

1 CONTINUING CARE RETIREMENT COMMUNITY

2 AMENDMENTS

3 2016 THIRD SPECIAL SESSION

4 STATE OF UTAH

5 Chief Sponsor: Deidre M. Henderson

6 House Sponsor: Earl D. Tanner

8 LONG TITLE

9 General Description:

10 This bill modifies provisions related to continuing care retirement communities.

11 Highlighted Provisions:

12 This bill:

- 13 ▶ defines terms;
- 14 ▶ provides that a court may direct a trustee to purchase land on which a continuing
15 care facility is located from a ground lessor under certain circumstances;
- 16 ▶ provides that the Department of Insurance may require a provider to pay rent under
17 a ground lease;
- 18 ▶ provides that the Department of Insurance may subordinate a lien on a provider's
19 assets under certain circumstances;
- 20 ▶ modifies a provision regarding when a provider is required to return a continuing
21 care entrance fee;
- 22 ▶ modifies a provision related to the liability of a provider for a misstatement or
23 omission of a material fact;
- 24 ▶ requires a person that holds a possessory interest in a facility to be bound by the
25 continuing care contracts related to the facility under certain circumstances; and
- 26 ▶ provides that a person may not sell land on which a facility subject to a ground lease
27 is located free and clear of the provider's interest in the lease.

28 Money Appropriated in this Bill:

29 None

30 **Other Special Clauses:**

31 This bill provides a special effective date.

32 **Utah Code Sections Affected:**

33 AMENDS:

34 **31A-44-102**, as enacted by Laws of Utah 2016, Chapter 270

35 **31A-44-104**, as enacted by Laws of Utah 2016, Chapter 270

36 **31A-44-401**, as enacted by Laws of Utah 2016, Chapter 270

37 **31A-44-404**, as enacted by Laws of Utah 2016, Chapter 270

38 **31A-44-502**, as enacted by Laws of Utah 2016, Chapter 270

39 **31A-44-503**, as enacted by Laws of Utah 2016, Chapter 270

40 **31A-44-601**, as enacted by Laws of Utah 2016, Chapter 270

41 **31A-44-602**, as enacted by Laws of Utah 2016, Chapter 270

42 **31A-44-605**, as enacted by Laws of Utah 2016, Chapter 270



44 *Be it enacted by the Legislature of the state of Utah:*

45 Section 1. Section **31A-44-102** is amended to read:

46 **31A-44-102. Definitions.**

47 As used in this chapter:

48 (1) "Continuing care" means [~~the~~] furnishing or providing access to an individual,
49 other than by an individual related to the individual by blood, marriage, or adoption, of lodging
50 together with nursing services, medical services, or other related services pursuant to a contract
51 requiring an entrance fee.

52 (2) "Continuing care contract" means a contract under which a provider provides
53 continuing care to a resident.

54 (3) (a) "Entrance fee" means an initial or deferred transfer to a provider of a sum of
55 money or property made or promised to be made as full or partial consideration for acceptance
56 of a specified individual as a resident in a facility.

57 (b) "Entrance fee" includes a monthly fee, assessed at a rate that is greater than the

58 value of the provider's monthly services, that a resident agrees to pay in exchange for
59 acceptance into a facility or a promise of future monthly fees assessed at a rate that is less than
60 the value of the services rendered.

61 (c) "Entrance fee" does not include an amount less than the sum of the regular period
62 charges for three months of residency in a facility.

63 (d) "Entrance fee" does not include a deposit of less than \$1,000 made under a
64 reservation agreement.

65 (4) "Facility" means a place in which a person provides continuing care~~[-]~~ pursuant to a
66 continuing care contract.

67 (5) "Ground lease" means a lease to a provider of the land and infrastructure
68 improvements to the land on which a facility is located.

69 (6) "Ground lessor" means, for a facility subject to a ground lease, the owner and lessor
70 of the land and infrastructure improvements to the land on which the facility is located.

71 ~~[(5)]~~ (7) "Living unit" means a room, apartment, cottage, or other area within a facility
72 set aside for the exclusive use or control of one or more identified individuals.

73 ~~[(6)]~~ (8) (a) "Provider" means:

74 ~~[(a)]~~ (i) the owner of a facility;

75 ~~[(b)]~~ (ii) a person, other than a resident, that claims a possessory interest in a facility; or

76 ~~[(c)]~~ (iii) a person who enters into a continuing care contract with a resident or
77 potential resident.

78 (b) "Provider" does not include a person who is solely a ground lessor.

