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Intensive Care

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Restructurings of Continuing-Care Retirement Communities

Continuing-care retirement communities (CCRCs) are a residential alternative for older adults that provide residents with independent-living units and access to amenities, social and recreational activities, and dining options. As residents' needs change through the aging process, they have access to a continuum of health care and support services, including assisted living, rehabilitation, skilled nursing and memory care, all located at the same campus. The majority of CCRCs are sponsored by religious or other nonprofit organizations, but there are some for-profit CCRCs.

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CCRCs are regulated under state law. In New York, CCRCs operate pursuant to Article 46 of the New York Public Health Law and Regulation 140 of the New York Insurance Regulations. As such, New York CCRCs are subject to regulation and oversight by both the Department of Health and the Department of Financial Services.

CCRCs are not a new phenomenon, but they have become more prevalent in recent decades. In 1984, there were 275 CCRCs.[2] Currently, there are approximately 1,900 CCRCs across the U.S.[3] The rise in CCRCs has been accompanied by a parallel increase in restructurings of CCRCs.

Financial Challenges

CCRCs derive a substantial portion of their revenue from sizable entrance fees paid by new residents, which can be in excess of $2 million depending on the CCRC's location, size of the residential unit and type of residency contract selected by the resident.[4] New residents typically sell their homes in order to afford the entrance fees, which are partially refundable upon the death or departure of a resident. Residents also pay a monthly fee.

New residents enter into a residency contract with the CCRC, which establishes the terms and conditions of residence at the facility, the resident's obligations to pay the entrance fee and other monthly charges, and the refundability of entrance fees. There are several types of residency contracts, with differing residence fee amounts, the percentage of the entrance fee that can be refunded, and the amount of monthly service fees, including the costs of future care, with higher upfront entrance fees corresponding to lower fees over the life of the contract.

The reliance on resident entrance and service fees to fund day-to-day operations, remain current on debt service and honor entrance refund obligations means that a decrease in occupancy rates can generate a liquidity crisis for a CCRC. Occupancy rates can be subject to factors outside of the CCRC's control, such as the COVID-19 pandemic, which slowed sales and marketing activity and put great strain on the health care industry as a whole.

Moreover, a CCRC's flexibility to respond to liquidity crises is limited by the nature of its operations and the legal requirements to which the CCRC is subject. For example, New York requires that CCRCs maintain a minimum liquid reserve for estimated future liabilities.[5] New York CCRCs are also required to pay entrance fee refunds no later than 30 days after the formerly occupied unit has been

1 The author and her colleagues represented Amsterdam Continuing Care Health System and Amsterdam Nursing Home Corp. (1992) in the 2021 bankruptcy case of *Amsterdam House CCRC*. The opinions expressed herein are solely those of the author.

2 Howard E. Winklevoss & Alwyn V. Powell, with David L. Cohen & Ann Trueblood-Raper, *Continuing Care Retirement Communities an Empirical, Financial and Legal Analysis* 6 (1984).

3 Ruben Castanada, "What to Know About Continuing Care Retirement Communities," *U.S. News & World Report* (Feb. 10, 2022), *available at* health.usnews.com/senior-care/caregiving/articles/continuing-care-retirement-communities (last visited Feb. 23, 2022).

4 Some CCRCs operate as rentals and do not require entrance fees. This article focuses on the issues faced by CCRCs operating on an entrance-fee model.

5 *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 350.2; N.Y. Pub. Health Law § 4611. The formula for calculating the reserve liability for a New York CCRC is found in § 350.3 of Regulation 140.

resold, but in no event later than one year after the formerly occupied unit has been vacated.[6]

In addition, regulations limit the incentives, such as temporary entrance fee deferrals, that CCRCs can offer to attract new residents. Changes to monthly service fees are also subject to regulatory approval, and CCRCs must maintain a high standard of resident care in the face of rising health care costs. It is inevitable that a regulatory cloud and unmanageable corporate debt will negatively impact the marketability of the units, further exacerbating challenges faced by distressed CCRCs. Accordingly, CCRCs in need of restructuring face complex challenges, including honoring commitments to current and former residents, maintaining regulatory compliance, addressing long-term debt obligations and preparing for potential future shortfalls.

