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Involuntary Discharge: Is an Assisted Living Resident Really a Tenant by Another Name?

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INVOLUNTARY DISCHARGE: IS AN ASSISTED LIVING RESIDENT REALLY A TENANT BY ANOTHER NAME?

I. INTRODUCTION

Imagine that Sally is sitting in her office one day when the phone rings.¹ She sees the phone number of her sister, Joan, who lives near their aging mother, Alice. Sally answers tentatively because her sister does not usually call during the work day. Joan tells Sally that their mother fell and broke her hip. She needs immediate surgery, hospitalization, and a few weeks of rehabilitation before she can return home.

Home for Alice is an assisted living facility (“ALF”) called Avalon.² Two years ago, she sold her home of forty years to move into Avalon

¹ The author crafted this hypothetical to illustrate the personal impact of involuntary discharge from an assisted living facility on residents and their families.

² The United States Congress defines “assisted living facility” as a public facility, proprietary facility, or facility of a private nonprofit corporation that—

(A) is licensed and regulated by the State . . . ;

(B) makes available to residents supportive services to assist the residents in carrying out activities of daily living, such as bathing, dressing, eating, getting in and out of bed or chairs, walking, going outdoors, using the toilet, laundry, home management, preparing meals, shopping for personal items, obtaining and taking medication, managing money, using the telephone, or performing light or heavy housework, and which may make available to residents home health care services, such as nursing and therapy; and

(C) provides separate dwelling units for residents, each of which may contain a full kitchen and bathroom, and which includes common rooms and other facilities appropriate for the provision of supportive services to the residents of the facility . . .

. . . .

12 U.S.C. § 1715w(b)(6) (2006). Generally, ALFs offer congregate residential housing for elderly residents augmented with a range of personal services, such as assistance with activities of daily living (“ADLs”), medication management, social services, and recreational activities. ERIC M. CARLSON, NAT’L SENIOR CITIZENS L. CTR., CRITICAL ISSUES IN ASSISTED LIVING: WHO’S IN, WHO’S OUT, AND WHO’S PROVIDING THE CARE 14 (2005) [hereinafter CARLSON, WHO’S IN], available at [http://www.nslc.org/areas/long-term-care/Assisted%20Living/article.2007-02 14.7789317669/at_download/attachment](http://www.nslc.org/areas/long-term-care/Assisted%20Living/article.2007-02%2014.7789317669/at_download/attachment). They provide an intermediate housing option between independent living and nursing home care. Jennifer Rae Fleming, *The Blurred Line Between Nursing Homes & Assisted Living Facilities: How Limited Medicaid Funding of Assisted Living Can Save Tax Dollars While Improving the Quality of Life of the Elderly*, 15 U. MIAMI BUS. L. REV. 245, 249 (2007). For a more detailed discussion of “assisted living” definitions, see *infra* notes 76–82 and accompanying text.

because she found it difficult to cook and keep house.³ She liked Avalon because it did not feel like a nursing home. The residents maintain their own private apartments and control their daily routine, which might include one of the myriad of activities planned by the facility. Alice was reassured during her admissions interview that the staff supported her independence and that additional services could be provided should her health deteriorate. She fully expected Avalon would be her last home.⁴ She quickly acclimated to life at Avalon, building new relationships and thriving more than she had in her own home.⁵ Alice's family was relieved that she was doing so well.

Doctors offered a promising prognosis for Alice's broken hip. Unfortunately, Avalon did not offer the services necessary to care for her during her recovery and rehabilitation. Once the initial crisis subsided, Sally and Joan began the tedious process of preparing the logistics of their mother's upcoming shift to a rehabilitation facility.

Sally made many phone calls, including one to Avalon informing them of Alice's condition and her short-term absence from the facility. That is when the bomb dropped. The Avalon manager announced that Alice could no longer live at the facility. The manager stated firmly that she must vacate her apartment within thirty days. Shocked, Sally asked, "Why?" After all, they had already paid the rent for this month and the next. The manager simply replied, "Alice's care needs exceed the services available here at Avalon."

³ See LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS 3-4 (2008) (indicating that the decision making involved in living alone and maintaining a home combined with the natural physical declines due to aging can be difficult for aging people to manage). See generally *id.* at 2-16 (suggesting that the physical, mental, and economic changes that accompany aging, as well as emotional issues and changing housing needs, affect the housing choices of older persons). The average assisted living resident is an eighty-four-year old white woman who requires assistance with three or more ADLs such as walking, bathing, or dressing. Sheryl Zimmerman et al., *How Good is Assisted Living? Findings and Implications from an Outcomes Study*, 60B J. OF GERONTOLOGY: SOC. SCI. S195, S198 (2005).

⁴ But see CARLSON, WHO'S IN, *supra* note 2, at 22-23 (encouraging prospective residents to be realistic about assisted living's limitations, which might force another move as they age, despite assisted living's perceived goal of aging-in-place). See generally Shulamit L. Bernard, Sheryl Zimmerman & J. Kevin Eckert, *Aging in Place*, in ASSISTED LIVING: NEEDS, PRACTICES, AND POLICIES IN RESIDENTIAL CARE FOR THE ELDERLY 224, 229 (Sheryl Zimmerman et al. eds., 2001) (identifying health status, social and economic resources, and demographic traits as factors that influence an ALF resident's ability to age-in-place).

