

**GENERAL ASSEMBLY OF NORTH CAROLINA
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HOUSE BILL 253

Senate Health & Human Resources Committee Substitute Adopted 5/27/03

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

(Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CHANGES TO THE CONTINUING CARE
RETIREMENT (CCR) LAWS.

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 G.S. 58-64-5(e) is repealed.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

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

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

33 "(a) Within 150 days following the end of each fiscal year, the provider shall file
34 with the Commissioner a revised disclosure statement setting forth current information
35 required pursuant to G.S. 58-64-20. The provider shall also make this revised disclosure
36 statement available to all the residents of the facility. This revised disclosure statement
37 shall include a narrative describing any material differences between (i) the ~~forecast~~
38 forecasted statements of revenues and expenses and cash flows or other ~~forecast~~
39 forecasted financial data filed pursuant to G.S. 58-64-20 as a part of the disclosure
40 statement recorded most immediately subsequent to the start of the provider's most
41 recently completed fiscal year and (ii) the actual results of operations during that fiscal
42 year, together with the revised ~~forecast~~—forecasted statements of revenues and expenses
43 and cash flows or other ~~forecast~~—forecasted financial data being filed as a part of the
44 revised disclosure statement. A provider may also revise its disclosure statement and

1 have the revised disclosure statement recorded at any other time if, in the opinion of the
2 provider, revision is necessary to prevent an otherwise current disclosure statement from
3 containing a material misstatement of fact or omitting a material fact required to be
4 stated therein. Only the most recently recorded disclosure statement, with respect to a
5 facility, and in any event, only a disclosure statement dated within one year plus 150
6 days prior to the date of delivery, shall be considered current for purposes of this Article
7 or delivered pursuant to G.S. 58-64-20."

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

9 **"§ 58-64-33. Operating reserves.**

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

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

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

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

35 **"§ 58-64-40. Right to organization.**

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

41 (b) The board of directors or other governing body of a ~~facility-provider~~
42 designated representative shall hold semiannual meetings with the residents of ~~the~~
43 ~~facility~~ each facility operated by the provider for free discussions of subjects including,
44 but not limited to, income, expenditures, and financial trends and problems as they

1 apply to the facility and discussions of proposed changes in policies, programs, and
2 services. Upon request of the most representative residents' organization, a member of
3 the governing body of the provider, such as a board member, a general partner, or a
4 principal owner shall attend such meetings. Residents shall be entitled to at least seven
5 days advance notice of each meeting. An agenda and any materials that will be
6 distributed by the governing body at the meetings shall remain available upon request to
7 residents."

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

9 **"§ 58-64-45. Supervision, rehabilitation, and liquidation.**

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

- 12 (1) A portion of an entrance fee escrow account required to be maintained
13 under this Article has been or is proposed to be released in violation of
14 this Article;
- 15 (2) A provider has been or will be unable, in such a manner as may
16 endanger the ability of the provider, to fully perform its obligations
17 pursuant to contracts for continuing care, to meet the ~~projected~~
18 forecasted financial data previously filed by the provider;
- 19 (3) A provider has failed to maintain the escrow account required under
20 this Article; or
- 21 (4) A ~~facility-provider~~ is bankrupt or insolvent, or in imminent danger of
22 becoming bankrupt or insolvent;

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

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

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

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

43 (f) In applying for an order to rehabilitate or liquidate a ~~facility-provider,~~ the
44 Commissioner shall give due consideration in the application to the manner in which the

1 welfare of persons who have previously contracted with the provider for continuing care
2 may be best served.

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

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

11 "**§ 58-64-46. Receiverships; exception for facility beds.**

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

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

22 "**§ 58-64-55. Examinations; financial statements.**

23 The Commissioner or the Commissioner's designee may, in the Commissioner's
24 discretion, visit a ~~facility-provider~~ offering continuing care in this State to examine its
25 books and records. Expenses incurred by the Commissioner in conducting examinations
26 under this section shall be paid by the ~~facility-provider~~ examined. The provisions of
27 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,
28 58-2-190, and 58-6-5 apply to this Article and are hereby incorporated by reference."

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

30 "**§ 58-64-60. ~~Agreements~~Contracts as preferred claims on liquidation.**

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

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

36 "**§ 58-64-65. Rule-making authority; reasonable time to comply with rules.**

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

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

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

44 "**§ 58-64-70. Civil liability.**

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

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

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

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

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

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