

09 LC 33 3246ER

House Bill 843

By: Representatives Jacobs of the 80<sup>th</sup> and Knox of the 24<sup>th</sup>

A BILL TO BE ENTITLED AN ACT

To amend Title 33 of the Official Code of Georgia Annotated, relating to insurance, so as to extensively revise the requirements for continuing care providers and facilities; to revise definitions; to provide for enforcement powers of the Commissioner of Insurance; to revise provisions relating to annual disclosure statements; to revise requirements for continuing care agreements; to provide extensive requirements for disclosure statements; to provide for specific financial requirements; to provide for supervision, rehabilitation, and liquidation of a continuing care provider facility; to revise provisions relating to penalties for violations; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Title 33 of the Official Code of Georgia Annotated, relating to insurance, is amended by revising Chapter 45, relating to continuing care providers and facilities, as follows:

"CHAPTER 45

33-45-1.

As used in this chapter, the term:

(1) 'Continuing care' or 'care' means furnishing pursuant to an agreement shelter, lodging ~~that is not in a skilled nursing facility as defined in Code section 31-6-2(34), an intermediate care facility as defined in Code section 31-6-2(22) nor a personal care home as defined in section 31-7-12,~~ food, and ~~either~~ nursing care ~~or personal services,~~ whether such nursing care ~~or personal services are~~ is provided in the facility or in another setting designated by the agreement for continuing care, to an individual not related by consanguinity or affinity to the provider furnishing such care upon payment of an entrance fee.

(2) 'Continuing care agreement' means a contract or agreement to provide continuing care or ~~limited continuing care . Agreements to provide continuing care or limited continuing~~

Deleted: in which a resident lives independently.

Deleted: Other personal Personal services provided, if any, shall be designated in the continuing care agreement. Agreements to provide continuing care include agreements to provide care for any duration, including agreements that are terminable by either party.¶

Deleted: other services regulated by this chapter

care include agreements to provide care for any duration, including agreements that are terminable by either party..

NOTE: THE FIRST DEFINITION HAS THE EFFECT OF REQUIRING THAT CONTINUING CARE MUST INCLUDE SKILLED NURSING CARE (NURSING HOMES). THIS IS OPTIONAL CURRENTLY. HOWEVER, IN ORDER TO CONTINUE REGULATING FACILITIES WHICH CHARGE LARGE ENTRANCE FEES BUT THAT OFFER ASSISTED LIVING, RATHER THAN SKILLED NURSING CARE, I HAVE ADDED THE DEFINITION OF “CONTINUING CARE AGREEMENT”. WHEN READ IN CONJUNCTION WITH (1) ADDITION OF A NEW TERM, “LIMITED CONTINUING CARE”; (2) CHANGES IN THE DEFINITION OF “ENTRANCE FEE, IMMEDIATELY BELOW, AND (3) CHANGES IN THE NEXT SECTION ON APPLICABILITY OF THE CHAPTER (33-45-2)- SEE THAT COMMENT AS WELL- THIS WILL CAPTURE REGULATION OF THOSE PROVIDERS.

~~(2)~~(3) 'Entrance fee' means an initial or deferred payment of a sum of money or property made as full or partial payment to assure the resident ~~a place in a facility~~ continuing care or limited continuing care. Provided, however, that such an initial or deferred payment of a sum of money or property made which is greater than or equal to 12 times the monthly care fee shall be presumed to be an entrance fee so long as such payment is intended to be a full or partial payment to assure the resident ~~lodging in a residential unit,~~ lodging in a residential unit. An accommodation fee, admission fee, or other fee of similar form and application greater than or equal to 12 times the monthly care fee shall be considered to be an entrance fee.

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Deleted: which he or she lives independently and certain other services which do not otherwise constitute continuing care.

~~(3)~~(4) 'Facility' means a place in which it is undertaken to provide continuing care or limited continuing care.

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(4)(5) 'Licensed' means that the provider has obtained a certificate of authority from the department.

(6) ‘Limited continuing care’ means furnishing pursuant to an agreement lodging that is not in a skilled nursing facility as defined in Code section 31-6-2(34), an intermediate care facility as defined in Code section 31-6-2(22) nor a personal care home as defined in section 31-7-12, food, and personal services whether such personal services are provided in a facility such as a personal care home or in another setting designated by the continuing care agreement, to an individual not related by consanguinity or affinity to the provider furnishing such care upon payment of an entrance fee.

~~(7)~~'Monthly care fee' means the fee charged to a resident for continuing care or limited continuing care on a monthly or periodic basis. Monthly care fees may be increased by the provider to provide care to the resident as outlined in the continuing care agreement. Periodic fee payments or other prepayments shall not be monthly care fees.

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(8) ‘Nursing care’ means services which are provided to residents of skilled nursing facilities or intermediate care facilities.

(9) 'Personal services' means, but is not limited to, such services as: individual assistance with eating, bathing, grooming, dressing, ambulation, and housekeeping; supervision of self-administered medication; arrangement for or provision of social and leisure services; arrangement for appropriate medical, dental, nursing, or mental health services; and other similar services which the department may define. 'Personal services' shall not be construed to mean the provision of medical, nursing, dental, or mental health services by the staff of a facility. **Personal services provided, if any, shall be designated in the continuing care agreement.**

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(10) 'Provider' means the owner or operator, 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, which owner or operator undertakes to provide continuing care **or limited continuing care** for a fixed or variable fee, or for any other remuneration of any type, whether fixed or variable, for the period of care, payable in a lump sum or lump sum and monthly maintenance charges or in installments.

