# Assisted Living Facility Litigation: Not Your Average Nursing Home Case[1]

**by Lisa J. Sansone**

We've all seen recent headlines and news exposés warning of the egregious cases of abuse and neglect of helpless elderly residents in assisted living facilities. These media events document the increase in abuse and neglect cases in assisted living in facilities across the country. As with the nursing home industry, poor care in assisted living facilities is a problem with many causes. Two of the primary reasons for this problem are the explosion in numbers of assisted living facilities that now house at least one million residents,[2] and inadequate state enforcement of regulations which differ from state to state.[3]

Irrespective of the causes of poor care, there is no doubt that nursing home litigation attorneys will see an increase in assisted living abuse and neglect cases. Before you litigate an assisted living case, you need to know the differences between litigating an assisted living case and litigating the typical nursing home case.

## Differences from Nursing Home Cases

First, there is no national definition of assisted living. Each state has different terms and definitions for an assisted living facility ("ALF"). ALFs are also known as adult homes, group homes, continuing care retirement communities, domiciliary care homes, personal care homes, and adult foster homes. Most states, approximately 70%, currently use the term "assisted living."[4]

These state regulations vary greatly in terms of the types of residents that can live in an ALF, and the type of care that can be provided. In Maryland, ALFs can admit residents with dementia and major health issues.[5] The current trend among states is to permit them to admit residents with multiple medical diagnoses. The bottom line is that ALF residents look a lot like nursing home residents.[6]

Nursing oversight is different within ALFs than in nursing homes. The timing of the initial assessments and when care plans must be updated can differ from nursing homes. Many states do not require a new patient to be seen by a physician within a certain time of admission. In many states, there is no licensing requirement for ALF administrators.

There is no federal regulation of ALFs. OBRA does not apply to ALFs.[7] Each state has its own regulations concerning such areas as staffing, certification or non-certification of nursing aides, types of patients that cannot be housed in an ALF, and other regulations.[8]

As for regulation, overall, states do a much worse job of inspecting and enforcing regulations of ALFs than nursing homes.[9] If you are looking for a stack of deficiencies to show the jury at your next ALF trial, they may not exist, not because the ALF was complying with the law, but

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[1] Portions of this paper were originally presented at the 2006 ATLA Teleseminar, Baltimore, Maryland, June 8, 2006, and at the AAJ Winter Convention in Miami, Florida on February 14, 2007.

[2] AARP Public Policy Institute, *Across the States: Profiles in Long Term Care and Independent Living*, 7th Ed. (2006) State Data and Rankings Supplement at W-18. http://assets.aarp.org/rgcenter/health/d18763_2006_ats_rankings.pdf

[3] Occupancy of nursing homes is decreasing while occupancy of assisted living facilities is rising. This trend is due, in part, to an increase in the use of the Medicaid waiver programs to fund stays in assisted living, and using assisted living as a substitute for nursing home care. *See The Shape Study*, Chapter VII: Long Term Care Findings: Nursing Home Facilities, at page 3. http://www.shaperi.org/longtermcarefindings.pdf.

[4] See National Center for Assisted Living, Assisted Living Regulatory Review 2007. http://www.ncal.org/about/2007_reg_review.pdf (Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana,. Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin,. Wyoming).

[5] *See, e.g.* COMAR 10.07.14.10J: Maryland assisted living facilities may not admit persons with the following conditions: (1) More than intermittent nursing care; (2) Treatment of stage three or stage four skin ulcers; (3) Ventilator services; (4) Skilled monitoring, testing, and aggressive adjustment of medications and treatments where there is the presence of, or risk for, a fluctuating acute condition; (5) Monitoring of a chronic medical condition that is not controllable through readily available medications and treatments; (6) Treatment for an active reportable communicable disease; or (7) Treatment for a disease or condition which requires more than contact isolation.

[6] Paul Willging, the CEO of the Assisted Living Federation of America, has described assisted living facilities as "nursing homes with chandeliers." *Long Term Care Needs to Change Its Focus*, Nursing Homes Magazine, February 2004, also available at http://findarticles.com/p/articles/mi_m3830/is_2_53/ai_n6094123.

[7] *See* the Omnibus Budget Reconciliation Act ("OBRA") of 1987 (P.L. 100-203), 42 U.S.C §1396r, 42 U.S.C. §1395i-3, 42 CFR §483.1 *et seq*.

