

CHAPTER 953

H.B. No. 2389

AN ACT

relating to continuing care facilities.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 246.002, Health and Safety Code, is amended to read as follows:

Sec. 246.002. DEFINITIONS. In this chapter:

(1) "Board" means the State Board of Insurance.

(2) "Commissioner" means the commissioner of the State Board of Insurance.

(3) "Continuing care" means the furnishing of a living unit, together with personal care services, nursing services, medical services, or other health-related services, regardless of whether the services and the living unit are provided at the same location:

(A) to an individual who is not related by consanguinity or affinity, as determined under Article 5996h, Revised Statutes, to the person furnishing the care; and

(B) under a *continuing care* contract.

(4) "*Continuing care contract*" means an agreement that requires the payment of an entrance fee *by or on behalf of a resident in exchange for the furnishing of continuing care by a provider* and that is effective [either] for:

(A) the life of the resident; [individual] or

(B) [for] more than one year.

(5) [(4)] "Entrance fee" means an initial or deferred transfer of money or other property valued at an amount exceeding three months' rent, made, or promised to be made, as full or partial consideration for acceptance by a provider of a specified individual as a resident. *The term does not include a deposit made under a reservation agreement.*

(6) [(5)] "Facility" means a place in which a person provides continuing care to an individual.

(7) [(6)] "Living unit" means a room, apartment, cottage, or other area that is in a facility and that is set aside for the exclusive use or control of one or more specified individuals.

(8) "*Long-term nursing care*" means *nursing care provided for a period longer than 365 consecutive days.*

(9) [(7)] "Person" means an individual, corporation, association, or partnership, and includes a fraternal or benevolent order or society.

(10) [(8)] "Provider" means a person who undertakes to provide continuing care in a facility.

(11) "*Reservation agreement*" means *an agreement that requires the payment of a deposit to reserve a living unit for a prospective resident.*

(12) [(9)] "Resident" means an individual entitled to receive continuing care in a facility.

SECTION 2. Section 246.021, Health and Safety Code, is amended to read as follows:

Sec. 246.021. CERTIFICATE OF AUTHORITY REQUIRED. *Unless a provider holds [A provider may not construct or acquire a facility or offer to the public a contract for continuing care without] a certificate of authority issued under this subchapter, the provider may not:*

(1) *acquire a facility;*

(2) *enter into a continuing care contract; or*

(3) *enter into a reservation agreement unless the agreement provides for the full refund, for any reason, of a deposit paid in connection with the agreement.*

SECTION 3. Section 246.042, Health and Safety Code, is amended to read as follows:

Sec. 246.042. DELIVERY OF DISCLOSURE STATEMENT. (a) A provider *who has not been issued a certificate of authority under Subchapter B* must deliver a disclosure statement to *any [a] person from whom the provider accepts a deposit in connection with a reservation agreement before the provider accepts the deposit.*

(b) *A provider who has been issued a certificate of authority under Subchapter B* must deliver a disclosure statement to a person with whom a continuing care contract is to be made before the earlier of:

(1) the execution of the *continuing care* contract; or

(2) the transfer of *any [the] entrance fee or nonrefundable deposit* to the provider by or on behalf of the person.

(c) [(b)] The most recently filed disclosure statement is the only statement that:

- (1) is current for purposes of this chapter; and
- (2) may be delivered under this section.

SECTION 4. Section 246.043, Health and Safety Code, is amended to read as follows:

Sec. 246.043. **COVER PAGE OF DISCLOSURE STATEMENT.** The cover page of a disclosure statement must *state*:

- (1) *the date of the statement* [~~state,~~] in a prominent location and in type that is boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material so as to be conspicuous[, ~~the date of the statement~~]; [~~and~~]
- (2) [~~include a statement~~] that *if the provider has not been issued a certificate of authority under Subchapter B*, this chapter requires the delivery of a disclosure statement to a prospective resident before the payment of any deposit to reserve a living unit;
- (3) *that this chapter requires the delivery of a disclosure statement to a contracting party before the execution of a continuing care contract or the payment of an entrance fee or nonrefundable deposit; and*
- (4) [~~but~~] that the disclosure statement has not been approved by a governmental agency or representative to ensure the accuracy of its information.

