

1 SENATE BILL 348

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

4 Peter Wirth

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10 AN ACT

11 RELATING TO CONTINUING CARE COMMUNITIES; AMENDING THE
12 CONTINUING CARE ACT TO PROVIDE FOR CONCURRENT JURISDICTION OF
13 THE AGING AND LONG-TERM SERVICES DEPARTMENT AND THE OFFICE OF
14 SUPERINTENDENT OF INSURANCE; REQUIRING A PROVIDER TO HAVE A
15 CERTIFICATE OF AUTHORITY TO ENTER INTO A CONTINUING CARE
16 CONTRACT WITH A RESIDENT; GIVING THE OFFICE OF SUPERINTENDENT
17 OF INSURANCE AUTHORITY TO OVERSEE, REGULATE AND ENFORCE
18 FINANCIAL PROVISIONS OF THE CONTINUING CARE ACT; LIMITING THE
19 JURISDICTION OF THE AGING AND LONG-TERM SERVICES DEPARTMENT TO
20 NONFINANCIAL PROVISIONS OF THE CONTINUING CARE ACT; AUTHORIZING
21 THE OFFICE OF SUPERINTENDENT OF INSURANCE TO SEEK INJUNCTIVE
22 RELIEF AGAINST A PROVIDER FOR CERTAIN VIOLATIONS OF THE
23 CONTINUING CARE ACT.

24
25 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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1 SECTION 1. Section 24-17-3 NMSA 1978 (being Laws 1985,
2 Chapter 102, Section 3, as amended) is amended to read:

3 "24-17-3. DEFINITIONS.--As used in the Continuing Care
4 Act:

5 A. "affiliate" means a person having a five percent
6 or greater interest in a provider;

7 B. "community" means a retirement home, retirement
8 community, home for the aged or other place that undertakes to
9 provide continuing care;

10 C. "continuing care" means furnishing, pursuant to
11 a contract that requires entrance or advance fees and service
12 or periodic fees, independent-living and health or health-
13 related services. Entrance or advanced fees do not include
14 security or damage deposit fees that amount to less than three
15 months' service or periodic fees. These services may be
16 provided in the community, in the resident's independent living
17 unit or in another setting, designated by the continuing care
18 contract, to an individual not related by consanguinity or
19 affinity to the provider furnishing the care. The services
20 include, at a minimum, priority access to a nursing facility or
21 hospital either on site or at a site designated by the
22 continuing care contract;

23 D. "continuing care contract" means an agreement by
24 a provider to furnish continuing care to a resident;

25 E. "department" means the aging and long-term

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1 services department;

2 ~~[E-]~~ F. "liquid reserves" means cash or other
3 assets that are available within sixty days to satisfy a
4 community's expenses and that do not include real property or
5 interests in real property;

6 ~~[F-]~~ G. "net operating expenses" means the total
7 costs of operating a community, including taxes and insurance
8 but not including amortization, depreciation or long-term debt
9 service;

10 ~~[G-]~~ H. "person" means an individual, corporation,
11 partnership, trust, association or other legal entity;

12 ~~[H-]~~ I. "priority access to a nursing facility or
13 hospital" means that a nursing facility or hospital services
14 the residents of independent living units or that there is a
15 promise of such health care or health-related services being
16 available in the future;

17 ~~[I-]~~ J. "provider" means the owner or manager of a
18 community that provides, or offers to provide, continuing care;

19 ~~[J-]~~ K. "resident" means, unless otherwise
20 specified, an actual or prospective purchaser of, nominee of or
21 subscriber to a continuing care contract;

22 L. "superintendent" means the office of
23 superintendent of insurance;

24 ~~[K-]~~ M. "type A" agreement means an extensive
25 entrance-fee contract that includes housing, residential

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1 services, amenities and unlimited specific health-related
2 services with little or no substantial increase in monthly
3 payments, except to cover normal operating costs and inflation
4 adjustments;

5 [H.] N. "type B" agreement means a modified
6 entrance-fee contract that includes housing, residential
7 services, amenities and a specific amount of health care with
8 no substantial increase in monthly payments, except to cover
9 normal operating costs and inflation adjustments. After the
10 specified amount of health care is used, persons served pay
11 either a discounted rate or the full per diem rates for
12 required health care services; and

13 [M.] O. "unit" means the living quarters that a
14 resident buys, leases or has assigned as part of the continuing
15 care contract."

