AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

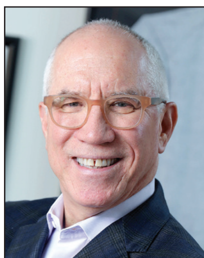
Claims Chat

By Harold D. Israel, Sean P. Williams and Sheldon D. Stone

CCRCs: A Bumpy Ride for Resident Entrance Fees

Harold D. Israel
Levenfeld Pearlstein, LLC; Chicago

Sean P. Williams
Levenfeld Pearlstein, LLC; Chicago



Sheldon D. Stone
Capstone Partners
Detroit

In recent years, the restructuring community has been inundated with bankruptcies of health care-related entities, including continuing-care retirement communities (CCRC).[1] A CCRC, also known as a life-plan community, delivers independent living in an amenity-rich lifestyle for senior citizens, with access to onsite higher-level care should medical needs progress. This continuum of care ensures that residents have the stability of remaining in one place as they age, without the need to continually move facilities. CCRCs are usually funded by secured bond debt, monthly fees and large resident entrance fees. These entrance fees are paid with the understanding that in many cases, 90 percent of such fees will be refunded once the residents leave the facility (either through death or a relocation) and someone else has moved into their units.

Resident entrance fee claims usually dominate the unsecured creditor class in CCRC bankruptcies. Historically, these claims have often had a smooth "ride through" the bankruptcy case, meaning that the obligations were assumed or repaid in full in order to avoid harming a sympathetic class of creditors and avoid the wrath of a state attorney general office.[2] In recent cases, however, numerous potholes have appeared on the road as senior citizens (or their heirs) are being deprived of millions of dollars in recoveries on account of their claims being significantly reduced. This is because in a reorganization case, resident refund claims are subordinate to bondholder claims, and bondholders are less willing to consent to such claims being paid in full (especially those of former residents) if it means they may wait years to be repaid. In the case of a sale of the CCRC's assets, the purchaser often conditions assumption of the lifecare contracts on the resident agreeing to modifications to such contracts or facing rejection of the contract and eviction. This article examines trends in CCRC bankruptcy cases with respect to the repayment of resident entrance fees.

CCRC Model and Lifecare Contracts

CCRCs are marketed to potential residents as places where seniors may live out the rest of their lives in relative peace. A typical CCRC resident moves into an independent-living unit, and as he/she ages or experiences declining health, this person may transition to assisted-living, skilled-nursing or memory-care units. A CCRC is constructed with the proceeds of secured bond financing and is typically funded by monthly fees, as well as sizable entrance fees, which can range from $100,000 to more than $1 million and usually are funded by the proceeds of the sale of the resident's prior home or retirement savings. The CCRC then has the obligation to refund 90 percent of such entrance fees when the resident passes away or moves out and someone else moves into that resident's unit.

In other words, entrance fees are typically used to operate the facility and are not escrowed. Instead, the refund of the entrance fee will generally be paid when the CCRC receives an entrance fee from a new resident that moves into a former resident's

---

1 *See, e.g., In re Christian Care Ctrs. Inc., et al.*, Case No. 22-8000 (Bankr. N.D. Tex.); *In re Northwest Senior Housing Corp., et al.*, Case No. 22-30659 (Bankr. N.D. Tex.); *In re Buckingham Senior Living Cmty. Inc.*, Case No. 21-32155 (Bankr. S.D. Tex.); *Amsterdam House Continuing Care Ret. Cmty. Inc.*, Case No. 21-71095 (Bankr. E.D.N.Y.); *In re SQLC Senior Living Ctr. at Corpus Christi Inc. d/b/a Mirador*, Case No. 19-20063 (Bankr. S.D. Tex.); *In re Tarrant Cnty. Senior Living Ctr. Inc.*, Case No. 19-33756 (Bankr. N.D. Tex.); *In re Clare Oaks*, Case No. 19-16708 (Bankr. N.D. Ill.).

2 *See, e.g., In re Christian Care Ctrs. et al.*, Case No. 22-8000 (Bankr. N.D. Tex.); *In re Northwest Senior Housing Corp., et al.*, Case No. 22-30659 (Bankr. N.D. Tex.) (proposed purchaser had intended to assume resident refund obligations); *In re SQLC Senior Living Ctr. at Corpus Christi Inc. d/b/a Mirador*, Case No. 19-20063 (Bankr. S.D. Tex.); *In re Mayflower Cmtys. Inc.*, Case No. 19-30283 (Bankr. N.D. Tex.); *In re Tarrant Cnty. Senior Living Ctr. Inc.*, Case No. 19-33756 (Bankr. N.D. Tex.); *In re The Clare at Water Tower*, Case No. 11-46151 (Bankr. N.D. Ill.); *In re Franciscan Cmtys. Villa De San Antonio*, Case No. 10-50712 (Bankr. W.D. Tex.).

unit (or, depending on the contract, in the order in which the residents moved out). The typical lifecare contract does not provide any property rights in the resident's unit (*i.e.*, the resident does not own the unit) or otherwise provide the resident with any security interest in the entrance fee. Thus, the CCRC must "replace" the resident in order to fund the refund obligation. If occupancy is declining, the resident could face significant delays in obtaining his/her refund. Many (if not most) residents are unaware of any of the foregoing.