79 ~~[(7)]~~ (9) "Provider disclosure statement" means, for a given provider, the disclosure
80 statement described in Section [31A-44-301](#).

81 ~~[(8)]~~ (10) "Reservation agreement" means an agreement that requires the payment of a
82 deposit to reserve a living unit for a prospective resident.

83 ~~[(9)]~~ (11) "Resident" means an individual entitled to receive continuing care in a
84 facility pursuant to a continuing care contract.

85 Section 2. Section **31A-44-104** is amended to read:

86 **31A-44-104. Scope of regulation -- When compliance is required.**

87 (1) The regulation of providers under this chapter does not limit or replace regulation
88 by any other governmental entity of continuing care facilities or providers.

89 (2) The department may not regulate, or in any manner inquire into, the quality of care
90 provided in a facility.

91 (3) A record that the department receives from a provider that is not required to be part
92 of a disclosure statement under this chapter is a protected record under Title 63G, Chapter 2,
93 Government Records Access and Management Act.

94 (4) The department shall determine the amount of any fee required under this chapter,
95 in accordance with Section 63J-1-504, and in an amount that covers the department's cost to
96 administer this chapter.

97 (5) A provider that begins marketing a continuing care facility project on or before
98 May 10, 2016, is not required to comply with this chapter until May 10, 2017.

99 Section 3. Section 31A-44-401 is amended to read:

100 **31A-44-401. Continuing care contract requirements -- No waiver.**

101 (1) A continuing care contract shall:

102 (a) provide that the provider shall refund the portion of a departing resident's entrance
103 fee that the provider has agreed to refund, if any, no later than the earlier of:

104 (i) if the departing resident ceased occupancy of the departing resident's unit before any
105 other departing resident who has not received an entrance fee refund, 30 days after the day on
106 which the [resident's living unit is occupied by a new resident] provider accumulates an amount
107 of money, from sales of living units previously occupied by departing residents, that is equal to
108 the departing resident's entrance fee refund; or

109 (ii) one year after the day on which the departing resident ceases to occupy the
110 departing resident's living unit, unless the provider proves that the provider has made and is
111 making a good faith effort to find [~~another resident for the living unit at the lowest entrance fee~~
112 ~~that is acceptable to the resident ceasing to occupy the living unit;~~] an occupant for a living unit
113 that was previously occupied by a departing resident;

114 (b) provide that the resident may terminate the continuing care contract upon giving
115 notice of termination:

116 (i) with or without cause; and

117 (ii) clearly stating what portion of the entrance fee the provider will refund and the date
118 by which the provider will make the refund; and

119 (c) provide that a continuing care contract is terminated by the resident's death and
120 clearly state:

121 (i) what portion of the entrance fee the provider will refund in the event of the
122 resident's death;

123 (ii) the date before which the provider will make the refund; and

124 (iii) to whom the provider will make the refund.

125 (2) A continuing care contract may permit involuntary dismissal of a resident from a
126 continuing care facility upon a reasonable determination by the provider that the resident's
127 health and well-being require termination of the continuing care contract.

128 (3) If a resident is dismissed under Subsection (2) and is in a condition of financial
129 hardship, as defined by the department by rule made in accordance with Title 63G, Chapter 3,
130 Utah Administrative Rulemaking Act, the provider shall refund the resident's entrance fee:

131 (a) in an amount provided in the continuing care contract; and

132 (b) before the earlier of:

133 (i) a time provided in the continuing care contract; and

134 (ii) 60 days after the day on which the provider dismisses the resident from the facility.

135 (4) A resident may not waive a provision of this chapter by agreement.

136 Section 4. Section **31A-44-404** is amended to read:

137 **31A-44-404. Nondisturbance of residents.**

138 (1) A person may not directly or indirectly disturb the rights of a resident or third party
139 beneficiary under a continuing care contract and this chapter if the resident has substantially
140 performed the resident's obligations under the continuing care contract.

141 (2) If the person to whom a resident owes performance under the continuing care

142 contract is contested, and a court has not issued a temporary or permanent order resolving the
143 contest:

144 (a) the department may appoint a temporary receiver to receive the performance of the
145 resident; and

146 (b) a court may appoint a receiver upon petition by the department.

