

SPECIAL ISSUE

brief



Resident Eviction

Managing the Challenges

American
Seniors
Housing
Association

Prepared by

**HANSON
BRIDGETT**

**MARCUS
VLACHOS
RUDY-LLP**

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. NONPAYMENT	2
A. Independent Living Community Considerations	2
B. Assisted Living Community Considerations	2
C. CCRCs and Equity Community Considerations	2
II. RESIDENT BEHAVIOR	3
A. General Guidelines	3
B. Independent Living Considerations	4
C. Assisted Living Considerations	4
D. CCRCs and Equity Community Considerations	5
E. Family Member Problems	6
F. Warning Signs	6
III. CHANGE OF CONDITION/CARE NEEDS	7
A. Independent Living Considerations	7
B. Assisted Living Considerations	7
C. CCRCs and Equity Community Considerations	8
D. Waiver Issues	8
IV. CONCLUSION	9



RESIDENT EVICTION

Managing the Challenges

EXECUTIVE SUMMARY

One of the most vexing problems facing senior community operators is the forced relocation of residents. The comprehensive relationship between providers and their residents combined with the age and frailty of those residents inherently makes eviction issues much more complex and challenging than in a typical landlord/tenant setting.

Eviction laws and regulations vary significantly from state to state. Nevertheless, the issues discussed below are of general applicability, and the federal Fair Housing Act may affect all providers when relocation issues pertain to care needs.

The issues that affect operators will vary significantly depending on the reason for an eviction and the type of community involved. This issue brief will discuss eviction based on a) nonpayment; b) violation of community rules; and c) need for a higher level of care as they pertain to independent living monthly fee communities, assisted living communities, entrance fee or equity CCRCs and other equity senior housing.

At the outset, a note of caution is necessary. Regardless of the type of community and the reason(s) for eviction, most states prohibit self-help. Thus, if the requisite notice is given and a resident declines to move out voluntarily, providers cannot unilaterally forceably evict a resident. Legal processes must be followed and even when a court order is issued, that order typically must be carried out by law enforcement officials, not the provider itself.

I. NONPAYMENT

As a general rule, nonpayment issues are the easiest to deal with as laws and regulations tend to be clear cut and the facts are typically not in controversy.

A. Independent Living Community Considerations

For independent living monthly fee properties, termination of residency based on nonpayment will be subject solely to the state's landlord/tenant laws. Most states provide an expedited legal process for residential evictions, although in some states the tenant has a right to request a jury trial. State law may preclude the resident from raising personal injury or other claims against the operator in an eviction proceeding. Thus, evictions for non-payment are usually straightforward.

If a problem arises, it is typically because the operator has failed to adhere strictly to state requirements pertaining to the content of the eviction notice or the method of service of the notice. For example, state law may require personal delivery of an eviction notice. In one situation, a provider sent an eviction notice by mail to avoid potential confrontation, and in doing so, failed to meet statutory notice requirements. In addition, providers have run into problems where they have accepted payments after serving an eviction notice for non-payment. Depending on state law, the acceptance of payment may be viewed as a waiver of the notice of termination and cause the provider to have to start the eviction process all over again.

B. Assisted Living Community Considerations

For assisted living communities, depending on the state, providers may need to adhere to specific assisted living laws or regulations, landlord/tenant law, or both. Many states provide for an administrative hearing process for assisted living evictions, while other states are silent as to the process. For example, in California, assisted living regulations permit a provider to evict a resident for nonpayment on 30 days notice. However, the regulations do not specify any procedure for eviction, and providers are thus forced to fall back on using landlord/tenant law in order to evict. This necessitates very careful drafting of an eviction notice to be certain to comply not only with assisted living regulatory requirements but also with landlord/tenant requirements. In some instances eviction notices have been provided to a resident's family member, but not to the resident him or herself, thereby invalidating the notice.

