion of the entrance fee amortizes over the first 2 to 6 years until the resident has no further upfront right to a return of any portion of the entrance fee. Such a contract is considered nonrefundable unless the contract also provides for a back-end refund or repayment at the end of the contract.

Entrance fees, which may be partially or fully returnable upon termination of the contract as a result of the resident leaving or dying, are characterized as either "repayable-on-resale fees," also called "repayable," or "refundable" fees.[193] Repayable entrance fees are returned only upon resale of the resident's unit; refundable entrance fees are returned if the provider has the contractual obligation to return any refund irrespective of the resale of the resident's unit.[194] Repayable entrance fee contracts thus shift to the residents the financial risk that the unit may not sell at all or may not sell within a reasonable period of time.[195] In addition, the sale of the unit is not under the control of the resident but the provider, which may have financial incentives to delay the sale of the unit.[196]

A unit's resale value may vary depending on the demand for similar units at the time, which in turn depends on the state of the economy and housing mar-

193 The term "returnable" as used in this article includes the terms "refundable" and "repayable." A contract is "refundable" if the promise to refund some or all of the entrance fee at the end of the contract extends beyond the resident's sixth year of residency and does not depend on resale of the departed resident's independent living unit at the end of the contract. Cal. Health & Safety Code § 1771(r)(2). A "repayable" or "repayable-on-resale" contract refers to a continuing care contract that includes a promise to refund some or all of the entrance fee at the end of the contract that is conditioned on reoccupancy or resale of the unit previously occupied by the resident. *Id.* at § 1771(r)(3).

194 *Id.*

195 Note that California has taken steps to mitigate this financial risk for more recent CCRC residents. For contracts signed after January 1, 2017, the statute has been strengthened to require the provider to pay interest on returned repayable/repayable-on-resale entrance fees after the unit has remained unsold for 180 days, with higher, compounding interest added over time. Cal. Health & Safety Code §§ 1788.4(f)(1)–(4). Nonetheless, older adults in California who signed repayable entrance fee contracts prior to January 1, 2017 are not subject to these protections. In addition, all residents with repayable contracts, regardless of when their contracts were signed, should be aware that under California law, repayable entrance fee refunds are not held in trust or subject to any fiduciary duty on behalf of the providers, unlike the statutorily created reserve for payment of refundable entrance fees. Cal. Health & Safety Code §§ 1771(r)(2)-(3), 1792.6.

196 There is a risk that providers may choose to hold onto a unit and sell other units instead in order to bring in a new set of entrance fees and resell more recently completed or updated units.

ket, and on the desirability of the CCRC compared with neighboring competition. In depressed housing markets, prospective CCRC residents have not been able to sell their current homes to pay the entrance fees necessary to enter a CCRC; therefore, providers have had greater difficulty reselling available CCRC units. This was a particular problem nationally during the 2008 recession.[197]

Providers' inability to resell available units has resulted in long waits of months or years before refunds have been available to departing residents or their heirs, who, as unsecured creditors, continue to bear the risks of the providers' inability to make the repayments. In California, waits of up to 6 years to receive repayable-on-resale refunds have been documented,[198] with one provider allegedly warning residents in their residency contracts that it could take up to 10 years to receive a refunded entrance fee.[199] In the event of the death of a former resident prior to resale of the unit, the resident's probate estate remains open for the duration of the resale waiting period, thus driving up probate costs.[200]

CCRCs favor repayable-on-resale contracts and nonrefundable contracts because such contracts relieve the provider of the burden of returning entrance fees without unit resale and instead place the risk on the CCRC resident.[201] Such arrangements contribute to lower attrition rates, longer resident lengths of stay, and, in the case of for-profit CCRCs, solid profits.[202] They also contribute to the potential for CCRC residents to become "captive tenants."[203]

Returned entrance fees are critically important for residents who need to break their contracts and leave their CCRCs. Typically, when a resident enters a CCRC, the bulk of the resident's assets are used to pay the entrance fee. Most CCRC residents must sell their homes to pay the entrance fee. Thus, if the resident needs to leave the CCRC, the resident will need access to these funds as soon as possible in order to pay for another place to live that

197 Amy Baxter, *Entrance Fee Bills Jeopardize CCRC Balance Sheets,* Senior Hous. News (Oct. 6, 2015), https://seniorhousingnews.com/2015/10/06/entrance-fee-bills-jeopardize-ccrc-balance-sheet (accessed Dec. 1, 2021).