147 ~~[(3) A person that succeeds a provider in the provider's interest in a facility is bound by
148 every continuing care contract concerning the facility, including a continuing care contract that
149 provides for the return of entrance fees.]~~

150 (3) (a) Except as provided in Subsection (3)(b), a person other than a resident that
151 holds a present right to possess a facility, including a ground lessor but only after the ground
152 lessor acquires a provider's possessory interest by termination of a ground lease or otherwise, is
153 bound by every continuing care contract related to the facility, including a continuing care
154 contract that provides for the return of part or all of a resident's entrance fee.

155 (b) If a ground lessor acquires a provider's possessory interest by termination of a
156 ground lease or otherwise, the ground lessor's obligation under the continuing care contracts is
157 limited to the monetary obligations of the provider to which the ground lessor succeeds.

158 (4) (a) The commissioner holds a covenant that:

159 (i) runs with the land on which a facility is located; and

160 (ii) except as provided in Subsection (4)(b), binds a person with a present right to
161 possess the land on which the facility is located, including a ground lessor but only after the
162 ground lessor acquires a provider's possessory interest by termination of a ground lease or
163 otherwise, to every continuing care contract related to the facility, including a continuing care
164 contract that provides for the return of all or part of a resident's entrance fee.

165 (b) If a ground lessor acquires a provider's possessory interest by termination of a
166 ground lease or otherwise, the ground lessor's obligation under the continuing care contracts
167 under the covenant described in Subsection (4)(a) is limited to the monetary obligations of the
168 provider to which the ground lessor succeeds.

169 (c) A person may not sell the land on which the facility is located free and clear of the

170 interest described in Subsection (4)(a).

171 (5) A person may not sell or transfer the land on which a facility subject to a ground
172 lease is located free and clear of the provider's possessory interest in the ground lease.

173 Section 5. Section 31A-44-502 is amended to read:

174 **31A-44-502. Order to rehabilitate.**

175 (1) A court order to rehabilitate a facility under Section 31A-44-501 may direct a
176 trustee to:

177 ~~[(1)]~~ (a) take possession of the provider's property in order to conduct the provider's
178 business, including employing any manager or agent that the trustee considers necessary; and

179 ~~[(2)]~~ (b) take action as directed by the court to eliminate the causes and conditions that
180 made rehabilitation necessary, which action may include:

181 ~~[(a)]~~ (i) selling the facility through bankruptcy or receivership proceedings; and

182 ~~[(b)]~~ (ii) requiring a purchaser of the facility to honor any continuing care contract for
183 the facility.

184 (2) (a) For a facility subject to a ground lease, a court may, in addition to the actions
185 described in Subsection (1), direct a trustee to purchase from the ground lessor, or assign to
186 another person that agrees to operate the facility, for market value, the ground lessor's interest
187 in the land and the infrastructure improvements to the land on which the facility is located.

188 (b) A court may direct a trustee under Subsection (2)(a) to purchase from a ground
189 lessor the land and infrastructure improvements to the land on which a facility is located,
190 regardless of the terms of the ground lease agreement.

191 (c) If a court directs a trustee to purchase or assign the land and infrastructure
192 improvements to the land under Subsection (2)(a), the ground lessor shall sell or assign the
193 land and infrastructure improvements to the land in compliance with the court order.

194 (d) The commissioner shall determine market value in accordance with rules made by
195 the commissioner in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking
196 Act.

197 (e) In determining market value under Subsection (2)(d), the commissioner shall:

198 (i) value the land and infrastructure improvements to the land on which the facility is
199 located as though the land and infrastructure improvements to the land were not subject to the
200 ground lease; and

201 (ii) disregard the monetized value of an existing ground lease.

202 (3) Solely for the purpose of enforcing this section, a court has personal jurisdiction in
203 a proceeding under this section over:

204 (a) the owner of a facility; and

205 (b) the owner of the land and infrastructure improvements to the land on which a
206 facility is located.

207 Section 6. Section **31A-44-503** is amended to read:

208 **31A-44-503. Order to liquidate.**

209 (1) If the trustee determines that further efforts to rehabilitate a provider's facility are
210 impractical or useless, the trustee may petition a court for liquidation of the facility.

211 (2) A court that issues an order to liquidate a facility under Subsection (1) shall appoint
212 a trustee to collect and liquidate all of the provider's assets located in this state.

213 (3) An individual may not enter into a continuing care contract at a facility after a court
214 enters an order to liquidate the facility.

215 (4) (a) For a facility subject to a ground lease, a court may, in an order to liquidate
216 under this section, direct a trustee to purchase from the ground lessor, or assign to another
217 person that agrees to operate the facility, for market value, the ground lessor's interest in the
218 land and the infrastructure improvements to the land on which the facility is located.

