



The Legislature
of the
State of New Mexico

49th Legislature, Second Session

LAWS 2010

CHAPTER 88

SENATE BILL 70, as amended

Introduced by

SENATOR CARLOS R. CISNEROS AND SENATOR MARY JANE M. GARCIA



Chapter 88

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

B. The purpose of the Continuing Care Act is to provide for disclosure and the inclusion of certain information in continuing care contracts in order that residents may make informed decisions concerning continuing care; to provide protection for residents; and to ensure the

1 solvency of communities."

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

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

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

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

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

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

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

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

9 G. "person" means an individual, corporation,
10 partnership, trust, association or other legal entity;

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

16 I. "provider" means the owner or manager of a
17 community that provides, or offers to provide, continuing
18 care;

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

22 K. "type A" agreement means an extensive
23 entrance-fee contract that includes housing, residential
24 services, amenities and unlimited specific health-related
25 services with little or no substantial increase in monthly

1 payments, except to cover normal operating costs and
2 inflation adjustments;

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

11 M. "unit" means the living quarters that a
12 resident buys, leases or has assigned as part of the
13 continuing care contract."

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

16 "24-17-4. DISCLOSURE.--

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

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

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

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

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

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

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

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

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

1 (b) has been held liable or enjoined in
2 a civil action by final judgment, if the civil action
3 involved fraud, embezzlement, fraudulent conversion or
4 misappropriation 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
10 the provider or any of its officers, directors, trustees,
11 partners, managers or affiliates and the result of such
12 action;

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

25 (7) the name and address of any person

1 owning land or property leased to the community and a
2 statement of what land or property is leased;

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

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

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

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

25 (12) an audited financial statement and an

1 audit report prepared in accordance with generally accepted
2 accounting principles applied on a consistent basis and
3 certified by a certified public accountant, including an
4 income statement or statement of activities, a cash-flow
5 statement or sources and application of funds statement and a
6 balance sheet as of the end of the provider's last fiscal
7 year. The balance sheet should accurately reflect the
8 deferred revenue balance, including entrance fees and any
9 other prepaid services, and should include notes describing
10 the community's long-term obligations and identifying all the
11 holders of mortgages and notes;

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

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

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

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

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

25 (d) a copy of lease agreements between

1 the community and any person owning land or property leased
2 to the community;

3 (e) information concerning the location
4 and description of other properties, both existing and
5 proposed, of the provider in which the provider owns any
6 interest and on which communities are or are intended to be
7 located and the identity of previously owned or operated
8 communities;

9 (f) a copy of the community's policies
10 and procedures; and

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

21 C. Each year, within one hundred eighty days after
22 the end of the community's fiscal year, the provider shall
23 furnish to actual residents the disclosure statement as
24 outlined in this section. For purposes of this subsection,
25 the obligation to furnish the required information to

1 residents shall be deemed satisfied if the information is
2 given to the residents' association, if there is one, and a
3 written message has been delivered to each resident, stating
4 that personal copies of the information are available upon
5 request."

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

8 "24-17-5. CONTRACT INFORMATION.--

9 A. A provider is responsible for ensuring that a
10 continuing care contract is written in clear and
11 understandable language.

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

13 (1) describe the community's admission
14 policies, including age, health status and minimum financial
15 requirements, if any;

16 (2) describe the health and financial
17 conditions required for a person to continue to be a
18 resident;

19 (3) describe the circumstances under which
20 the resident will be permitted to remain in the community in
21 the event of financial difficulties of the resident;

22 (4) list the total consideration paid,
23 including donations, entrance fees, subscription fees,
24 periodic fees and other fees paid or payable; provided,
25 however, that a provider cannot require a resident to

1 transfer all the resident's assets or the resident's real
2 property to the provider or community as a condition for
3 providing continuing care and the provider shall reserve the
4 right to charge periodic fees;

5 (5) describe in detail all items of service
6 to be received by the resident, such as food, shelter,
7 medical care, nursing care and other health services, and
8 whether services will be provided for a designated time
9 period or for the resident's lifetime;

10 (6) as an addendum to the contract, provide
11 a description of items of service, if any, that are available
12 to the resident but that are not covered in the entrance or
13 monthly fee;

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

16 (8) specify that deposits or entrance fees
17 paid by or for a resident shall be held in trust for the
18 benefit of the resident in a federally insured New Mexico
19 bank until the resident has taken possession of the
20 resident's unit or the resident's contract cancellation
21 period has ended, whichever occurs later;

22 (9) state the terms under which a continuing
23 care contract may be canceled by the resident or the
24 community and the basis for establishing the amount of refund
25 of the entrance fee;

1 (10) state the terms under which a
2 continuing care contract is canceled by the death of the
3 resident and the basis for establishing the amount of refund,
4 if any, of the entrance fee;

5 (11) state when fees will be subject to
6 periodic increases and what the policy for increases will be;
7 provided, however, that the provider shall give advance
8 notice of not less than thirty days to the residents before
9 the change becomes effective and increases shall be based
10 upon economic necessity, the reasonable cost of operating the
11 community, the cost of care and a reasonable return on
12 investment as defined by rules promulgated by the aging and
13 long-term services department;

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

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

21 (14) state the rules and regulations of the
22 provider then in effect and state the circumstances under
23 which the provider claims to be entitled to have access to
24 the resident's unit;

25 (15) list the resident's and provider's

1 respective rights and obligations as to any real or personal
2 property of the resident transferred to or placed in the
3 custody of the provider;

4 (16) describe the rights of the residents to
5 form a residents' association and the participation, if any,
6 of the association in the community's decision-making
7 process;

