Date of Hearing: July 14, 2015

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE
Cheryl Brown, Chair
SB 475 (Monning) – As Amended July 6, 2015

SENATE VOTE: 31-4

SUBJECT: Continuing care contracts: cancellation: payments.

SUMMARY: Forbids assessing a resident or his or her estate a monthly fee once a unit has been permanently vacated by the resident under certain conditions, and alters refund or repayment requirements of a lump sum entrance fee, under certain conditions.
Specifically, **this bill**:

1) Prohibits a Continuing Care Retirement Community (CCRC) provider from making further charges to the resident or his or her estate, or against the lump sum payment, for purposes of continued monthly payments to the provider, or for maintenance or housekeeping, after the unit has been vacated.

2) Provides that if a lump sum payment following termination of contract that is conditioned upon resale of a unit is not paid within 120 days after the formerly occupied unit has been vacated, then:

   a. A 20% partial payment must be paid if the former occupant is still living; and,

   b. A 10% partial payment must be made to the estate of a former occupant who is deceased.

3) In the event that a partial payment is made, interest accrues at the rate of the U.S. Prime Lending rate on the remainder balance until the 180th day when interest will accrue at a rate of 2% + the rate of the U.S. Prime Lending rate.

4) Requires continuing care contracts to declare that monthly fees do not accrue to vacated units unless the monthly fee is part of a contract that guarantees an equity interest in the facility.

5) Requires continuing care contracts to state that the provider will make a good faith effort to market, sell or in other words, re-occupy the unit for which a lump sum payment is required.

6) Requires a continuing care contract state the longest, and average amount of time a lump-sum fee refund has been delayed.

EXISTING LAW:

1) Articulates legislative findings and declarations and legislative intent that CCRCs offer an alternative delivery mode for residential, social, and health needs of elderly Californians which minimizes transfer trauma and the effects of well-known, siloed and fragmented governmental oversight and regulatory authorities; disclosure of terms and agreements made between prospective residents and the provider, as well as the operations of a CCRC, are necessary since consumers expend significant portions of their savings in order to purchase

care in a CCRC, and typically expect to rely upon that care for the rest of their lives; and, providers should acquire certificates of authority from the California Department of Social Services (CDSS) regulators, and that such a certificate is neither a guarantee of performance, nor an endorsement of services or contract provisions; and that prospective residents must carefully consider the risks, benefits, and costs before entering into continuing care contracts, and should be encouraged to seek financial and legal advice.

2) Provides for the licensure and regulation of Continuing Care Retirement Community (CCRC) services, including assisted-living and residential care services by the Department of Social Services, and skilled nursing services by the Department of Public Health.

3) Defines a "continuing care contract" to mean a contract that includes a promise by a provider to provide one or more elements of care to an elderly resident, as specified, in exchange for an entrance fee and/or the payment of periodic charges.

4) Defines a "Continuing Care Promise" as a promise - expressed or implied - to provide elements of care to an elderly resident for a period of at least one year, though usually for the duration of his or her life, including those promises implied within marketing material, written or oral statements, contracts, agreements, or advertising.

5) Defines a "Continuing Care Retirement Community" (CCRC) to mean a facility located in the state where continuing care promises in a continuing care contract are provided.

6) Requires a CCRC provider to hold a certificate of authority from CDSS permitting the provider to contract for the provision of continuing care services.

7) Requires a CCRC to pay refunds owed to a resident within 14 calendar days after a resident makes possession of the living unit available to the provider or 90 calendar days after death or receipt of notice of termination, whichever is later.

8) Prohibits characterizing as a refund, a lump sum payment following termination of a continuing care contract that is conditioned upon resale of the unit, and requires the payment to be made within 90 days following resale of the unit.

FISCAL EFFECT: This measure has been designated a "non-fiscal" bill by the Office of Legislative Counsel.

