

GENERAL ASSEMBLY OF NORTH CAROLINA
1987 SESSION

CHAPTER 83
SENATE BILL 78

AN ACT TO REQUIRE ADEQUATE DISCLOSURE BY CONTINUING CARE
FACILITIES.

The General Assembly of North Carolina enacts:

Section 1. Chapter 131E of the General Statutes is amended by adding a new Article to read:

"Article 12.
"Disclosure and Contract Requirements for
Continuing Care Facilities.

"§ 131E-215. **Definitions.**—As used in this Article, unless otherwise specified:

- (1) 'Continuing care' means the furnishing to an individual other than an individual related by blood, marriage, or adoption to the person furnishing the care, of lodging together with nursing services, medical services, or other health related services, pursuant to an agreement effective for the life of the individual or for a period in excess of one year.
- (2) 'Entrance fee' means a payment that assures a resident a place in a facility for a term of years or for life.
- (3) 'Facility' means the place or places in which a provider undertakes to provide continuing care to an individual.
- (4) 'Health related services' means, at a minimum, nursing home admission or assistance in the activities of daily living, exclusive of the provision of meals or cleaning services.
- (5) 'Living unit' means a room, apartment, cottage, or other area within a facility set aside for the exclusive use or control of one or more identified residents.
- (6) 'Provider' means the promoter, developer, or owner of a continuing care retirement community, whether a natural person, partnership, or other unincorporated association, however organized, trust, or corporation, of an institution, building, residence, or other place, whether operated for profit or not, or any other person, that solicits or undertakes to provide continuing care under a continuing care facility contract.
- (7) 'Resident' means a purchaser of, a nominee of, or a subscriber to, a continuing care contract.

"§ 131E-216. **Pre-contractual statements of record.**—No provider may enter into a contract to provide continuing care in a facility if (i) the contract requires or permits the payment of an entrance fee to any person, and (ii) the facility is, or will be, located in this State unless there has been filed in the office of the Division of Facility Services of the Department of Human Resources:

- (1) A current disclosure statement as prescribed by G.S. 131E-217, and
- (2) A copy of the agreement establishing the escrow as prescribed by G.S. 131E-220.

"§ 131E-217. **Disclosure statement.**—(a) At the time of, or prior to, the execution of a contract to provide continuing care, or at the time of, or prior to, the transfer of any money or other property to a provider by or on behalf of a prospective resident, whichever occurs first, the provider shall deliver a current disclosure statement to the person with whom the contract is to be entered into, the text of which shall contain at least:

- (1) The name and business address of the provider and a statement of whether the provider is a partnership, corporation, or other type of legal entity.
- (2) The names and business addresses of the officers, directors, trustees, managing or general partners, any person having a ten percent (10%) or greater equity or beneficial interest in the provider, and any person who will be managing the facility on a day-to-day basis, and a description of these persons' interests in or occupations with the provider.
- (3) The following information on all persons named in response to subdivision (2) of this section:
 - a. a description of the business experience of this person, if any, in the operation or management of similar facilities;
 - b. the name and address of any professional service, firm, association, trust, partnership, or corporation in which this person has, or which has in this person, a ten percent (10%) or greater interest and which it is presently intended shall currently or in the future provide goods, leases, or services to the facility, or to residents of the facility, of an aggregate value of five hundred dollars (\$500.00) or more within any year, including a description of the goods, leases, or services and the probable or anticipated cost thereof to the facility, provider, or residents or a statement that this cost cannot presently be estimated; and
 - c. a description of any matter in which the person (i) has been convicted of a felony or pleaded **nolo contendere** to a felony charge, or been held liable or enjoined in a civil action by final judgment, if the felony or civil action involved fraud, embezzlement, fraudulent conversion, or misappropriation of property; or (ii) is subject to a currently effective injunctive or restrictive court order, or within the past five years, had any

State or federal license or permit suspended or revoked as a result of an action brought by a governmental agency or department, if the order or action arose out of or related to business activity of health care, including actions affecting a license to operate a foster care facility, nursing home, retirement home, home for the aged, or facility subject to this Article or a similar law in another state.