[8] For a state by state review of these regulations, *see* the National Center for Assisted Living, Assisted Living Regulatory Review 2007, http://www.ncal.org/about/2007_reg_review.pdf; *see also,* Mollica RL, and Johnson-Lamarche. (2005). *State Residential Care and Assisted Living Policy*, 2004. Washington, DC: U.S. Department of Health and Human Services. http://aspe.hhs.gov/daltcp/reports/04alcom.htm.

because the state lacks the funding to inspect the ALFs regularly.[10] For example, in Pennsylvania, there are 31 inspectors for 1581 ALFs, compared to 120 inspectors for about 750 nursing homes.[11] In Michigan, there are 100 ALFs for every inspector.[12] In Maryland, there are 22 inspectors for over 2100 ALFs and each ALF is required to be inspected annually. According to the Office of Health Care Quality of the Maryland Department of Health, in 2005 the Office was only able to complete 30% of the inspections required by law.[13]

## Claims and Causes of Action

When you review ALF cases, the traditional theories of liability associated with nursing home cases exist, with some differences. Some additional theories of liability are more unique to the ALF environment and should be considered when screening an ALF case.

### Negligent Admission to Assisted Living

Negligent admission of a resident in an ALF is a common claim where the ALF admits a resident whose needs exceed the facility's ability to care for the resident. A resident who is totally dependent in all activities of daily living ("ADLs") may require more staff hours than can be provided by a particular facility. Negligent admission may also occur where the resident's admission violates state law, for example, where the resident is on a ventilator and state law prohibits this ALF placement.

### Negligence

The standard of care is generally similar in both the nursing home and ALF settings. For example, nursing standards of care are similar because the state nurse practice acts apply in all environments. Regulations pertaining to delegation nursing duties to nursing aides, however, may vary with the setting, especially since some aides in ALFs are not certified.[14] In addition, nursing duties that are given to non-certified aides may give rise to liability.

Standards of care for fall cases may also differ in the ALF setting, depending



[9] It is a generally accepted truth that states do a deplorable job of regulating nursing homes. *See, e.g., Oversight of Nursing Homes Is Criticized*, By Robert Pear, New York Times, Published: April 22, 2007. The fact that assisted living facilities receive even less regulatory scrutiny is directly responsible for the low quality of care in some ALFs.

[10] For a comprehensive list of links to state agencies that regulate ALFs, and other information, *see* the Consumer Consortium on Assisted Living, http://www.ccal.org/agencies.htm.

[11] *'Shame of the State' Troubled facilities and lax state oversight have for years put residents of Pennsylvania's assisted-living homes at risk of assault, neglect - and tragedy.* Ken Dilanian Philadelphia Inquirer, February 25, 2007. http://www.philly.com/inquirer/front_page/20070225_Shame_of_the_State.html

[12] *Assisted Living, Erratic Regulation: With No Federal Regulation And Limited State Laws, Negligence Cases Are Growing*, Armen Keteyian, CBS Chief Investigative Correspondent, November 13, 2006. http://www.cbsnews.com/stories/2006/11/13/cbsnews_investigates/main2177892.shtml

[13] *See Maryland Department of Health and Mental Hygiene Office of Health Care Quality Annual Report and Staffing Analysis*, January 2006 at pages 10, 17. http://www.dhmh.state.md.us/ohcq/reports/ohcq_arsa_05.pdf.

on the assessment of the patient and the services promised. Liability may exist where a resident was assessed as being at risk for falls, but was not adequately supervised. Also, liability in a wandering case in an ALF may depend on whether the resident was in an independent living area or was in a locked Alzheimer unit, and whether the resident's risk for wandering was accurately assessed.

## Negligent Hiring, Training, Supervision and Retention

This claim may be easier to establish in a nursing home setting, because standards of care are more uniform and established. In an ALF setting, it is important to look at the state regulations for staff qualifications and training. Look at the training logs for the staff. Is the required training documented? Was the training done timely? When the employees are deposed, do they answer questions relating to care accurately? Some ALFs hire aides with no education, experience or training. Training is more crucial in an ALF setting where there is an Alzheimer's or special care unit and the aides are not certified. These residents tend to be the frailest of the frail, and when they are cared for by non-certified, improperly trained staff, this often spells disaster. Even where training is not state-mandated, a negligent hiring and retention claim may exist where the ALF has admitted residents with needs for which that the staff is not trained to care. Hiring individuals with criminal records is also a problem in ALFs.

