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SENATE BILL 70

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Carlos R. Cisneros

FOR THE LEGISLATIVE HEALTH AND HUMAN SERVICES COMMITTEE

AN ACT

RELATING TO LONG-TERM CARE; AMENDING THE CONTINUING CARE ACT TO
PROVIDE FOR GREATER CONSUMER PROTECTION OF RESIDENTS OF
CONTINUING CARE COMMUNITIES.

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

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

"24-17-1. SHORT TITLE.--~~[Sections 1 through 13 of this
act]~~ Chapter 24, Article 17 NMSA 1978 may be cited as the
"Continuing Care Act"."

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

"24-17-2. FINDINGS AND PURPOSE.--

A. The legislature finds that continuing care
communities are an important and growing alternative for the

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1 provision of long-term residential, social and health
2 maintenance needs for the elderly; however, the legislature
3 also finds that severe consequences to residents may result
4 when a provider becomes insolvent or unable to provide
5 responsible care.

6 B. The purpose of the Continuing Care Act is to
7 provide for disclosure and the inclusion of certain information
8 in continuing care contracts in order that residents may make
9 informed decisions concerning continuing care; ~~[and]~~ to provide
10 protection for residents; and to ensure the solvency of
11 communities."

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

14 "24-17-3. DEFINITIONS.--As used in the Continuing Care
15 Act:

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

18 B. "community" means a retirement home, retirement
19 community, home for the aged or other place that undertakes to
20 provide continuing care;

21 C. "continuing care" means furnishing, pursuant to
22 a contract that requires entrance or advance fees and service
23 or periodic fees, independent-living and health or health-
24 related services. Entrance or advanced fees do not include
25 security or damage deposit fees that amount to less than three

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1 months' service or periodic fees. These services may be
2 provided in the community, in the resident's independent living
3 unit or in another setting, designated by the continuing care
4 contract, to an individual not related by consanguinity or
5 affinity to the provider furnishing the care. The services
6 include, at a minimum, priority access to a nursing facility or
7 hospital either on site or at a site designated by the
8 continuing care contract;

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

11 E. "liquid reserves" means cash or other assets
12 that are available within thirty days to satisfy a community's
13 expenses and that do not include real property or interests in
14 real property;

15 F. "net operating expenses" means the total costs
16 of operating a community, including taxes and insurance but not
17 including long-term debt service;

18 [~~E.~~] G. "person" means an individual, corporation,
19 partnership, trust, association or other legal entity;

20 [~~F.~~] H. "priority access to a nursing facility or
21 hospital" means that a nursing facility or hospital services
22 the residents of independent living units or that there is a
23 promise of such health care or health-related services being
24 available in the future;

25 [~~G.~~] I. "provider" means the owner or manager of a

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1 community that provides, or offers to provide, continuing care;

2 ~~[H.]~~ J. "resident" means, unless otherwise
3 specified, an actual or prospective purchaser of, nominee of or
4 subscriber to a continuing care contract; and

5 ~~[I.]~~ K. "unit" means the living quarters that a
6 resident buys, leases or has assigned as part of the continuing
7 care contract."

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

10 "24-17-4. DISCLOSURE.--

11 A. A ~~[person who provides or offers to provide~~
12 ~~continuing care in this state]~~ provider shall furnish a current
13 annual disclosure statement that meets the requirements set
14 forth in Subsection B of this section and ~~[a]~~ the aging and
15 long-term services department's and attorney general's
16 consumer's guide to continuing care communities ~~[as furnished~~
17 ~~by the aging and long-term services department or the attorney~~
18 ~~general's office]~~ to each actual ~~[residents]~~ resident and to a
19 prospective resident at least seven days ~~[prior to entering]~~
20 before the provider enters into a continuing care contract with
21 the prospective resident, or seven days prior to the
22 prospective resident's first payment, whichever occurs first.

23 For the purposes of this subsection, the obligation to furnish
24 information to each actual ~~[residents]~~ resident shall be deemed
25 satisfied if a copy of the disclosure statement and the

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1 consumer's guide is given to the residents' association, if
2 there is one, and a written message has been delivered to [~~all~~
3 ~~residents~~] each actual resident, stating that personal copies
4 are available upon request.