C. CCRCs and Equity Community Considerations

For CCRCs, many states have special requirements and frequently longer notice periods are mandated. In addition, certain refund obligations may be triggered when a provider initiates termination.

For equity CCRCs, the issues are more complex. Because the apartment is owned by the resident, the provider must not only abide by continuing care termination requirements,

but, if the resident does not agree voluntarily to sell his or her unit, may also need to initiate foreclosure proceedings. Foreclosure may also be required for non-CCRC equity senior communities.

Whenever a senior community operator is required to evict a resident because of nonpayment, the experience is unpleasant and potentially disruptive to the community. Although occasional default on payment may be inevitable, the problem can be abated through appropriate financial screening upfront and, where residents' financial qualifications may be borderline, having a relative serve as guarantor. In addition, providers need to be vigilant in responding to late payment issues. Too often, providers fail to take action until months of non-payment have elapsed and amounts owed are substantial. Even if a provider is successful in evicting a non-paying resident, collecting the amount owed can be difficult, time consuming, and expensive.

II. RESIDENT BEHAVIOR

A. General Guidelines

Evictions due to resident behavior problems are typically more problematic than for nonpayment. A disruptive resident can sabotage the well-being of an entire community. Yet evicting a frail, elderly resident for behavior issues is not always easy. Regardless of the type of community in which a resident is living, there are five general rules that are important for operators to follow.

First, it is critical (unless prohibited by law or regulations) that your admission agreement contain, as a specific ground for eviction, the failure of a resident to abide by community rules and regulations.

Second, it is critical that community rules and regulations be set out in writing either in the admission agreement or in a resident handbook or other document that is incorporated by reference into the admission agreement.

Third, it is important that community rules contain provisions pertaining to resident decorum and behavior. On many occasions, a provider wishes to evict a resident because of behavioral issues, yet the house rules contain no mention of resident behavior. At a minimum, community rules should include something to the effect of the following:

- » Neither residents nor their guests or employees shall interfere with the rights, comfort, safety, or convenience of other residents. Residents shall not make loud or disturbing noises or engage in disruptive or disturbing activities in the buildings, common areas, or parking areas of the community and shall not permit their employees or guests to do so.
- » Neither residents nor their guests or employees shall act in a violent or threatening manner toward other residents, guests, or staff. Residents shall not pose a danger to themselves or others.

- » Residents shall at all times be courteous to other residents, visitors, and employees. Residents shall not engage in rude, abusive, or insulting behavior.
- » Residents are responsible for the conduct of their guests and employees.

While there may be other more specific rules that can come into play in evictions, such as those pertaining to parking restrictions, dress codes and the like, in most cases where a community wishes to evict a resident because of behavioral problems, general rules such as those listed above are sufficient.

Fourth, operators must reserve the right to amend their house rules and adopt new rules upon written notification to residents. A provider may wish to evict a resident who is engaging in a specific behavior that had not previously been contemplated and therefore house rules were silent as to that behavior. For example, one assisted living community had a resident who was keeping guns and other weapons in his apartment. The community had no specific rule barring such items and thus could not use that as a ground for eviction. However, they reserved the right to amend house rules, and thus were able to implement a new rule, provide notice and then use it as the basis for terminating a residency.

Fifth, where a resident violates house rules, it is imperative that there be appropriate communication with the resident and a good paper trail. In many cases, when a provider is ready to evict a resident because of persistent violation of house rules, there is no written documentation of any transgressions, or there is written documentation, but it is all internal. Whenever there is a serious infraction of rules, there should be a face to face meeting with the resident (and, when appropriate, family members or another person responsible for the resident) followed by a written summary of what was discussed and the consequences if there are further transgressions. While there may be situations where a single incident is sufficiently severe to warrant an immediate eviction, in most cases progressive meetings and warnings will be required.