As with nursing homes, understaffing is rampant in ALFs, and is worse than in a nursing home setting, mostly due to lack of state minimum staffing standards.[15] Most states are only recently beginning to require awake overnight staff for facilities housing Alzheimer's residents.[16] Whenever evaluating a claim of understaffing, it is important to realize that ALF staffing hours are not directly comparable to staffing hours in nursing homes. Care aides in ALFs tend to have more housekeeping duties, including laundry, bussing tables, and sweeping the floors.

Likewise, staff turnover is higher in ALF than nursing homes,[17] because the pay is lower in ALFs (from $1-$1.50 per hour less). Aides in ALFs also have more housekeeping duties than aides in a nursing home. The management of ALFs also tends to be more complacent about retaining staff who abuse and neglect residents. This complacence is reflective of the high turnover rates and the difficulty in finding replacement staff.

## Fraud

Fraud in nursing home cases is most commonly associated with Medicare fraud, which is billing the government for services that were not provided. In the ALF environment, it is usually related to misrepresentations regarding the ability of the facility to care for a resident, services promised, and concealment of poor quality of care given to the resident. Frequently, ALFs fraudulently misrepresent their ability to care for patients because most states do not heavily regulate what consumers must be told about services provided and costs for those services.

## Contract-based theories of liability

These theories in both ALF and nursing home litigation include breach of contract claims and claims under a state consumer protection act. These theories of liability are arguably stronger in ALF cases where there are less regulatory standards and the care required is more closely linked to the residency agreement. State consumer protection statutes can be helpful in protecting ALF residents who received misrepresentations in sales pitches and advertising materials. In ALFs, the admission contract or residency agreement and service level designations should spell out the services the resident or patient is to receive. When the resident, who is dependent on staff for assistance in eating, loses weight because the facility is understaffed, the facility has breached the residency agreement in which it promised to provide assistance in eating.

## Premises Liability

This theory of liability is more frequently used in states where the ALFs do not provide medical care. The trend in the country is to hold assisted living facilities liable for conditions that would not be considered dangerous to mentally and physically capable people but are dangerous to the residents of an assisted living facility.[18]

[14] *See American Assisted Living Nurses Association Scope and Standards for Assisted Living Nurses*, http://www.alnursing.org/alnursecert/SCOPE_AND_STANDARDS_FINAL2_09-19-06.pdf

[15] Alabama is one of the few states that has enacted minimum staffing standards for specialty care ALFs. *See* 14. Ala. Admin. Code r. 420-5-20-.04.

[16] *See* the National Center for Assisted Living, Assisted Living Regulatory Review 2007. http://www.ncal.org/about/2007_reg_review.pdf

[17] AARP, *Direct Care Workers in Long-Term Care Research Report* , Bernadette Wright, AARP Public Policy Institute May 2005, http://www.aarp.org/research/long-termcare/nursinghomes/dd117_workers.html

[18] Recent appellate decisions involving premises liability include the following cases:

In *Klein v. BIA Hotel Corp.*, 41 Cal. App.4th 1133, 49 Cal.Rptr.2d 60, 96 Cal. Daily Op. Serv. 329, 96 Daily Journal D.A.R. 486 (Cal. App. 2 Dist.,1996), the Court held that the evidence of liability was sufficient to submit to a jury where an 85-year old fell or jumped from the roof of a residential care facility.

In *Hammack v. Lutheran Social Services of Michigan*, 211 Mich. App. 1, 535 N.W.2d 215 (Mich.App.,1995), the Court held that the defendants were not entitled to summary judgment or a directed verdict on negligence or premises liability claims where the decedent died after having a seizure in a bathtub.

**Defenses Differ in the ALF Setting**

There are other issues that differ in assisted living litigation. In the course of assisted living litigation, various defenses need to be considered in light of the ALF setting.

