American Seniors Housing Association

Seniors Housing Legal Notes

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Beware of Landlord-Tenant Restrictions on Your Service Program

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A lawsuit pending in Los Angeles Superior Court, brought by the California Public Interest Research Group and the Congress for California Seniors, alleges that certain admission fees charged by independent living and assisted living providers violate a California law limiting the amounts landlords can charge residential tenants. The Complaint, which originally named over 150 defendants operating over 30,000 units, seeks recovery of all admission fees paid by independent and assisted living residents from 2000 to the present, and seeks an injunction preventing the collection of all such fees in the future. Although defendants have reduced the scope of the lawsuit since it was originally filed in February of 2004, and have brought a motion to have the case dismissed in the wake of the passage of California's Proposition 64 in November limiting unfair business practices lawsuits, the potential impact of landlord-tenant laws on assisted living and independent living properties remains an issue often overlooked by retirement community developers and operators. In fact, a similar unfair business practices suit was also filed under Florida's landlord-tenant law, seeking recovery of retirement community entrance fees exceeding $100,000 each.

Many states have enacted laws that restrict the ability of landlords to charge tenants upfront fees in excess of certain amounts, such as one month's rent, or which characterize such fees as security deposits that must be kept in escrow, accrue interest, be made refundable, or are otherwise restricted. Applicability of a state's landlord-tenant laws may also have an impact upon such diverse issues as zoning, the term of a resident's occupancy, a tenant's withholding of rent to make repairs, evictions, and other operational issues. Usually, these laws were not written with serviced-oriented retirement communities in mind, and therefore they are likely to create serious problems if applied to such properties.

Several court cases throughout the country have determined that state landlord-tenant laws do not apply to assisted living and continuing care retirement communities, because the communities' primary purpose is the delivery of services to the residents. Assisted living facilities, continuing care retirement communities and other properties subject to licensing regulations may also argue that their state's licensure statutes so comprehensively and exclusively regulate the business activity as to demonstrate a legislative intent that the general landlord-tenant laws do not apply. However, in the absence of such a legal precedent in a given state, or if the licensure law does not cover certain aspects of the relationship between a service provider and the resident, a broadly worded landlord-tenant law may pose significant challenges to a senior services community's practices.

Even for unlicensed independent living properties, arguably the relationship is not one of landlord and tenant, but rather that of proprietor and lodger. The classic proprietor-lodger relationship is that of a hotel and its customer. Unlike a residential landlord who typically provides no services other than limited maintenance and repairs, staff are on the premises of an independent living property to

provide dining, housekeeping, transportation and other services to the occupant. Unlike a tenancy, where the tenant is said to have "exclusive" possession of the residential unit, in a proprietor-lodger relationship the proprietor retains the right of full access to the unit, as evidenced by housekeeping and other staff routinely going into the occupant's room to perform services as needed.

When courts review the nature of the relationship between a housing and services provider and its customer, they may not limit their inquiry to the parties' actions, but also look to their words. For example, use of words such as "lease," "landlord," "tenant," and "rent" in an occupancy agreement or in advertising might support an argument that the relationship is one of landlord and tenant. On the other hand, words like "residence agreement" or "occupancy agreement," "provider," "resident" and "monthly fee," are consistent with the position that customers are accessing the property primarily to receive services and not as tenants seeking only shelter.

The dilemma presented in the admission fee cases is not limited to the application of landlord-tenant laws. Whether in finance, appraisal, legal/regulatory or other settings, service-enriched seniors housing properties are seldom considered to be squarely within the realm of just one of the real estate, hospitality or health care sectors. Retirement community owners and operators need to be sensitive to the dual or even multifaceted character of their products, and use caution when structuring or describing what they offer to obtain the most favorable and appropriate financing, valuation, regulatory, or other treatment.

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About the Author:
Paul Gordon has represented over 250 seniors housing and care companies, facilities and investors since 1975 and practices exclusively in the area. He is the author of *Seniors' Housing and Care Facilities: Development, Business and Operations*, 3rd edition (Urban Land Institute, 1998) -- a 600-page volume with over 1,000 additional pages of business forms on CD-ROM. Paul has been on the Executive Board of the American Seniors Housing Association since 1995, and serves as its legal counsel. He is former chair of the Legal Committee of the American Association of Homes and Services for the Aging and the American Bar Association's Committee on Housing for the Elderly.