B. Independent Living Considerations

While an eviction for violation of rules in a independent living community will likely be the same from a legal perspective as for any residential landlord, disruptive behavior can be highly problematic. In a typical apartment house, an obnoxious tenant can often be ignored by other tenants. However, in an independent living community, a disruptive resident can have a profound deleterious impact on the well-being of a community as residents share meals and social and recreational activities. Thus, the need to enforce house rules evenhandedly and consistently is important.

C. Assisted Living Considerations

For assisted living communities, it is critical that operators follow specific state regulations pertaining to eviction for resident misbehavior. For example, in California, an assisted living provider must set forth the grounds for eviction in its admission agreement exactly as the requirements are contained in applicable regulations. The regulation pertaining to behavioral issues states that the assisted living community may evict the resident if there is a:

“... failure of the resident to comply with general policies of the facility. Said general policies must be in writing, must be for the purpose of making it possible for residents to live together and must be made part of the admission agreement.”

In North Carolina, assisted living regulations provide for a specific eviction process which includes the right to an appeal. The provider must give the resident all documents and records intended to be used at that hearing at least five days in advance.

Ohio assisted living regulations provide very narrow grounds for eviction of residents. These grounds do not include a violation of community rules. Therefore, for example, to evict a resident for acting obnoxiously or abusively toward other residents, one would have to characterize such behavior as presenting a health or safety threat to the resident.

Some state assisted living regulations allow for expedited evictions when a resident's behavior constitutes an immediate threat to his or her health and safety or the health and safety of other residents. These regulations may first require approval of the licensing agency. Providers may want to request such approvals when there is a threat to health and safety even when they know that approval is unlikely. If your licensing agency denies an expedited eviction and an injury or other damage occurs prior to eviction, you are in a better defensive position when subsequently dealing with your regulators.

D. CCRC and Equity Community Considerations

In a CCRC, resident behavioral issues can be even more problematic. Residents have made a substantial investment to move into a CCRC. Residents who are adversely affected by misbehaving fellow resident cannot relocate without incurring significant financial loss. A disruptive CCRC resident can have a profound deleterious impact on marketing.

At the same time, the offending CCRC resident also has a vested economic interest and may well have the willingness and financial resources to fight an eviction. It is therefore critical for CCRCs to document carefully violations of house rules, meet with the resident to discuss such violations and provide written summaries of such meetings and progressive warnings about the consequences of continued transgressions. Early intervention is helpful and if eviction becomes necessary, strict adherence to legal notice requirements is imperative. In California, for example, CCRC residents are entitled to 90 days advance written notice of termination of their admission agreement. If improper notice is given, and the resident declines to move out at the end of the notice period, it would take another three months before eviction proceedings could begin.

Equity CCRCs and non-CCRC equity senior communities have the added problem that the resident owns his or her unit. Ideally, the agreements between the resident and the CCRC (or other equity community) require that the resident must resell his or her apartment upon termination of the residency agreement and provide for enforcement mechanisms so that, if necessary, a judicial foreclosure can be obtained.

E. Family Member Problems

In many instances, it is not the resident who is engaging in disruptive behavior, but rather a family member. For this reason, it is important, as noted above, to include behavior of guests in community rules. Nevertheless, in an assisted living setting, it may be difficult if not impossible to evict a resident solely on the basis of the actions of a family member. This is especially true for a dementia resident who has no ability to control guest behavior. In a few instances, providers have been able to proceed with eviction based on a family member's behavior where it could be demonstrated that that behavior had an adverse impact on the health or safety of the resident in question or other residents. For example, a resident's son was being abusive to staff and preventing the community from obtaining a reassessment of his mother as required by regulations. Rather than base the eviction on his violation of house rules, the focus of the eviction was on the inability of the assisted living community to meet his mother's needs because he had prevented the reassessment.

In another situation, a provider attempted to evict a resident where the resident's daughter was engaging in an abusive behavior toward staff, including the use of profanity and racial slurs. Her actions were causing staff to quit or become demoralized and thus adversely affected services to residents. However, in that situation, the ultimate resolution involved obtaining a restraining order against the daughter rather than eviction of the resident.

