

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1573 Continuing Care Providers

SPONSOR(S): Commerce Committee and Insurance & Banking Subcommittee, Persons-Mulicka and others

TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 622

FINAL HOUSE FLOOR ACTION: 113 Y's 1 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1573 passed the House on April 27, 2023, and subsequently passed the Senate on May 4, 2023.

Continuing care retirement communities (CCRCs) offer a transitional approach to the aging process, accommodating residents' evolving levels of care needs. A CCRC can include independent living apartments or houses, as well as an assisted living facility or a nursing home. CCRCs may also offer at-home programs that provide residents with services until they are ready to move to the CCRC. The fees associated with a CCRC include a reservation deposit, an initial entrance fee (often a major sum) and monthly fees to cover costs related to health care and other aspects of community living.

Regulatory oversight of CCRCs in Florida is shared primarily between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR). OIR regulates CCRC providers as specialty insurers, while AHCA regulates the provision of health care.

The bill makes changes to the law governing CCRCs, including amending law enacted in 2019 following insolvencies at two Tampa area CCRCs. It allows a CCRC provider to keep their escrow account in any state or federally chartered institution, rather than only institutions with a Florida branch. The bill permits the release of expansion-related escrow funds when 75 percent of the total units are reserved, rather than when only half of the total units have been paid in full, plus, the provider must submit an attestation concerning use of the entrance fees collected. It revises when a provider may withdraw funds from its debt service reserves.

The bill reduces the timeline for review of an CCRC expansion application by the Office of Insurance Regulation (OIR) from 45 days to 30 days. It significantly expands the list of financial institutions that may supply a provider with a letter of credit in order to satisfy the statutory minimum liquid reserve requirements, including institutions without a Florida branch. It changes the conditions under which an individual must pay a penalty for cancelling a contract with a CCRC. The bill shortens the lookback period for required OIR market conduct examinations of a CCRC. It increases transparency for the benefit of authorized resident councils in CCRC operations, budgeting, planning, pricing, and OIR examining. It clarifies that a residents' council has the authority to establish and maintain its own governance documents and that residents have the right to participate in resident council matters, including elections. The bill requires facilities with common ownership to each have their own resident representative and specifies resident representative obligations of good faith as a fiduciary to the residents.

The bill has no effect on state or local revenues or expenditures. It has an indeterminate direct economic impact on the private sector.

The bill was approved by the Governor on June 26, 2023, ch. 2023-295, L.O.F., and will become on effective date on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Continuing Care Retirement Communities

Continuing care retirement communities (CCRCs) offer a transitional approach to the aging process, accommodating residents' evolving levels of care needs. A CCRC can include independent living apartments or houses, as well as an assisted living facility or a nursing home. CCRCs may also offer at-home programs that provide residents with services until they are ready to move to the CCRC.¹ The fees associated with a CCRC include an initial entrance fee and monthly fees to cover costs related to health care and other aspects of community living.²

Regulatory oversight of CCRCs in Florida is shared primarily between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR). OIR regulates CCRC providers³ as specialty insurers. AHCA regulates aspects of the CCRCs related to the provision of health care, such as nursing facilities, assisted living facilities, home health agencies, quality of care, and medical facilities.⁴

History of Regulatory Oversight

Certificate of Authority Granted by OIR

Because residents may pay, in some cases, considerable amounts in entrance fees and ongoing monthly fees, OIR is given primary responsibility to regulate and monitor the operation of CCRCs and to determine facilities' financial condition and the management capabilities of their managers and owners.⁵ If a provider is accredited through a process "substantially equivalent" to the requirements of ch. 651, F.S., OIR may waive any requirements of the chapter.⁶

To operate a CCRC in Florida, a provider must obtain from OIR a certificate of authority (COA) predicated upon first receiving a provisional COA.⁷ The application process involves submitting various financial statements and information, expectations of the financial condition of the project, and copies of contracts.⁸ Further, the applicant must provide evidence that the applicant is reputable and of responsible character.⁹ A COA will be issued once a provider meets the requirements set forth in s. 651.023, F.S.¹⁰

Continuing Care Contracts

Continuing care services are governed by a contract between the facility and the resident of a CCRC. In Florida, continuing care contracts are considered an insurance product and are reviewed and

¹ S. 651.057, F.S.