SECTION 5. Sections 246.056(a) and (c), Health and Safety Code, are amended to read as follows:

(a) A person who executes a continuing care contract with a provider may rescind the contract at any time before the later of midnight of the seventh day, or a later day if specified in the contract:

- (1) after the date on which the *continuing care* contract is executed; or
- (2) after the date on which the person receives a disclosure statement that meets the requirements of this subchapter.

(c) If a *continuing care* contract is rescinded under this section, any money or property transferred to the provider, other than periodic charges specified in the contract and applicable only to the period a living unit was actually occupied by the resident, shall be refunded not later than the 30th day after the date of rescission.

SECTION 6. Section 246.057(b), Health and Safety Code, is amended to read as follows:

(b) If a *continuing care* contract is canceled under this section, the resident or the resident's legal representative is entitled to a refund of all money or property transferred to the provider, minus:

- (1) any nonstandard costs specifically incurred by the provider or facility at the request of the resident that are described in the contract or in an addendum to the contract signed by the resident; and
- (2) a reasonable service charge, if set out in the contract, that may not exceed the greater of \$1,000 or two percent of the entrance fee.

SECTION 7. Section 246.071, Health and Safety Code, is amended to read as follows:

Sec. 246.071. **ENTRANCE FEE ESCROW ACCOUNT; ESCROW AGENT.** (a) Before a provider may accept the payment of a deposit made under a reservation agreement or any portion of an entrance fee [~~make a continuing care contract~~], the provider must establish an entrance fee escrow account with a bank or trust company, as escrow agent, that is located in this state.

(b) The provider shall deposit with the escrow agent *any deposit or any* [~~each entrance fee or~~] portion of an entrance fee received by the provider [~~from or on behalf of a resident~~] not later than 72 hours after the provider receives the *deposit or fee*.

SECTION 8. Section 246.072, Health and Safety Code, is amended to read as follows:

Sec. 246.072. **RETURN OF DEPOSITS; RELEASE OR RETURN OF ENTRANCE FEE.** (a) On [~~Unless the escrow agent receives~~] a written request from or on behalf of the provider or a prospective resident, the escrow agent shall return the amount on deposit to the person who paid the deposit or shall maintain the deposit as an entrance fee in the entrance fee escrow account.

(b) ~~Unless the escrow agent receives a written request from or on behalf of a provider or [a provider, a resident, or the personal representative of]~~ a resident for the return of an entrance fee under Section 246.056, the agent shall release the fee to the provider or place the fee in a loan reserve fund escrow.

SECTION 9. Section 246.073(a), Health and Safety Code, is amended to read as follows:

(a) Except as provided by Subsection (b), an escrow agent shall release an entrance fee to the provider if:

(1) a minimum of 50 percent of the number of living units in the facility have been reserved for residents, as evidenced by:

(A) uncanceled executed continuing care contracts with those residents; and

(B) the receipt by the agent of entrance fee deposits of at least 10 percent of the entrance fee designated in each *continuing care* contract;

(2) the total amount of aggregate entrance fees received or receivable by the provider under binding continuing care contracts, the anticipated proceeds of any first mortgage loan or other long-term financing commitment described under Subdivision (3), and funds from other sources in the actual possession of the provider are equal to or more than the total amount of:

(A) 90 percent of the aggregate cost of constructing or purchasing, equipping, and furnishing the facility;

(B) 90 percent of the funds estimated, in the statement of anticipated source and application of funds included in the disclosure statement, to be necessary to cover initial losses of the facility; and

(C) 90 percent of the amount of any loan reserve fund escrow required to be maintained by the provider under Section 246.077; and

(3) a commitment has been received by the provider for any permanent mortgage loan or other long-term financing described in the statement of anticipated source and application of funds included in the current disclosure statement and any conditions of the commitment before disbursement of funds have been substantially satisfied, other than completion of the construction or closing on the purchase of the facility; and:

(A) if construction of the facility has not been substantially completed:

(i) all necessary government permits or approvals have been obtained;

(ii) the provider and the general contractor responsible for construction of the facility have entered into a maximum price contract;

(iii) a recognized surety authorized to do business in this state has executed in favor of the provider a bond covering faithful performance of the construction contract by the general contractor and the payment of all obligations under the contract;

(iv) the provider has entered a loan agreement for an interim construction loan in an amount that, when combined with the amount of entrance fees in escrow plus the amount of funds from other sources in the actual possession of the provider, equals or exceeds the estimated cost of constructing, equipping, and furnishing the facility;