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(11) 'Resident' means a purchaser of or a nominee of or a subscriber to a continuing care agreement. Such an agreement may not be construed to give the resident a part ownership of the facility in which the resident is to reside unless expressly provided for in the agreement.

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(12) **'Residential unit' means a residence or apartment in which a resident lives that is neither a skilled nursing facility as defined in Code section 31-6-2(34), an intermediate care facility as defined in Code section 31-6-2(22), nor a personal care home as defined in section 31-7-12.**

**NOTE: "RESIDENTIAL" IS USED IN LIEU OF "INDEPPENDENT" LIVING BRCAUSE THAT TERM CAUSES SEPARATE LEGAL ISSUES WITH HUD, VIV A VIS THE AMERICANS WITH DISABILITIES ACT.**

33-45-2.

Except as provided in this chapter, providers of continuing care facilities shall be governed by the provisions of this chapter and shall be exempt from all other provisions of this title. (a) For the purpose of enforcing the requirements of this chapter, the Commissioner and the department are authorized to use the powers granted in Chapters 1 and 2 of this title.

(b) A **provider or** facility which charges a resident an entrance fee for lodging in **a residential unit and provides limited continuing care** shall not call itself nor be considered a provider of continuing care, but such **provider or** facility shall otherwise be subject to the requirements imposed upon the providers and facilities regulated by this chapter. **Provided, however, a facility that has received a certificate of authority and has been in conformance with the provisions of this chapter prior to July 1, 2010 may continue to call and present itself to the public as a provider of continuing care.**

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**NOTES: (1) GRANDFATHERING IS ADDED; AND (2) THIS IS THE COROLLARY**

**TO THE ENTRANCE FEE CHANGE. ESSENTIALLY WE WOULD BE REGULATING THOSE FACILITIES (WHICH CHARGE LARGE ENTRY FEES BUT HAVE ASSISTED LIVING IN LIEU OF NURSING HOME CARE) AS CCRCs BUT NOT LETTING THEM BE CALLED CCRCs.**

33-45-3.

Nothing in this title or chapter shall be deemed to authorize any provider of a continuing care facility **or facility providing limited continuing care** to transact any insurance business other than that of continuing care insurance or **limited continuing care insurance or** otherwise to engage in any other type of insurance unless it is authorized under a certificate of authority issued by the department under this title. Nothing in this chapter shall be construed so as to interfere with the jurisdiction of the Department of Human **Services**, the Department of Community Health, or any other regulatory body exercising authority over providers **regulated by this chapter.**

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33-45-4.

The administration of this chapter is vested in the department, which shall:

- (1) Prepare and furnish all forms necessary under the provisions of this chapter;
- (2) Collect in advance, and the applicant shall pay in advance, the following fees:

- (A) At the time of filing an application for a certificate of authority, an application fee as provided in Code Section 33-8-1 for each facility;
- (B) At the time of renewal of a certificate of authority, a renewal fee as provided in Code Section 33-8-1 for each year or part thereof for each facility where continuing care **or limited continuing care** is provided; and
- (C) A late fee in an amount equal to 50 percent of the renewal fee in effect on the last preceding regular renewal date. In addition to any other penalty that may be provided for under this chapter, the department may levy a fine not to exceed \$50.00 a day for each day of noncompliance; and

(3) Adopt rules, within the standards of this chapter, necessary to effect the purposes of this chapter. Specific provisions in this chapter relating to any subject shall not preclude the department from adopting rules concerning such subject if such rules are within the standards and purposes of this chapter;

~~(4) Adopt rules, within the standards of this chapter, to set a bond conditioned upon compliance with the provisions of this chapter. The amount of the bond shall be not less than \$10,000.00. The rules adopted by the department shall provide for consideration of the obligations, financial condition, amounts of debt, service provisions, and such other features as deemed pertinent and applicable to the determination of a sufficient bond amount; and~~

(5) ~~Impose administrative fines and penalties pursuant to this chapter.~~

**NOTE: THESE TWO PROVISIONS ARE DELETED BECAUSE THE BOND REQUIREMENT IS BEING REPLACED BY THE REQUIREMENTS TO MAINTAIN ESCROW ACCOUNT AND/OR FINANCIAL RESERVES (LATER IN THE BILL IN 33-45-10). THE OTHER IS DUPLICATIVE OF THE DEPARTMENT'S POWERS.**

33-45-5.

No person may engage in the business of providing continuing care or **limited continuing care** or issuing continuing care agreements in this state without a certificate of authority therefor obtained from the department as provided in this chapter. **For purposes of this section 'engage in the business of' shall include the development or construction of a facility subject to regulation under this chapter or holding oneself out to the public as a provider.**

The application for approval or renewal of a certificate of authority shall be on such forms as provided by the department. The department shall issue such certificate of authority if the applicant pays the required fees and the continuing care agreement for the applicant meets the requirements of Code Section 33-45-7. The department shall renew a certificate of authority if the provider pays the required fees and furnishes the annual disclosure statements required by Code Section 33-45-6 and is otherwise not in violation of this chapter.

