Oregon State Bar

Elder Law Newsletter

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Continuing Care Retirement Communities: What the careful lawyer needs to know

By Thomas Bode, Attorney at Law, and John Rake, Attorney at Law

An agreement to live in a continuing care retirement community (CCRC), also known as a life plan community, can be in force for decades, require millions of dollars in payments, and determine a person's quality of life during their vulnerable elder years. Therefore, lawyers should be prepared both to counsel clients who seek to sign a residency and care agreement (RCA) with a CCRC and to advocate for the residents' rights should a dispute arise. This article provides a short background on CCRCs, describes their regulatory environment, suggests important points for a potential resident to consider before signing an RCA, and provides some commentary on obstacles to enforcing the rights of residents.

CCRC structure

In theory, a CCRC is a retirement community that offers escalating levels of care: independent living, assisted living, memory care, skilled nursing, and/or hospice.

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This design allows residents to age in place and saves them the stress of moving as their care needs increase. The most desirable CCRCs provide their services in a single location. Oregon regulations, however, appear to allow a CCRC merely to provide housing services while designating another institution as the provider of health care.

CCRCs typically charge two types of fees. The entrance fee, which is at least the sum of a year's worth of monthly fees and is often tiered to the size of accommodations desired, is payment for the resident's acceptance into the CCRC; a half-million dollars or more is common for larger apartments or patio homes. If a resident leaves the CCRC within six months for a reason other than death, some portion of the entrance fee is typically refundable, dependent on the resident's chosen plan. Monthly fees resemble rent, paying for living space, housekeeping, dining, and other ongoing services and amenities.

CCRCs predict population flow through their various levels of care and model the corresponding revenues and expenses. As in any business, overall revenues must exceed expenses. To meet this requirement, CCRCs depend on the large entrance-fee payments from new residents, turnover in or expansion of the facility, and the elimination of high-cost services, often including medical care. Although residents may believe their entrance fees to be prepayments for medical services that they

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*In **Hyland v. Mary's Woods at Marylhurst**, Clack. Co. Cir. Ct. Case No. 21CV19655, they represented two former residents of the Mary's Woods CCRC in a claim based on the CCRC's closing of a skilled nursing facility in violation of the residency and care agreement. The parties settled the case on confidential terms.*

will later require, in our experience CCRCs treat entrance fees as revenue when they are received and do not consider those sums to be reserved for the residents' benefit. In short, CCRCs operate under a sort of insurance scheme, with entrance fees from new residents funding that year's provision of expensive medical care for existing residents.

Regulation of CCRCs

While federal law may govern the provision of services eligible for Medicare reimbursement, CCRCs are primarily regulated under state law. Oregon law includes a "residents' bill of rights," ORS 101.115, but the rights are largely procedural rather than substantive, and residents lack a means of enforcement, which is the prerogative of the Oregon Department of Human Services (ODHS). State law also requires that CCRCs make an annual disclosure statement, including basic organizational and financial information, available to current and prospective residents. ORS 101.050(1).

Evaluating a potential CCRC: the careful prospective resident

CCRCs invest heavily in marketing to prospective residents in pursuit of the hefty entrance fees they bring with them. Simultaneously, prospective residents often wait for months before there is an opening at a CCRC and may be eager to move. Despite the desire of both parties to complete the transaction, residents should be cautious.

Counsel advising elders interested in a CCRC should review the RCA, the disclosure statement, and marketing materials (including the website), which may clarify any ambiguous terms in the contract.

