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Massachusetts high court rules on treatment of "community fees" in assisted living facilities

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On December 5, 2019, the Massachusetts Supreme Judicial Court (SJC) issued a decision clarifying the interplay between the state's assisted living and landlord-tenant laws. The case, *Ryan v. Mary Ann Morse Healthcare Corp.*, centered on the legality of an assisted living residence (ALR) charging a "community fee" upon commencement of residency when landlord-tenant law only permits certain upfront charges. After two different Superior Court judges reached opposite conclusions in three different cases, the SJC ruled on appeal that, while the ALR law incorporates landlord-tenant (and other consumer laws) governing the maximum upfront charges allowable in a residential tenancy, ALRs can impose additional upfront fees for the services they provide if the purpose and use of each additional fee is (1) expressly permitted by the ALR law, or (2) for services distinct to ALRs (as compared to services provided at non-ALR tenancies). This is the first guidance from the state's high court on these issues and has possible implications for independent living (IL) communities as well. All ALR and IL owners should review their fee structures, marketing materials, and residency agreements to ensure compliance with this guidance.

Background

Recent cases in the Massachusetts Superior Court have questioned whether or not G.L.c. 186, § 15B, often referred to as the security deposit law, applies to ALRs. The security deposit law limits the upfront fees that a landlord can charge to the following: first and last months' rent; a security deposit equal to first month's rent; and the cost of installing a new lock and key at the residence. The law also requires that security deposits must be held in a separate interest-bearing account in a bank located in Massachusetts, "under such terms as will place such deposit beyond the claim of creditors of the lessor." § 15B (3) (a). These cases have been closely watched given that, prior to move in, many Massachusetts ALRs impose additional charges often labeled as a "community fee." The plaintiffs argued that this practice exceeded the limitations set by the security deposit statute, while the operators contended that in G.L.c. 19D, the assisted living certification law, the legislature intended to establish ALRs as a distinct form of residency compared to "traditional" landlord-tenant housing.

The Superior Court's decisions on this issue produced conflicting results. In *Gowen v. Benchmark Senior Living LLC* (2017) and *Hennessy v. Brookdale Senior Living* (2018), Judge Kenneth W. Salinger

held that the security deposit statute does apply to ALRs. However, in *Ryan* (2018), Justice Christopher K. Barry-Smith allowed the defendant's motion to dismiss, finding that the legislature did not intend for the security deposit statute to apply to ALRs. The plaintiffs in *Ryan* appealed to the SJC.

SJC provides new "distinctive ALR services" test

In *Ryan*, the SJC does not broadly exempt ALRs from the security deposit statute, but rather provides a new test for determining when ALRs are exempt. Writing for the court, Justice Scott K. Kafker explained, "the ALR statute incorporates applicable consumer protection laws, including G.L.c. 186, § 15B, but allows for additional upfront charges for the distinctive services assisted living facilities provide that are not applicable to traditional landlord-tenant relationships." Judge Kafker established a two-part test regarding the permissibility of a community fee including "a determination of (1) the actual purpose and use of the fee, and (2) whether such purpose and use are for distinctive ALR-specific services, rather than general maintenance or other aspects of a generic residential tenancy." Accordingly, if "community fees" and similar upfront charges are used for purposes other than for an ALR's distinctive services, the ALR will be in violation of G.L.c. 186, § 15B, the security deposit law. While the SJC found that certain of the charges included in the *Ryan* community fee corresponded to requirements laid out in the ALR law, it sent the case back to the Superior Court for additional fact-finding as to whether the community fee was permissibly charged and used for services distinct to ALRs.

Implications for operators of ALRs in Massachusetts

The SJC's decision in *Ryan* should provide the operators of Massachusetts's 260 certified ALRs some relief as it did not strike down the broad practice of imposing and using "community fees." However, all such fees will be exempt from compliance with the security deposit law only if they satisfy the distinctive services test. Every operator should accordingly examine each upfront charge it imposes in addition to the limitations of the security deposit law (as well as ensuring that, if charged, a security deposit is lawfully handled) in light of the test. With respect to such additional charges, every operator should ask: "is the purpose—and use—of the fee to pay for a service that is distinctive to an ALR (as opposed to a service provided in a traditional or ordinary landlord-tenant setting)? A permissible additional charge, cited by the *Ryan* court, would be for the initial assessment and service planning mandated by the ALR law. The SJC also cited several other distinctions between an ALR and a "regular apartment complex" that should be useful in applying the test.

Possible implications for operators of Massachusetts independent living communities

In its decision, the SJC also observed that ALRs "fall within a 'spectrum of living alternatives for the elderly within the commonwealth.'" (quoting 1994 Mass. Acts 1142). This spectrum includes hundreds of IL communities, which, unlike ALRs, are not subject to a specific certification statute, but like ALRs offer resident services (and often innovative programs) beyond those offered at a "regular apartment complex." To partially fund what is sometimes referred to as service-enriched seniors housing, many IL communities also charge upfront fees in addition to the security deposit law maximums. Although the SJC's decision does not explicitly apply to IL communities, until the law is settled, operators of these IL communities would be well advised to apply and follow the distinctive services test.

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