33-45-6. Annual Statements

**NOTES: (1) THE ANNUAL STATEMENT IS BEING CHANGED TO A DISCLOSURE STATEMENT TO BE PROVIDED AT THE TIME OF CONTRACTING OR THE COMMITMENT OF FUNDS BY THE PROSPECTIVE RESIDENT (SEE 33-45-9) (2) THE SECOND PARAGRAPH (b) IS FROM THE NC LAW, REQUIRING MORE EXTENSIVE DISCLOSURE. (3) THE DELETED PROVISIONS IN (c) BELOW ARE IN CURRENT LAW AS PART OF THE ANNUAL STATEMENT AND MOST ARE BEING RETAINED BUT MOVED TO 33-45-9, THE SECTION ON DISCLOSURE STATEMENT.**

(a) Annually, on or before ~~May 1~~, **June 1**, the provider shall file ~~an annual~~ a revised disclosure statement and such other information and data showing its condition as of the last day of the preceding calendar year or fiscal year of the provider. If the department does not receive the required information on or before ~~May 1~~, **June 1**, a late fee may be charged pursuant to Code Section 33-45-7. The department may approve an extension of up to 30 days.

(b) **(1)** The provider shall also make the revised disclosure statement available to all the residents of the facility.

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Deleted: The revised disclosure statement shall include a narrative describing any material differences between the forecasted statements of revenues and expenses and cash flows or other forecasted financial data filed pursuant to paragraph (9) of subsection (d) of Code Section 33-45-9 as a part of the disclosure statement recorded immediately subsequent to the start of the provider's most recently completed fiscal year and the actual results of operations during that fiscal year, together with the revised forecasted statements of revenues and expenses and cash flows or other forecasted financial data being filed as a part of the revised disclosure statement.

~~(2) A provider, shall also revise its disclosure statement and have the revised disclosure statement recorded at any other time if, 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 120 days prior to the due date of the time of renewal of a certificate of authority required by this chapter, shall be considered current.~~

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~~(b) The annual statement shall be in such form as the department prescribes and shall contain at least the following:~~

~~(1) Financial statements audited by an independent certified public accountant, which shall contain, for two or more fiscal years if the facility has been in existence that long, the following:~~

~~(A) An accountant's opinion and, in accordance with generally accepted accounting principles:~~

~~(i) A balance sheet;~~

~~(ii) A statement of income and expenses;~~

~~(iii) A statement of equity or fund balances; and~~

~~(iv) A statement of changes in financial position; and~~

~~(B) Notes to the financial statements considered customary or necessary for full disclosure or adequate understanding of the financial statements, financial condition, and operation;~~

~~(2) The following financial information:~~

~~(A) A schedule giving additional information relating to property, plant, and equipment having an original cost of at least \$25,000.00 so as to show in reasonable detail with respect to each separate facility original costs, accumulated depreciation, net book value, appraised value or insurable value and date thereof, insurance coverage, encumbrances, and net equity of appraised or insured value over encumbrances. Any property not used in continuing care shall be shown separately from property used in continuing care;~~

~~(B) The level of participation in medicare or Medicaid programs, or both;~~

~~(C) A statement of all fees required of residents including, but not limited to, a statement of the entrance fee charged, the monthly service charges, the proposed application of the proceeds of the entrance fee by the provider, and the plan by which the amount of the entrance fee is determined if the entrance fee is not the same in all cases; and~~

~~(D) Any change or increase in fees when the provider changes either the scope of, or the rates for, care or services, regardless of whether the change involves the basic rate or only those services available at additional costs to the resident; and~~

~~(3)(c). Notwithstanding the provisions of Code section 33-45-9, the commissioner may require a provider to submit such other information he or she deems necessary to enforce this chapter.~~

Deleted: If the provider is an individual, the annual revised disclosure statement shall be sworn to by the individual; if a limited partnership, by the general partner; if a partnership other than a limited partnership, by all the partners; if any other unincorporated association, by all its members or officers and directors; if a trust, by all its trustees and officers; and, if a corporation, by the president and secretary thereof.

33-45-7. Continuing Care Agreements

**NOTE: THIS SECTION ON THE CONTINUING CARE AGREEMENT IS LARGELY LEFT IN INTACT, BUT IT CONTAINS ADDITIONAL NEW SECTIONS WHICH ARE FROM NC LAW.**

(a) In addition to other provisions considered proper to effectuate any continuing care agreement, addendum, or amendment, each such agreement, addendum, or amendment shall be in writing and shall:

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(1) Provide for the continuing care **or limited continuing care** of only one resident, or for two persons occupying space designed for double occupancy under appropriate regulations established by the provider, and shall state the total consideration to be paid, including a list all properties transferred and their market value at the time of transfer, including donations, subscriptions, fees, and any other amounts paid or payable by, or on behalf of, the resident or residents;

(2) Specify all services which are to be provided by the provider to each resident, including, in detail, all items which each resident will receive, whether the items will be provided for a designated time period or for life, and whether the services will be available on the premises or at another specified location. The provider shall indicate which services or items are included in the **monthly care fee** and which services or items are made available at or by the facility at extra charge. Such items ~~shall~~ may include, but are not limited to, food, ~~shelter~~ lodging, personal services or nursing care, drugs, burial, and incidentals;

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~~(3)~~ Describe the terms and conditions under which **the** agreement may be canceled by the provider or by a 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 agreement by the provider or by the resident, including the effect of death of or any change in the health or financial condition of a person between the date of entering an agreement for continuing care and the date of initial occupancy of a **residential** unit by that person;

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~~(4)~~ Describe:

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(A) The **residential unit**;

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(B) Any property rights of the resident;

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(C) ~~The~~ the health and financial conditions required for a person 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 into a continuing care agreement and the date of taking occupancy in a **residential** unit;