16 SECTION 2. Section 24-17-4 NMSA 1978 (being Laws 1985,
17 Chapter 102, Section 4, as amended) is amended to read:

18 "24-17-4. DISCLOSURE.--

19 A. A provider shall furnish a current annual
20 disclosure statement that meets the requirements set forth in
21 Subsection B of this section and the [~~aging and long-term~~
22 ~~services~~] department's and attorney general's consumer's guide
23 to continuing care communities to each actual resident and to a
24 prospective resident at least seven days before the provider
25 enters into a continuing care contract with the prospective

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1 resident, or prior to the prospective resident's first payment,
2 whichever occurs first. For the purposes of this subsection,
3 the obligation to furnish information to each actual resident
4 shall be deemed satisfied if a copy of the disclosure statement
5 and the consumer's guide is given to the residents'
6 association, if there is one, and a written message has been
7 delivered to each actual resident, stating that personal copies
8 are available upon request.

9 B. The disclosure statement provided pursuant to
10 Subsection A of this section shall include:

11 (1) a brief narrative summary of the contents
12 of the disclosure statement written in plain language;

13 (2) the name and business address of the
14 provider;

15 (3) if the provider is a partnership,
16 corporation or association, the names, addresses and duties of
17 its officers, directors, trustees, partners or managers;

18 (4) the name and business address of each of
19 the provider's affiliates;

20 (5) a statement as to whether the provider or
21 any of its officers, directors, trustees, partners, managers or
22 affiliates, within ten years prior to the date of application:

23 (a) was convicted of a felony, a crime
24 that if committed in New Mexico would be a felony or any crime
25 having to do with the provision of continuing care;

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1 (b) has been held liable or enjoined in
2 a civil action by final judgment, if the civil action involved
3 fraud, embezzlement, fraudulent conversion or misappropriation
4 of property;

5 (c) had a prior discharge in bankruptcy
6 or was found insolvent in any court action; or

7 (d) had a state or federal license or
8 permit suspended or revoked or had any state, federal or
9 industry self-regulatory agency commence an action against the
10 provider or any of its officers, directors, trustees, partners,
11 managers or affiliates and the result of such action;

12 (6) the name and address of any person whose
13 name is required to be provided in the disclosure statement who
14 owns any interest in or receives any remuneration from, either
15 directly or indirectly, any other person providing or expected
16 to provide to the community goods, leases or services with a
17 real or anticipated value of five hundred dollars (\$500) or
18 more and the name and address of the person in which such
19 interest is held. The disclosure shall describe such goods,
20 leases or services and the actual or probable cost to the
21 community or provider and shall describe why such goods, leases
22 or services should not be purchased from an independent entity;

23 (7) the name and address of any person owning
24 land or property leased to the community and a statement of
25 what land or property is leased;

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1 (8) a statement as to whether the provider is,
2 or is associated with, a religious, charitable or other
3 organization and the extent to which the associate organization
4 is responsible for the financial and contractual obligations of
5 the provider or community;

6 (9) the location and description of real
7 property being used or proposed to be used in connection with
8 the community's contracts to furnish care;

9 (10) a statement as to the community's or
10 corporation's liquid reserves to assure payment of debt
11 obligations and an ongoing ability to provide services to
12 residents. The statement shall also include a description of
13 the community's or corporation's reserves, including a specific
14 explanation as to how the community or corporation intends to
15 comply with the requirements of Section 24-17-6 NMSA 1978;

16 (11) for communities that provide type A and
17 type B agreements, a summary of an actuarial analysis within
18 the last five years and an annual future-service obligation
19 calculation by an actuary who is a member of the American
20 academy of actuaries and who is experienced in analyzing
21 continuing care communities;

22 (12) an audited financial statement and an
23 audit report prepared in accordance with generally accepted
24 accounting principles applied on a consistent basis and
25 certified by a certified public accountant, including an income

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1 statement or statement of activities, a cash-flow statement or
2 sources and application of funds statement and a balance sheet
3 as of the end of the provider's last fiscal year. The balance
4 sheet should accurately reflect the deferred revenue balance,
5 including entrance fees and any other prepaid services, and
6 should include notes describing the community's long-term
7 obligations and identifying all the holders of mortgages and
8 notes;

9 (13) a sample copy of the contract used by the
10 provider; and

11 (14) a list of documents and other information
12 available upon request, including:

13 (a) a copy of the Continuing Care Act;

14 (b) if the provider is a corporation, a
15 copy of the articles of incorporation; if the provider is a
16 partnership or other unincorporated association, a copy of the
17 partnership agreement, articles of association or other
18 membership agreement; and if the provider is a trust, a copy of
19 the trust agreement or instruments;

20 (c) resumes of the provider and
21 officers, directors, trustees, partners or managers;

22 (d) a copy of lease agreements between
23 the community and any person owning land or property leased to
24 the community;

25 (e) information concerning the location

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1 and description of other properties, both existing and
2 proposed, of the provider in which the provider owns any
3 interest and on which communities are or are intended to be
4 located and the identity of previously owned or operated
5 communities;

6 (f) a copy of the community's policies
7 and procedures; and

8 (g) other data, financial statements and
9 pertinent information with respect to the provider or
10 community, or its directors, trustees, members, managers,
11 branches, subsidiaries or affiliates, that a resident requests
12 and that is reasonably necessary in order for the resident to
13 determine the financial status of the provider and community
14 and the management capabilities of the managers and owners,
15 including the most recent audited financial statements of
16 comparable communities owned, managed or developed by the
17 provider or its principal.