(v) the lender has disbursed not less than 10 percent of the amount of the construction loan for physical construction or completed site preparation work; and

(vi) the provider has placed orders at firm prices for not less than 50 percent of the value of items necessary for equipping and furnishing the facility in accordance with the description in the disclosure statement, including any installation charges; or

(B) if construction or purchase of the facility has been substantially completed:

(i) an occupancy permit covering the living unit has been issued by the local government that has authority to issue the permit; and

(ii) if the entrance fee applies to a living unit that has been previously occupied, the living unit is available for occupancy by the new resident.

SECTION 10. Section 246.074, Health and Safety Code, is amended to read as follows:

Sec. 246.074. RETURN OF ENTRANCE FEE. The escrow agent shall return an entrance fee to the person who paid it if the fee is not released to the provider or placed in the loan reserve fund escrow required under Section 246.077 within:

(1) 36 months after the date on which any portion of the entrance fee is received by the provider; or

(2) a longer time specified by the provider in the disclosure statement delivered with the continuing care contract *under which the fee was paid* [~~of the person who paid the fee~~].

SECTION 11. Section 246.075, Health and Safety Code, is amended to read as follows:

Sec. 246.075. ESCROW OF APPLICATION FEE NOT REQUIRED. This subchapter does not require the escrow of *any* [a] nonrefundable *portion of a deposit or entrance* [application] fee that:

(1) does not exceed an amount equal to two percent of the entrance fee; and

(2) is clearly designated as nonrefundable in the continuing care contract *or reservation agreement*.

SECTION 12. Section 246.076, Health and Safety Code, is amended to read as follows:

Sec. 246.076. INTEREST ACCRUED ON ENTRANCE FEE FUNDS. Unless otherwise provided in a continuing care contract, interest that accrues on [entrance fee] funds held in an entrance fee escrow account is the property of the provider.

SECTION 13. Section 246.111(c), Health and Safety Code, is amended to read as follows:

(c) A lien under this section is subordinate to *any liens* [~~the lien of a first mortgage~~] on the [real] property of the facility if the proceeds of the loan secured by *the liens* [~~the first mortgage~~] were used in whole or in part to:

(1) construct, [or] acquire, *replace, or improve* the facility; or

(2) refinance an earlier loan used to construct, [or] acquire, *replace, or improve* the facility.

SECTION 14. Sections 246.114(b) and (c), Health and Safety Code, are amended to read as follows:

(b) A facility *subject to this section* that initially filed with the commissioner an actuarial review performed on or after September 1, 1982, and before September 1, 1987, shall file with the commissioner subsequent actuarial reviews at five-year intervals from the date of completion of the initial actuarial review.

(c) A facility *subject to this section* that initially filed with the commissioner an actuarial review performed on or after September 1, 1987, shall file with the commissioner subsequent actuarial reviews at five-year intervals from the date of the filing of the initial actuarial review.

SECTION 15. Section 246.111(a), Health and Safety Code, is amended to read as follows:

(a) To secure the obligations of the provider under any continuing care contract, a lien attaches on the date a resident first occupies a facility. The lien covers the real and personal property of the provider located at the facility. *The provider shall prepare a written notice sworn to by an officer of the provider for each county where the provider has a facility. The notice must contain the name of the provider, the legal description of each facility of the provider, and a statement that the facility is subject to this chapter and the lien provided by this section. The provider shall file for record the notice in the real property records of each county where the provider has a facility on or before the later of January 1, 1994, or the date of the execution of the first continuing care contract relating to the facility.*

SECTION 16. This Act takes effect September 1, 1993, and applies only to a continuing care contract or reservation agreement entered into on or after the effective date of this Act. A continuing care contract entered into before the effective date of this Act is governed by the law in effect at the time the fee was paid, and that law is continued in effect for that purpose. Section 15 of this Act applies to facilities existing before, on, or after the effective date of this Act.

SECTION 17. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the

constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on May 7, 1993, by a non-record vote; the House concurred in Senate amendments to H.B. No. 2389 on May 27, 1993, by a non-record vote; passed by the Senate, with amendments, on May 22, 1993, by a viva-voce vote.

Approved June 19, 1993.

Effective Sept. 1, 1993.