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(D) The conditions under which a unit occupied by a resident may be made available by the provider to a different or new resident other than on the death of the prior resident; ~~(E)~~ Describe the The policies to be implemented and the circumstances under which the resident will be permitted to remain in the facility in the event of financial difficulties of the resident; and

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(F) 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 **of** the general and economic welfare of the **facility**;

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(5) State the fees that will be charged if the resident marries while at the designated facility, the terms concerning the entry of a spouse to the facility, and the consequences if the spouse does not meet the requirements for entry;

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(6) State whether the funds or property transferred for the care of the resident is:

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(A) Nonrefundable, in which event the agreement shall comply with this subparagraph. Such agreement shall allow a 90 day trial period of residency in the facility during which time the provider, resident, or person who provided the transfer of funds or property for the care of such resident may cancel the agreement after written notice. A refund ~~must~~ shall be made of such funds, property, or both within 120 days after the receipt of such notice and shall be calculated on a pro rata basis with the provider retaining no more than 10 percent of the amount of the entry fee. Notwithstanding the provisions of this subparagraph, the provisions of paragraph (8) of this subsection, and the provisions of subsections (b) and (e) of this Code section shall apply to nonrefundable agreements; or

(B) Refundable, in which event the agreement shall comply with this subparagraph. Such agreement may be canceled upon the giving of written notice of cancellation of at least 30 days by the provider, the resident, or the person who provided the transfer of property or funds for the care of such resident; provided, however, that if an agreement is canceled because there has been a good faith determination that a resident is a **threat to his or her health or safety** or to **the health or safety of** others, only such notice as is reasonable under the circumstances shall be required. The agreement shall further provide in clear and understandable language, in print no smaller than the largest type used in the body of the agreement, the terms governing the refund of any portion of the entrance fee, which terms shall include a provision that all refunds be made within 120 days of notification. The agreement shall further comply with the following requirements:

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(i) For a resident whose agreement with the facility provides that the resident does not receive a transferable membership or ownership right in the facility and who has occupied his or her residential unit, the refund shall be calculated on a pro rata basis with the facility retaining no more than 2 percent per month of occupancy by the resident and no more than a 4 percent fee for processing. Such refund shall be paid no later than 120 days after the giving of notice of intention to cancel; or

(ii) ~~Alternatively, if~~ If the agreement provides for the facility to retain no more than 1 percent per month of occupancy by the resident, it may provide that such refund will be payable upon receipt by the provider of the next entrance fee for any comparable residential unit upon which there is no prior claim by any resident. Unless the provisions of subsection (e) of this Code section apply, for any prospective resident, regardless of whether or not such a resident receives a transferable membership or ownership right in the facility, who cancels the agreement prior to occupancy of the unit, the refund shall be the entire amount paid toward the entrance fee, less a processing fee not to exceed 4 percent of the entire entrance fee, but in no event shall such processing fee exceed the amount paid by the prospective resident. Such refund shall be paid no later than 60 days after the giving of notice of intention to cancel. For a resident who has occupied his or her residential unit and who has received a

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transferable membership or ownership right in the facility, the foregoing refund provisions shall not apply but shall be deemed satisfied by the acquisition or receipt of a transferable membership or an ownership right in the facility. The provider shall not charge any fee for the transfer of membership or sale of an ownership right;

(7) State the terms under which an agreement is canceled by the death of the resident. These terms may contain a provision that, upon the death of a resident, the entrance fee of such resident shall be considered earned and shall become the property of the provider. When the unit is shared, the conditions with respect to the effect of the death or removal of one of the residents shall be included in the agreement;

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(8) Require:

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(A) Describe the policies which may lead to changes in monthly recurring and nonrecurring charges or fees for goods and services received. The agreement shall to provide for advance notice to the resident, of not less than 60 days, before any change in fees or charges or the scope of care or services may be effective, except for changes required by state or federal assistance programs;

(B) A description of the manner by which the provider may adjust periodic charges or other recurring fees and the limitations on these adjustments, if any; and

(C) A description of any policy regarding fee adjustments if the resident is voluntarily absent from the facility;

Deleted: (10) Provide the location of other facilities, if any, which the provider owns or operates in the State of Georgia;

(9) Provide that charges for care paid in one lump sum shall not be increased or changed during the duration of the agreed upon care, except for changes required by state or federal assistance programs;

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(11) Specify whether or not the facility is, or is affiliated with, a religious, nonprofit, or proprietary organization or management entity, the extent to which the affiliate organization will be responsible for the financial and contractual obligations of the provider, and the provisions of the federal Internal Revenue Code, if any, under which the provider or affiliate is exempt from the payment of federal income tax; and

Deleted: (12)(13) Describe the policy of the provider regarding reserve funding State that the provider maintains an operating reserve in conformance with the requirements of Code Section 33-45-10 or is not yet required to maintain an operating reserve pursuant to that Code section.

(10) State 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.

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(b) Notwithstanding the provisions of subparagraph (a)(6)(A) of this Code section, a resident has the right to rescind a continuing care agreement without penalty or forfeiture, within seven days after executing the such agreement. During the seven-day period, the resident's funds shall be retained in an escrow account in accordance with the provisions of Code section 33-45-10(a). A resident shall not be required to move into the facility designated in the agreement before the expiration of the seven-day period. **In the event that the prospective resident exercises his or her right to rescind the continuing care agreement**

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

within seven days of executing such agreement, the facility shall return any portion of the entrance fee paid by the resident within thirty days of receipt of the prospective resident's notice of rescission.