**Defense of Assumption of the Risk**

In *Storm v. NSL Rockland Place*, LLC, 898 A.2d 874, 884 (Del.Super.,2005), the Court rejected the defendant's claim that a resident who drank alcohol and refused to take his medication, assumed the risk of falling and sustaining a subdural hematoma, even where the residency agreement contained a waiver of liability clause:

> As to the second theme, there is virtually no scenario in which a patient can consent to allow a healthcare provider to exercise less than "ordinary care" in the provision of services.FN41 Even if given, a patient's consent to allow a healthcare provider to exercise less than ordinary care would be specious when considered against the strict legal, ethical and professional standards that regulate the healthcare profession. Regardless of whether the patient elects to have healthcare or requires it, the patient appropriately expects that the treatment will be rendered in accordance with the applicable standard of care. This is so regardless of how risky or dangerous the procedure or treatment modality might be.
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> FN41. The only such scenario that the Court can envision is where the patient gives informed consent to undergo an experimental medical procedure where the standards of care have not yet been fully developed or consents to treatment modalities known to be outside of the medical mainstream. *See e.g. Boyle v. Revici*, 961 F.2d 1060 (2d Cir.1992) and *Schneider v. Revici*, 817 F.2d 987 (2d Cir.1987) (holding that a jury charge on primary assumption of the risk was proper

[19] *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, --- So.2d ----, 2007 WL 597008 (Fla. App. 1 Dist.) at *3, 32 Fla. L. Weekly D574 (2007), in which the ALF resident died after being allegedly beaten and raped. The Court upheld the arbitration agreement but struck down the limitation on liability clause which limited liability to $250,000 and eliminated punitive damages:

> Nor did the trial court err in its substantive determination that the remedial limitations in the arbitration agreement were void as against the public policy of the statute. The arbitrability of statutory claims rests on the assumption that the arbitration clause permits relief equivalent to that available via the courts. An arbitration clause is thus unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations. *See Paladino v. Avnet Computer Techs., Inc.,* 134 F.3d 1054, 1062 (11th Cir.1998); *see also Romano,* 861 So.2d at 61-63.
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> Like the Nursing Home Residents Act, the Assisted Living Facilities Act is a remedial statute, designed to protect the residents of such facilities. *See Bryant,* 937 So.2d at 266. The arbitration agreement in the present case defeats the remedial purpose of the Act by eliminating punitive damages and capping noneconomic damages, so the trial court correctly ruled that it was void as against public policy. *See Bryant* at 266; *Lacey,* 918 So.2d at 334; *Romano,* 861 So.2d at 61-63; *see also Blankfeld,* 902 So.2d at 298-99; *SA-PG-Ocala,* 935 So.2d at 1242.

In *Alterra Healthcare Corp. v. Bryant*, 937 So.2d 263, 31 Fla. L. Weekly D2364 (Fla. App. 4 Dist.,2006), the Court upheld an arbitration agreement signed with a power of attorney but severed a limitation of liability clause.

In *Raper v. Oliver House*, LLC, 637 S.E.2d 551, 556 (N.C.App.,2006), the Court reversed the trial court's holding that a North Carolina arbitration agreement was unconscionable:

> The trial court erred in concluding the arbitration clause was unconscionable. The trial court's finding that there was no independent negotiation on the terms of the contract or the arbitration agreement is not supported by any competent evidence. Plaintiff admitted she signed the Agreement and stated she "voluntarily enter[ed] into this agreement with the facility." *See Sciolino v. TD Waterhouse Investor Servs., Inc.,* 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (The "apparent requirement for independent negotiation underscores the importance of an arbitration provision and militates against its inclusion in contracts of adhesion." (internal quotation omitted)), *disc. rev. denied,* 356 N.C. 167, 568 S.E.2d 611 (2002). The trial court also erred in finding the use of a standardized form *per se* by the parties led to unconscionability of the contract.
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> The trial court erred in concluding the arbitration clause was unconscionable because of a lack of mutual agreement or inequality of bargaining power. Plaintiff's proffered affidavit stated she "met with representatives of the Oliver House on September 1, 2001, in order to sign all of the documents necessary for Mr. Raper's admission to the Oliver House." Plaintiff also signed the Agreement and stated she "voluntarily enter[ed] into this agreement with the Facility."
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> The agreement to arbitrate is prominently located on the last page of the contract in bold face type, directly above plaintiff's signature. The provisions of the agreement to arbitrate are mutual and apply equally to all parties. The trial court's findings are not supported by any competent evidence and these unsupported findings of fact do not support a conclusion of unconscionability.
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> The trial court's determination that the arbitration clause is unconscionable because it deals with a matter of substantial importance is not based upon any competent evidence and does not overcome North Carolina's strong public policy presumption in favor of arbitration. *See Red Springs Presbyterian Church,* 119 N.C. App. at 303, 458 S.E.2d at 273 ("North Carolina has a strong public policy favoring arbitration.").
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> The trial court's finding of fact that the Agreement fails to clearly state who is bound is not supported by any competent evidence. The Agreement is clear, unambiguous, and names the decedent, plaintiff, and defendant Oliver House as parties. The trial court entered an uncontested finding of fact that plaintiff held decedent's power of attorney. Plaintiff signed the Agreement as the "Responsible Party." Defendants' motion sought to enforce the arbitration clause and Agreement against plaintiff.