COMMENTS:

1) *Author's Statement:* "Under current law, Continuing Care Retirement Community (CCRC) contracts that base the repayment of a resident's entrance fee upon the resale of the unit and not upon vacancy are unfair arrangements for consumers and there is little incentive to resale those units in a timely manner. In many cases the CCRC provider is able to take advantage of this type of contract, which can lead to seniors or their estates experiencing significant delays in the repayment of entrance fees. For example, a CCRC in Pacific Grove had not paid $530,600 to the estate of a resident who died more than 3 years ago because the refund was conditioned upon resale of the unit. SB 475 levels the playing field for the CCRC resident in a manner that will result in more timely repayments and adds an incentive for a CCRC to re-sell a unit in the form of interest on the unpaid remaining balance. The resident

safeguards in the bill balance the need for steadfast repayment while ensuring the CCRC can remain fiscally solvent so the current residents are not adversely impacted."

2) *Need for Bill:* According to the author, Continuing Care Retirement Community (CCRC) residents and their heirs have experienced long delays in receiving reimbursements from termination of contract payments from CCRC providers after the resident terminates a contract, or passes away. Based upon existing CCRC practices, providers have sometimes been challenged to balance community needs with the needs of former residents, or their estates. In some cases, there may be little incentive to re-occupy a unit associated with an entrance fee reimbursement. Some corporate practices may favor marketing and selling unoccupied units, preferring to first sell and occupy units that do not have outstanding entrance fees due to former or deceased residents. The author additionally states that while the unit is unoccupied, some CCRC contracts permit the provider to charge monthly maintenance fees that are deducted from the entrance fees.

3) *What is a CCRC*? Continuing Care Retirement Communities, or "CCRCs," offer people 60 years old and up a long-term continuing care option that pairs their current health and resources with an individualized contract that provides community life and a range of levels-of-care, typically in a campus-like community setting, and usually for a resident's lifetime, and always for at least one year. Most CCRCs require substantial entrance fees, along with monthly fees. Entrance fees can reach well into the "seven-figures," though rare. Most entrance fees for an individual are in the hundreds-or-thousands of dollar range.

   According to Health and Safety Code Section 1771, in California, a Continuing Care Retirement Community is defined as a facility located within the State where services promised in a "**continuing care contract**" are provided. A "**continuing care contract**" includes a "**continuing care promise**" made, in exchange for an entrance fee, the payment of periodic charges, or both. A continuing care contract may consist of one agreement for continuous care, or a series of agreements describing care, conditions for that care, and payment of it, if and when it becomes necessary. "Continuing care promises" are expressed or implied by a provider to provide care to an elderly resident for at least one year, and usually for the duration of his or her life. Any such promise or representation, whether part of a continuing care contract, other agreement, or series of agreements, or contained in any advertisement, brochure, or other material, either written or oral, is considered to be included as a continuing care promise.

4) *Continuing Care Contracts Vary.* There is no standardized contract, though there are elements that must be in place in order to be approved by the Department of Social Services. Upon approval of a contract by CDSS, the CCRC community will use that contract's structure for more individualized contracts with residents, or couples. Each potential consumer presents themselves to a CCRC with different health and long-term care risks and needs, financial risks and needs, and other factors which require contract flexibility, and each CCRC offers differing provisions on costs, payment methods, services provided, and other elements. CDSS does not oversee or approve each resident's contract. Continuing care contracts typically require an individual to pay an entrance fee and monthly fees. Entrance fees can vary significantly from one community to the next, and monthly fees vary depending on the level of services included in the contract and other factors associated with location, exclusivity, business plan variations, and more. There are three "types" of CCRC contracts:

a. Type A contracts (also known as life care contracts), are the most expensive and are all-inclusive agreements wherein all housing, services and healthcare are covered by the entrance fee and monthly fees;
b. Type B contracts typically offer discounted healthcare services for limited amounts of time, after which services can be purchased; and,
c. Type C contracts offer the lowest entrance and monthly fees, but require residents to be responsible for paying for healthcare services at market rates.

Continuing care contracts may be refundable or non-refundable. Refundable contracts refund a portion of the entrance fees, sometimes on a scale that decreases over time the percentage of the entrance fee that is refunded. These types of contracts require a CCRC to maintain a reserve for refunds (in addition to other reserves required for the operation of a CCRC), and generally, this is not the contract type which SB 475 is focused upon. Many CCRC providers choose instead to offer a repayment of a designated portion of the entrance fee - a "lump-sum payment" - that is conditioned upon resale of the unit. A reserve is not required in this case, as it is assumed that the resale of the unit will result in the new resident's entrance fee covering the cost of repaying a portion of the former resident's entrance fee. In California, there are currently no requirements that resale and/or repayment of entrance fees take place within a certain period of time.

