Elaboration on the Continuing Care Retirement

Community Standards and Model Laws Project

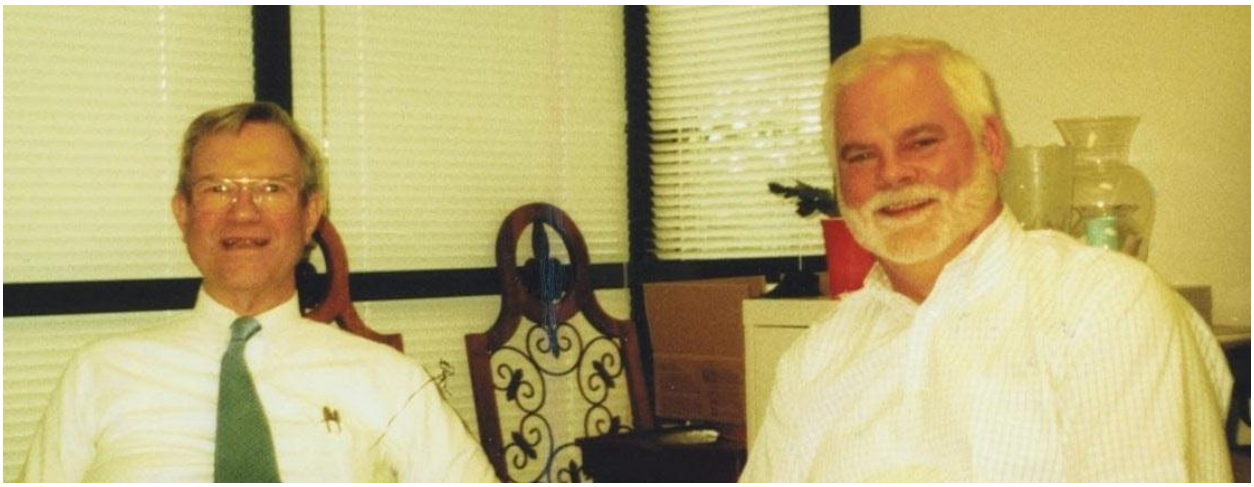
The intent of this project is simple, to give Continuing Care Retirement Community (CCRC) residents, who invest their life savings in Continuing Care Contracts, assurance that those contracts will be fulfilled. Life insurance and annuity contract holders now enjoy that assurance in all 50 states and the territorial and commonwealth jurisdictions of the United States. Entrance fee contracts are very similar to single premium immediate life annuities. Clearly, CCRC residents are more vulnerable and have more at stake than do most insurance policyholders. Their protections should be no less.

The CCRC industry has been dominated by nonprofit, tax exempt providers so it is appropriate that it be held to a higher standard of public stewardship than is the case for commercial enterprises entering into short term undertakings. Many CCRCs require large Entrance Fees with the understanding that benefits will be provided much later as needs arise. Although the United State Internal Revenue Service (IRS) has ruled that senior housing is *ipso facto* charitable, a higher public purpose would be to allow aging Americans to avoid becoming a burden to society through welfare or Medicaid.

This project, which we might call the NaCCRA Standards for short, seeks to support the CCRC industry by giving it the regulatory credibility and uniformity that it has lacked heretofore. The public has grown wary of CCRCs. Bankruptcies are publicized and little is known about how they impact residents other than a sense that bankruptcy can't be good. People hear stories of residents impacted by provider decisions, and they are afraid to trust their own lives to questionable oversight. This project seeks to address these legitimate grounds for skepticism and, thus, to provide a platform of integrity on which the industry can grow and thrive.

The National Continuing Care Residents Association (NaCCRA) seeks to work in harmony and cooperation with industry leaders and regulators. This project found its start in a meeting on May 18, 2010 with Steve Maag at his office in Washington, DC. Mr. Maag is the LeadingAge officer responsible for CCRC rela-

tions. LeadingAge is the provider organization, and it was in that spirit of cooperation that we met first with Mr. Maag, offering to work with providers to address the issues that concerned us. The presentation for that meeting can be accessed at http://www.jackcumming.com/AAHSA05182010.html. In addition to Mr. Maag, that meeting was attended by then NaCCRA President, Jack Mathison, then NaCCRA Vice President Bill Root, and Jack Cumming. Here is a picture that Jack Mathison then took of Messrs. Cumming and Maag.



Although nothing developed from that initial meeting, we have stayed in contact with Mr. Maag and others in the industry, and he has been cordial toward us, though it early became clear that NaCCRA would have to move forward on its own if anything was going to be accomplished to give CCRC residents the protections they might expect. NaCCRA remains committed to working with providers.

The CCRC industry began with a true public purpose mission. The early CCRCs were established to house clergy, missionaries, church workers, and other indigents who contributed what little life savings they had amassed in return for lifetime sustenance and care. Those early institutions were dependent on philanthropic donations to provide services and they operated on principles of compassion and altruism.

That changed in 1972 when the IRS issued a ruling (Revenue Ruling 72-124) which held that the mere housing of the elderly was in and of itself a charitable activity. The requirement of indigency or financial need was thereby lifted, and it became

profitable for tax exempt providers to offer luxury housing, care, and other amenities to the wealthy. In fact, people were required to demonstrate that they had sufficient assets before they were admitted. The pretense of compassionate service to the indigent was ended for the upscale senior housing market.

