GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H **D**

HOUSE DRH70078-LN-51 (2/27)

Short Title:	Continuing Care Ret./Tech. Changes.-AB	(Public)
Sponsors:	Representative Setzer.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL AND RELATED SUBSTANTIVE CHANGES TO THE CONTINUING CARE RETIREMENT (CCR) LAWS TO ELIMINATE THE UNNECESSARY PROVISION ALLOWING FOR ACCREDITED BUT UNLICENSED PROVIDERS OF CCR SERVICES; CHANGE REFERENCES FROM "FACILITY" TO "PROVIDER" WHERE APPROPRIATE TO ACCOMMODATE THE SITUATION WHERE AN ENTITY OPERATES MORE THAN ONE FACILITY; CHANGE "FORECAST" TO "FORECASTED" WHERE FOUND; CHANGE THE OPERATING RESERVES STATUTE BY REWORDING SOME PROVISIONS TECHNICALLY; CHANGE REFERENCES TO "REGISTRATION" OF A FACILITY TO "LICENSURE"; MAKE GENDER NEUTRAL CHANGES TO THE CCR LAWS; CLARIFY THAT A PROVIDER MUST HOLD SEMI-ANNUAL MEETINGS WITH THE RESIDENTS OF EACH FACILITY OPERATED BY THE PROVIDER; AND MAKE OTHER TECHNICAL AND CONFORMING CHANGES TO ARTICLE 64.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 58-64-5(e) is repealed.

SECTION 2. G.S. 58-64-5(g) reads as rewritten:

"(g) The Commissioner may require a ~~facility~~ provider to: (i) provide the report of an actuary that estimates the capacity of the provider to meet its contractual obligation to the resident, or (ii) give consideration to expected rates of mortality and morbidity, expected refunds, and expected capital expenditures in accordance with standards promulgated by the American Academy of Actuaries, within the five-year forecast statements, as required by G.S. 58-64-20(a)(12)."

SECTION 3. G.S. 58-64-20(a)(7)d. reads as rewritten:

"d. The conditions under which a living unit occupied by a resident may be made available by the ~~facility~~ provider to a different or new resident other than on the death of the prior resident; and".

SECTION 4. G.S. 58-64-20(a)(11) reads as rewritten:

"(11) In the event the ~~facility~~ provider has had an actuarial report prepared within the prior two years, the summary of a report of an actuary that estimates the capacity of the provider to meet its contractual obligations to the residents."

SECTION 5. G.S. 58-64-20(a)(12) reads as rewritten:

"(12) ~~Forecast~~ Forecasted financial statements for the ~~facility~~ provider of the next five years, including a balance sheet, a statement of operations, a statement of cash flows, and a statement detailing all significant assumptions, compiled by an independent certified public accountant. Reporting routine, categories, and structure may be further defined by regulations or forms adopted by the Commissioner."

SECTION 6. G.S. 58-64-20(a)(14)b. reads as rewritten:

"b. Narrative disclosure detailing all significant assumptions used in the preparation of the ~~forecast~~ forecasted financial statements, including:

1. Details of any long-term financing for the purchase or construction of the facility including interest rate, repayment terms, loan covenants, and assets pledged;
2. Details of any other funding sources that the provider anticipates using to fund any start-up losses or to provide reserve funds to assure full performance of the obligations of the provider under contracts for the provision of continuing care;
3. The total life occupancy fees to be received from or on behalf of, residents at, or prior to, commencement of operations along with anticipated accounting methods used in the recognition of revenues from and expected refunds of life occupancy fees;
4. A description of any equity capital to be received by the facility;
5. The cost of the acquisition of the facility or, if the facility is to be constructed, the estimated cost of the acquisition of the land and construction cost of the facility;
6. Related costs, such as financing any development costs that the provider expects to incur or become obligated for prior to the commencement of operations;
7. The marketing and resident acquisition costs to be incurred prior to commencement of operations; and

8. A description of the assumptions used for calculating the estimated occupancy rate of the facility and the effect on the income of the facility of government subsidies for health care services."

SECTION 7. G.S. 58-64-30(a) reads as rewritten:

"(a) Within 150 days following the end of each fiscal year, the provider shall file with the Commissioner a revised disclosure statement setting forth current information required pursuant to G.S. 58-64-20. The provider shall also make this revised disclosure statement available to all the residents of the facility. This revised disclosure statement shall include a narrative describing any material differences between (i) the ~~forecast~~ forecasted statements of revenues and expenses and cash flows or other ~~forecast~~ forecasted financial data filed pursuant to G.S. 58-64-20 as a part of the disclosure statement recorded most immediately subsequent to the start of the provider's most recently completed fiscal year and (ii) the actual results of operations during that fiscal year, together with the revised ~~forecast~~ forecasted statements of revenues and expenses and cash flows or other ~~forecast~~ forecasted financial data being filed as a part of the revised disclosure statement. A provider may also revise its disclosure statement and have the revised disclosure statement recorded at any other time if, in the opinion of the provider, revision is necessary to prevent an otherwise current disclosure statement from containing a material misstatement of fact or omitting a material fact required to be stated therein. Only the most recently recorded disclosure statement, with respect to a facility, and in any event, only a disclosure statement dated within one year plus 150 days prior to the date of delivery, shall be considered current for purposes of this Article or delivered pursuant to G.S. 58-64-20."