A Success Story

Amsterdam House Continuing Care Retirement Community Inc. (hereinafter, "Amsterdam House CCRC") is a New York nonprofit that operates the Amsterdam at Harborside, a CCRC licensed under Article 46 and located in Port Washington, N.Y.

On June 14, 2021, Amsterdam House CCRC filed a chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of New York.[7] However, this was not Amsterdam House CCRC's first foray into bankruptcy.

In 2014, Amsterdam House CCRC underwent a balance-sheet restructuring whereby outstanding Series 2007 bonds were exchanged for new Series 2014A, B and C Bonds issued by the Nassau County Industrial Development Agency.[8] Unfortunately, Amsterdam House CCRC encountered financial difficulties, including the aforementioned challenges, and was unable to maintain occupancy at the level it needed in order to be financially stable.

In 2020, Amsterdam House CCRC ceased payments on its bond obligations and suspended entrance-fee refunds. This led to events of default under the 2014 bond documents and a citation from the Department of Health for failure to pay entrance fee refunds within the time frame required under Article 146.

As of the petition date, Amsterdam House CCRC owed bondholders approximately $207.8 million in unpaid principal and approximately $6.5 million in accrued but unpaid interest. In the months leading up to the chapter 11 filing, Amsterdam House CCRC, its sole member Amsterdam Continuing Care Health System Inc. and a majority group of holders of 2014 bonds (hereinafter, the "bondholders") extensively negotiated the terms of a restructuring, which was ultimately memorialized in a plan-support agreement (PSA).

Under the PSA, the bondholders agreed to fund $40.7 million in new money bond financing through the purchase of new Series 2021A Bonds. This level of new money commitment was unprecedented among CCRC restructurings. The size of the investment reflected both the bondholders' confidence in Amsterdam House CCRC's future prospects and the dire liquidity crisis that prompted the facility's need for bankruptcy relief.

Specifically, Amsterdam House CCRC owed former residents in excess of $20 million on account of entrance-fee refunds. The PSA provided that the Series 2021A Bond proceeds would be used to satisfy existing claims for entrance-fee refunds. An additional $9 million of Series 2021A Bond proceeds would be used to fund the minimum liquid reserve required under Regulation 140. The balance would be used to pay the costs of the restructuring and fund a debt reserve. The PSA also provided that Series 2014A and B Bonds, totaling approximately $140 million in principal amount, would be exchanged for new Series 2021B Bonds at 91 percent par. Past-due and accrued interest on the Series 2014A and B Bonds and the entirety of the Series 2014C Bonds would be extinguished.

As a condition of the new money bond financing, the bondholders demanded a sizable commitment on Amsterdam Continuing Care Health System's part to completing the restructuring and keeping Amsterdam House CCRC in regulatory compliance. As a separate corporate entity, Amsterdam Continuing Care Health System was not legally responsible for Amsterdam House CCRC's debts. Nevertheless, to reach a deal with bondholders, Amsterdam Continuing Care Health System agreed to contribute $9 million to Amsterdam House CCRC on the effective date of a confirmed chapter 11 plan, to be used to fund the balance of the liquidity reserve or other costs of the restructuring not satisfied by the proceeds of the Series 2021A Bonds.

Amsterdam Continuing Care Health System committed an additional $9 million in post-effective-date liquidity support, pursuant to the terms of a liquidity-support agreement (LSA). The LSA provided for the establishment of a liquidity reserve account, to be funded in the amount of $9 million from the proceeds of the sale of substantially all of the assets of a certain affiliate of Amsterdam Continuing Care Health System.

In the future, Amsterdam House CCRC can draw on the liquidity support to the extent that it otherwise lacks sufficient cash on hand to comply with the financial requirements applicable to CCRCs under New York law, including with respect to payments of unpaid entrance fee refunds and minimum liquid reserve requirements under Article 46 and Regulation 140. Accordingly, the LSA mitigates the risk that Amsterdam House CCRC will lack sufficient cash flow to satisfy regulatory requirements in a future period of slow turnover.