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

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

9 (2) the name and business address of the
10 provider;

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

14 (4) the name and business address of [~~any~~
15 ~~affiliate~~] each of the provider's affiliates;

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

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

22 (b) has been held liable or enjoined in
23 a civil action by final judgment, if the civil action involved
24 fraud, embezzlement, fraudulent conversion or misappropriation
25 of property;

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

3 (d) had ~~[any]~~ a state or federal
4 ~~[licenses]~~ license or ~~[permits]~~ permit suspended or revoked or
5 had any state, federal or industry self-regulatory agency
6 commence an action against ~~[him]~~ the provider or any of its
7 officers, directors, trustees, partners, managers or affiliates
8 and the result of such action;

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

20 (7) the name and address of any person owning
21 land or property leased to the community and a statement of
22 what land or property is leased;

23 (8) a statement as to whether the provider is,
24 or is associated with, a religious, charitable or other
25 organization and the extent to which the associate organization

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1 is responsible for the financial and contractual obligations of
2 the provider or community;

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

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

14 (11) ~~[for those communities that charge an~~
15 ~~entrance fee that were not in operation on June 14, 1985]~~ an
16 actuarial analysis [of the community performed] within the last
17 three years by an actuary who is a member of the American
18 academy of actuaries and who is experienced in analyzing
19 continuing care communities;

20 (12) an audited financial statement and an
21 audit report prepared in accordance with generally accepted
22 accounting principles applied on a consistent basis and
23 certified by a certified public accountant, including an income
24 statement, a cash-flow statement or sources and application of
25 funds statement and a balance sheet as of the end of the

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1 provider's last fiscal year [~~or a copy of the previous year's~~
2 ~~tax filings with the internal revenue service~~]. The balance
3 sheet should accurately reflect the deferred revenue balance,
4 including entrance fees and any other prepaid services, and
5 should include notes describing the community's long-term
6 obligations and identifying all the holders of mortgages and
7 notes;

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

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

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

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

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

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

24 (e) information concerning the location
25 and description of other properties, both existing and

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

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

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

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

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1 request."

2 Section 5. Section 24-17-5 NMSA 1978 (being Laws 1985,
3 Chapter 102, Section 5, as amended) is amended to read:

4 "24-17-5. CONTRACT INFORMATION.--

5 A. A provider is responsible for ensuring that a
6 continuing care contract [~~shall be~~] is written in clear and
7 understandable language.

8 B. A continuing care contract shall, at a minimum:

9 (1) describe the community's admission
10 policies, including age, health status and minimum financial
11 requirements, if any;

12 (2) describe the health and financial
13 conditions required for a person to continue to be a resident;

14 (3) describe the circumstances under which the
15 resident will be permitted to remain in the community in the
16 event of [~~possible~~] financial difficulties of the resident;

17 (4) list the total consideration paid,
18 including donations, entrance fees, subscription fees, periodic
19 fees and other fees paid or payable; provided, however, that a
20 provider cannot require a resident to transfer all the
21 resident's assets or the resident's real property to the
22 provider or community as a condition for providing continuing
23 care and the provider shall reserve the right to charge
24 periodic fees;

25 (5) describe in detail all items of service to

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1 be received by the resident, such as food, shelter, medical
2 care, nursing care and other health services, and whether
3 services will be provided for a designated time period or for
4 [~~life~~] the resident's lifetime;

5 (6) [~~provide~~] as an addendum to the contract,
6 provide a description of items of service, if any, that are
7 available to the resident but that are not covered in the
8 entrance or monthly fee;

9 (7) specify taxes and utilities, if any, that
10 the resident must pay;

11 (8) specify that deposits or entrance fees
12 paid by or for a resident shall be held in trust for the
13 benefit of the resident in a federally insured New Mexico bank
14 in an interest-bearing account until the resident has occupied
15 [~~his~~] the resident's unit or the resident's contract
16 cancellation period has ended, whichever occurs later;

17 (9) state the terms under which a continuing
18 care contract may be canceled by the resident or the community
19 and the basis for establishing the amount of refund of the
20 entrance fee;