18 C. Each year, within one hundred eighty days after
19 the end of the community's fiscal year, the provider shall
20 furnish to actual residents the disclosure statement as
21 outlined in this section. For purposes of this subsection, the
22 obligation to furnish the required information to residents
23 shall be deemed satisfied if the information is given to the
24 residents' association, if there is one, and a written message
25 has been delivered to each resident, stating that personal

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1 copies of the information are available upon request."

2 SECTION 3. A new section of the Continuing Care Act is
3 enacted to read:

4 "[NEW MATERIAL] PROVIDER REQUIRED TO HAVE CERTIFICATE OF
5 AUTHORITY--JURISDICTION, POWERS AND DUTIES OF SUPERINTENDENT.--

6 A. A provider must have a certificate of authority
7 from the superintendent prior to entering into a continuing
8 care contract with a resident.

9 B. The superintendent may:

10 (1) issue, deny or revoke a certificate of
11 authority to a provider to enter into a continuing care
12 contract with a resident; and

13 (2) promulgate rules to implement the
14 provisions of this section.

15 C. A provider shall apply for a certificate of
16 authority in a form and manner required by the superintendent
17 and shall provide the financial and other information required
18 by the superintendent.

19 D. The superintendent shall:

20 (1) conduct an annual review of the financial
21 condition of each provider;

22 (2) require annual proof of financial
23 responsibility from each provider; and

24 (3) conduct such examinations and
25 investigations as the superintendent may deem proper to:

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1 (a) determine whether a provider has
2 misrepresented any information required to be disclosed
3 pursuant to Section 24-17-4 NMSA 1978;

4 (b) determine whether a provider has
5 violated any of the provisions of Section 24-17-6 NMSA 1978;

6 (c) determine whether a provider has
7 violated any rule adopted by the superintendent pursuant to the
8 Continuing Care Act; and

9 (d) obtain information useful in the
10 administration or enforcement of any provision of the
11 Continuing Care Act.

12 E. Jurisdiction to ensure that a provider that
13 enters into a continuing care contract with a resident is
14 solvent and remains financially able to fulfill its obligations
15 to the resident over the course of the contract shall be
16 exclusive to the superintendent.

17 F. Except as otherwise provided in the Continuing
18 Care Act, nothing in this section shall be construed to
19 interfere with the jurisdiction of the department or any other
20 regulatory body exercising authority over providers regulated
21 pursuant to the Continuing Care Act."

22 SECTION 4. Section 24-17-7 NMSA 1978 (being Laws 1985,
23 Chapter 102, Section 7) is amended to read:

24 "24-17-7. DISCLOSURE STATEMENTS FILED WITH THE [STATE
25 ~~AGENCY ON AGING~~] SUPERINTENDENT AND THE DEPARTMENT FOR PUBLIC

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1 INSPECTION.--A provider shall file a copy of the disclosure
2 statement and any amendments to that statement:

3 A. with the superintendent; and

4 B. with the [~~state agency on aging~~] department for
5 public inspection during regular working hours."

6 SECTION 5. Section 24-17-16 NMSA 1978 (being Laws 1991,
7 Chapter 263, Section 5) is amended to read:

8 "24-17-16. IDENTIFICATION AND PROCEDURES FOR CORRECTION
9 OF VIOLATIONS UNDER THE JURISDICTION OF THE DEPARTMENT.--

10 A. If the [~~state agency on aging~~] department
11 determines that a person [~~or an organization~~] has engaged in or
12 is about to engage in an act or practice constituting a
13 violation of the Continuing Care Act, other than a
14 misrepresentation of information required to be disclosed
15 pursuant to Section 24-17-4 NMSA 1978 or a violation pursuant
16 to Section 24-17-6 NMSA 1978, or of any rule adopted by the
17 department pursuant to that act, the [~~state agency on aging~~]
18 department shall issue a notice of violation in writing to that
19 person [~~or organization~~] and send copies to the resident
20 association of any facility affected by the notice.