There are three common CCRC contracts. A Type A contract (lifecare contract) is the standard contract that most residents will sign. In a lifecare contract, a resident pays a refundable entrance fee and monthly service fees for any services the resident requires. In a lifecare contract, the monthly service fees are particularly attractive, as they generally may be increased only for inflation, not based on the resident's need.[3] A Type B contract (modified contract) generally includes an entrance fee and monthly service fee, which are set off against future needs of the residents, but which are not locked in (*i.e.*, the price can be increased or decreased, depending on the health care services actually used by each resident).[4] Finally, a Type C contract (fee-for-service contract) generally requires significantly lower entrance fees and monthly service fees, but health care services are charged on as-needed basis and at market price.[5]

Harold Israel is a partner and Sean Williams is an associate with Levenfeld Pearlstein, LLC in Chicago. Sheldon Stone is a managing director with Capstone Partners in Detroit.

Lifecare Contracts Are Executory Contracts

CCRCs fail for several reasons, including inability to service bond debt, increased competition, poor management and increased costs (including those incurred on account of COVID-19). When they do fail, resident entrance fee claims fall below bond debt and any other secured debt in priority and are treated as general unsecured claims. CCRCs often resort to filing chapter 11 cases in order to restructure bond debt and, more recently, to modify their obligations to refund entrance fees owed to current and former residents.

There is little dispute that lifecare contracts are executory contracts and therefore are subject to assumption or rejection under § 365 of the Bankruptcy Code.[6] The CCRC and resident have continuing obligations to each other. The CCRC has certain financial and health-related obligations to the resident, such as (1) provide a place for the resident to live; (2) refund a percentage of the entrance fee; and (3) care for the residents for the duration of his/her stay. Residents, on the other hand, must comply with all CCRC rules and pay monthly service fees. Because the contracts are executory, they may either be assumed by the CCRC and/or assumed and assigned to a new purchaser in connection with a sale of the CCRC's operations. Lifecare contracts may also be rejected by a CCRC operator.

If assumed, residents historically have suffered no damages, as assignees must assume the entire contract.[7] If rejected, a resident is left with an unsecured claim in the bankruptcy for the refundable portion of the entrance fee, which has little or no value, as such claim is wholly unsecured. Recently, new potential outcomes have emerged: Accept modifications to the lifecare contract, have the contract rejected and be forced to move, or the facility could be converted from an entrance fee model to a rental model, with deposits to be refunded over a substantial period of time.

Residents Left Holding the Bag: Lifecare Contract Rejection or Modification

Due largely to the potential public outcry or poor public relations, entrance-fee claims in CCRC bankruptcy cases have been considered sacrosanct and historically have passed through bankruptcy unaffected. However, in the last 10-15 years, more cases have bucked this trend, and residents have not been able to recover entrance fees as set forth in their lifecare contracts, contrary to an expectation that there was little or no risk to the repayment of the entrance fees when due. Five cases illustrate the myriad ways in which certain debtors have dealt with refundable resident entrance fees.

The *Covenant at South Hills Inc.* bankruptcy, filed in the U.S. Bankruptcy Court for the Western District of Pennsylvania in 2009, was one of the more publicized cases in which resident entrance fee obligations were not satisfied.[8] In that case, the buyer of Covenant at South Hills's assets was unwilling to assume the lifecare contracts, and the contracts were rejected after the closing of sale.[9] Subsequently, the residents filed a class action lawsuit to recover more than $20 million in lost deposits.[10] While the parties settled out of court pursuant to terms that remain confidential, it is highly unlikely that the residents were paid in full.

In late 2020, Henry Ford Village, a Detroit-area CCRC, filed for bankruptcy in the U.S.

3 Brad Breeding, "A Primer on CCRC Residency Contracts," myLifeSite (March 12, 2018), *available at* mylifesite.net/blog/post/primer-ccrc-residency-contracts (unless otherwise specified, all links in this article were last visited on March 20, 2023).

4 *Id.*

5 *Id.*

6 *See* Vern Countryman, "Executory Contracts in Bankruptcy: Part I," 57 *Minn. L. Rev.* 439, 460 (1973); *see also Mission Prod. Holdings Inc. v. Tempnology LLC*, 139 S. Ct. 1652, 1658 (2019) ("A contract is executory if performance remains due to some extent on both sides.") (internal citations omitted).

7 *See, e.g., In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) (noting that debtor "must assume the entire contract, *cum onere*" and accept "both the obligations and the benefits of the executory contract").

8 *The Covenant at South Hills Inc.*, Case No. 09-20121 (Bankr. W.D. Pa.).

9 *Id.*

10 *Hirschfield v. B'nai B'rith Int'l*, No. 2:09CV1535, 2010 WL 11565250, at *2 (W.D. Pa. Aug. 10, 2010).