198 *See* Kelly Nix, *Family in Legal Battle With P.G. Senior Home Over $250K Deposit,* 100(35) Carmel Pine Cone 1A (Aug. 29–Sept. 4, 2014), http://pineconearchive.fileburstcdn.com/140829PCA.pdf (accessed Dec. 1, 2021); Kelly Nix, *Proposed Legislation on Senior Housing Refunds Goes to Brown,* 102(28) Carmel Pine Cone 8A (July 8–14, 2016), http://pineconearchive.fileburstcdn.com/160708PCA.pdf (accessed Dec. 1, 2021) (nearly 6-year wait reported in these articles, with allegations that resale conditions were not included in marketing materials); Ltr. From FGL Residents' Council, *supra* n. 63, at 4.

199 Letter from FGL Residents' Council, *supra* n. 63, at 4.

200 *See* Nix, *supra* n. 198.

201 Tel. Interview With Inv. Banking Dir., *supra* n. 83 (Returnable entrance fees that are not repayable on resale are not even used by CCRCs anymore; interviewee does not believe that there are any CCRCs that, in practical terms, would offer refunds.); Chuck Sudo, *Healthpeak Bullish on CCRCs But Negotiating Potential Senior Housing Sales,* Senior Hous. News (Sept. 16, 2020), https://seniorhousingnews.com/2020/09/16/healthpeak-bullish-on-ccrcs-but-negotiating-potential-senior-housing-sales/ (accessed Dec. 1, 2021) (One large real estate investment trust has expressed satisfaction with investing in CCRCs specifically because of the use of nonrefundable entrance fees.); *see also* Gerace, *supra* n. 36.

202 *Id.*

203 *See also* Ltr. From FGL Residents' Council, *supra* n. 63, at 4 (raising issues of "captive tenants").

requires either a mortgage, a deposit, or another entrance fee.

Residents of a financially distressed CCRC whose primary assets are tied up in their repayable-on-resale entrance fees are unable to afford to move, and they have little choice but to stay on in a failing CCRC in the hopes that the CCRC somehow avoids bankruptcy. A worse dilemma exists for residents who have nonrefundable entrance fees. They could become captive residents if they have little or no funds to enable them to leave.

One resident shared her despair about wanting to leave her CCRC, which was teetering on the edge of bankruptcy.[204] She felt trapped; she could not leave the CCRC because she did not have access to other funds.[205]

E. Worst Case Scenario: CCRC Closure or Bankruptcy

The vulnerability of CCRC residents is most evident when a CCRC closes or is at risk of bankruptcy.

Fortunately, the bankruptcy rate of CCRCs has been estimated to be between 0.1% and under 3%,[206] and bankruptcy is the exception to the rule.[207] However, a low bankruptcy rate may mask the financial distress of a higher percentage of CCRCs in California and nationwide.[208] Short of bankruptcy, ailing CCRCs are often purchased by other CCRCs that may consolidate, change management, restructure services, and make changes to the physical plant.[209] Between 2017 and 2019, there was a 15% change in CCRC status and/or ownership among the 113 California CCRCs that existed in 2017 based on annual report submissions by providers.[210]

204 This resident signed her repayable-on-resale CCRC contract before January 1, 2017, and, therefore, does not benefit from the more recent protections of Cal. Health & Safety Code § 1788.4(f)(1)–(4). *See supra* n. 195.

205 Interviews With CCRC Resident (Nov. 9, 2020, July 16, 2021). This resident's CCRC has since declared bankruptcy, and as an unsecured creditor in the bankruptcy process, she is fighting to retain some portion of the refund owed.

206 NaCCRA Fin. Soundness Comm., *Financial Soundness Handbook for CCRCs* 7 (Jan. 2022) (CCRC bankruptcy rate estimated to be .1% to .2%); Gerace, *supra* n. 36 (CCRC bankruptcy rate estimated to be less than 3%). Two CCRC providers in California, representing three CCRCs, declared bankruptcy between 2019 and 2021, which puts California at a current bankruptcy rate of about 2.7%. Nationwide, there were approximately 20 CCRC bankruptcies between 2001 and 2016 and more since then. *See* John F. Wasik, *The Everything-in-One Promise of a Continuing Care Community*, N.Y. Times (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/your-money/the-everything-in-one-promise-of-a-continuing-care-community.html (accessed Dec. 1, 2021).