*But see Giordano ex rel. Estate of Brennan v. Atria Assisted Living, Virginia Beach, L.L.C.*, 429 F.Supp.2d 732 (E.D.Va.,2006), where the Court held that daughter did not bind mother to arbitration agreement when she signed the residency agreement.

in medical malpractice case only where a patient knowingly passed on conventional medical treatment to undergo medical treatment that did not conform to accepted medical standards, such as ingesting non-FDA approved medication).

In *Williamson by Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (Neb.1996), the Court held that there was insufficient evidence of assumption of the risk where a resident of an assisted living facility fell on gravel while on an outing with the facility.

## Arbitration Clauses

Nursing homes are not alone in trying to limit jury verdicts by including arbitration clauses in their residency agreements. Although very few ALF cases have made their way into published appellate opinions, it appears as though the trend is that courts are enforcing the clauses.[19]

## Pre-suit Requirements

In *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321 (Tex.App.-San Antonio, 2006), the Court dismissed plaintiff's claims for failure to file a timely pre-suit expert report. In an unreported opinion, the Court in *Fallo v. McLean Ass'n, Inc.*, not Reported in A.2d, 2001 WL 950911 (Conn. Super. 2001), 30 Conn. L. Rptr. 217 (*citing*, *Badrigian v. Elmcrest Psychiatric Institute*, 6 Conn. App. 383, 386-87, 505 A.2d 741 (1986)), held that a certificate of an expert was not required in a case where a resident of an assisted living facility fell down the stairs because the alleged negligent supervision did not occur during the provision of medical treatment, and thus sounded in ordinary negligence and not in medical malpractice.

## Summary Judgment

*Warner v. Regent Assisted Living*, 132 Wash. App. 126, 130 P.3d 865 (Wash. App. Div. 1, 2006), in which the Court reversed a defense summary judgment, holding that there was sufficient evidence of abuse and neglect to create a jury question as to pain and suffering under the Washington Vulnerable Adult Statute. The abuse and neglect included leaving the resident in urine and feces, medications not being given,

Nursing home litigation provides an excellent basic education for ALF litigation. Be aware of the differences, and consult with nursing and medical experts with ALF experience for the best outcome. ALFs are increasingly becoming a more serious threat to the health and safety of frail elders than even nursing homes. Litigation appears to be the only way most negligent ALFs are held accountable for harming residents. Holding ALFs responsible for injuring helpless senior citizens advances the twin goals of compensating victims and improving the quality of care for seniors. ■

## About the Author

***Lisa J. Sansone*** graduated m*agna cum laude* from the University of Baltimore School of Law in 1992. She was an assistant editor of the *University of Baltimore Law Review*. In 1992, she was a law clerk to the Honorable Rosalyn B. Bell on the Court of Special Appeals of Maryland. In 1994, she opened the Law Office of Lisa J. Sansone, representing plaintiffs in complex civil litigation matters. Since 1998, Ms. Sansone has focused her practice on the representation of victims of nursing home abuse and neglect. She is a member of the Maryland Trial Lawyers Association and is the past chair of the Nursing Home Litigation Section. She is also a member of the American Association for Justice. She has lectured nationally on the topic of assisted living facilities. She is on the Board of Directors of Lighthouse Inc., a Maryland Youth Services Bureau organization providing mental health services to children with special needs and their families.