SECTION 8. G.S. 58-64-33 reads as rewritten:

"**§ 58-64-33. Operating reserves.**

(a) ~~All continuing care facilities~~ A provider shall maintain after ~~opening:~~ the opening of a facility: an operating ~~reserves~~ reserve equal to fifty percent (50%) of the total operating costs of the facility ~~projected~~ forecasted for the 12-month period following the period covered by the most recent ~~annual~~ disclosure statement filed with the Department. The forecast statements as required by G.S. 58-64-20(a)(12) shall serve as the basis for computing the operating reserve. In addition to total operating expenses, total operating costs will include debt service, consisting of principal and interest payments along with taxes and insurance on any mortgage loan or other long-term financing, but will exclude depreciation, amortized expenses, and extraordinary items as approved by the Commissioner. If the debt service portion is accounted for by way of another reserve account, the debt service portion may be excluded. ~~Facilities that maintain~~ If a facility maintains an occupancy level in excess of ninety percent ~~(90%)~~ (90%), a provider shall only be required to maintain a twenty-five percent (25%) operating reserve upon approval of the Commissioner, unless otherwise instructed by the Commissioner. The operating ~~reserves may~~ reserve must be funded by cash, by ~~invested cash,~~ cash equivalents, or by investment grade securities, including bonds, stocks, U.S. Treasury obligations, or obligations of U.S. government agencies.

(b) A provider that has begun construction or has permanent financing in place or is in operation on the effective date of this section has up to five years to meet the operating reserve requirements.

(c) ~~Operating reserves~~ An operating reserve shall only be released upon the submittal of a detailed request from the provider or facility and must be approved by the Commissioner. Such requests must be submitted in writing for the Commissioner to review at least 10 business days prior to the date of withdrawal."

SECTION 9. G.S. 58-64-40 reads as rewritten:

"**§ 58-64-40. Right to organization.**

(a) A resident living in a facility ~~registered under this Article~~ operated by a provider licensed under this Article has the right of self-organization, the right to be represented by an individual of ~~his~~ the resident's own choosing, and the right to engage in concerted activities to keep informed on the operation of the facility in which ~~he is a resident~~ the resident resides or for other mutual aid or protection.

(b) The board of directors or other governing body of a ~~facility~~ provider or its designated representative shall hold semiannual meetings with the residents of ~~the facility~~ each facility operated by the provider for free discussions of subjects including, but not limited to, income, expenditures, and financial trends and problems as they apply to the facility and discussions of proposed changes in policies, programs, and services. Upon request of the most representative residents' organization, a member of the governing body of the provider, such as a board member, a general partner, or a principal owner shall attend such meetings. Residents shall be entitled to at least seven days advance notice of each meeting. An agenda and any materials that will be distributed by the governing body at the meetings shall remain available upon request to residents."

SECTION 10. G.S. 58-64-45 reads as rewritten:

"**§ 58-64-45. Supervision, rehabilitation, and liquidation.**

(a) If, at any time, the Commissioner determines, after notice and an opportunity for the provider to be heard, that:

(1) A portion of an entrance fee escrow account required to be maintained under this Article has been or is proposed to be released in violation of this Article;

(2) A provider has been or will be unable, in such a manner as may endanger the ability of the provider, to fully perform its obligations pursuant to contracts for continuing care, to meet the ~~projected~~ forecasted financial data previously filed by the provider;

(3) A provider has failed to maintain the escrow account required under this Article; or

(4) A ~~facility~~ provider is bankrupt or insolvent, or in imminent danger of becoming bankrupt or insolvent;

the Commissioner may commence a supervision proceeding pursuant to Article 30 of this Chapter or may apply to the Superior Court of Wake County or to the federal bankruptcy court that may have previously taken jurisdiction over the provider or

facility for an order directing the Commissioner or authorizing the Commissioner to rehabilitate or to liquidate a facility in accordance with Article 30 of this Chapter.

(b) The definition of "insolvency" or "insolvent" in G.S. 58-30-10(13) shall not apply to ~~facilities~~ providers under this Article. Rules adopted by the Commissioner shall define and describe "insolvency" or "hazardous financial condition" for ~~facilities~~ providers under this Article. G.S. 58-30-12 shall not apply to facilities under this Article.

(c) If, at any time, the Court finds, upon petition of the Commissioner or provider, or on its own motion, that the objectives of an order to rehabilitate a ~~facility~~ provider have been accomplished and that the facility or facilities owned by, or operated by, the provider can be returned to the provider's management without further jeopardy to the residents of the ~~facility,~~ facility or facilities, the Court may, upon a full report and accounting of the conduct of the ~~facility's~~ provider's affairs during the rehabilitation and of the ~~facility's~~ provider's current financial condition, terminate the rehabilitation and, by order, return the facility or facilities owned by, or operated by, the provider, along with the ~~and its~~ assets and affairs of the provider, to the provider's management.