207 Alwyn V. Powell, *supra* n. 121, at 1 (The few CCRCs that have had financial difficulties resulting in bankruptcy are exceptions to the overall risk exposure for residents.).

208 *Supra* n. 130.

209 NaCCRA Fin. Soundness Comm., *supra* n. 206, at 7 (Consolidation is sometimes an indicator of troubled finances.); *see also e.g.* Tim Mullaney, *$70 Million Transaction Could Turn 'Untouchable' Property Into Modern, Middle-Market CCRC*, Senior Hous. News (Aug. 10, 2020), https://seniorhousingnews.com/2020/08/10/70-million-transaction-could-turn-untouchable-property-into-modern-middle-market-ccrc (accessed Dec. 1, 2021); Chuck Sudo, *After C-Suite Overhaul, Lifespace Turns to Growth and Stabilizing Distressed CCRCs*, Senior Hous. News (Apr. 1, 2021), https://seniorhousingnews.com/2021/04/01/after-c-suite-overhaul-lifespace-turns-to-growth-and-stabilizing-distressed-ccrcs (accessed Dec. 1, 2021) (addressing providers discussing plans to purchase or affiliate with distressed CCRCs).

210 Comparison of 2017 and 2019 Annual Re-

Although a CCRC may be able to avoid bankruptcy, periods of financial distress can result in the deterioration of residents' quality of life.[211] In such cases, residents cannot do much to improve their situation because they are beholden to the CCRC provider's allocation of financial resources. During times of financial distress, residents who can afford to leave often do so, which only further decreases CCRC revenue and worsens the problem.[212]

When CCRCs do close[213] or go bankrupt, CCRC residents are considered unsecured creditors, as noted previously. Bankruptcy and applicable state laws do not shield residents from the "catastrophic consequences of losing entrance fees or the discounted medical services promised to them for their lifetime."[214]

Fortunately, most bankruptcies eventually result in the CCRC restructuring or being purchased by another provider that typically will refund some or all of the entrance fees after a lengthy process.[215] In the course of the bankruptcy proceeding, the new provider may or may not be required to honor the CCRC contracts.[216] In some cases, residents may lose at least a portion of their entrance fees and/or their promised access to medical care and/or may be able to continue residing at the CCRC, but only in a rental capacity.

Residents at one California CCRC that underwent a reorganization during bankruptcy from 2017 to 2019 were able to recover unamortized refunds of their entrance fees, but lost an estimated $100,000 to $200,000 in promised medical-care discounts when their CCRC contracts were discontinued.[217] Instead of medical discounts, residents are now required to pay market rates for medical care onsite.[218] In 2024, the new for-profit rental operator will be permitted to close the medical facilities and discontinue priority access for former CCRC residents. Other protective terms of the agreement will also end.[219]

Even if the CCRC contract is even-

ports (on file with author) (Status and/or ownership changes include one bankruptcy, one closure, one nonprofit that became a for-profit, and four multifacility providers that changed ownership, affecting 14 CCRCs.).

211 *See supra* n. 154; *see also* Pat Arends, *Column: The Legislature Must Protect Continuing-Care Facilities,* Tampa Bay Times (Mar. 6, 2018), https://www.tampabay.com/opinion/columns/Column-The-Legislature-must-protect-continuing-care-facilities_166096030 (accessed Dec. 1, 2021) (referencing decline in services in a Florida CCRC before and during bankruptcy, including faulty heating unit and elevators and built-up sewage and trash).

212 McDonald Hopkins News, *supra* n. 22.

213 Ramos, *supra* n. 189 (One California CCRC was closed in 2019 due to building safety concerns, compelling it to relocate residents or terminate their residents' contracts.).

214 Gamliel, *supra* n. 186.

215 Laise, *supra* n. 93.

216 Elizabeth Ecker, *When Restructuring Financially Distressed CCRCs, Go With Creativity — Not Bankruptcy,* Senior Hous. News (July 24, 2012), https://seniorhousingnews.com/2012/07/24/when-restructuring-financially-distressed-ccrcs-go-with-creativity-not-bankruptcy (accessed Dec. 1, 2021).