- (4) A statement as to whether the provider is, or is not affiliated with, a religious, charitable, or other nonprofit organization, the extent of the affiliation, if any, the extent to which the affiliate organization will be responsible for the financial and contract obligations of the provider, and the provision of the Federal Internal Revenue Code, if any, under which the provider or affiliate is exempt from the payment of income tax.
- (5) The location and description of the physical property or properties of the facility, existing or proposed, and to the extent proposed, the estimated completion date or dates, whether construction has begun, and the contingencies subject to which construction may be deferred.
- (6) The services provided or proposed to be provided pursuant to contracts for continuing care at the facility, including the extent to which medical care is furnished, and a clear statement of which services are included for specified basic fees for continuing care and which services are made available at or by the facility at extra charge.
- (7) A description of all fees required of residents, including the entrance fee and periodic charges, if any. The description shall include:
 - a. a statement of the fees that will be charged if the resident marries while at the facility, and a statement of the terms concerning the entry of a spouse to the facility and the consequences if the spouse does not meet the requirements for entry;
 - b. the circumstances under which the resident will be permitted to remain in the facility in the event of possible financial difficulties of the resident;
 - c. the terms and conditions under which a contract for continuing care at the facility may be canceled by the provider or by the resident, and the conditions, if any, under which all or any portion of the entrance fee will be refunded in the event of cancellation of the contract by the provider or by the resident or in the event of the death of the resident prior to or following occupancy of a living unit;
 - d. the conditions under which a living unit occupied by a resident may be made available by the facility to a different or new resident other than on the death of the prior resident; and

- e. the manner by which the provider may adjust periodic charges or other recurring fees and the limitations on these adjustments, if any; and, if the facility is already in operation, or if the provider or manager operates one or more similar continuing care locations within this State, tables shall be included showing the frequency and average dollar amount of each increase in periodic charges, or other recurring fees at each facility or location for the previous five years, or such shorter period as the facility or location may have been operated by the provider or manager.
- (8) The health and financial conditions required for an individual to be accepted as a resident and to continue as a resident once accepted, including the effect of any change in the health or financial condition of a person between the date of entering a contract for continuing care and the date of initial occupancy of a living unit by that person.
- (9) The provisions that have been made or will be made, if any, to provide reserve funding or security to enable the provider to perform its obligations fully under contracts to provide continuing care at the facility, including the establishment of escrow accounts, trusts, or reserve funds, together with the manner in which these funds will be invested, and the names and experience of any individuals in the direct employment of the provider who will make the investment decisions.
- (10) Certified financial statements of the provider, including (i) a balance sheet as of the end of the most recent fiscal year and (ii) income statements for the three most recent fiscal years of the provider or such shorter period of time as the provider shall have been in existence. If the provider's fiscal year ended more than 120 days prior to the date the disclosure statement is recorded, interim financial statements as of a date not more than 90 days prior to the date of recording the statement shall be included, but need not be certified.
- (11) A summary of a report of an actuary, updated every five years, that estimates the capacity of the provider to meet its contract obligation to the residents. Disclosure statements of Continuing Care Facilities established prior to January 1, 1988, do not need an actuary report or summary until January 1, 1993.
- (12) If operation of the facility has not yet commenced, a statement of the anticipated source and application of the funds used or to be used in the purchase or construction of the facility, including:
 - a. an estimate of the cost of purchasing or constructing and equipping the facility including such related costs as financing expense, legal expense, land costs, occupancy development costs, and all other similar costs the provider expects to incur or become obligated for prior to the commencement of operations;