(c) The agreement shall include or shall be accompanied by a statement, printed in boldface type, which reads: "This facility and all other continuing care agreements in this state are regulated by Chapter 45 of Title 33 of the Official Code of Georgia Annotated. A copy of the law is on file in this facility. The law gives you or your legal representative the right to inspect our most recent disclosure statement before signing the agreement."

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(d) Before the transfer of any money or other property, other than an application fee which shall not exceed \$1,500.00, to a provider by or on behalf of a prospective resident, the provider shall present a typewritten or printed copy of the agreement and the disclosure statement required pursuant to Code Section 33-45-9 to the prospective resident and all other parties to the agreement. The provider shall secure a signed, dated statement from each party to the contract certifying that a copy of the agreement and the disclosure statement, was received.

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(e) If a resident dies before occupying the facility or, through illness, injury, or incapacity, is precluded from becoming a resident under the terms of the continuing care agreement, the agreement ~~is~~ shall be automatically canceled, and the resident or his or her legal representative shall receive a full refund of all moneys paid to the facility, except those costs specifically incurred by the facility at the request of the resident and set forth in writing in a separate addendum, signed by both parties, to the agreement.

(f) In order to comply with this Code section, a provider may furnish information not contained in the continuing care agreement through an addendum.

(g) The Commissioner may also require the provider to submit to him or her a copy of the continuing care agreement generally used by the provider. Provided, however, that nothing in this subsection shall prohibit the department from requiring the submission of an individual contract between the provider and the resident.

33-45-8.

No act, agreement, or statement of any resident, or of an individual purchasing continuing care or limited continuing care for a resident, under any agreement to furnish care to the resident shall constitute a valid waiver of any provision of this chapter intended for the benefit or protection of the resident or the individual purchasing care for the resident. Provided, however, nothing in this section shall be construed to prohibit a continuing care agreement from providing for a resident or prospective resident to agree to arbitration prior to bringing any action pursuant to Section 33-45-11.

33-45-9. Disclosure Statement

**NOTE: THIS SECTION: (1) CONTAINS MUCH NEW MATERIAL-NOT IN CURRENT GA LAW AND (2) MOST OF THE FINANCIAL COMPONENTS OF THE ANNUAL STATEMENT FROM CURRENT GA LAW. (3) IT ALSO ADDS DISCLOSURE OF MORE FINANCIAL INFORMATION, AS PER NC LAW.**

(a) Each facility shall maintain as public information, available upon request, ~~all annual~~ a copy of its current disclosure statement and the disclosure and all previous disclosure statements that have been filed with the department.

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(b) Each facility shall post in a prominent position in the facility so as to be accessible to all residents and to the general public a brief summary of the ~~latest annual~~ disclosure statement required pursuant to subsection (d) of this Code section, indicating in the summary where the full ~~annual~~ disclosure statement may be inspected in the facility. A listing of any proposed changes in policies, programs, and services shall also be posted.

(c) Before entering into a continuing care agreement ~~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 undertaking to furnish the care, or the agent of the provider, shall ~~make full disclosure and~~ provide the current disclosure statement required pursuant to subsection (d) of this Code section and copies to the prospective resident, or his or her legal representative, of the continuing care agreement.

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(d) The text of the disclosure statement required by this section shall contain at least:

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(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 10 percent 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;

Deleted: 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

(3) The following information on all persons named in response to paragraph (2) of this subsection:

(A) A description of the business experience of the 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 the person has, or which has in the person, a 10 percent 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 \$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 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 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 chapter 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) An estimate of the number of residents of the facility to be provided services;**

**NOTE: PARAGRAPHS (5), (7), AND (8)(A) HAVE BEEN MOVED FROM THE "ANNUAL STATEMENT" SECTION OF HB 843- AS INTRODUCED- TO THE "DISCLOSURE" SECTION HERE.**

**(6) 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;**

**7) The location of other facilities, if any, which the provider owns or operates;**

**(8) A statement:**

**(A) That the provider maintains financial reserves in conformance with the requirements of Code Section 33-45-10(b) or otherwise meets the requirements of that Code section; and**

**(B) Of the provisions that have been made or will be made, including, but not limited to, the requirements of Code Section 33-45-10, to provide reserve funding or security to enable the provider to perform its obligations fully under agreements to provide continuing care or limited 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;**

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Deleted: (9) Financial statements of the provider certified to by an independent public accountant as of the end of the most recent fiscal year 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 also be included, but need not be certified to by an independent certified public accountant;¶

¶  
(8) In the event the provider has had an actuarial report prepared within the prior two years, the summary of a report of an actuary that estimates the capacity of the provider to meet its contractual obligations to the residents;

**NOTE: PARAGRAPH (9) BELOW CONSOLIDATES TWO PARAGRAPHS FROM HB 843 AS INTRODUCED.**

**(9) A financial statement audited by an independent certified public accountant which shall provide the information required by this paragraph, for two or more fiscal years if the facility has been in existence that long. If the facility has been in existence for a lesser length of time, the financial statements of the provider shall be for the most recent fiscal year 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 also be included, but need not be certified to by an independent certified public accountant. The financial statement shall contain the following:**

**(A) An accountant's opinion and, in accordance with generally accepted accounting principles:**

- (i) A balance sheet;**
- (ii) A statement of income and expenses;**
- (iii) A statement of equity or fund balances; and**
- (iv) A statement of changes in financial position; and**