² AARP, *How Continuing Care Retirement Communities Work*, available at <https://www.aarp.org/caregiving/basics/info-2017/continuing-care-retirement-communities.html> (last visited Mar. 24, 2023).

³ A "provider" is "the owner or operator... which... provides continuing care or continuing care at-home for a fixed or variable fee... for the period of care." S. 651.011(23), F.S.

⁴ Agency for Health Care Administration, *Consumer Guides: Nursing Home Care in Florida*, available at <https://quality.healthfinder.fl.gov/reports-guides/nursinghomesfl.aspx> (last visited Mar. 24, 2023).

⁵ Ss. 651.021, 651.022, 651.023, F.S.

⁶ S. 651.028, F.S.

⁷ S. 651.022, F.S.

⁸ Ss. 651.021-651.023, F.S.

⁹ S. 651.022(2)(c), F.S.

¹⁰ S. 651.023(4)(a), F.S.

approved by OIR.¹¹ A CCRC enters into contracts with prospective residents to provide housing and medical care in exchange for an entrance fee and monthly fees. Entrance fees are a significant commitment by the resident, as entrance fees range from approximately \$100,000 to over \$1 million.¹² CCRCs offer different types of contracts that provide for varying amounts of monthly fees and levels of healthcare discounts.¹³

All CCRC contracts provide for a refund of a declining portion of the entrance fee if the contract is cancelled for reasons other than the death of the resident during the first four years of occupancy by the resident.¹⁴ However, many contracts exceed this requirement and contain minimum refund provisions that promise a refund of a specified portion (typically 50 to 90 percent) of the entrance fee upon the death of the resident or termination of the contract regardless of the length of occupancy by the resident.¹⁵

Financial Requirements/Solvency

CCRCs are required to file an annual report with OIR, which includes an audited financial report, and other detailed financial information, such as a listing of assets maintained in the liquid reserve required under s. 651.035, F.S., and information about fees required of residents.¹⁶ OIR requires unaudited quarterly reports from CCRCs, but OIR will waive such quarterly reports for accredited CCRCs.¹⁷ OIR may also require more frequent filing of financial reports and additional information if OIR deems such reports necessary to monitor and evaluate the financial condition of a CCRC that is subject to a corrective action plan; declining financial position; refinancing; acquisition; or administrative supervision, delinquency, receivership, or bankruptcy proceedings.¹⁸

Section 651.033, F.S., prescribes requirements for the establishment and maintenance of escrow accounts, duties of escrow agents, and procedures for withdrawals from a CCRC's reserve funds. As prescribed in s. 651.035, F.S., CCRCs are required to maintain a minimum liquid reserve (MLR) consisting of, as applicable, a debt service reserve, operating reserve, and renewal and replacement reserve. A provider may meet the MLR requirement by obtaining an unconditional irrevocable letter of credit from a financial institution participating in the State of Florida Treasury Certificate of Deposit Program.¹⁹

Rights of Residents in a Continuing Care Retirement Community

OIR is also authorized to discipline a facility for violations of residents' rights.²⁰ These rights include:

- A right to live in a safe and decent living environment, free from abuse and neglect;
 - Freedom to participate in and benefit from community services and activities and to achieve the highest possible level of independence, autonomy, and interaction within the community;
- and

¹¹ S. 651.055(1), F.S.

¹² Kennedy, Jayme, *The cost of continuing care retirement communities: Can you afford it?*, Care.com, published Jan. 31, 2021, available at <https://www.care.com/c/continuing-care-retirement-community-cost/> (last visited Mar. 25, 2023).