Review of the RCA should include, at least:

- statements regarding which services (e.g., medical care, assisted living, housekeeping, personal grooming assistance) and amenities (e.g., restaurants, entertainment facilities, workout facilities, parking) are provided by the CCRC, their cost, and whether they are provided onsite or offsite, as well as whether those statements align with marketing materials and your client's expectations
- conditions under which a resident who leaves the CCRC is entitled to a refund of part of their entrance fee
- any mandatory arbitration clause, which might preclude class claims, and the resident's ability to waive the clause

The disclosure statement should be examined for:

- recent audited financial information, including trends in balance sheets and cash flows, which will reveal the facility's financial health
- resident membership on the CCRC board of directors. (Because residents and CCRC leadership may have divergent interests, the presence of an active resident member is one indication of healthy transparency in the CCRC's management.)
- evidence that the CCRC is financially entangled with related entities, such as a controlling parent organization. Are some board seats reserved for people with certain affiliations? Do other entities play an outsized role in the finances of the CCRC or is it financially independent? Does the board of directors have a conflict-of-interest policy?

Counsel also should advise elders about alternatives that do not require a substantial entrance fee, including in-home care and rental communities that provide the precise level of care needed.

Challenges to enforcement and holding CCRCs accountable

A resident who has been unable to informally resolve a grievance against a CCRC has few regulatory options. In our experience, regulators at ODHS may only

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Litigation is likely to be expensive and complex.

have resources to act on the most serious of complaints involving health or safety. If the CCRC is a 501(c)(3) nonprofit and the CCRC has breached its corresponding obligations, a resident may file a Form 13909 complaint with the IRS.

Otherwise, an aggrieved resident's best option is likely to be a breach of contract action based on the RCA.

A preliminary question for a resident with a dispute against their CCRC is whether the resident will move out before or remain in residence while pursuing the claim. Aggrieved residents may wish to move out in fear of retaliation. The practical burden of moving is significant. A resident with a legitimate claim may be unable to find replacement housing or is unwilling to leave the CCRC. For residents of advanced age, there is strong motivation to stay put.

Litigation is likely to be expensive and complex. In our experience, discovery from third parties, such as medical service providers, accountants, actuaries, or other vendors, is necessary. Early judicial resolution is difficult: A motion for summary judgment in a contract dispute faces the high bar of showing that the contract language is unambiguous, or, if it is ambiguous, that the extrinsic evidence supports only one interpretation. A CCRC faces pressure to avoid admitting any breach, as that could create vulnerability to similar claims. The prospect of lengthy, expensive litigation is a burden for any plaintiff. When evaluating a case against a CCRC, consider whether bringing class claims or multiple plaintiffs is possible, because that may generate moral support and spread the financial burden.

There is no fee-shifting clause that generally applies to disputes arising from an RCA. Recovery of attorney fees may be possible for a claim arising from financial or physical abuse of an elderly person, but that claim would be separate, and a CCRC's failure to provide a service or amenity as promised is, in itself, unlikely to give rise to a statutory elder abuse claim.

In the context of a resident's breach of contract claim against a CCRC, expectation damages may be unsatisfactory. If the resident has moved out before bringing the claim, they will want to recover what they have paid in excess of the value of services received. For that reason, a resident bringing a breach of contract claim should consider seeking the remedy of rescission—the unwinding of the contract and restoring each party to their position ex ante. This remedy comes with challenges from heightened standards; the breach must be material, and residents must avoid taking actions inconsistent with an intent to rescind. This presents a conundrum to residents who remain at a CCRC after initiating legal action. Continuing to pay monthly fees, for example, could be used against them.

Rescission allows a plaintiff to claim prejudgment interest from the date of each payment made under the contract. In the case of an RCA that has been in place for a long time, prejudgment interest can be greater than the principal amounts owed. Rescission is a remedy, not a claim, so a court's rejection of rescission does not preclude expectation damages.

Conclusion

Residents of a CCRC rely on the institution to look after their well-being as they age. To ensure that happens, careful lawyers and prospective residents should be aware of the structure, regulatory context, and unique litigation challenges of CCRCs. ■

Long term care insurance: Death of the insured and estate recovery

By Cynthia Barrett, Attorney at Law

Cynthia Barrett is a retired Portland elder law attorney. She is a volunteer with Oregon's SHIBA program, which provides health insurance counseling statewide on Medicare, health insurance issues, and long-term care.