F. Warning Signs

While it is often impossible to predict in advance who may become disruptive, there are times when there are warning signs that need to be heeded. For example, has the resident come from another senior community? While the applicant or family may give a plausible explanation for the move, the reality may be substantially different. Perhaps the applicant is being evicted or at least pressured to move out. A resident who has had a problem elsewhere is likely to be a problem for you. Your application forms should require that prospective residents list all prior communities in which they have resided. If there are multiple communities listed, this is certainly a red flag.

If the applicant or the applicant's family is rushing to move into your community, except in circumstances where there is a pressing health care need, this may be a sign that they are attempting to hide financial, mental health, or behavioral issues that will manifest later.

Often, behavior during the application, interview and touring process is a harbinger of what is to come. Applicants and family members who are dictatorial, critical, uncooperative, or disengaged during the application process, when they should be motivated to make a good impression, are likely to be far more difficult down the road.

Do not ignore these warning signs; recognize and investigate them. Check references and past history as thoroughly as you can, asking specifically about relationships with other residents and staff, problematic behaviors and the like. Make sure all paperwork is complete and thorough. Most importantly, do not rush into admitting a resident before your due diligence is complete. It is much better and more economical to reject an application up front than to have to evict a resident later.

III. CHANGE OF CONDITION/CARE NEEDS

Eviction due to a resident's change of condition or care needs can present special complexity due to federal and state disability discrimination laws.

A. Independent Living Considerations

Unlicensed independent living providers are subject to the same rules as any residential landlord — they cannot take someone's disability into account in determining appropriateness of a resident and can only look to the applicant's ability to meet the "requirements of tenancy." Ironically, this means that someone who has a condition that would preclude retention in an assisted living community or CCRC may be able to continue to live in an unlicensed setting.

Rules prohibiting disability discrimination do not mean that a independent living provider must abdicate all ability to require a resident to move out due to care needs. To do so, however, the provider must focus not on the resident's needs, but rather on whether the resident's needs are being met. Independent living admission agreements should contain a statement to the effect that the community is not licensed to offer and does not offer assisted living or other personal care services and that the resident represents that he or she is capable of providing for his or her health care and personal care needs and will provide for all such needs as long he or she is a resident. The agreement should also state that if residents use private duty caregivers or companions while residing in the community, they agree to comply with applicable policies for such personnel. The agreement should further state that if the resident becomes incapable of providing for or fails to provide for his or her health care or personal care needs, or if he or she develops a condition that presents a danger to him/herself or others, he or she will be required to move out.

Please note that the key word here is "for." As long as a resident is providing for his or her needs, even if he or she cannot personally care for him or herself, the resident cannot be evicted. The focus should not be on the resident's condition, but on whether his or her needs are being met. For example, a resident who is incapable of bathing herself may be perfectly appropriate to remain in a independent living community if she is receiving outside assistance with bathing. A provider cannot evict her because she needs assistance with bathing. However, if she is not receiving the bathing assistance that she needs, and shows up to dinner in a condition that offends others and interferes with their appetite, this can be grounds for termination of admission.

B. Assisted Living Considerations

In assisted living communities, retention determinations must be made in accordance with state laws and regulations and will vary widely from state to state. Some states, such as California, have strict prohibitions on certain conditions including, for example, the need for 24-hour skilled nursing care, Stage III or Stage IV decubitus ulcers, infectious airborne diseases (such as tuberculosis), or the use of nasogastric tubes. Other states are even more restrictive and preclude retention of residents with much less serious

conditions. Conversely, some other states, such as Michigan, provide considerable flexibility and allow assisted living communities to retain a resident as long as there is an agreement among the assisted living community, the resident, the resident's family and the resident's physician, and an appropriate care plan is implemented (which may include the use of home health care services). Many states provide exceptions for residents who are receiving hospice care. Some states, such as Florida and New York provide for different levels of assisted living and permit retention of more needy residents only in communities that are specially certified to provide such care.