¹³ *Id.*

¹⁴ S. 651.055, F.S.

¹⁵ Jones, Roger J., *Continuing Care Retirement Communities (CCRCs) Fees – A Primer on the Tax Treatment of Entrance and Monthly Fees*, The National Law Review, published Dec. 6, 2012, available at <https://www.natlawreview.com/article/continuing-care-retirement-communities-ccrcs-fees-primer-tax-treatment-entrance-and-> (last visited Mar. 25, 2023).

¹⁶ S. 651.026, F.S.

¹⁷ S. 651.0261, F.S., Rr. 69O-193.005(1) and 69O-193.055, F.A.C.

¹⁸ R69O-193.005(2), F.A.C.

¹⁹ S. 651.085(5), F.S.

²⁰ S. 651.083, F.S.

- Ability to present grievances and recommend changes in policies, procedures, and services to the staff of the facility, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal.²¹

Each CCRC must establish a resident's council to provide a forum for residents' input on issues that affect the general residential quality of life, such as the facility's financial trends and problems, as well as proposed changes in policies, programs, and services.²² CCRCs are required to maintain and make available certain public information and records, such as records of all cost and inspection reports pertaining to that facility, a concise summary of the last examination report issued by OIR, and a summary of the most recent annual statement.²³

OIR Enforcement Authority

If a provider fails to meet the requirements of ch. 651, F.S., relating to a provisional COA or a COA, OIR must notify the provider of any deficiencies and require the provider to take corrective action within a time period determined by OIR.²⁴ If the provider does not correct the deficiencies by the expiration of such time, OIR may initiate delinquency proceedings as provided in s. 651.114, F.S., or seek other relief provided under ch. 651, F.S.²⁵ OIR may deny, suspend, or revoke the provisional COA or the COA of any applicant or provider for grounds specified in s. 651.106, F.S.

Except in limited circumstances, OIR's right to initiate delinquency proceedings against a provider is subordinate to the rights of a trustee or lender if the trustee or lender agrees that the rights of residents under a CCRC contract will be honored and will not be disturbed by a foreclosure.²⁶ If OIR recommends that the Department of Financial Services (DFS) Division Rehabilitation and Liquidation institute receivership or liquidation proceedings against a CCRC, the continuing care contracts are deemed preferred claims against assets of the provider.²⁷ Such claims are subordinate, however, to any secured claim.

Until 2019, even though OIR had enforcement authority over CCRCs, ch. 651, F.S., lacked the framework that OIR uses to protect consumers of other insurance products, including early intervention concepts like impairment, a statutory requirement to provide supplementary information to support or explain filings, and clear authority to prohibit certain individuals from exercising control over a CCRC.

The need for better regulatory oversight became apparent with the case of a CCRC in Tampa in which unapproved owners and managers failed to cooperate with examination by OIR and with other provisions of state law. Previously, a bankruptcy court in 1997 cancelled residents' contracts for a different CCRC in Tampa. Additionally, a CCRC in St. Augustine filed for bankruptcy in 2013 and 2016, which resulted in former residents or their estates receiving only 20 percent of their entrance fee refunds.

Involvement by the Department of Financial Services

DFS may become involved with a resident after a CCRC contractual agreement has been signed by both parties or during a mediation or arbitration process.²⁸ Typically, residents will contact DFS Division of Consumer Services, which receives and resolves complaints involving products and persons regulated by OIR or DFS.²⁹

²¹ *Id.*

²² S. 651.081, F.S.

²³ S. 651.091, F.S.

²⁴ S. 651.105(4), F.S.

²⁵ *Id.*

²⁶ S. 651.114(8), F.S.

²⁷ S. 651.071, F.S.

²⁸ Rr. 69O-193.062 and 69O-193.063, F.A.C.

²⁹ S. 624.307, F.S.