During probate or postmortem administration engagements, the elder law attorney's intake process should inquire whether the deceased had a long-term care insurance (LTCI) policy. If the decedent was insured, there are three potential issues:

- premium refund
- reduction in estate recovery if the policy was a "partnership policy"
- collection of any unpaid claims due by substituting the estate or an entitled successor as party to claim the unpaid contract proceeds

Premium refund feature

Many old LTCI policies, group or individual, had some form of premium refund feature. For example, the contract could provide that all, or some percentage, of the total premiums paid—less any benefits collected—are refunded at death. Some policies refund all premiums (less benefits paid) if the death occurs before age 65, and a declining fraction of the premiums paid until the insured reaches the age of 75 years (at which time the premium refund feature ends). A review of the contract will determine if this feature exists, and any refund is due.

Partnership policy reduces estate recovery

If the deceased had a LTCI Long-Term Care Qualified Partnership Program policy, Medicaid spend-down and estate recovery claims are reduced. The website of Oregon's Office of Payment Accuracy and Recovery (OPAR)—a subunit of the Oregon Department of Human Services—explains how the process works at death: a sum equal to the benefit amount paid out prior to applying for Medicaid is protected from spend-down, and if that sum is still in the insured's estate at death, that sum is also protected from estate recovery.

An example:

Your long-term care partnership policy paid $50,000 for your care before you applied for Medicaid. You would get to keep both $2,000 and $50,000 and still be eligible for Medicaid. Medicaid would collect $50,000 less from your estate, if that amount is still in your estate when you die.
https://dfr.oregon.gov/insure/health/long-term-care/Pages/qualified-partnership-program.aspx

If the decedent owned one of these rare partnership policies, eventually spent down assets and became eligible for Medicaid long term care, and an estate administration claim is sent to the heirs or filed in probate, determine the exempt amount (what the policy paid out before Medicaid application), and deny the claim up to that exempt amount.

However, my research has turned up little evidence that partnership policies are a significant factor in Medicaid estate recovery. Rick Mills, who retired from Oregon's Department of Human Services where he worked with the Estate Administration Unit (EAU) (and other financial recovery programs) for many years, told me, "In my entire career, I don't recall ever seeing a partnership policy case in EAU."

It also appears that no lawyer in Oregon has any experience with partnership policy estate recovery protection. (If that is not the case, post what happens on the Elder Law Section discussion list and educate the rest of us.)

After death of the insured, who can collect policy benefits?

After the death of the insured, there may still be monies due from the insurer for an outstanding claim, or/and

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LTCI

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premium refund (if the policy had that feature).

After the death of an individual with an LTCI policy, the post-mortem intake process should identify any unpaid refund or claims proceeds and determine what party under the contract can collect the funds. In many cases, the client's estate will not be probated so there is no court-appointed personal representative to collect the funds.

The policy itself may contain details to help the family or personal representative identify how to claim policy benefits due after the insured dies.

If the policy is silent, then a personal representative of the estate is, by law, an authorized representative and can enforce any contract rights of the deceased insured.

But the insurer may recognize and pay benefits to someone other than a probate court's duly appointed personal representative. I have seen two circumstances where a post-mortem alternate payee could be recognized: a living trust successor trustee, and a post-death payee defined in the contract.

Living trust successor trustee claims benefits due

If the insured set up a living trust and assigned all contract rights due at death (such as any refund of premium payable at death) to the trust, the successor trustee should be allowed to collect any sums due without opening a full probate. Notifying the insurer of the existence of the trust, and of the assignment of benefits, will smooth the successor trustee's path. If the insurer provides a form to designate a beneficiary, then naming the trust as beneficiary prior to death of the insured would work.

Alternate payee by contract terms entitled to claim benefits

Some LTCI policies with "premium refund at death" provisions permit the insured to name a person entitled to the premium refund at the insured's death. Many policies are silent on this issue, leaving it to the duly appointed personal representative to collect any refund due on behalf of a probate estate.