**(B) Notes to the financial statements considered customary or necessary for full disclosure or adequate understanding of the financial statements, financial condition, and operation; additional costs to the resident; and**

**(10) The level of participation in Medicare or Medicaid programs, or both;**

**(11) A statement concerning all fees required of residents, including, but not limited to:**

**(A) A statement of the entrance fee charged, the monthly service charges, the proposed application of the proceeds of the entrance fee by the provider, and the plan by which the amount of the entrance fee is determined if the entrance fee is not the same in all cases; and**

**(B) A record of past increases in entrance fees and monthly care fees and other similar charges during the previous three years.**

**(12) If a facility is in a stage of being proposed or developed, it shall additionally provide:**

**(A) The summary of the report of an actuary estimating the capacity of the provider to meet its contractual obligation to the residents;**

**(B) A statement of cash flows; and**

**Deleted: (9) Forecasted financial statements for the provider of the next five years, including a balance sheet, a statement of operations, a statement of cash flows, and a statement detailing all significant assumptions. Reporting routine, categories, and structure may be further defined by regulations or forms adopted by the Commissioner;**

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**Deleted: A financial statement audited by an independent certified public accountant which shall contain, for two or more fiscal years if the facility has been in existence that long, the following:**

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**¶**  
**(C) The following financial information:¶**

**(i) A schedule giving additional information relating to property, plants, and equipment having an original cost of at least \$25,000.00 so as to show in reasonable detail with respect to each separate facility original costs, accumulated depreciation, net book value, appraised value or insurable value and date thereof, insurance coverage, encumbrances, and net equity of appraised or insured value over encumbrances. Any property not used in continuing care shall be shown separately from property used in continuing care;¶**

**(ii) The level of participation in medicare or Medicaid programs, or both;¶**

**(iii) A statement of all fees required of residents, including, but not limited to, a statement of the entrance fee charged, the monthly service charges, the proposed application of the proceeds of the entrance fee by the provider, and the plan by which the amount of the entrance fee is determined if the entrance fee is not the same in all cases; and¶**

**(iv) Any change or increase in fees when the provider changes either the scope of, or the rates for, care or services, regardless of whether the change involves the basic rate or only those services available at**

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**(C) A narrative disclosure detailing all significant assumptions used in the preparation of the statement of cash flows, including:**

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(i) Details of any long-term financing for the purchase or construction of the facility, including interest rate, repayment terms, loan covenants, and assets pledged;

(ii) Details of any other funding sources that the provider anticipates using to fund any start-up losses or to provide reserve funds to assure full performance of the obligations of the provider under its continuing care agreements;

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(iii) The total entrance fees to be received from or on behalf of residents at, or prior to, commencement of operations along with anticipated accounting methods used in the recognition of revenues from and expected refunds of entrance fees;

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(iv) A description of any equity capital to be received by the facility;

(v) The cost of the acquisition of the facility or, if the facility is to be constructed, the estimated cost of the acquisition of the land and construction cost of the facility;

(vi) Related costs, such as financing any development costs that the provider expects to incur or become obligated for prior to the commencement of operations;

(vii) The marketing and resident acquisition costs to be incurred prior to commencement of operations; and

(viii) 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.

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**(13) Any other information the commissioner deems necessary.**

(e) 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 the 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 continuing care agreement is required by this chapter 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.

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(f) A copy of the continuing care agreement generally used by the provider shall be attached to each disclosure statement.

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(g) The Commissioner may prescribe a standardized format for the disclosure statement required by this Code section.

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(h) The disclosure statement shall be in plain English, printed in font no smaller than ten point, and in language understandable by a layperson and combine simplicity and accuracy to fully advise residents of the items required by this Code section.

Deleted: (2) The Commissioner may also require the provider to submit to him or her a copy of the standardized format for the disclosure statement and a copy of the standardized form of contract for continuing care used by the provider. Provided, however, that nothing in this paragraph shall prohibit the department from requiring the submission of an individual contract between the continuing care provider and the resident.

(i) The department may require a provider to alter or amend its disclosure statement in order to provide full and fair disclosure to prospective residents. The department may also require the revision of a disclosure statement which it finds to be unnecessarily complex, confusing, or illegible.

33-45-10. Escrow and Financial Reserves

**NOTE: THIS ENTIRE SECTION HAS BEEN REWORKED TWICE (SINCE THE "AS INTRODUCED" VERSION). THERE ARE EXTENSIVE CHANGES TO PARAGRAPH (b), CONCERNING FINANCIAL RESERVES, PARTICULARLY AFTER FURTHER RESEARCH WE FOUND THAT NC LAW AS ADJUSTED A SECOND TIME WAS MORE FLEXIBLE IN ACCOMPANYING BOTH NONPROFITS AND PROFIT ENTITIES AND THE FINANCIAL RESERVES ARE MORE IN LINE WITH INDUSTRY STANDARDS, AND RESEARCH SHOWS WHEN RESERVES ARE TOO HIGH, THIS JUST RESULTS IN THE CONSUMER PAYING MORE IN FEES, ETC.**

**(a) Any portion of the entrance fee paid by a resident to the provider shall be held in escrow during the resident's right-of-rescission period required in subsection (b) of Code Section 33-45-7. After such time, the provider shall continue to maintain entrance fee funds in escrow until such time as said funds may be released as follows:**

**Deleted:** In addition to the requirements of subsection (b) of Code Section 33-45-7, and following the seven-day period in which the provider shall place funds in escrow as required by such Code section, a provider shall ensure that the total amount of any entrance fee, or any other fee or deposit paid by residents and prospective residents, shall be placed in a separate account in accordance with the provisions of this Code section and under terms approved by the department. The terms of the account required by this subsection shall provide that funds