Chapter 631, F.S., governs the rehabilitation and liquidation process for insurers in Florida. Federal law provides that insurance companies are not eligible to be a debtor in federal bankruptcy proceedings and are instead subject to state laws regarding receivership.³⁰ In Florida, the Division of Rehabilitation and Liquidation within DFS is responsible for managing insurance companies placed into receivership. The goal of rehabilitation is to return the insurer to solvency. The goal of liquidation, however, is to liquidate the business of the insurer and use the proceeds to pay claims, including those of policyholders, creditors, and employees.

2019 Statutory Changes Regarding CCRCs

In 2019, the state enacted broad statutory changes to enhance OIR's authority to regulate CCRCs.³¹ Section 651.034, F.S., was created to establish a framework of required actions if a provider falls below specified levels of three key indicators at the time of the annual report: occupancy, days cash on hand, and the debt service coverage ratio. The key indicators were selected based on their tendency to highlight problematic financial developments. If the provider's performance falls below the specified levels on two of the following three key indicators at the time of the annual report, it is considered a "regulatory action level event."

In the event that a "regulatory action level event" occurs, the provider is required to submit a corrective action plan; OIR is required to perform an examination or analysis of the provider; and OIR is required to issue a corrective order specifying any corrective actions that OIR determines are required. For new CCRCs, OIR may exempt a provider from the consequences of a regulatory action level event or impairment until the earlier of the CCRC reaching stabilized occupancy, the time projected to achieve stabilized occupancy, or five years from the date of issuance of the COA.

A definition for "impaired" was to allow for earlier intervention by OIR in an effort to prevent harm to Florida consumers. The impairment framework has been an effective tool in preventing, or minimizing the impact of, insurer insolvencies. The previous intervention framework for CCRCs was triggered only after a provider became insolvent, meaning it is unable to pay its obligations as they come due in the normal course of business. The establishment of the impairment framework allowed OIR to begin partnering with a provider much sooner to mitigate or resolve any potential issues that would put resident interests in jeopardy.

A provider is considered impaired if it fails to hold the MLR. Additionally, a provider without mortgage or bond financing is considered impaired if it does not maintain the specified level of days cash on hand, and a provider with mortgage or bond financing is considered impaired if it does not maintain specified levels of days cash on hand and debt service coverage ratio. If the provider is a member of an obligated group having cross-collateralized debt, the obligated group's debt service coverage ratio and days cash on hand must be used to determine if the provider is impaired. OIR may forego taking action for up to 180 days after an impairment occurs if OIR finds there is a reasonable expectation that the impairment may be eliminated within the 180-day period.

The 2019 law created a number of new requirements for the provider to give notice to the residents or residents' council. These help residents and prospective residents to remain apprised of the status and stability of the provider and to take action to protect their interests.

Previously, OIR received advance notice of new financing and receives financing documents after the transaction closes, and the residents' council receives notice of all financing documents filed with OIR. Although OIR received advance notice of a financing transaction, OIR had no authority to disapprove or otherwise intervene in the financing transaction if it considered it a hazardous transaction.

³⁰ Historically and currently, Florida CCRCs have entered bankruptcy despite being regulated as a specialty insurer in Florida and despite the federal Bankruptcy Code precluding insurance companies from being a debtor in bankruptcy.

³¹ Ch. 2019-160, L.O.F. (2019).

2019 amendments to ss. 651.019 and 651.091(2), F.S., shifted the notice requirements so that financing documents are first received by the residents' council. A provider is required to provide to the residents' council, at least 30 days before the closing date of the transaction, a general outline of the amount and terms of the transaction and the intended use of proceeds for any new financing or refinancing. This allows residents the ability to object to financing transactions that concern them. Additionally, it removed the illusion that OIR could prevent a provider from securing new financing, additional financing, or refinancing that may be hazardous to the residents.

Section 651.091(2), Florida Statutes, was amended to require the provider to furnish the following information to the chair of the residents' council:

- A notice of the issuance of any examination reports;
- A notice of the initiation of any legal or administrative proceedings by OIR or the DFS;
- A notice of any change in ownership filing submitted to OIR; and
- Any master plans approved by the provider's governing board and any plans for expansion or phased development.