- b. a description of any mortgage loan or other long-term financing intended to be used for the financing of the facility, including the anticipated terms and costs of this financing;
 - c. an estimate of the total entrance fees to be received from, or on behalf of, residents at, or prior to, commencement of operation of the facility; and
 - d. an estimate of the funds, if any, that are anticipated to be necessary to fund start-up losses and provide reserve funds to assure full performance of the obligations of the provider under contracts for the provision of continuing care.
- (13) Pro forma annual income statements for the facility for a period of not less than five fiscal years, including:
- a. a beginning cash balance consistent with the certified income statement required by subdivision (10) of this section or, if operation of the facility has not commenced, consistent with the statement of anticipated source and application of funds required by subdivision (12);
 - b. anticipated earnings on cash reserves, if any;
 - c. estimates of net receipts from entrance fees, other than entrance fees included in the statement of source and application of funds required by subdivision (12) less estimated entrance fee refunds, if any, and including a description of the actuarial basis and method of calculation for the projection of entrance fee receipts;
 - d. an estimate of gifts or bequests, if any, that are to be relied on to meet operating expenses;
 - e. a projection of estimated income from fees and charges other than entrance fees, showing individual rates presently anticipated to be charged and including 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, if any, to be provided pursuant to the contracts for continuing care;
 - f. a projection of estimated operating expenses of the facility, including a description of the assumptions used in calculating the expenses, and separate allowances, if any, for the replacement of equipment and furnishings and anticipated major structural repairs or additions; and
 - g. an estimate of annual payments of principal and interest required by any mortgage loan or other long-term financing arrangement relating to the facility.
- (14) The estimated number of residents of the facility to be provided services by the provider pursuant to the contract for continuing care.

(15) Any other material information concerning the facility or the provider as the provider wishes to include.

(b) The cover page of the disclosure statement shall state, in a prominent location and in boldface type, the date of the disclosure statement, the last date through which that disclosure statement may be delivered if not earlier revised, and that the delivery of the disclosure statement to a contracting party before the execution of a contract for the provision of continuing care is required by this Article but that the disclosure statement has not been reviewed or approved by any government agency or representative to ensure accuracy or completeness of the information set out.

(c) A copy of the standard form of contract for continuing care used by the provider shall be attached to each disclosure statement.

"§ 131E-218. Contract for continuing care; specifications.—(a) Each contract for continuing care shall provide that:

(1) The party contracting with the provider may rescind the contract within 30 days following the later of the execution of the contract or the receipt of a disclosure statement that meets the requirements of this section, in which event any money or property transferred to the provider, other than periodic charges specified in the contract and applicable only to the period a living unit was actually occupied by the resident, shall be returned in full, and the resident to whom the contract pertains is not required to move into the facility before the expiration of the 30 day period; and

(2) If a resident dies before occupying a living unit in the facility, or if, on account of illness, injury, or incapacity, a resident would be precluded from occupying a living unit in the facility under the terms of the contract for continuing care, the contract is automatically canceled and the resident or legal representative of the resident shall receive a refund of all money or property transferred to the provider, less (i) those nonstandard costs specifically incurred by the provider or facility at the request of the resident and described in the contract or an addendum thereto signed by the resident, and (ii) a reasonable service charge, if set out in the contract, not to exceed the greater of one thousand dollars (\$1,000) or two percent (2%) of the entrance fee.

(b) Each contract shall include provisions that specify the following:

(1) The total consideration to be paid;

(2) Services to be provided;

(3) The procedures the provider shall follow to change the resident's accommodation if necessary for the protection of the health or safety of the resident or the general and economic welfare of the residents;

(4) The policies to be implemented if the resident cannot pay the periodic fees;

(5) The terms governing the refund of any portion of the entrance fee in the event of discharge by the provider or cancellation by the resident;

(6) The policy regarding increasing the periodic fees;

- (7) The description of the living quarters;
- (8) Any religious or charitable affiliations of the provider and the extent, if any, to which the affiliate organization will be responsible for the financial and contractual obligations of the provider;
- (9) Any property rights of the resident;
- (10) The policy, if any, regarding fee adjustments if the resident is voluntarily absent from the facility; and
- (11) Any requirement, if any, that the resident apply for Medicaid, public assistance, or any public benefit program.

"§ 131E-219. Annual disclosure statement revision.—Within the 150 days following the end of each fiscal year, the provider shall have filed in the Division of Facility Services of the Department of Human Resources a revised disclosure statement setting forth current information required pursuant to G.S. 131E-217. 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 pro forma income statements filed in response to G.S. 131-217 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 pro forma income statements 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. 131E-217.