8 (17) describe the living quarters purchased
9 by or assigned to the resident;

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

12 (19) include the policy and procedure with
13 regard to changes in accommodations due to an increase or
14 decrease in the number of persons occupying an individual
15 unit;

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

18 (21) state the fee adjustments that will be
19 made in the event of a resident's voluntary absence from the
20 community for an extended period of time;

21 (22) include the procedures to be followed
22 when the provider temporarily or permanently changes the
23 resident's accommodations, either within the community or by
24 transfer to a health facility; provided that the contract
25 shall state that such changes in accommodations shall only be

1 made to protect the health or safety of the resident or the
2 general and economic welfare of all other residents of the
3 community;

4 (23) if the community includes a nursing
5 facility, describe the admissions policies and what will
6 occur if a nursing facility bed is not available at the time
7 it is needed;

8 (24) in the event the resident is offered a
9 priority for nursing facility admission at a facility that is
10 not owned by the community, describe with which nursing
11 facility the formal arrangement is made and what will occur
12 if a nursing facility bed is not available at the time it is
13 needed;

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

25 (26) specify the types of insurance, if any,

1 the resident is required to maintain, including medicare,
2 other health insurance and property insurance;

3 (27) specify the circumstances, if any,
4 under which the resident will be required to apply for any
5 public assistance, including medical assistance, or any other
6 public benefit programs;

7 (28) in bold type of not less than
8 twelve-point type on the signature page, state that a
9 contract for continuing care may present a significant
10 financial risk and that a person considering a continuing
11 care contract should consult with an attorney and with a
12 financial advisor concerning the advisability of pursuing
13 continuing care; provided, however, that failure to consult
14 with an attorney or financial advisor shall not be raised as
15 a defense to bar recovery for a resident in any claims
16 arising under the provisions of the Continuing Care Act;

17 (29) in bold type of not less than
18 twelve-point type on the front of the contract, state that
19 nothing in the contract or the Continuing Care Act should be
20 construed to constitute approval, recommendation or
21 endorsement of any continuing care community by the state of
22 New Mexico;

23 (30) in immediate proximity to the space
24 reserved in the contract for the signature of the resident,
25 in bold type of not less than twelve-point type, state the

1 following:

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

6 (31) contain a completed form, in duplicate,
7 captioned "Notice of Cancellation", which shall be attached
8 to the contract and easily detachable, and which shall
9 contain in twelve-point boldface type the following
10 information and statements in the same language as that used
11 in the contract.

12 "NOTICE OF CANCELLATION

13 Date: _____

14 (enter date of transaction)

15 You may cancel this transaction without any penalty or
16 obligation within seven days from the above date. If you
17 cancel, any payments made by you under the contract or sale
18 and any negotiable instrument executed by you will be
19 returned within ten business days following receipt by the
20 provider of your cancellation notice, and any security
21 interest or lien arising out of the transaction will be
22 canceled.

23 To cancel this transaction, deliver a signed and dated
24 copy of this cancellation notice or any other written notice,
25 or send a telegram, to: _____

(Name of Provider)

at _____

(Address of Provider's Place of Business)

not later than midnight of _____

(Date)

I hereby cancel this transaction.

(Buyer's Signature)

(Date)""

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

"24-17-6. REQUIREMENTS FOR FINANCIAL RESERVES.--

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

B. In addition to the amounts held in trust for specific residents under Subsection A of this section, a community that provides a type A agreement shall maintain at all times liquid reserves equal to the principal and interest payments due for a twelve-month period on all accounts of any mortgage loan and other long-term debt, as well as three

1 months' worth of net operating expenses.

2 C. A community that provides a type A or type B
3 agreement shall keep the funds maintained under Subsection A
4 of this section in federally insured bank accounts that are
5 separate from the community's operating accounts.

6 D. For communities that provide type B agreements,
7 reserves shall be calculated on a prorated basis for
8 residents who fall under type B agreements."

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

11 "24-17-10. RESTRAINT OF PROHIBITED ACTS--REMEDIES.--

12 A. Whenever the attorney general has reasonable
13 belief that any person is violating or is about to violate
14 any provision of the Continuing Care Act, or any regulation
15 promulgated pursuant to that act, and that proceedings would
16 be in the public interest, the attorney general may bring an
17 action in the name of the state to restrain or prevent
18 violations of that act or regulations promulgated pursuant to
19 that act. The action may be brought in the district court of
20 the county in which the person resides or has the person's
21 principal place of business or in the district court for
22 Santa Fe county. The attorney general acting on behalf of
23 the state shall not be required to post bond when seeking a
24 temporary or permanent injunction in such action.

25 B. In any action filed pursuant to this section of SB 70
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1 the Continuing Care Act, including an action with respect to
2 unimproved real property, the attorney general may petition
3 the district court for temporary or permanent injunctive
4 relief, and restitution or remedies available pursuant to
5 Section 24-17-15 NMSA 1978.

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

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

11 "24-17-17. RULES AND REGULATIONS AUTHORIZED.--The aging
12 and long-term services department shall promulgate all rules
13 and regulations necessary or appropriate to administer the
14 provisions of the Continuing Care Act, including, but not
15 limited to, requirements regarding financial reserves,
16 disclosure and actuarial studies."

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Diane D. Denish

Diane D. Denish, President
Senate

Lenore M. Naranjo
Lenore M. Naranjo, Chief Clerk
Senate

Ben Lujan

Ben Lujan, Speaker
House of Representatives

Stephen R. Arias
Stephen R. Arias, Chief Clerk
House of Representatives

Approved by me this 8th day of March, 2010

Bill Richardson

Governor Bill Richardson
State of New Mexico

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