21 B. The notice of violation shall state the
22 following:

- 23 (1) a description of a violation at issue;
24 (2) the action that, in the judgment of the
25 [~~state agency on aging~~] department, the provider should take to

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1 conform to the law or the assurances that the [~~state agency on~~
2 ~~aging~~] department requires to establish that no violation is
3 about to occur;

4 (3) the compliance date by which the provider
5 shall correct any violation or submit assurances;

6 (4) the requirements for filing a report of
7 compliance; and

8 (5) the applicable sanctions for failure to
9 correct the violation or failure to file the report of
10 compliance according to the terms of the notice of violation.

11 C. At any time after receipt of a notice of
12 violation, the person [~~or organization~~] to which the notice is
13 addressed or the [~~state agency on aging~~] department may request
14 a conference. The [~~state agency on aging~~] department shall
15 schedule a conference within seven days of a request.

16 D. The purpose of the conference is to discuss [~~the~~
17 ~~contents of~~] the notice of violation and to assist the
18 addressee to comply with the requirements of the Continuing
19 Care Act. Subject to rules that the [~~state agency on aging~~]
20 department may promulgate, a representative of the resident
21 association at any facility affected by the notice shall have a
22 right to attend the conference.

23 E. A person receiving a notice of violation shall
24 submit a signed report of compliance as provided by the notice.
25 The [~~state agency on aging~~] department shall send a copy to the

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1 resident association of any facility affected by the notice.

2 F. Upon receipt of the report of compliance, the
3 [~~state agency on aging~~] department shall take steps to
4 determine that compliance has been achieved."

5 SECTION 6. Section 24-17-17 NMSA 1978 (being Laws 1991,
6 Chapter 263, Section 6, as amended) is amended to read:

7 "24-17-17. RULES [~~AND REGULATIONS~~] AUTHORIZED.--The
8 [~~aging and long-term services~~] department shall promulgate
9 [all] rules [~~and regulations~~] necessary or appropriate to
10 administer the nonfinancial provisions of the Continuing Care
11 Act [~~including, but not limited to, requirements regarding~~
12 ~~financial reserves, disclosure and actuarial studies~~]."

13 SECTION 7. Section 24-17-18 NMSA 1978 (being Laws 1991,
14 Chapter 263, Section 7) is amended to read:

15 "24-17-18. DEPARTMENT REPORT TO ATTORNEY GENERAL--CIVIL
16 ACTION--CIVIL PENALTIES.--Any time after the [~~state agency on~~
17 ~~aging~~] department issues a notice of violation, the [~~state~~
18 ~~agency on aging~~] department may send the attorney general a
19 written report alleging a possible nonfinancial violation of
20 the Continuing Care Act or of any rule adopted by the
21 department pursuant to that act. Upon receipt of that report,
22 the attorney general shall promptly conduct an investigation to
23 determine whether grounds exist for formally finding a
24 violation. If the attorney general makes that finding, [~~he~~
25 the attorney general shall file an appropriate action against

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1 the alleged violator in a court of competent jurisdiction.
2 Upon finding violations of any provisions of the Continuing
3 Care Act or any rule adopted by the department pursuant to that
4 act, the court may impose a civil penalty in the amount of five
5 dollars (\$5.00) per resident or up to five hundred dollars
6 (\$500), in the discretion of the court, for each day that the
7 violation remains uncorrected after the compliance date
8 stipulated in a notice of violation issued pursuant to the
9 Continuing Care Act."

10 SECTION 8. A new section of the Continuing Care Act is
11 enacted to read:

12 "[NEW MATERIAL] SUPERINTENDENT REPORT TO ATTORNEY GENERAL--
13 CIVIL ACTION--INJUNCTIVE RELIEF--REQUIREMENT TO POST SECURITY.--

14 A. The superintendent may send the attorney general
15 a written report if the superintendent determines that a
16 provider has:

17 (1) entered into a continuing care contract
18 without a certificate of authority from the superintendent;

19 (2) misrepresented any information required to
20 be disclosed pursuant to Section 24-17-4 NMSA 1978;

21 (3) violated any of the provisions of Section
22 24-17-6 NMSA 1978; or

23 (4) violated any rule adopted by the
24 superintendent pursuant to the Continuing Care Act.

25 B. Upon receipt of that report, the attorney

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1 general shall promptly conduct an investigation to determine
2 whether grounds exist to file an action in a court of competent
3 jurisdiction against the provider for injunctive relief,
4 including the requirement that the provider post security to
5 guarantee performance of its obligations under a continuing
6 care contract."

7 SECTION 9. A new section of the Continuing Care Act is
8 enacted to read:

9 "[NEW MATERIAL] GRACE PERIOD.--Providers in operation as
10 of July 1, 2013 may continue to operate without a certificate
11 of authority until thirty days after the rules applicable to
12 the certificate of authority are promulgated by the
13 superintendent."

14 SECTION 10. EFFECTIVE DATE.--The effective date of the
15 provisions of this act is July 1, 2013.