For example, the federal employee long term care plan provides both a form to designate a person to collect premium refunds, and a process to name an alternate payee other than a probate estate:

> ***Refund of Premium Death Benefit***. *If your FLTCIP coverage is in force on your date of death, a refund of premium death benefit may be payable. Any PSF Amount available will be paid as a refund of premium death benefit to your estate or a beneficiary you designated in Writing and on file with us if the beneficiary is alive on your date of death.....*
>
> *The beneficiary must be deemed, in our sole discretion, entitled to the payment. If a PSF Amount is available as a refund of premium death benefit, and a beneficiary predeceases you, the refund of premium death benefit will be divided equally among any remaining living beneficiaries. If no beneficiary is alive on your date of death, and a PSF Amount is available as a refund of premium death benefit, the amount will be payable to your estate or, if there is no estate, to an alternative payee(s). The alternative payee(s) must be a person(s) who is (are) deemed, in our sole discretion, entitled to the payment. Neither the FLTCIP administrator nor we will be liable as a result of any payment made in good faith under this provision.* https://cdn.ltcfeds.com/planning-tools/downloads/3.0-Benefit-Booklet.pdf, p. 32-33

Perhaps other insurers or third-party administrators permit naming an alternate payee. Many of our estate planning clients (and their heirs) prize probate avoidance and will want you to try to convince the insurance company to pay someone other than a duly appointed personal representative.

Dealing with an insurer after death of the insured is tricky, because of healthcare privacy laws. Probate may be necessary so a personal representative can sign the HIPAA release, before the company will even deal with the law office.

The LTCI policy itself, or company practices, may permit payment of a refund or claims proceeds to a person or entity other than a personal representative. I have seen such a contract/claims refund provision that identified heirs and required execution of a release of all claims in return for payment post-mortem. Reviewing the contract and claims policy administration website will be necessary to identify such a provision and determine how it will work. ■

Annual Elder Law Section unCLE forum held June 24

Despite unexpected changes in date and location, the unCLE forum was as always a great success! Elder law attorneys from around the state gathered to discuss multiple topics—including legal issues in estate planning, Medicaid planning, court proceedings, law-firm burnout, and ChatGPT.

Rather than a typical CLE format with formal presenters, this event features roundtable discussions that provide conversation and information from all participants. There is no question that it is a favorite among the seminars our Section provides.

This year, the event was held at the Oregon State Bar facility, due to a fire at our previous location. Next year, the Elder Law Section CLE Subcommittee will again host the unCLE at the Oregon State Bar, but plans to investigate other locations for future years.

There is no better way to learn, ask questions, provide information, and network than the unCLE. If you were unable to join us this time, we hope you join us next year! ■

Participants ready for the session on protective orders

J. Glenn Null and Kay Hyde-Patton

Anastasia Yu Meisner, Daniela Holgate, and Theressa Hollis

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Annual unCLE *Continued from page 6*

Michelle Johansson and Gina Goddard

Kristen Chambers and Ekua Hackman

Legislative and lobbying update session

John Shickich and Alana Hawkins

2023 unCLe topics and session facilitators

Updates on ONE and Medicaid Applications
Rebecca Kueny and Julie Meyer Rowett

Difficult Conservatorships: Managing Clients, Explanation to the Court, and Weird Assets
Michelle Johansson

Secure Act 2.0: Charitable Giving, IRAs, ABLE Accounts
John Hemmerich

Planning on Today's Estate Recovery
Megan Fuhrer

Temporary Protective Proceedings, Limited Authorities, and Other Protective Orders
Brett Callahan

Problem Solving Protective Proceedings with ORS Requirements and Limited Protected Person Funds
Julie Nimnicht and Liz Jessop

Managing Clients We Represent with Terminal Illness, Mental Health, or Incapacity
Kirk Strohman and Sarah Fudge

Medicaid: Life Estates, Asset Protection Trusts, and Residence Trusts
Kay Hyde-Patton and Alex E. Gavriilidis