(d), (e) Repealed by Session Laws 1995 (Regular Session, 1996), c. 582, s. 3.

(f) In applying for an order to rehabilitate or liquidate a ~~facility,~~ provider, the Commissioner shall give due consideration in the application to the manner in which the welfare of persons who have previously contracted with the provider for continuing care may be best served.

(g) An order for rehabilitation shall be refused or vacated if the provider posts a bond, by a recognized surety authorized to do business in this State and executed in favor of the Commissioner on behalf of persons who may be found entitled to a refund of entrance fees from the provider or other damages in the event the provider is unable to fulfill its contracts to provide continuing care at the ~~facility,~~ facility or facilities, in an amount determined by the Court to be equal to the reserve funding that would otherwise need to be available to fulfill such obligations."

SECTION 11. G.S. 58-64-46 reads as rewritten:

"**§ 58-64-46. Receiverships; exception for facility beds.**

When the Commissioner has been appointed as a receiver under Article 30 of this Chapter for a provider or facility subject to this Article, the Department of Health and Human Services may, notwithstanding any other provision of law, accept and approve the addition of adult care home beds ~~for that facility~~ for a facility owned by, or operated by, the provider, if it appears to the court, upon petition of the Commissioner or the provider, or on the court's own motion, that (i) the best interests of the ~~facility~~ provider or (ii) the welfare of persons who have previously contracted with the provider or may contract with the ~~facility,~~ provider, may be best served by the addition of adult care home beds."

SECTION 12. G.S. 58-64-55 reads as rewritten:

"**§ 58-64-55. Examinations; financial statements.**

The Commissioner or the Commissioner's designee may, in the Commissioner's discretion, visit a ~~facility~~ provider offering continuing care in this State to examine its books and records. Expenses incurred by the Commissioner in conducting examinations

under this section shall be paid by the ~~facility~~ provider examined. The provisions of G.S. 58-2-131, 58-2-132, 58-2-133, 58-2-134, 58-2-155, 58-2-165, 58-2-180, 58-2-185, 58-2-190, and 58-6-5 apply to this Article and are hereby incorporated by reference."

SECTION 13. G.S. 58-64-60 reads as rewritten:

"**§ 58-64-60. ~~Agreements~~Contracts as preferred claims on liquidation.**

In the event of liquidation of a provider, all contracts for continuing care ~~agreements~~ executed by the provider shall be deemed preferred claims against all assets owned by the provider; provided, however, such claims shall be subordinate to the liquidator's cost of administration or any secured claim."

SECTION 14. G.S. 58-64-65 reads as rewritten:

"**§ 58-64-65. Rule-making authority; reasonable time to comply with rules.**

(a) The Commissioner is authorized to promulgate rules to carry out and enforce the provisions of this Article.

(b) Any provider who is offering continuing care may be given a reasonable time, not to exceed one year from the date of publication of any applicable rules promulgated pursuant to this Article, within which to comply with the ~~rules and to obtain a license.~~rules."

SECTION 15. G.S. 58-64-70 reads as rewritten:

"**§ 58-64-70. Civil liability.**

(a) A provider who enters into a contract for continuing care at a facility without having first delivered a disclosure statement meeting the requirements of G.S. 58-64-20 to the person contracting for this continuing care, or enters into a contract for continuing care at a facility with a person who has relied on a disclosure statement that omits to state a material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they are made, not misleading, shall be liable to the person contracting for this continuing care for actual damages and repayment of all fees paid to the ~~provider, facility, or person~~ provider violating this Article, less the reasonable value of care and lodging provided to the resident by or on whose behalf the contract for continuing care was entered into prior to discovery of the violation, misstatement, or omission or the time the violation, misstatement, or omission should reasonably have been discovered, together with interest thereon at the legal rate for judgments, and court costs and reasonable attorney fees.

(b) Liability under this section exists regardless of whether the provider ~~or person liable~~ had actual knowledge of the misstatement or omission.

(c) A person may not file or maintain an action under this section if the person, before filing the action, received a written offer of a refund of all amounts paid the provider, ~~facility, or person violating this Article~~ together with interest at the rate established monthly by the Commissioner of Banks pursuant to G.S. 24-1.1(c), less the current contractual value of care and lodging provided prior to receipt of the offer, and if the offer recited the provisions of this section and the recipient of the offer failed to accept it within 30 days of actual receipt.

(d) An action may not be maintained to enforce a liability created under this Article unless brought before the expiration of three years after the execution of the contract for continuing care that gave rise to the violation."

SECTION 16. If any section or provision of this act is declared unconstitutional, preempted, or otherwise invalid by the courts, it does not affect the validity of the act as a whole or any part other than the part so declared to be unconstitutional, preempted, or otherwise invalid.

SECTION 17. This act is effective when it becomes law.