

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

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HOUSE BILL 253

Short Title: Continuing Care Ret./Tech. Changes.-AB

(Public)

Sponsors: Representative Setzer.

Referred to: Insurance.

March 6, 2003

A BILL TO BE ENTITLED

1
2 AN ACT TO MAKE TECHNICAL AND RELATED SUBSTANTIVE CHANGES TO
3 THE CONTINUING CARE RETIREMENT (CCR) LAWS TO ELIMINATE THE
4 UNNECESSARY PROVISION ALLOWING FOR ACCREDITED BUT
5 UNLICENSED PROVIDERS OF CCR SERVICES; CHANGE REFERENCES
6 FROM "FACILITY" TO "PROVIDER" WHERE APPROPRIATE TO
7 ACCOMMODATE THE SITUATION WHERE AN ENTITY OPERATES MORE
8 THAN ONE FACILITY; CHANGE "FORECAST" TO "FORECASTED" WHERE
9 FOUND; CHANGE THE OPERATING RESERVES STATUTE BY
10 REWORDING SOME PROVISIONS TECHNICALLY; CHANGE REFERENCES
11 TO "REGISTRATION" OF A FACILITY TO "LICENSURE"; MAKE GENDER
12 NEUTRAL CHANGES TO THE CCR LAWS; CLARIFY THAT A PROVIDER
13 MUST HOLD SEMI-ANNUAL MEETINGS WITH THE RESIDENTS OF EACH
14 FACILITY OPERATED BY THE PROVIDER; AND MAKE OTHER
15 TECHNICAL AND CONFORMING CHANGES TO ARTICLE 64.

16 The General Assembly of North Carolina enacts:

17 **SECTION 1.** G.S. 58-64-5(e) is repealed.

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

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

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

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

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

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

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

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

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

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

- 16 1. Details of any long-term financing for the purchase or
17 construction of the facility including interest rate,
18 repayment terms, loan covenants, and assets pledged;
- 19 2. Details of any other funding sources that the provider
20 anticipates using to fund any start-up losses or to provide
21 reserve funds to assure full performance of the
22 obligations of the provider under contracts for the
23 provision of continuing care;
- 24 3. The total life occupancy fees to be received from or on
25 behalf of, residents at, or prior to, commencement of
26 operations along with anticipated accounting methods
27 used in the recognition of revenues from and expected
28 refunds of life occupancy fees;
- 29 4. A description of any equity capital to be received by the
30 facility;
- 31 5. The cost of the acquisition of the facility or, if the
32 facility is to be constructed, the estimated cost of the
33 acquisition of the land and construction cost of the
34 facility;
- 35 6. Related costs, such as financing any development costs
36 that the provider expects to incur or become obligated
37 for prior to the commencement of operations;
- 38 7. The marketing and resident acquisition costs to be
39 incurred prior to commencement of operations; and
- 40 8. A description of the assumptions used for calculating the
41 estimated occupancy rate of the facility and the effect on
42 the income of the facility of government subsidies for
43 health care services."

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

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

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

21 "**§ 58-64-33. Operating reserves.**

22 (a) ~~All continuing care facilities~~-A provider shall maintain after ~~opening~~-the
23 opening of a facility: an operating reserves-reserve equal to fifty percent (50%) of the
24 total operating costs of the facility projected-forecasted for the 12-month period
25 following the period covered by the most recent ~~annual~~-disclosure statement filed with
26 the Department. The forecast statements as required by G.S. 58-64-20(a)(12) shall serve
27 as the basis for computing the operating reserve. In addition to total operating expenses,
28 total operating costs will include debt service, consisting of principal and interest
29 payments along with taxes and insurance on any mortgage loan or other long-term
30 financing, but will exclude depreciation, amortized expenses, and extraordinary items as
31 approved by the Commissioner. If the debt service portion is accounted for by way of
32 another reserve account, the debt service portion may be excluded. ~~Facilities that~~
33 ~~maintain~~-If a facility maintains an occupancy level in excess of ninety percent (~~90%~~)
34 (90%), a provider shall only be required to maintain a twenty-five percent (25%)
35 operating reserve upon approval of the Commissioner, unless otherwise instructed by
36 the Commissioner. The operating ~~reserves~~-may-reserve must be funded by cash, by
37 ~~invested cash, cash equivalents,~~ or by investment grade securities, including bonds,
38 stocks, U.S. Treasury obligations, or obligations of U.S. government agencies.

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

42 (c) ~~Operating reserves~~-An operating reserve shall only be released upon the
43 submittal of a detailed request from the provider or facility and must be approved by the

1 Commissioner. Such requests must be submitted in writing for the Commissioner to
2 review at least 10 business days prior to the date of withdrawal."

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

4 **"§ 58-64-40. Right to organization.**

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

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

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

22 **"§ 58-64-45. Supervision, rehabilitation, and liquidation.**

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

- 25 (1) A portion of an entrance fee escrow account required to be maintained
26 under this Article has been or is proposed to be released in violation of
27 this Article;
- 28 (2) A provider has been or will be unable, in such a manner as may
29 endanger the ability of the provider, to fully perform its obligations
30 pursuant to contracts for continuing care, to meet the ~~projected~~
31 forecasted financial data previously filed by the provider;
- 32 (3) A provider has failed to maintain the escrow account required under
33 this Article; or
- 34 (4) A ~~facility~~ provider is bankrupt or insolvent, or in imminent danger of
35 becoming bankrupt or insolvent;

36 the Commissioner may commence a supervision proceeding pursuant to Article 30 of
37 this Chapter or may apply to the Superior Court of Wake County or to the federal
38 bankruptcy court that may have previously taken jurisdiction over the provider or
39 facility for an order directing the Commissioner or authorizing the Commissioner to
40 rehabilitate or to liquidate a facility in accordance with Article 30 of this Chapter.

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

1 providers under this Article. G.S. 58-30-12 shall not apply to facilities under this
2 Article.

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

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

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

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

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

25 "**§ 58-64-46. Receiverships; exception for facility beds.**

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

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

36 "**§ 58-64-55. Examinations; financial statements.**

37 The Commissioner or the Commissioner's designee may, in the Commissioner's
38 discretion, visit a facility-provider offering continuing care in this State to examine its
39 books and records. Expenses incurred by the Commissioner in conducting examinations
40 under this section shall be paid by the facility-provider examined. The provisions of
41 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,
42 58-2-190, and 58-6-5 apply to this Article and are hereby incorporated by reference."

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

44 "**§ 58-64-60. Agreements Contracts as preferred claims on liquidation.**

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

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

6 "**§ 58-64-65. Rule-making authority; reasonable time to comply with rules.**

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

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

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

14 "**§ 58-64-70. Civil liability.**

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

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

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

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

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

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