It is critical when evicting an assisted living resident due to care needs that state regulatory requirements be strictly followed. For example, in California, in order to evict a resident because of a change in condition, an assisted living provider must first perform a reappraisal of the resident, notify the resident's family and physician of the results of the reappraisal, and hold a meeting with the family to discuss the change in the resident's condition. Many states have similar requirements. If these requirements are not met prior to the issuance of an eviction notice, the notice is defective.

C. CCRC and Equity Community Considerations

For non-CCRC equity communities, the issues are similar to those for unlicensed independent living rental communities. Obviously, the stakes are higher where a resident owns his or her unit, and the willingness of a court to enforce an eviction based on care needs may be less. In a CCRC, special issues may arise where the CCRC attempts to move a resident from independent to assisted living or skilled nursing. CCRC admission agreements typically reserve to the community the right to determine the appropriate level of care for a resident. There is currently pending litigation challenging the right of a CCRC to require a resident who requires intensive personal care services to move from her independent apartment to an assisted living apartment. The resident claims that the forced transfer violates the federal Fair Housing Act by discriminating against her based on her disability. The CCRC takes the position that its entire business plan is contingent on residents being cared for in the appropriate setting and that the resident agreed to this when she signed her admission agreement. They argue that the resident is requesting them to fundamentally alter their program, and this is not required by the Fair Housing Act. The outcome of this case may have a profound impact on the manner in which CCRCs operate.

D. Waiver Issues

When terminating a residency due to behavioral or care need issues, acceptance of payment of fees for periods that extend beyond the termination date may constitute a waiver of the termination notice, depending on state law. This presents a dilemma for a provider that is attempting to evict an inappropriate resident. It may take months to get the resident out, and in the interim, thousands of dollars in fees are coming due. There is a strong temptation to accept payment, but doing so may result in having to start all over



again. Providers should consult with legal counsel before accepting payment. In addition, depending on your state, it may be helpful to add to your admission agreement language to the effect of the following:

Waiver: The failure of the Community in any instance or instances to insist upon your strict performance or observation of or compliance with, any of the terms or provisions of this Agreement, shall not be construed to be a waiver or relinquishment of its right to insist upon your strict compliance with all of the terms and provisions of this Agreement. In addition, acceptance by the Community of any payment from you after your breach of any term of this Agreement or after providing you with a notice of termination based on a reappraisal as described above, shall not constitute a waiver of the right of the Community to insist upon full performance of all terms of this Agreement, nor shall it waive the Community's right to terminate this Agreement for any breach previously committed or to terminate in accordance with the provisions of this Agreement.

IV. CONCLUSION

The process of terminating the residency of a resident of a senior community is complex and potentially volatile. Contested evictions are never pleasant and invariably take both a financial and personal toll on the community. For that reason, careful screening of residents at the outset prior to admission is critical. When problems do arise, early intervention can help and strict adherence to legal and regulatory requirements is essential. In the event that it does become necessary to terminate a residency despite attempts at intervention, providers may wish to consider offering the resident an incentive to voluntarily relocate thus obviating the need to go through a forced eviction process.

American Seniors Housing Association

5100 Wisconsin Avenue, NW
Suite 307
Washington, DC 20016
(202) 237.0900
FAX (202) 237.1616
www.seniorshousing.org



ABOUT THE AUTHOR

Joel Goldman is a partner in the 130 attorney law firm of Hanson Bridgett Marcus Vlahos and Rudy, LLP, headquartered in San Francisco. He is well-recognized as one of the leading experts on legal, regulatory and risk management issues affecting senior care communities. For nearly 27 years, he has devoted his practice to the representation of developers, owners and operators or assisted living, congregate and continuing care communities. Mr. Goldman is an active member of ASHA. He is a frequent speaker at conferences around the country and is Past Chairman and a long time member of the Board of Directors of the California Assisted Living Association.