Office Efficiency, Open AI, and More
John Shickich

Legislative and Lobbying Updates
Christopher Hamilton

Burnout/Compassion Fatigue in the Office
Megan Fuhrer and Rebecca Kueny

Oregon now has NAELA chapter

A message from the Oregon NAELA Steering Committee: *Darin Dooley, Megan Fuhrer, Alana Hawkins, Kay Hyde-Patton, Rebecca Kueny, and Julie Meyer Rowett*

It is with great excitement that we are announcing the launch of the Oregon Chapter of the National Academy of Elder Law Attorneys! Oregon NAELA will advance the mission of the national organization: to equip Oregon attorneys for the complexity of serving older adults and people with disabilities through education, advocacy, and community. With the significant changes Oregon Medicaid has experienced in the previous years, this mission is more important than ever.

The members of the initial steering committee feel strongly that elder law attorneys need an increased presence at the legislative level to bring meaningful change that will benefit older and disabled Oregonians.

Oregon NAELA will provide several benefits right away to our membership. These include:

- Membership in the Oregon NAELA listserv. Membership in the Oregon NAELA listserv is limited to Oregon attorneys, making it a meaningful forum for exchange of ideas and planning tools.
- A forum to advance policy and legislative changes.
- A monthly Zoom forum for exchange of planning tips and tools. Steering committee members, who are all experienced with Medicaid planning, will attend these monthly meetings.

The success of Oregon NAELA will depend on a robust and engaged membership. Membership will cost only $50 per year. This is in addition to the national NAELA dues. If you have not already joined NAELA, we invite you to visit www.naela.org. Once our Oregon registration link is live, we will email all NAELA members to register formally for the Oregon Chapter.

A happy hour reception to toast the start of the Oregon chapter was hosted by Draneas Huglin Dooley LLC, on June 22.

We look forward to connecting with you over the coming months. ■

New on the Elder Law Section website

An index of our *Elder Law Newsletter* articles is now on the Section website.

It can be accessed from the newsletter webpage: https://elderlaw.osbar.org/newsletters/

The direct link is https://elderlaw.osbar.org/index-of-elder-law-newsletter-articles/

The index includes articles from 2016–2023. Earlier articles will gradually be added. ■

Save the Dates

October 6, 2023
Elder Law: The Field of Dreams
Elder Law Section CLE program
Oregon State Bar, Tigard
This will be a basic elder law and long-term-care planning program.

May 3, 2024
unCLE Forum
Oregon State Bar, Tigard

Important elder law numbers

as of
July 1, 2023

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $914/month Eligible couple $1,371/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000 Burial account limit ..... $1,500 Long term care income cap ..... $2,742/month Community spouse minimum resource standard ..... $29,724 Community spouse maximum resource standard ..... $148,620 Community spouse minimum and maximum monthly allowance standards ..... $2,465/month; $3,715.50/month Excess shelter allowance ..... Amount above $739.50/month SNAP utility allowance used to figure excess shelter allowance ..... $452/month Personal needs allowance in nursing home ..... $74.75/month Personal needs allowance in community-based care ..... $203/month Room & board rate for community-based care facilities ..... $711/month OSIP maintenance standard for person receiving in-home services ..... .$1,414/month;SSI only $936/month Average private pay rate for calculating ineligibility for applications made on or after October 1, 2020 ..... $10,342/month Home equity limit for an individual $688,000
Oregon ABLE Savings Plan	ABLE account contributions for 2023 are capped at $17,000. The beneficiary can also contribute an additional amount that is the lesser of the beneficiary's compensation for the tax year OR $13,590 (continental US).
Medicare	Part B premium ..... $164.90/month* Part D premium ..... Varies according to plan chosen Part A hospital deductible per spell of illness ..... $1,600 Part B deductible ..... $226/year Skilled nursing facility co-insurance for days 21–100 ..... $200/day * Premiums are higher if annual income is more than $97,000 (single filer) or $194,000 (married couple filing jointly).

Oregon State Bar

Elder Law Section

Newsletter Committee

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