"§ 131E-220. Escrow, collection of deposits.—(a) A provider shall establish an escrow account with (i) a bank, (ii) a trust company, or (iii) another person or entity agreed upon by the provider and the resident. The terms of this escrow account shall provide that the total amount of any entrance fee received by the provider prior to the date the resident is permitted to occupy a living unit in the facility be placed in this escrow account. These funds may be released only as follows:

- (1) If the entrance fee applies to a living unit that has been previously occupied in the facility, the entrance fee shall be released to the provider when the living unit becomes available for occupancy by the new resident;
- (2) If the entrance fee applies to a living unit which has not previously been occupied by any resident, the entrance fee shall be released to the provider when the escrow agent is satisfied that:
 - a. construction or purchase of the living unit has been completed and an occupancy permit, if applicable, covering the living unit has been issued by the local government having authority to issue such permits;

- b. a commitment has been received by the provider for any permanent mortgage loan or other long-term financing, and any conditions of the commitment prior to disbursement of funds thereunder have been substantially satisfied; and
- c. aggregate entrance fees received or receivable by the provider pursuant to binding continuing care retirement community contracts, plus the anticipated proceeds of any first mortgage loan or other long-term financing commitment are equal to not less than ninety percent (90%) of the aggregate cost of constructing or purchasing, equipping and furnishing the facility plus not less than ninety percent (90%) of the funds estimated in the statement of anticipated source and application of funds submitted by the provider as that part of the disclosure statement required by G.S. 131E-217(12)d., to be necessary to fund start-up losses and assure full performance of the obligations of the provider pursuant to continuing care retirement community contracts.

(b) Upon receipt by the escrow agent of a request by the provider for the release of these escrow funds, the escrow agent shall approve release of the funds within five working days unless the escrow agent finds that the requirements of subsection (a) of this section have not been met and notifies the provider of the basis for this finding. The request for release of the escrow funds shall be accompanied by any documentation the fiduciary requires.

(c) If the provider fails to meet the requirements for release of funds held in this escrow account within a time period the escrow agent considers reasonable, these funds shall be returned by the escrow agent to the persons who have made payment to the provider. The escrow agent shall notify the provider of the length of this time period when the provider requests release of the funds.

(d) An entrance fee held in escrow may be returned by the escrow agent to the person who made payment to the provider at any time upon receipt by the escrow agent of notice from the provider that this person is entitled to a refund of the entrance fee.

"§ 131E-221. Civil liability.—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. 131E-217 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 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.

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

(b) 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(3), 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.

(c) 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.

(d) This Article may not limit a liability that may exist by virtue of any other statute or under common law if this Article were not in effect.

"§ 131E-222. Investigations and subpoenas.—The Attorney General may make such public or private investigations within or outside of this State as necessary to determine whether any person has violated or is about to violate any provision of this Article or to aid in the enforcement of this Article or to verify statements contained in any disclosure statement filed or delivered hereunder.

(a) For the purpose of any investigation or proceeding under this Article, the Attorney General may require or permit any person to file a statement in writing, under oath or otherwise, as to any of the facts and circumstances concerning the matter to be investigated.

(b) For the purpose of any investigation or proceeding under this Article, the Attorney General or a designee thereof has all the powers given to him for consumer protection. He may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records deemed relevant or material to the inquiry, all of which may be enforced in any court of this State which has appropriate jurisdiction.

"§ 131E-223. Cease and desist orders and injunctions.—Whenever it appears to the Attorney General or any district attorney, upon complaint or otherwise, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Article or any order hereunder, this officer may bring an action in any court which has appropriate jurisdiction to enjoin the acts or practices and to enforce compliance with this Article or any order hereunder. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets.

"§ 131E-224. Criminal penalties.—Any person who willfully and knowingly violates any provision of this Article is guilty of a misdemeanor and shall, upon conviction, be fined not more than ten thousand dollars (\$10,000) or imprisoned not more than one year, or both. The Attorney General or the district attorney may institute the appropriate

criminal proceedings under this Article. Nothing in this Article limits the power of the State to punish any person for any conduct that constitutes a crime under any other statute."

Sec. 2. This act shall become effective January 1, 1988.

In the General Assembly read three times and ratified this the 23rd day of April, 1987.