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Via E-Mail to nmarvel@leg.state.vt.us
Senate Health & Welfare Committee
State of Vermont Senate
115 State Street
Montpelier, Vermont 05633-5301

Re: H. 635 (an Act relating to long-term care facilities; receivership)

Dear Chair and Members of the Committee:

Thank you again for having provided my Office with the opportunity to testify last week regarding H. 635, an Act relating to long-term care facilities; receivership. At your request, I write to reiterate the rationale for the three statutory amendments H. 635 proposes, all of which the Attorney General Office's ("AGO") supports. As a general reminder, H. 635 addresses concerns that arose in the context of the State's recent effort to obtain a court-appointed receiver over the Pillsbury Senior Communities located in South Burlington and St. Albans, Vermont.

Amendment 1

Under Section 1, H. 635 would add a definition of "insolvent" to the statute governing long-term care facilities: 33 V.S.A. § 7201 *et seq*. Currently, one of the grounds on which the State can request the appointment of a receiver over a long-term care facility is that the facility in question is "insolvent." 33 V.S.A. § 7202(a)(4). However, the long-term care statute does not define "insolvent." As a result, the State and courts lack clarity on when a facility qualifies as "insolvent" for the purposes of receivership.

The Vermont Uniform Commercial Code (VT-UCC) already defines "insolvent" as "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due; or (C) being insolvent within the meaning of federal bankruptcy law." 9A V.S.A. §1-201(b)(22). The AGO supports amending 33 V.S.A. § 7102 to include a definition of "insolvent" that is consistent with the term's definition in the VT-UCC. Such a definition would be broadly protective of long-term care facility residents, particularly in cases, like *Pillsbury*, where a facility-owner's failure to pay debts in the ordinary course of business is more readily evidenced than the facility-owner's economic

inability to pay these debts, yet equally a threat to the health, safety and welfare of the facility's residents.

Amendment 2

Under Section 2, H. 635 would add "mental harm" as a basis for "Immediate Enforcement Action" by the Department of Disabilities, Aging and Independent Living ("DAIL"). To explain: DAIL has a range of tools it may use in addressing long-term care facilities of concern, from requiring corrective action to imposing fines to banning the admission of new residents to suspending or revoking licenses.

Generally, under 33 V.S.A. § 7110(a), before DAIL undertakes any of these enforcement actions, it is required to provide the facility in question with the opportunity for corrective action. However, under 33 V.S.A. § 7110(b), DAIL "may take immediate enforcement action"—action without first providing corrective opportunity—"when necessary to eliminate a condition which can reasonably be expected to cause death or serious physical harm to residents or staff before it can be eliminated" by conventional enforcement processes.

H. 635 would amend 33 V.S.A. § 7110(b) to add "mental harm" as a basis for such immediate enforcement action. This amendment would bring 33 V.S.A. § 7110(b) into alignment with:

- Vt. Admin. Code 12-4-202:2 (Providing that "mental harm" is a basis for "immediate enforcement action" in residential care homes);

- 33 V.S.A. § 7202 (a)(2) (Providing that "mental harm" is a basis for receivership over long-term care facilities); and

- 33 V.S.A. § 7203(b)(1)(B) (Providing that "mental harm" is a basis for temporary receivership over long-term care facilities).

As the recent *Pillsbury* litigation reflected, widespread mental harms may be present in a long-term care facility where "physical" harms may or may not have manifested. In those instances, immediate enforcement and relief are nonetheless warranted.[1]

Amendment 3

Finally, under Section 3, H. 635 would clarify that a court must evaluate a complaint for receivership as of the time of the complaint's filing, thereby eliminating the possibility that a problematic facility owner improperly benefits from the performance of a temporary receiver.

[1] Such an approach is consistent with the policy behind Vermont's regulation of long-term care facilities: to promote safe surroundings, adequate care, and humane treatment, safeguard the health of, safety of, and continuity of care to residents, and protect residents from the adverse health effects caused by abrupt or unsuitable transfer of such persons cared for in these facilities." 33 V.S.A. § 7101.

To explain: under the receivership statute, after the State files a complaint requesting receivership, *see* 33 V.S.A. § 7202, the State must then prove at trial that the allegations set forth in that complaint are true. 33 V.S.A. § 7204. Because those allegations invariably regard facility-conditions at or before the time the complaint was filed, proof of those allegations is invariably proof of past conditions (even if those conditions happen to be ongoing).

However, the receivership statute does not explicitly preclude courts from considering evidence of facility conditions as they exist *after* the time of the complaint's filing. Indeed, in the recent *Pillsbury* litigation, the court required the State to demonstrate that a receiver was required based on facility conditions as of the *conclusion* of the (three month) trial on the State's complaint for receivership—not the facilities' conditions at the time of the complaint's filing.

While the *Pillsbury* court ultimately found that a receiver was warranted, the existing statutory construction could lead to undesirable results, absent amendment. For example, a bad actor could seek to temporarily "cure" problematic facility conditions during the pendency of a receivership trial to avoid the imposition of receivership. Similarly, if the court appointed a temporary receiver to operate a facility for the duration of the "permanent" receivership trial (as it may under 33 V.S.A. 7203), that temporary receiver's work to alleviate the conditions of concern could potentially undercut the State's ability to demonstrate that a "permanent" receiver was warranted. At risk is the reversion of facility control to the initial problematic owner/operator. Clearly the receivership statute does not intend for these results.[2]

For these reasons, the AGO supports an amendment to Title 33, Chapter 71, Subchapter 4 clarifying that a complaint for receivership must be evaluated by the court as of the time of the complaint's filing.[3]

Sincerely,

Jamie Renner
Assistant Attorney General

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[2] As occurred in the *Pillsbury* case, the State may argue—and the Court may rule—that, despite a temporary receiver's improvement of facility conditions, receivership is warranted because if the court returned control of the facility to the prior problematic owner/operator, facility conditions would likely revert to those that justified the temporary receivership in the first place. The proposed amendment would obviate any potential need for the State or a court to prove or rule as much. The result would benefit the intent of the statute and judicial economy alike.

[3] 33 V.S.A. § 7216 provides for a receivership's termination.