(1) When the agreement between a provider and resident or prospective resident provides that funds deposited by such resident or prospective resident are refundable, funds shall be released by the provider to such resident or prospective resident upon the written request of such resident or prospective resident requesting a refund of the payment made to the provider. The amount refunded shall be the entire amount deposited or the amount initially deposited less any fee that may be retained by the provider as permitted pursuant to Code Section 33-45-7;

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**Deleted: withdrawal fee or**

(2) At the time a new project is financed or after the opening of a facility by a provider, entrance fee funds paid by a resident or prospective resident may be released, so long as the provider is in compliance with the financial reserves required by paragraph (b) of this section and the resident's right-of-rescission period has expired;

**Deleted: subparagraphs (a)(9)(A) and (a)(9)(B) of**

**Deleted:** funds deposited by a resident or prospective resident may be remitted to a trustee or mortgage holder of a financing instrument, if any, in order to complete construction or reduce debt, so long as sufficient funds are withheld to maintain the operating reserve required by this subsection;

**(3) For a facility under construction or in development, entrance fee funds deposited by a resident or prospective resident may be released when:**

**Deleted:** Funds deposited by a resident or prospective resident may be released to a financing trustee or mortgage holder when:

(A) The provider has presold at least 50 percent of the residential units, having received a minimum 10 percent deposit on each of the presold residential units;

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(B) The provider has received a commitment for any first mortgage loan or other financing, and any conditions of the commitment prior to disbursement of funds thereunder have been substantially satisfied; and

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(C) Aggregate entrance fees received or receivable by the provider pursuant to binding continuing care agreements, plus the anticipated proceeds of any first mortgage loan or other financing commitment are equal to not less than 90 percent of the aggregate cost of constructing or purchasing, equipping, and furnishing the facility plus not less than 90 percent of the funds estimated in the statement of cash flows submitted by the provider as that part of the disclosure statement required by this chapter, to be necessary to fund start-up losses and assure full performance of the obligations of the provider pursuant to continuing care contracts; or

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(4) When the provider submits a plan of reorganization that is accepted and approved by the Commissioner.

Deleted: (b) A provider shall maintain an operating reserve in accordance with the following requirements.¶

¶  
(1) A provider shall maintain after the opening of a facility: an operating reserve equal to 50 percent of the total operating costs of the facility forecasted for the 12 month period following the period covered by the most recent disclosure statement filed with the department. The forecast statements required by paragraph (9) of subsection (d) of Code Section 33-45-9 shall serve as the basis for computing the operating reserve. In addition to total operating expenses, total operating costs shall include debt service, consisting of principal and interest payments along with taxes and insurance on any mortgage loan or other long-term financing, but shall exclude depreciation, amortized expenses, and extraordinary items as approved by the Commissioner. If the debt service portion is accounted for by way of another reserve account, the debt service portion may be excluded. If a facility maintains an occupancy level in excess of 90 percent, a provider shall only be required to maintain a 25 percent operating reserve upon approval of the Commissioner, unless otherwise instructed by the Commissioner. The operating reserve may be funded by cash, by invested cash, or by investment grade securities, including bonds, stocks, United States Treasury obligations, or obligations of United States government agencies.¶

(2) A provider shall maintain the operating reserve required by this subsection for a facility no later than five years after the facility reaches an occupancy rate of 95 percent or higher in lodging in which residents live independently; and¶

¶  
(3) An operating reserve shall only be released upon the submittal of a detailed request from the provider or facility and shall be approved by the Commissioner. Such requests shall be submitted in writing for the Commissioner to review at least ten business days prior to the date of withdrawal.¶

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(b)(1) A provider or facility shall maintain financial reserves equal to 25 percent of the total operating costs of the facility projected for the 12 month period following the period covered by the most recent audited financial statements included in the disclosure statement required by Code section 33-45-9. In addition to total operating expenses, total operating costs shall include debt service, consisting of principal and interest payments, along with taxes and insurance on any mortgage loan or other financing, but shall exclude depreciation, amortized expenses, and extraordinary items as approved by the Commissioner. If the debt service portion is accounted for by way of another reserve account, the debt service portion may be excluded.

(2) Provided further, a provider or facility which:

(A) Has opened but not yet achieved full occupancy, as defined by its lender or financing documents, if any, or 95% occupancy of its residential units; or

(B) A provider or facility that has received a certificate of authority and has been in conformance with the provisions of this chapter prior to July 1, 2010,

shall be required to achieve the level of financial reserves required by subparagraph (1) of this paragraph as follows:

(i) The provider or facility shall submit a plan to the commissioner the terms of which assure that the provider or facility shall maintain sufficient progress to achieving the level of financial reserves required by this section; and

(ii) The plan demonstrates that the provider or facility is substantially likely to achieve the required level of financial reserves within five years of opening or for existing facilities that received a certificate of authority and have been in conformance with the provisions of this chapter prior to July 1, 2010, within five years of July 1, 2010. For purposes of this subparagraph, 'substantially likely' means a provider or facility shall meet the level of financial reserves required by paragraph (1) of this subsection at a minimum rate of 20 percent per year as of the end of each fiscal year after the later of the date the facility opens or July 1, 2010, up to a total of 100 percent as of the end of the fifth fiscal year.