True, there were other requirements in Revenue Ruling 72-124, but they were ambiguous. There is a requirement that residents be kept in residence even if they outlive their assets, but that requirement can be voided if it is found that the residents have misspent funds or if it is thought that the continued residency requirement might undermine the enterprise. There is also a requirement that nonprofit CCRCs be operated at the "lowest feasible cost" but that has never been clearly defined and there is no evidence that it, or any other requirements of Revenue Ruling 72-124, have ever been enforced. It's unlikely that there is much interest in CCRCs and their challenges within the corridors of authority of the IRS.

Under these circumstances it's not surprising that some providers – perhaps only a few – have rationalized practices that may seem inimical to the best interests of the beneficiaries they are committed to serve. There are no constraints on the use of Entrance Fees. Perhaps the originating presumption was that they would be invested in the physical equipment needed to fulfill the contractual promises but availability of debt funding has allowed CCRC enterprises to become cash rich business engines.

We need to quickly add that many providers – perhaps most providers – continue to follow what they perceive to be sound operating principles. That guiding mission is complicated by the absence of a framework that clearly defines for CCRC operators what might be considered to constitute sound operations and sound reserving principles. For instance, Entrance Fees are a partial consideration paid in return for contractual obligations undertaken by the provider, but there is no requirement now in law or in accounting practice that those revenues be matched to the obligations that they are intended to fund. Moreover, provider organizations are given wide latitude to craft contracts that favor enterprise interests over the interests of the individuals that the enterprise serves, and those

seeking comfort for their latter years are obligated to accept these contracts of adhesion as they are presented. There is little regulation of the content of such contracts and less understanding among residents of what the limitations are in their contracts and how those limitations can affect them.

Nonprofit organizations are more autonomous in their governance than are commercial organizations. Board members are typically recruited and employed by the executives and "independent" directors who have similar interests to those of the executives. The financial reorganizations that redress challenges in the investment world are far less common in the nonprofit world of business. And these nominally nonprofit organizations are often lucrative businesses with fee income that allows the executives to enjoy a lifestyle comparable to their peers in the tax-paying business community.

Thus, there is a need to strengthen protections for all residents that those residents who are now in the more responsibly managed CCRCs already enjoy. Among these protections are:

- Understandable, clear and unambiguous contracts which are regulated to fairly balance the interests of residents with those of the business entities that offer the contracts.
- Financial practices that clearly match consideration required from residents to the benefits that the residents are promised, so that it is clear that those promises can be fulfilled without diversion of the matched funds to unrelated, speculative ventures.
- Provision that allows those entering into Continuing Care Contracts to fulfill their public purpose intent to be able to provide for their own expected costs of aging on a responsible basis without becoming a burden on others or wards of the state.
- Financial practices that maintain equity among and between like situated cohorts of residents who have a similar expectation of benefit upon entry into the Continuing Care Contract.

- Governance practices that balance residents' interests with the career interests of the executives who manage senior housing and senior services entities.

To give precision and practicality to the project, we have developed a portfolio of model laws, and this discussion introduces that portfolio. At this stage NaCCRA's hope is to get as many eyes as possible on the draft laws during the early exposure period so that the drafts can evolve to have credibility if they are later adopted as an advocacy program. Because of this wish for wide-ranging comments and corrections, it is desirable that this early work be shared widely with anyone who might be willing to comment thoughtfully and constructively.

Provider comments are particularly sought since no one wants to advance any legislation that would be impractical or that might have unforeseen negative consequences. Too often legislation has unintended impacts which is why we are exposing this regulatory portfolio for review. If there is something proposed that is impractical, or which has other negative implications, the NaCCRA group working on this project would like to know that right away, so changes can be made to achieve the purpose while keeping the outcomes workable.

Many of the model laws exposed here are adapted from insurance precedents, reworked to give CCRC residents the same protections that insurance policyholders now have. Insurance is regulated at the state level principally by state laws that are uniform from state to state. Those laws are developed as model laws by the National Association of Insurance Commissioners (NAIC) and the states then treat them differently from other legislative enactments, i.e. they tend to enact the model laws verbatim, which is what makes it possible for insurance to work effectively as a state-regulated, nationwide industry.

Ideally, we might develop these laws under the aegis of the NAIC, but not all states regulate CCRCs within the insurance department, and the NAIC has its resources taxed to the hilt just now by the need to develop the State Insurance Exchanges required by the Patient Protection and Affordable Care Act of 2010. Hence, the idea emerged of letting NaCCRA fulfill a role similar to what the NAIC has done for insurance. In this development process we will give primacy to the

state regulators who now have responsibility for CCRC oversight. Later, the entire project may be able to be moved to the NAIC but this approach allows us to get started without needless delay.

Currently, CCRC residents have fewer protections and are more vulnerable than are most insurance policyholders. Other model laws exposed here are specific to CCRC residential circumstances and not derived from insurance parallels, e.g. the inclusion of residents in governance. Other draft model laws are intended to reduce counterproductive regulation by allowing providers to earn standing as Trusted Providers. Thus, this this is a large and complex undertaking, and it is our intention to proceed cautiously and openly to try to craft something that is constructive in giving residents the protections they expect while allowing providers the freedom of action to meet resident needs effectively.