Bankruptcy Court for the Eastern District of Michigan.[11] The purchaser required residents to agree to a modified contract whereby residents would recover a portion of their deposit based on how long he/she continued living at HFV after the sale closed (ranging from 8 percent of potential refund liability after one year to 60 percent of liability after 15 years), or face eviction.[12] Approximately 11 percent of the residents signed the amended agreements, and the estimated combined losses for all residents is approximately $110 million.

Similarly, in the *HHH Choices Health Plan LLC* bankruptcy case, the purchaser of the CCRC operations, as a condition of its offer, required *all* residents to enter into binding amendments to their residency agreements.[13] The amended residency agreements significantly revised and restructured residents' refund claims.[14] Each of the residents executed the amended residency agreements, which were subsequently assumed and assigned to the purchaser.[15]

Next, in the *Buckingham Senior Living Community Inc.* bankruptcy case, the debtor used a hybrid approach to deal with its entrance fee liability.[16] It assumed the contracts and liabilities associated with all current residents. However, recovery for former residents is dependent on Buckingham's future performance (or that of its post-confirmation litigation trust). After receiving an initial payment, those parties are being forced to wait for future payments until funds become available from a litigation trust or until the debtor has in excess of 135 days of cash on hand.[17] While ultimate recovery is projected to be 100 percent on account of such claims, former residents are to be paid these amounts over time as opposed to the terms of their contracts.[18] Therefore, former residents must bear the risk of Buckingham being able to meet its contractual obligations and the conditions of repayment — not the results they result bargained for when they entered their lifecare contracts.

Lastly, in April 2022, Northwest Senior Housing Corp., d/b/a the Edgemere, filed for bankruptcy in the U.S. Bankruptcy Court for the Northern District of Texas.[19] According to the first-day declaration filed in the case, it has in excess of $25 million in past-due entrance fee obligations and more than $122 million of potential entrance fee refund liability.[20] The Edgemere is proposing to sell substantially all of its assets to a third-party buyer through a reorganization plan that provides for the rejection of all lifecare contracts.[21] Under this plan, current residents may retain their units under a monthly rental model.[22]

With respect to the return of their entrance fees, current and former residents will be repaid over 18 years from Edgemere's sponsor, Lifecare Communities Inc. (referred to as "Lifespace"), in exchange for a complete release of Lifepsace and the plan sponsors.[23] Its obligations to repay residents is contingent upon, among other items, Lifespace maintaining at least 250 days of cash on hand and/or any such payment not triggering a default under Lifespace's bond documents.[24] The court has confirmed the plan, but the amount that residents will recover on account of their entrance-fee claims remains uncertain.

Conclusion

Recent CCRC bankruptcy cases make it clear that it is by no means certain that entrance fee obligations will "ride through" a bankruptcy. Residents will be at the mercy of CCRC operators, their bondholders and/or the purchasers of the CCRCs' assets, then might be faced with the proverbial Hobson's Choice:[25] Accept a modified lifecare contract that reduces the benefits, or face eviction. In the interim, residents entering CCRCs should be aware that the road to getting their entrance fee payments repaid might not be a smooth one. abi

Reprinted with permission from the ABI Journal, Vol. XLII, No. 5, May 2023.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 12,000 members, representing all facets of the insolvency field. For more information, visit abi.org.

---

11 *In re Henry Ford Village Inc.*, Case No. 20-51066 (Bankr. E.D. Mich.). Mr. Stone is the liquidation trustee for Henry Ford Village.

12 *Id.*

13 *See* Amended Disclosure Statement for the Chapter 11 Plan of Liquidation for Hebrew Hospital Senior Housing Inc. Proposed by the Debtor, *In re HHH Choices Health Plan LLC*, Case No. 15-11158 (Bankr. S.D.N.Y.) [Docket No. 883 June 12, 2018].

14 *Id.*

15 *Id.*

16 *In re Buckingham Senior Living Cmty. Inc.*, Case No. 21-32155 (Bankr. S.D. Tex.).

17 First Amended Disclosure Statement Relating to the Debtor's First Amended Chapter 11 Plan of Reorganization, *In re Buckingham Senior Living Cmty. Inc.*, Case No. 21-32155 (Bankr. S.D. Tex.) [Docket No. 309 Sept. 9, 2021].

18 *Id.*

19 *In re Northwest Senior Housing Corp.*, Case No. 22-30659 (Bankr. N.D. Tex.).

20 Declaration of Nick Harshfield in Support of Chapter 11 Petition and First Day Pleadings, *In re Nw. Senior Housing Corp.*, Case No. 22-30659 (Bankr. N.D. Tex.) [Docket No. 7 April 14, 2022].

21 Third Amended Disclosure Statement for the Plan of Reorganization of the Plan Sponsors, *In re Nw. Senior Housing Corp.*, Case No. 22-30659 (Bankr. N.D. Tex.) [Docket No. 934, Dec. 19, 2022].

22 *Id.*

23 *Id.*

24 *Id.* According to the public records, the Lifespace Communities Obligated Group had 232 days of cash on hand for the month ending Dec. 31, 2022.

25 This is defined as "a free choice in which only one thing is actually offered." *See* Hobson's Choice, Wikipedia, *available at* en.wikipedia.org/wiki/Hobson%27s_choice (*e.g.*, "I'll give you a choice: take it or leave it.").