21 (10) state the terms under which a continuing
22 care contract is canceled by the death of the resident and the
23 basis for establishing the amount of refund, if any, of the
24 entrance fee;

25 (11) state when fees will be subject to

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1 periodic increases and what the policy for increases will be;
2 provided, however, that the provider shall give advance notice
3 of not less than thirty days to the residents before the change
4 becomes effective and increases shall be based upon economic
5 necessity, the reasonable cost of operating the community, the
6 cost of care and a reasonable return on investment as defined
7 by rules promulgated by the aging and long-term services
8 department [~~no later than January 31, 2006~~];

9 (12) state the entrance fee and periodic fees
10 that will be charged if the resident marries while living in
11 the community, the terms concerning the entry of a spouse to
12 the community and the consequences if the spouse does not meet
13 the requirements for entry;

14 (13) indicate funeral and burial services that
15 are not furnished by the provider;

16 (14) state the rules and regulations of the
17 provider then in effect and state the circumstances under which
18 the provider claims to be entitled to have access to the
19 resident's unit;

20 (15) list the resident's and provider's
21 respective rights and obligations as to any real or personal
22 property of the resident transferred to or placed in the
23 custody of the provider;

24 (16) describe the rights of the residents to
25 form a residents' association and the participation, if any, of

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1 the association in the community's decision-making process;

2 (17) describe the living quarters purchased by
3 or assigned to the resident;

4 (18) provide under what conditions, if any,
5 the resident may assign the use of a unit to another;

6 (19) include the policy and procedure with
7 regard to changes in accommodations due to an increase or
8 decrease in the number of persons occupying an individual unit;

9 (20) state the conditions upon which the
10 community may sublet or relet a resident's unit;

11 (21) state the fee adjustments that will be
12 made in the event of a resident's voluntary absence from the
13 community for an extended period of time [~~by the resident, what~~
14 ~~fee adjustments, if any, will be made~~];

15 (22) include the procedures to be followed
16 when the provider temporarily or permanently changes the
17 resident's accommodations, either within the community or by
18 transfer to a health facility; provided that the contract shall
19 state that such changes in accommodations shall only be made to
20 protect the health or safety of the resident or the general and
21 economic welfare of all other residents of the community;

22 (23) if the community includes a nursing
23 facility, describe the admissions policies and what will occur
24 if a nursing facility bed is not available at the time it is
25 needed;

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1 (24) [~~describe, if~~] in the event the resident
2 is offered a priority for nursing facility admission at a
3 facility that is not owned by the community, describe with
4 which nursing facility the formal arrangement is made and what
5 will occur if a nursing facility bed is not available at the
6 time it is needed;

7 (25) include the policy and procedures for
8 determining under what circumstances a resident will be
9 considered incapable of independent living and will require a
10 permanent move to a nursing facility. The contract shall also
11 state who will participate in the decision for permanent
12 residency in the nursing facility and shall provide that the
13 resident shall have an advocate involved in that decision;
14 provided that if the resident has no family member, attorney,
15 guardian or other responsible person to act as the resident's
16 advocate, the provider shall request the local office of the
17 human services department to serve as advocate;

18 (26) specify the types of insurance, if any,
19 the resident [~~must~~] is required to maintain, including
20 medicare, other health insurance and property insurance;

21 (27) specify the circumstances, if any, under
22 which the resident will be required to apply for [~~medicaid~~] any
23 public assistance, including medical assistance, or any other
24 public benefit programs;

25 (28) [~~state~~] in bold type of not less than

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1 twelve-point type on the front of the contract, state that a
2 contract for continuing care may present a significant
3 financial risk and that a person considering a continuing care
4 contract should consult with an attorney and with a financial
5 advisor concerning the advisability of pursuing continuing
6 care; provided, however, that failure to consult with an
7 attorney or financial advisor shall not be raised as a defense
8 to bar recovery for a resident in any claims arising under the
9 provisions of the Continuing Care Act;

10 (29) [~~state~~] in bold type of not less than
11 twelve-point type on the front of the contract, state that
12 nothing in the contract or the Continuing Care Act should be
13 construed to constitute approval, recommendation or endorsement
14 of any continuing care community by the state of New Mexico;

15 (30) [~~state~~] in immediate proximity to the
16 space reserved in the contract for the signature of the
17 resident, in bold type of not less than twelve-point type,
18 state the following:

19 "You, the buyer, may cancel this transaction at any time
20 prior to midnight of the seventh day after the date of this
21 transaction. See the attached notice of cancellation form for
22 an explanation of this right."; and

23 (31) contain a completed form, in duplicate,
24 captioned "Notice of Cancellation", which shall be attached to
25 the contract and easily detachable, and which shall contain in

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1 twelve-point boldface type the following information and
2 statements in the same language as that used in the contract.