219 (b) A court may direct a trustee under Subsection (4)(a) to purchase from a ground
220 lessor the land and infrastructure improvements to the land on which a facility is located,
221 regardless of the terms of the ground lease agreement.

222 (c) If a court directs a trustee to purchase or assign land and infrastructure
223 improvements to the land under Subsection (4)(a), the ground lessor shall sell or assign the
224 land and infrastructure improvements to the land in compliance with the court order.

225 (d) The commissioner shall determine market value in accordance with rules made by

226 the commissioner in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking
 227 Act.

228 (e) In determining market value under Subsection (4)(d), the commissioner shall:

229 (i) value the land and infrastructure improvements to the land on which the facility is
 230 located as though the land and infrastructure improvements to the land were not subject to the
 231 ground lease; and

232 (ii) disregard the monetized value of an existing ground lease.

233 (5) Solely for the purpose of enforcing this section, a court has personal jurisdiction in
 234 a proceeding under this section over:

235 (a) the owner of a facility; and

236 (b) the owner of the land and infrastructure improvements to the land on which a
 237 facility is located.

238 Section 7. Section **31A-44-601** is amended to read:

239 **31A-44-601. Lien held by the commissioner in favor of a resident or a group of**
 240 **residents.**

241 (1) To secure the obligations of the provider to a resident or a group of residents under
 242 a continuing care contract, the commissioner holds a lien in favor of the resident or group of
 243 residents that attaches on the day the notice described in Subsection (3) is recorded as provided
 244 in Subsection (4).

245 (2) A lien described in Subsection (1) covers the real and personal property of the
 246 provider that is used in connection with the facility.

247 (3) The provider shall prepare, for ~~[each]~~ the county where the ~~[provider has an interest~~
 248 ~~in real or personal property]~~ facility is located, a written notice, sworn to by ~~[an officer of the~~
 249 ~~provider]~~ each person with an interest in the facility, that contains:

250 (a) the name of ~~[the]~~ any provider and ground lessor;

251 (b) a legal description of the provider's real or personal property that is used in
 252 connection with the facility; and

253 (c) a statement that the real or personal property used in connection with the facility is

254 subject to this chapter and to the lien imposed by this section~~[-]~~, except that the interest of a
255 ground lessor in the land and infrastructure improvements to the land on which the facility is
256 located is not subject to the lien imposed by this section.

257 (4) The provider shall record the notice described in Subsection (3) in the real property
258 records of each county where the provider has real property on or before the date the provider
259 first executes a continuing care contract for the facility.

260 (5) Except as provided in Subsection (6), the lien described in Subsection (1) is
261 subordinate to ~~[a]~~ any lien on the property of the provider.

262 (6) The amount of ~~[a]~~ any lien on the provider's property that is superior to a lien
263 described in Subsection (1) is limited to the portion of the funds secured by the lien that the
264 provider uses to:

265 (a) construct, acquire, replace, or improve a facility;

266 (b) refinance the portion of a loan used to construct, acquire, replace, or improve a
267 facility;

268 (c) pay, for a loan related to the facility, a reasonable loan fee, a loan expense, or loan
269 interest; ~~[or]~~

270 (d) refund an entrance fee to a facility resident;

271 ~~[(d)]~~ (e) pay reasonable operating costs of the facility[-]; or

272 (f) pay an amount for a purpose determined by the commissioner by rule made in
273 accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

274 (7) If a lien on the property of the provider is superior to a lien described in Subsection
275 (1), a provider may only use an entrance fee to:

276 (a) reduce a debt secured by a superior lien;

277 (b) construct, acquire, replace, or improve a facility;

278 (c) fund reserves for the provider's actuarial debt under continuing care contracts for a
279 facility;

280 (d) refund an entrance fee of a resident of a facility;

281 (e) pay a facility resident's debt to the provider for a recurring fee due under the

282 resident's continuing care contract; or

283 (f) pay an amount for a purpose approved by the commissioner.

284 (8) The commissioner may judicially foreclose a lien described in Subsection (1) if
285 property subject to the lien is liquidated or the provider is insolvent or bankrupt.

286 (9) The commissioner shall use the proceeds from a lien foreclosed under Subsection
287 (8) to satisfy the provider's obligations under any continuing care contract in effect on the day
288 the commissioner forecloses the lien.