5) *SB 475:* The proposed changes in SB 475 would in effect do the following:
   a) <u>Prevent a CCRC from charging an estate, or former resident, monthly fees</u>. SB 475 seeks additional CCRC contract disclosure to include a statement that monthly fees may not accrue against a former resident when they no longer live at the CCRC. Under SB 475, monthly fees would cease once a resident dies, or once a resident re-locates from the facility. Monthly fees generally pay for supports and services to help the resident maximize their independence, such as custodial care, house-keeping, and meals, but may also include other non-essential services that support recreational or other voluntary services and activities. An "equity interest" contract where a resident has a standing as co-owner of the property, are treated separately.

   b) <u>Provides for lump-sum payments to former residents, or estates of deceased residents, within 120 days of vacating the unit.</u> When a resident dies, or decides to vacate a community, the estate of the deceased resident or the former resident is typically entitled to re-payment of the lump-sum, or "entrance fee" payment that most residents pay as a condition to enter a CCRC. SB 475 was introduced because a CCRC owed over $500,000 to the estate and heirs of a former resident for 3½ years. Though that estate was settled after SB 475 was introduced, the bill has garnered the attention of others who find themselves in similar situations, some with unpaid balances which are over 5 years old. Under SB 475, as amended, a former resident, or the estate of a former resident would be assured re-payment of at least 20% of the upfront fee in the instance of a living former resident, and at least 10% of the up-front fee in the instance of a deceased former resident within 120 days. If full repayment is not made, an interest rate is applied to the outstanding balance at the rate equivalent to the U.S. Prime Lending Rate until the 180th day when the interest rate increases to two points above the U.S. Prime rate until full repayment is made.

6) *Supporters Argue:* The California Continuing Care Residents Association (CalCRA) writes that CCRs offer a model of care that is different than any other service model. When seniors

make the decision to move into a CCRC, it comes with a substantial entrance fee and additional monthly fees in exchange for lifetime care and residency. Some include an entrance fee with a promise to return it, or a portion of it, when the resident voluntarily leaves, or dies. These entrance fees represent significant investments. Many seniors sell their homes to pay the fee, and find security in a contract to return it, if necessary. CalCRA asserts that when the fee is "conditioned upon the resale of the unit," the obligation for the CCRC to return the fee is diminished - refunds can be delayed for years, or indefinitely, and with no corresponding interest rate to compensate for the slow process to refund the fee. Sometimes, providers charge monthly maintenance and upkeep against the balance of the fee while the refund awaits issuance to the former resident, or the estate. Thus there is little, sometimes no incentive to sell the unit. Former residents have waited years, and sometimes engaged in disheartening legal battles to obtain their refund. Current law leaves families with little or no leverage or recourse to demand fair return of entrance fees. SB 475 changes that and helps seniors protect their investments.

The National Association of Social Workers, California Chapter (NASW-CA) writes that SB 475 protects consumers from unfair CCRC contracts. Rather than waiting for the 14th day after the CCRC has sold a vacancy at a CCRC, former residents are entitled to 20% after waiting four months from the date of vacancy to see a partial return of their entrance fee. NASW-CA also supports the provision to prohibit fees accruing against an entrance fee after the resident has vacated.

7) *Opponents Argue:* LeadingAge opposes, unless amended, due to a punitive interest rate charged against outstanding entry fee refund balances which could unintentionally restrict access to CCRCs and create potential expenses for remaining residents of CCRCs. LeadingAge is concerned that indexing interest rates on unreimbursed entrance fee refunds could cause havoc as interest rates have been known to soar, as they did in the early 1980s. Furthermore, SB 475 holds CCRCs responsible for housing market conditions that they are unable to control. Combined with potentially unfavorable interest rates, the compounding impact could hobble the entire industry. LeadingAge also argues that SB 475 could reduce a provider's willingness to offer refundable contracts, (currently the most favored model), and SB 475 does not offer protections against a so-called "run" on a community, where a domino-like effect of one resident exiting may cause others to seek to exit, thereby de-stabilizing the entire community.