3 "NOTICE OF CANCELLATION

4 Date: _____

5 (enter date of transaction)

6 You may cancel this transaction without any penalty or
7 obligation within seven days from the above date. If you
8 cancel, any payments made by you under the contract or sale and
9 any negotiable instrument executed by you will be returned
10 within ten business days following receipt by the provider of
11 your cancellation notice, and any security interest or lien
12 arising out of the transaction will be canceled.

13 To cancel this transaction, deliver a signed and dated
14 copy of this cancellation notice or any other written notice,
15 or send a telegram, to: _____

16 (Name of Provider)

17 at _____

18 (Address of Provider's Place of Business)

19 not later than midnight of _____

20 (Date)

21 I hereby cancel this transaction.

22 _____

23 (Buyer's Signature)

24 _____

25 (Date) ". "

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1 Section 6. Section 24-17-6 NMSA 1978 (being Laws 1985,
2 Chapter 102, Section 6, as amended) is amended to read:

3 "24-17-6. [~~ESCROW~~] REQUIREMENTS FOR FINANCIAL RESERVES.--

4 A. Any deposits or entrance fees paid by or for a
5 resident shall be held in trust for the benefit of the resident
6 in a federally insured New Mexico bank until the resident has
7 occupied [~~his~~] the resident's unit or the resident's contract
8 cancellation period has ended, whichever occurs later.

9 B. In addition to the amounts held in trust for
10 specific residents under Subsection A of this section, a
11 provider shall maintain at all times liquid reserves equal to
12 the principal and interest payments due for a twelve-month
13 period on all accounts of any mortgage loan and other long-term
14 debt, as well as three months' worth of net operating expenses.

15 C. A provider shall keep the funds maintained under
16 Subsection A of this section in interest-bearing, federally
17 insured bank accounts that are separate from the provider's
18 operating accounts."

19 Section 7. Section 24-17-10 NMSA 1978 (being Laws 1985,
20 Chapter 102, Section 10, as amended) is amended to read:

21 "24-17-10. RESTRAINT OF PROHIBITED ACTS--REMEDIES.--

22 A. Whenever the attorney general has reasonable
23 belief that any person is violating or is about to violate any
24 provision of the Continuing Care Act, or any regulation
25 promulgated pursuant to that act, and that proceedings would be

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1 in the public interest, [~~he~~] the attorney general may bring an
2 action in the name of the state to restrain or prevent
3 violations of that act or regulations promulgated pursuant to
4 that act. The action may be brought in the district court of
5 the county in which the person resides or has [~~his~~] the
6 person's principal place of business or in the district court
7 for Santa Fe county. The attorney general acting on behalf of
8 the state shall not be required to post bond when seeking a
9 temporary or permanent injunction in such action.

10 B. In any action filed pursuant to this section of
11 the Continuing Care Act, including an action with respect to
12 unimproved real property, the attorney general may petition the
13 district court for temporary or permanent injunctive relief,
14 and restitution or remedies available pursuant to Section
15 24-17-15 NMSA 1978.

16 C. Any person who is the subject of an action
17 brought under this section shall have the right to demand a
18 jury trial."

19 Section 8. Section 24-17-17 NMSA 1978 (being Laws 1991,
20 Chapter 263, Section 6) is amended to read:

21 "24-17-17. RULES AND REGULATIONS AUTHORIZED.--The [~~state~~
22 ~~agency on~~] aging and long-term services department shall
23 promulgate all rules and regulations necessary or appropriate
24 to administer the provisions of the Continuing Care Act,
25 including, but not limited to, requirements regarding financial

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reserves, disclosure and actuarial studies."

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