

LEGAL DEVELOPMENTS AND ENFORCEMENT ACTIONS IMPACTING CCRCS

LeadingAge New York's CCRC Summer Summit

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Overview

- **Litigation Trends**
- **Scooters / Motorized Devices**
- **OIG Advisory Opinion No. 14-01**
- **The Non-Profit Revitalization Act of 2013**
- **Good Samaritan Law**

Litigation

- **Retaining Entrance Fees**
- **CCRC's Financial Security**

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Scooters / Motorized Devices

- **DOJ / HUD Guidance**
 - **The U.S. Department of Justice and the Department of Housing and Urban Development: Reasonable Modifications Under the Fair Housing Act ("FHA") (2004)**
 - **Prohibited policies include conditioning use of motorized device on the payment of fees or a deposit, and requiring liability insurance.**
 - **Resident may be assessed for cost of repairs to residential units and common areas for damage caused by motorized devices if it is the provider's practice to assess tenants for any damage they cause to the premises.**
 - **Resident's use of a motorized device may be conditioned on his or her ability to operate it without posing a significant risk to the safety of others.**

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Scooters / Motorized Devices (cont'd)

- Prohibited Practices Under the Fair Housing Act
 - United States v. Rathbone Retirement Community Inc., No. 2008-cv-00174 (S.D. Ind. 2008) (senior housing provider required to pay \$116,000 settlement for entirely prohibiting motorized carts and wheelchairs in the dining area and all resident apartments)
 - Consent Order, United States v. Twining Service Corp., No. 05-cv-05177 (E.D. Pa. Sept. 30, 2005) (enjoining the CCRC from prohibiting mobilized devices in common areas and from requiring users to indemnify and hold the CCRC harmless for injuries)

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Scooters / Motorized Devices (cont'd)

- Prohibited Practices Under the Fair Housing Act (*cont'd*)
 - Consent Order, United States v. Savannah Pines, L.L.C., No. 401-CV-3303 (D. Neb. Apr. 30, 2003) (enjoining the senior housing provider from making residents operating mobilized devices pay higher security deposits, banning the devices in all common areas, and only permitting residents with such devices to live on the first floor of the facility)
 - HUD v. Country Manor Apartments, HUD ALJ 05-98-1649-8 (2001) (prohibiting conditioning the use of motorized scooter on procurement of liability insurance)

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Scooters / Motorized Devices (cont'd)

- **Permissible Practices**
 - Groteboer v. Eyota Economic Development Authority, 724 F. Supp. 2d 1018 (D. Minn. 2010) (establishing a speed limit, asking resident with mobilized chair to pad her chair, and providing the resident with escorts are permissible)
 - United States v. Hillhaven Corp., 960 F. Supp. 259 (D. Utah 1997) (restrictions on the time, place, and manner of use of motorized devices are permissible when implemented for legitimate, non-discriminatory reasons)

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Scooters / Motorized Devices (cont'd)

- **Americans with Disabilities Act ("ADA") Regulations**
 - Effective March 2011, impose limitations on requiring verification of a disability necessitating a motorized device.
 - Factor analysis for determining whether a motorized device may be allowed in a facility under Title III of the ADA as a reasonable accommodation. See 28 C.F.R. Part 36.

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Scooters / Motorized Devices (cont'd)

- **Examples of Scooter Policies**
 - Resident application to use motorized devices and physician's written statement stating the medical need
 - Approval of "authorized personnel" to operate scooter
 - Imposing parking restrictions
 - Requiring etiquette, including yielding
 - Requiring flag mounted on the device and use of signaling devices

Scooters / Motorized Devices (cont'd)

- **Examples of Scooter Policies (*cont'd*)**
 - Recommending residents transfer from their mobility device to a dining chair
 - Holding a resident liable for any damages to property or persons for operating a motorized device
 - Prohibiting the use of motorized devices on public roads on the grounds

OIG Advisory Opinion No. 14-01 (January 13, 2014)

- Arrangement with a placement agency for payment of a fee for residents admitted to senior living community does not violate the Federal anti-kickback statute based on low risk that referral fee would be for any Federal health care program coverage.
- Consistent with **OIG Advisory Opinion No. 10-05 (May 19, 2010)** (policy of granting employees and residents of a CCRC either a gift card or a one-time credit if they referred a prospective resident to the CCRC determined not to violate the Federal anti-kickback statute; the prospective residents did not currently need government-funded assisted living or skilled nursing care and any future need was “substantially speculative”)

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The Non-Profit Revitalization Act of 2013

- Re-categorization of not-for-profit corporations
- Related-party transactions
- Conflict of interest and whistleblower policies
- Additional regulations on governing boards
- Board authorization of real estate transactions
- Approval of certain significant transactions
- Modernization of rules governing participation in meetings
- Financial reporting
- Board oversight of audited financial statements

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Good Samaritan Law

- No clear guidance from New York courts on whether: [1] a CCRC employee, administering CPR or AED to a resident in independent living or adult home/assisted living, would be protected by the Good Samaritan Law; or [2] the CCRC would be liable for the employee's negligence.
- To be protected under the Good Samaritan Law (Public Health Law § 3000-a) (other than for gross negligence), any emergency medical treatment must be administered:
 - voluntarily
 - without expectation of monetary compensation, and
 - outside of a hospital, doctor's office or "any other place having proper and necessary medical equipment."

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Good Samaritan Law

- Maintaining an AED onsite will not expose an organization to liability in connection with the negligent use of the AED by a Good Samaritan (meeting the above criteria) if the organization is required by law to maintain an AED or is a "public access defibrillation provider" pursuant to a "collaborative agreement" with a hospital or physician on AED procedures (specified in Public Health Law § 3000-b).
- See also Education Law §§ 6527[2] (physicians), 6611[6] (dentists), and 6909[1] (nurses), and 6737 (physical therapists). [Immunity under Good Samaritan Law extends to these health care professionals except for care rendered "in the normal and ordinary course of his practice."]
- New York State Court of Appeals held that a health club employee, who had received emergency-aid training from the health club, was not liable for employee's alleged failure to use the AED on the premises for a distressed gym patron. Miglino v. Bally Total Fitness of Greater New York, Inc., 20 N.Y.3d 342 (2013).

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Good Samaritan Law

- Reasoning in Miglino:
 - [1] although a health club (with 500 or more members) must be, by statute, a “public access defibrillation provider”, the Business Corporation Law (§ 627-a[1]) does not impose an affirmative duty on a health club to use the AED
 - [2] a health club employee who does choose to administer emergency care, as well as the health club, would be protected from liability under the Good Samaritan Law.
- Liability may turn on whether employee was trained in CPR or the use of an AED and was expected to perform emergency care as part of his or her employment responsibilities
- Important to clarify with employees as well as residents, the community's emergency response procedures and extent of emergency medical treatment to be performed by staff