   The California Association of Continuing Care Retirement Communities (CACCRC) urges opposition (unless amended) because the "accelerated" reimbursement of entry fees could place an unmanageable financial obligation upon communities. CACCRC echoes the concerns about a "run" on the community that LeadingAge expressed. The association also is concerned that repayment requirements that are misaligned with unit re-sale processes could trigger a requirement that reserves be established, an element not currently part of most CCRC business models.

8) *Chronology of SB 475 Amendments:* For orientation purposes, the following describes the amendment history of SB 475 thus far. Based upon discussion with committee members, and other stakeholders, a range of amendments are proposed on the following pages to reflect stakeholder discussions and committee member preferences.

<u>February 26, 2015 – Introduction</u>

- Requires CCRC providers to repay residents, or their estates, the full lump sum of their entrance fee no later than 90 days after the unit had been vacated. If repayment could not be made in 90 days, the provider would be required to pay an interest at a rate equal to 10% of the remaining balance owed until the full lump sum could be repaid.

- Would apply to all existing and prospective repayment contracts.

- Prohibits a provider from charging the resident, or estate, for any monthly payments, maintenance or housekeeping once the unit has been vacated.

<u>May 5, 2015 - Amended in Senate Human Services Committee</u>

- Revised full repayment at 90 days to no less than 20% of the entrance fee amount owed to the resident within 90 days of the unit becoming vacant.

- Limited application prospectively to contracts signed after January 1, 2016.

- Revised 10% interest to 2% plus the U.S. Prime Lending Rate. If entrance fee remains unpaid after 180 days: 5% plus the U.S. Prime Lending Rate.

- Interest provisions would apply to all existing and prospective residents.

- Added requirement for the provider to make a good faith effort to reoccupy or resell a unit that is harboring an entrance fee repayment to a past or deceased resident.

<u>June 25, 2016 - Amended Prior to Assembly Human Services Committee Hearing</u>

- Extends the 90 day 20% repayment to 120 days.

- Lowers the interest rate to the U.S. Prime Lending Rate until 180 days. After 180 days to 2% plus the U.S. Prime Lending Rate.

- Exempts equity interest contracts from provisions that prohibit the continued monthly charges after a unit has been vacated.

- Requires the provider to disclose the average and longest length of time the lump-sum payment has been delayed by the resale.

- Clarifies that the requirement in SB 475 only impacts lump-sum payment contracts that condition repayment upon resale of the unit.

<u>July 6. 2016 - Amended in Assembly Human Services Committee</u>

- Lowers the 20% repayment to 10% for estate repayments.

- For living residents who decide to leave the facility, providers would be required to return 20% of the entrance fee repayment within 120 days, if the unit has not been resold or the full repayment has not otherwise been made. This repayment would ONLY apply to contracts signed after January 1, 2016.

9) *Proposed/Recommended Amendments:* Based upon discussions coordinated by the author's office, the author has proposed the following changes to the current version of SB 475 to address the concerns of committee members, and those opposing SB 475.

   a. **"Fix" the interest rate.** Representatives for LeadingAge have indicated that for business purposes, a floating interest rate on outstanding debts to former residents creates a range of complexities which could be remedied by establishing a specific interest rate. Senator Monning has proposed the following as an author's amendment:

HSC 1788.4 (e) (3) Any payments that are not paid to the resident within the 120-day period pursuant to paragraph (2) will accrue interest at a rate no lower than **four percent.** ~~the United States prime lending rate.~~

(4) Any payments that are not paid to the resident within the 180-day period pursuant to paragraph (2) will accrue interest at a rate no lower than **six percent.** ~~2 percent plus the United States prime lending rate.~~

   b. **Clarify repayment permission for CCRC providers.** CCRC providers have expressed concern that CDSS would resist the repayment of a lump-sum to a former resident or their estate. Based upon technical assistance provided by the CDSS, it is unknown if such a scenario has ever evolved in California. The author proposes the following change:

HSC 1771 (r) (1) "Refund reserve" means the reserve a provider is required to maintain, as provided in Section 1792.6.