217 Interview With CCRC Resident (Oct. 23, 2020).

218 *Id.; see also* Ltr. From Wendi A. Horwitz, Cal. Dep. Atty. Gen., to Gary Marsh & Alison Elko Franklin, Dentons US LLP, *Proposed Sale of Air Force Village West, Inc.* (Aug. 29, 2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/nonprofithosp/ag-decision-altavita-village-082919.pdf (accessed Dec. 1, 2021) (Because the buyer was a for-profit entity taking over a nonprofit CCRC, the attorney general's office oversaw the sale.).

219 Ltr. From Wendi A. Horwitz, *supra* n. 218, at 3 (discussing resident participation on a community advisory board).

tually preserved, bankruptcy can be a wrenching process for CCRC residents.[220] Residents may need to hire their own lawyers to represent their interests,[221] and the process can take years.[222]

V. Conclusion: The Role of the Elder Law Attorney

By many accounts, CCRCs can be vibrant and healthful places to age. Precisely because the allure of CCRCs is so compelling to prospective residents and their families, it is important for elder law attorneys and their clients to understand the extent of control clients may be giving up when joining an entrance fee CCRC. Due to the inherent structure of CCRCs and the exacerbating factors described in this article, CCRC residents are positioned in an imbalanced power relationship with CCRC providers. By virtue of signing an adhesion contract with a CCRC, residents transfer significant legal rights to the CCRC provider often without realizing the extent of the control they have relinquished.

At the same time, CCRC residents provide the funding to sustain CCRC operations — but without the protection of being secured creditors. In addition, many residents in entrance fee CCRCs end up locking their major assets into the CCRC and possibly giving up the freedom to leave the CCRC if their entrance fees are repayable only on resale or nonrefundable. On the flipside, CCRC residents can become unable to stay at a CCRC if their monthly fees climb too much year after year to cover the CCRC's growing expenses or, in the worst-case scenario, their CCRC closes.

Despite these risks, elder law attorneys should be careful not to disavow CCRCs as an option for their clients. CCRCs offer services for which there is, understandably, ample demand, and CCRCs are here to stay. Whether a continuing care contract at a particular CCRC is right for a particular individual will depend on the totality of circumstances involved. This includes the finances and contract provisions associated with a given provider in addition to the finances, needs, expectations, and risk tolerance of the prospective resident.

Our role as elder law attorneys is to help prospective CCRC residents ask the right questions to enable them to appreciate fully the terms of the relationship they are considering with the CCRC. We

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220 Pat Arends, *Arends: CCRCs in Florida Need Reform,* Tallahassee Democrat (Apr. 18. 2017), https://www.tallahassee.com/story/opinion/2017/04/18/arends-ccrcs-florida-need-reform/100562736/ (accessed Dec. 1, 2021) (During the 2 years after the provider declared bankruptcy, more than 500 CCRC residents lived under a "cloud of anxiety."); Mark Muckenfuss, *Why Residents Are Worried About Sale of Altavita Village, A Riverside Retirement Community,* Press-Enterprise (Sept. 17, 2017), https://www.pe.com/2017/09/17/why-residents-are-worried-about-sale-of-altavita-village-a-riverside-retirement-community (accessed Dec. 1, 2021) (describing residents' "turmoil").

221 Arends, *supra* n. 211.; *see* Ltr. From Danielle Perlman to The Honorable Judge Michael Wiles, Bankruptcy Judge, U.S. Dist. Ct., 2 (July 5, 2020), https://hhshlitigation.files.wordpress.com/2020/07/2020-07-07-1066-letter-from-danielle-pearlman.pdf (accessed Feb. 9, 2022) (As one resident's granddaughter in the Westchester Meadows case quipped, "It is only the lawyers involved who will be made whole.").

222 *E.g.* Westchester Meadows filed for bankruptcy in December 2015. The residents' lawsuit to recover entrance fees did not settle until July 2020. Hebrew Hosp. Litig., *Litigation Updates,* https://hhshlitigation.com/updates-on-litigation (accessed Dec, 1, 2021).

can help our clients slow down and make this critically important decision with their eyes wide open. After all, fully understanding the risks will best equip our clients to preserve their sense of control as they join CCRCs.