(3) The financial reserves may be funded by cash, by invested cash, or by investment grade securities, including bonds, stocks, United States Treasury obligations, obligations of United States government agencies, any reserves required by lenders or established by the facility, or any other financial resources approved by the commissioner can be used by the facility to meet its operating reserve;

(4) The provider or facility shall notify the Commissioner as soon as the provider or facility has knowledge of the need to expend any funds which reduce the balance in the financial reserves to an amount less than the amount required by this subsection. Such notice shall be made within at least 30 business days of the provider or facility having such knowledge . If the provider or facility does not have such knowledge within thirty business days, the provider or facility shall notify the commissioner as soon as possible, but not more than thirty business after the expenditure of such funds. In the event that the amount in the reserves falls to an amount less than the amount required by this subsection, the Commissioner:

(A) Shall require that the provider or facility submit a plan to the department such that the commissioner finds that the provider or facility can be reasonably expected to be able to reinstate the level of financial reserves required by this subsection within sufficient time to ensure that the contractual liabilities of the provider and the best interests of the residents of the facility will be adequately protected; and

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(B) May require the provider or facility to make additional financial arrangements to ensure that the contractual liabilities of the provider and the best interests of the residents of the facility are adequately protected. Such arrangements may include:

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(i) The posting of a security bond;

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(ii) Requiring that the proceeds from any entrance fees from new residents be placed in escrow. Any requirement to escrow funds shall not be applied to funds which are subject to prior claims by a resident of the facility; or

(iii) Any other security which the Commissioner determines provides adequate assurance that the provider or facility will be able to fulfill its obligations to its residents to the same extent as it would be if the financial reserves were funded at the amount required by this subsection.

(5) Upon written application by a provider, the Commissioner may authorize a facility to maintain financial reserves in an amount less than the amount set forth in this subsection, or at a lesser rate than the minimum rate of 20 percent per year as of the end of each fiscal year set forth in subparagraph (B) of paragraph (3) of this subsection, if the Commissioner determines that the contractual liabilities of the provider and the best

interests of the residents of the facility may be adequately protected by the financial reserves in a lesser amount or by achieving the required financial reserves at a lesser rate than 20% per year

33-45-11.

Any resident injured by a violation of this chapter may bring an action for the recovery of damages plus reasonable attorney's fees.

33-45-12.

(a) If, at any time, the Commissioner determines, after notice and an opportunity for the provider to be heard, that:

- (1) A provider has been or will be unable, in such a manner as may endanger the ability of the provider to fully perform its obligations pursuant to ~~its continuing care agreements,~~
- (2) A provider has failed to maintain the escrow account deposits or ~~financial reserves~~ required by Code Section 33-45-10, or otherwise not complied with the requirements of such Code section under this chapter; or
- (3) A provider is bankrupt or insolvent, or in imminent danger of becoming bankrupt or insolvent;

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the Commissioner may commence a supervision proceeding pursuant to applicable law or may apply to the Superior Court of Fulton County or to the federal bankruptcy court that may have previously taken jurisdiction over the provider or facility for an order directing the Commissioner or authorizing the Commissioner to rehabilitate or to liquidate a facility in accordance with law.

(b) If, at any time, the court finds, upon petition of the Commissioner or provider or on its own motion, that the objectives of an order to rehabilitate a provider have been accomplished and that the facility or facilities owned by, or operated by, the provider can be returned to the provider's management without further jeopardy to the residents of the facility or facilities, the court may, upon a full report and accounting of the conduct of the provider's affairs during the rehabilitation and of the provider's current financial condition, terminate the rehabilitation and, by order, return the facility or facilities owned by, or operated by, the provider, along with the assets and affairs of the provider, to the provider's management.

(c) In applying for an order to rehabilitate or liquidate a provider, the Commissioner shall give due consideration in the application to the manner in which the welfare of persons who have previously contracted with the provider for continuing care ~~or limited continuing care~~ may be best served.

(d) An order for rehabilitation may be refused or vacated if the provider posts a bond, by a recognized surety authorized to do business in this state and executed in favor of the

Commissioner on behalf of persons who may be found entitled to a refund of entrance fees from the provider or other damages in the event the provider is unable to fulfill its **obligations under its continuing care agreements** in an amount determined by the court to be equal to the reserve funding that would otherwise need to be available to fulfill such obligations.

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~~33-45-10.~~ 33-45-13.

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(a) Any person who knowingly maintains, enters into, performs, or, as manager or officer or in any other administrative capacity, assists in entering into, maintaining, or performing any continuing care agreement subject to this chapter without a valid certificate of authority or renewal thereof, as contemplated by or provided in this chapter, or who otherwise violates any provision of this chapter, is guilty of a misdemeanor. Each violation of this chapter constitutes a separate offense.

(b) ~~The~~ In addition to the powers granted pursuant to Chapters 1 and 2 of this title, the department may bring an action to enjoin a violation, threatened violation, or continued violation of this chapter in the superior court of the county in which the violation occurred, is occurring, or is about to occur.

(c) Any action brought by the department against a provider shall not abate by reason of a sale or other transfer of ownership of the facility used to provide care, which provider is a party to the action, except with the express written consent of the Commissioner ~~of Insurance.~~

~~33-45-12.~~ 33-45-14.

Any contract or agreement for continuing care executed before July 1, 1991, which is amended or renewed subsequent to July 1, 1991, and any contract or agreement for continuing care executed on or after July 1, 1991, is subject to this chapter."

## SECTION 2.

All laws and parts of laws in conflict with this Act are repealed.