Additionally, a provider must post in a prominent place in the facility a notice that contains OIR's website and phone number and the website and toll-free consumer helpline for the DFS Division of Consumer Services. The notice must also state that either OIR or DFS Division of Consumer Services may be contacted for the submission of inquiries and complaints with respect to potential violations of law.

Section 651.035, F.S., which contains MLR requirements, was amended to require providers that do not have a mortgage loan or other financing on the facility, to deposit monthly in escrow one-twelfth of their annual property tax liability and to pay property taxes out of such escrow. 2019 bill provided a framework for CCRCs to request a withdrawal of reserve funds and grants OIR authority to require the transfer of reserve funds into the custody of the DFS Bureau of Collateral Management if OIR finds that the provider is impaired or insolvent in order to ensure the safety of those assets. Any increase in the MLR must be funded no later than 61 days after the MLR calculation is due to be filed. If the MLR is less than the required minimum amount at the end of any fiscal quarter due to a change in the market value of the invested funds, the provider must fund the shortfall within 10 business days.

Section 651.033, F.S., contains requirements for a provider's escrow account and was amended to clarify the duties that apply to escrow agents, including the prohibition that an escrow agent may not release or otherwise allow the transfer of funds without the written approval of OIR, unless the withdrawal is from funds in excess of specified statutory requirements. Additionally, the statutory change now permits an escrow account to be held in a national bank that has a branch in this state.

Effect of the Bill

The bill makes changes and updates to the extensive regulatory revisions for CCRCs that were enacted in 2019.

The bill eliminates the requirement that a provider's escrow account be established in a bank that has a branch in Florida. In addition to the current ability to secure the release of escrow moneys when payment in full has been received for at least 50 percent of the total units of a phase or phases constructed, the bill allows for the release of such funds when:

- The provider has collected a reservation deposit for at least 75 percent of the proposed units; and
- The provider submits an attestation to OIR to use the entrance fees collected and held in escrow for the sole purpose of paying debts as specified in the feasibility study.³²

³² The language in this section of the bill could use additional clarity. See drafting comment below regarding lines 147-156 of the bill.

If the expansion is to be completed in multiple phases, the 75 percent reservation escrow-release option applies separately to each phase. The bill reduces the number of days that OIR has to review and approve an expansion application for a CCRC from 45 days to 30 days.³³

The bill creates parameters for the financial statements that a provider must submit to OIR with its annual statement. If the provider's financial statements are consolidated with the financial statements of additional entities owned or controlled by the provider, in accordance with generally accepted accounting principles,³⁴ the financial report must include:

- The provider's consolidated or combined financial statements; and
- Supplemental information showing the individual financial statements for each CCRC facility.

The bill adds the following requirements that must be met for a provider to withdraw funds from its debt service reserves:

- The trust indenture, loan agreement, or escrow agreement must provide that the provider, trustee, lender, escrow agent, or a person designated to act in its place, must notify OIR in writing at least ten days before the withdrawal of any portion of the debt service reserves required to be held in escrow; and
- Such notice must be accompanied by a sworn affidavit by the provider, trustee, or a person designated to act in its place that includes:
 - The amount of the scheduled debt service payment;
 - The payment due date;
 - The amount of the withdrawal;
 - The accounts from which the withdrawal will be made; and
 - A plan with a schedule for replenishing the withdrawn funds. Any revised plan must be submitted to OIR within ten days of approval by the lender or trustee.

Under the bill, a provider is permitted to withdraw escrow funds without OIR approval if the withdrawal is from a debt service reserve required to be held in escrow pursuant to trust indenture or mortgage lien on the facility and the withdrawn funds will be used to pay delinquent principal and interest payments the debtor is obligated to pay on the facility. The bill clarifies that the funds may also be used to pay property taxes and insurance. A provider must provide OIR with ten-days' notice before withdrawing funds from the debt service reserve even when prior approval by OIR is not required.