(2) "Refundable contract" means a continuing care contract that includes a promise, expressed or implied, by the provider to pay an entrance fee refund or to repurchase the transferor's unit, membership, stock, or other interest in the continuing care retirement community when the promise to refund some or all of the initial entrance fee extends beyond the resident's sixth year of residency. Providers that enter into refundable contracts shall be subject to the refund reserve requirements of Section 1792.6. A continuing care contract that includes a promise to repay all or a portion of an entrance fee that is conditioned upon re-occupancy or resale of the unit previously occupied by the resident shall not be considered a refundable contract for purposes of the refund reserve requirements of Section 1792.6, provided that this conditional promise of repayment is not referred to by the applicant or provider as a "refund." **A provider may repay all or a portion of the entrance fee that is contingent upon resale of the unit before the resale of the unit, if it chooses to do so. Such an early payment will not cause any other entrance fee to be subject to the refund reserve requirements of Section 1792.6, provided that the provider does not, at the time of contracting or thereafter promise to make such a payment, represent that it intends to make such a payment, or indicate that it has a practice of making such a payment.**

Section 1788 (33)(E) of Health and Safety Code to align with language above:

~~(E) For a lump-sum payment, the provider shall state the average and longest amount of time that a lump-sum payment has been delayed.~~
(E) For all contracts with a repayment of all or a portion of the entrance fee contingent upon resale of the unit, the provider shall state the average and longest amount of time that it has taken to resell a unit within the last five calendar years.

c. **Retrospective vs. Prospective application:** The cornerstone of the CCRC industry is the CCRC contract between a provider and the resident. These contracts articulate specific deliverables that each party to the contract must perform. Though some scenarios brought to light by the introduction of SB 475 have raise alarm that good-faith performance may not be standard practice, particularly in the case of vacated units not getting the same marketing support as new, previously unoccupied units with no associated re-payment obligations, members of the committee have generally insisted that the re-payment provisions of SB 475 only apply prospectively; only to new contracts. To address the potentially unfair treatment of vacated units which are subject to existing contracts, the author proposes giving new power to the Department to investigate whether the CCRC is making sufficient efforts to re-let the unit. The author has proposed the following language:

HSC 1784 (e) (2) Any payment balance that has not been paid to the resident within 120 days shall accrue interest at a rate calculated pursuant to paragraph (3). Any payment balance that has not been paid to the resident within 180 days will accrue interest at a rate calculated pursuant to paragraph (4). Interest shall continue to accrue until the date the full lump-sum payment is paid to the resident. This paragraph shall apply **only** to ~~existing and~~ prospective continuing care contracts **beginning January 1, 2016**.

HSC 1788 (b) (33) (D) **(i)** State the provider shall make a good faith effort to reoccupy or resell a unit for which a lump-sum payment is conditioned upon resale of the unit. No later than July 1, 2016, a provider shall provide notice to all current residents with contracts applicable to this subparagraph regarding the statement required by this subparagraph as a clarification of the resident's existing contract.

(ii) The Department, in response to a complaint from a resident or estate, may determine when a provider has not made sufficient good faith effort to reoccupy or resell a unit for which a lump sum payment is conditioned upon resale of a unit. An insufficient effort on behalf of the provider shall include, but not be limited to, failure to undergo the facility's refurbishment process for re-letting, failure to make needed repairs, failure to reasonably market the unit to potential residents, failure to show the unit to prospective residents, or the period of 36 months from the date of vacancy has elapsed.

(iii) Providers who fail to act in good faith, pursuant to subparagraph (ii) shall repay the full lump sum payment owed to the resident or estate within 14 days of the department's determined finding and reimburse the Department for any costs associated to the investigation of good faith.

REGISTERED SUPPORT / OPPOSITION:

Support

California Continuing Care Residents Associations (CALCRA) – Sponsor
California Advocates for Nursing Home Reform (CANHR)
California Commission on Aging (CCoA)
California Long-Term Care Ombudsman Association (CLTCOA)
Consumer Federation of California (CFC)
National Association of Social Workers, California Chapter (NASW-CA)
Numerous Individuals (about 150).

Opposition

American Baptist Home of the West
The British Home in California, Ltd.
California Association of Continuing Care Retirement Communities – Oppose Unless Amended
Channing House
Episcopal Communities & Services
Episcopal Senior Communities
Erickson Living – Oppose Unless Amended
Forest Hill
La Costa Glen, Carlsbad
Lake Park, Community Care Retirement Community
LeadingAge – Oppose Unless Amended
Los Angeles Jewish Home for the Aging
O'Connor Woods
Spring Lake Village
Stoneridge Creek Pleasanton

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