As a tax-exempt organization and a public charity under § 501(a)(3) and (c)(3) and of the Internal Revenue Code, Amsterdam Continuing Care Health System is subject to regulatory oversight by the Charities Bureau of the New York State Attorney General, the Department of Health and the Department of Financial Services. Thus, Amsterdam Continuing Care Health System's commitments to fund the LSA and the $9 million contribution were expressly subject to obtaining any and all state and local approvals required for its participation in the transactions under the restructuring-support agreement.

With a deal in place, Amsterdam House CCRC filed for chapter 11 relief and moved for authorization to assume the PSA. Amsterdam House CCRC's ability to propose a pre-negotiated plan minimized the costs associated with a protracted chapter 11 case. The plan was confirmed on Aug. 26, 2021, and the effective date occurred on Sept. 8, 2021.

6 N.Y. Pub. Health Law § 4609.
7 Case No. 21-71095-ast (Bankr. E.D.N.Y.).
8 Case No. 14-73348-ast (Bankr. E.D.N.Y.).

Amsterdam House CCRC's exit from bankruptcy less than three months after the petition date minimized disruptions and uncertainty for its residents caused by a bankruptcy filing. Current and former residents who have entrusted their life's savings in a CCRC are key stakeholders in any restructuring. In the case of Amsterdam House CCRC, (1) all residency agreements with existing residents were assumed; (2) all claims for refunds of entrance fees pursuant to residency agreements and applicable New York law due and owing as of the effective date were paid the full face amount of the claims; and (3) operations will continue under the same ownership and management.

That is not always the case in CCRC bankruptcies. The chapter 11 case of *Henry Ford Village Inc*., filed in October 2020, is a useful point of comparison.[9] Henry Ford Village was the operator of a nonprofit CCRC in Michigan. Similar to Amsterdam Continuing Care Health System, Henry Ford Village's need for bankruptcy relief was precipitated by unfunded entrance-fee-refund claims and events of default under its bond documents. However, unlike the other, Henry Ford Village did not enter bankruptcy with a pre-negotiated reorganization plan, but instead determined that its only viable option was to pursue a § 363 sale of substantially all of its assets.

Ultimately, the court authorized the sale of the facility to Henry Ford Village OPCO LLC, an affiliate of Sage Healthcare Partners (the "purchaser"). The purchaser converted the facility to a for-profit senior care facility operating on a rental model (as opposed to the entrance-fee model). Current residents who entered into new lease agreements with the purchaser were entitled to discounted care and temporary rent freezes. However, sale of the facility meant that the majority of current residents would not be paid the entire amount of the entrance-fee refund that they would have been entitled to under their contracts with Henry Ford Village. Rather, the purchaser committed to pay current residents a portion of their entrance-fee refund, ranging from 8 percent to 60 percent, depending on the resident's length of stay at the facility after the closing date.

In December 2021, the court confirmed Henry Ford Village's liquidation plan. Under the plan, the class of general unsecured creditors, which included the majority of former residents holding entrance-fee refund claims, will receive recoveries in the estimated range of 24-40 percent. Clearly, current and former residents fared better under Amsterdam Continuing Care Health System's financial restructuring than current and former residents under Henry Ford Village's sale and liquidation.

The Path Forward

Amsterdam House CCRC is one of several CCRCs to have filed for bankruptcy in recent years. As economic volatility in the wake of COVID-19 continues, it can be expected that CCRCs will continue to need restructuring. At the same time, demand for CCRCs will continue to rise as an aging population plans for long-term housing, care and medical needs. The Amsterdam House CCRC case demonstrates that the market views CCRCs as an opportunity for growth and sees CCRCs as offering an attractive tax-exempt investment opportunities. With buy-in from all stakeholders, including ownership, residents and regulators, there is potential for value-enhancing restructurings in the CCRC sector. **abi**

9 Case No. 20-51066-mar (Bankr. W.D. Mich.).

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