The bill broadens the financial institutions from which a provider may obtain a letter of credit in order to satisfy the statutory MLR requirements to include the following institutions, in addition to an institution participating in the State of Florida Treasury Certificate of Deposit Program:

- A Florida bank;
- A Florida savings and loan association;
- A Florida trust company; or
- A national bank that is chartered and supervised by the Office of the Comptroller of the Currency within the U.S. Department of the Treasury.

In general, a resident has the right to rescind a continuing care contract, and receive a full refund of any funds paid, without penalty or forfeiture, within seven days of executing the contract.³⁵ However, the bill changes the conditions under which an individual must pay a penalty for cancelling a contract with a CCRC. If an individual signs a reservation contract, fails to cancel it within 30 days after executing the contract, and then signs a care contract and rescinds it within seven days of execution, the authorized

³³ No fiscal impact on OIR is expected from the reduction in review time for OIR. See Office of Insurance Regulation (OIR), Agency Analysis of 2023 SB 622, p. 6 (Feb. 15, 2023) (SB 622 is the Senate companion bill to HB 1573).

³⁴ Insurers generally utilize statutory accounting principles. However, CCRCs use generally accepted accounting principles, which often require consolidated audits.

³⁵ S. 651.055(2), F.S.

forfeiture penalty may be deducted from the refund, unless there is evidence of extenuating circumstances, including but not limited to:

- Death, illness, or diagnosis or a chronic or terminal illness of the individual or the individual's spouse; or
- A change in financial or asset position which warrants cancellation of the contract.

The bill clarifies the examination timeframes for a CCRC. Such an exam must cover the preceding three or five fiscal years of the provider, whichever is applicable,³⁶ and must begin within 12 months after the end of the most recent fiscal year covered by the exam. It may include examination of events following the end of the most recent fiscal year and events of any prior period that affect the provider's present financial condition. As part of the examination, OIR must interview the current president or chair of the residents' council or another designated officer if the president or chair is not available.

It also requires that, following an examination, every CCRC must provide a copy of the final examination report and corrective action plan, if required by OIR, to the executive officer of the provider's governing body and the president or chair of the residents' council within 60 days after the report is issued, rather than only the executive officer of the governing body. Additionally, all CCRCs must provide written notice of any change in management to the president or chair of the residents' council within 10 business days.

The bill also provides new definitions related to the residents of a CCRC. It defines designated resident representative as a resident elected by the residents' council to represent residents on matters related to changes in fees or services within a CCRC. The bill defines the residents' council as an organized body that represents the resident population of a CCRC. The residents' council serves as a liaison between residents and the provider.

It also clarifies that a residents' council has the authority to establish and maintain its own governance documents such as bylaws, operating agreements, policies, and operating procedures, which may include establishing committees. Additionally, residents have the right to participate in resident council matters, including elections.

Additionally, the bill clarifies that the resident representative designated to represent the residents before the governing body of the provider:

- Must be a resident as defined in s. 651.011, F.S.;
- Must be elected to the position; and
- Need not be a current member of the residents' council.

If a provider owns or operates more than one facility in Florida, each facility must have its own designated resident representative. Designated resident representatives must perform their duties in good faith. Additionally, the bill requires that a resident who serves as a member of the board or governing body of the facility must perform his or her duties in a fiduciary manner, including the following duties:

- Confidentiality;
- Care;
- Loyalty; and
- Obedience.

A representative of the provider must notify the designated resident representative at least 14 days in advance of any meeting of the full governing body at which the annual budget and any proposed changes or increases in resident fees are on the agenda or will be discussed.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

³⁶ Accredited CCRCs may be examined by OIR on a five-year schedule, but non-accredited CCRCs are examined by OIR on a three-year schedule.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has an indeterminate direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.