289 Section 8. Section 31A-44-602 is amended to read:

290 **31A-44-602. Enforcement by department -- Rulemaking.**

291 (1) Subject to the requirements of Title 63G, Chapter 4, Administrative Procedures
292 Act, the department may:

293 (a) receive and act on a complaint from a resident about a provider or a facility;

294 (b) take action designed to obtain voluntary compliance by the provider with this
295 chapter for the benefit of a resident;

296 (c) commence administrative or judicial proceedings on the commission's own in order
297 to enforce compliance by a provider with this chapter for the benefit of a resident; ~~or~~

298 (d) after a complaint by a resident about a provider for a facility subject to a ground
299 lease, require the provider to pay rent in accordance with the ground lease; or

300 ~~(d)~~ (e) take action against a provider who fails to:

301 (i) respond to the department, in writing, before 30 business days after the day on
302 which the provider receives notice from the department of a complaint filed with the
303 department; or

304 (ii) submit information requested by the department.

305 (2) The department may:

306 (a) counsel an individual on the individual's rights or duties under this chapter;

307 (b) make rules in accordance with Title 63G, Chapter 3, Utah Administrative

308 Rulemaking Act, to:

309 (i) restrict or prohibit practices by the provider that are misleading, unfair, or abusive;

310 (ii) promote or assure fair and full disclosure of the terms and conditions of continuing
311 care contracts, agreements, and communications between a resident and a provider;

312 (iii) promote or assure the ability of the public to compare continuing care contracts,
313 providers, and facilities; and

314 (iv) clearly disclose any financial risks related to a provider's facility to the facility's
315 residents;

316 (c) employ hearing examiners, clerks, and other employees and agents as necessary to
317 perform the department's duties under this chapter; ~~and~~

318 (d) appoint a receiver for a provider~~[-]~~; and

319 (e) upon request by a provider, subordinate a lien imposed under Section 31A-44-601
320 for the purpose of the provider obtaining secondary financing or refinancing of a facility if:

321 (i) the facility is financially sound; and

322 (ii) subordinating the lien does not adversely affect the residents of the facility.

323 Section 9. Section 31A-44-605 is amended to read:

324 **31A-44-605. Civil liability.**

325 (1) A provider who enters into a continuing care contract with an individual without
326 complying with the disclosure statement requirement described in this chapter, or who makes a
327 continuing care contract with an individual who relies on a disclosure statement that misstates
328 or omits a material fact, is liable to the individual for:

329 (a) actual damages;

330 (b) repayment of all fees the individual paid to the provider, minus the reasonable
331 value of care and lodging provided to the individual before the violation, misstatement, or
332 omission was discovered or reasonably should have been discovered;

333 (c) interest at the legal rate for judgments;

334 (d) court costs; and

335 (e) reasonable attorney fees.

336 (2) A provider is liable under this section ~~[regardless of whether the provider had~~
337 ~~actual knowledge of the]~~ unless the provider proves by a preponderance of evidence that the

338 provider and the provider's agents and employees did not know and should not have known of
339 the misstatement or omission.

340 (3) An individual may not ~~file or~~ maintain an action under this section if:

341 (a) the individual ~~[, before filing the action,]~~ receives a written offer from the provider
342 for refund of all amounts paid to the provider or the provider's facility plus reasonable interest
343 from the date of payment, minus the reasonable value of care and lodging provided before the
344 receipt of the offer;

345 (b) the individual receives the offer described in Subsection (3)(a) before a day that is
346 30 days after the earlier of:

347 (i) the day on which the individual submits a written request to the provider for
348 repayment under this section; or

349 (ii) the day on which the individual files an action under this section;

350 ~~[(b)]~~ (c) the offer includes a description of the provisions of this section; and

351 ~~[(c)]~~ (d) the recipient of the offer fails to accept the offer within 30 days after the date
352 the offer is received.

353 (4) An individual shall bring an action under this section before the day three years
354 after:

355 (a) the day on which the individual enters into the continuing care contract; or

356 (b) the individual discovers, or reasonably should have discovered, the provider's
357 violation, misstatement, or omission.

358 (5) A person does not have a cause of action under this chapter except as expressly
359 provided by this chapter.

360 (6) This chapter does not limit the liability that exists under any other statute or
361 common law.

362 (7) The provisions of this chapter are not exclusive and the remedies provided by this
363 chapter are in addition to any other remedies provided by any other law.

364 Section 10. **Effective date.**

365 If approved by two-thirds of all the members elected to each house, this bill takes effect

366 upon approval by the governor, or the day following the constitutional time limit of Utah
367 Constitution, Article VII, Section 8, without the governor's signature, or in the case of a veto,
368 the date of veto override.