⁵ See Lois J. Cutler, *Physical Environments of Assisted Living: Research Needs and Challenges*, 47 GERONTOLOGIST 68, 69, 76 (2007) (reporting research showing that ALF residents demonstrate increased functional levels and quality of life due to the homelike environment of the ALF setting).

“But she’ll be back to her former abilities in a few weeks,” Sally responded. “Her needs won’t be any different than they have been for the last two years once she completes rehab.” Avalon’s manager repeated, “I’m sorry, but under the admissions contract we are free to terminate any resident whose needs exceed the services we provide without regard to whether those needs are temporary or permanent. We sincerely hope your mother recovers, but, frankly, these episodes are usually the beginning of greater difficulties to follow.” Stunned, Sally hung up, told her sister, and started wondering what to do next.

This story illustrates how ALF residents live at the mercy of ALFs who retain unilateral discretion to evict, or involuntarily discharge, residents at any time, without any meaningful opportunity to challenge the decision.⁶ State regulatory schemes and ALF admission contracts facilitate this unilateral discretion.⁷ ALFs argue that such discretion and flexibility are necessary for maximizing the autonomy, choice, and dignity of residents as they age-in-place, the perceived hallmark of assisted living.⁸ Yet, such discretion also legitimizes ALF discharges executed to protect the facility’s marketing image or profit margin at the expense of residents with limited recourse.⁹ In contrast to vulnerable ALF residents, tenants in other rental situations generally enjoy statutory and common law protections from unreasonable eviction.¹⁰

⁶ See *infra* Part II.B (discussing the components of involuntary discharges from ALFs). Compare Table A-4: *Complaint Summary: Board and Care Facilities for FY 2008 by Group and Sub-Group*, in ADMIN. ON AGING, 2008 NAT’L OMBUDSMAN REPORTING SYS. DATA TABLES, at 9, available at http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2008/Index.aspx (reporting that in 2008, 17.77% of residents’ rights complaints in Board and Care Facilities, which includes ALFs, were related to admission, transfer, discharge, or eviction), with Table A-4: *Complaint Summary: Board and Care Facilities for FY 2004 by Group and Sub-Group*, in ADMIN. ON AGING, 2004 NAT’L OMBUDSMAN REPORTING SYS. DATA TABLES, at 10, available at http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2004/Index.aspx (reporting that in 1999, 16.36% of residents’ rights complaints in Board and Care Facilities, which includes ALFs, were related to admission, transfer, discharge, or eviction).

⁷ See *infra* Part II.B.1-2 (describing the current ALF regulatory environment and how the ALF residency agreement, or contract, actually dictates the terms of the ALF-resident relationship).

⁸ See *Assisted Living Regulations*, ASSISTED LIVING FEDERATION OF AMERICA, http://www.alfa.org/alfa/Consumer_Protection.asp?SnID=14902583044 (last visited July 25, 2010) (explaining to consumers that the assisted living industry resists additional government regulation on the grounds that it would limit the flexibility that allows them to “focus on choice and independence,” features that characterize the industry).

⁹ See *infra* Part II.B.2-3 (indicating that ALFs consider marketing and profitability when making discharge decisions without regard for the resident’s interest in aging-in-place and that appeal mechanisms are limited).

¹⁰ See *infra* Part II.A.2 (describing the modern statutory protections against residential tenant evictions).

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This Note proposes statutory reform that would extend the protections and remedies currently enjoyed by tenants facing eviction to ALF residents facing involuntary discharge. Comparing the vulnerability of ALF residents to involuntary discharge with the plight of tenants facing unreasonable eviction reveals striking similarities. This Note argues that those similarities justify statutory protections for ALF residents, such as disclosure of discharge criteria, notice and opportunity to remedy alleged breaches of the residency agreement, and an unwaivable right to judicial review of discharge decisions.

Part II of this Note traces the evolution of tenant protections against unreasonable evictions under landlord-tenant law and then provides background on the ALF involuntary discharge problem.¹¹ Part III analyzes the consumer protection needs of ALF residents and argues that landlord-tenant law is an appropriate model for a statutory solution to the ALF involuntary discharge problem.¹² Part IV presents a model statutory provision, which mandates an ALF discharge policy designed to preserve flexibility in the resident-ALF relationship while protecting residents from unreasonable discharge decisions.¹³

II. BACKGROUND

In the 1980s, the assisted living industry emerged as an attractive alternative long-term care option for elderly consumers who could no longer live independently but did not require full-time nursing home care.¹⁴ Unlike the nursing home industry, which accepts heavy regulation in exchange for federal funding through Medicare and Medicaid, ALFs remain predominantly private-pay arrangements, free from federal regulation that might otherwise dictate the terms of residency agreements between the facilities and their residents.¹⁵ In their

¹¹ See *infra* Part II (providing background information on landlord-tenant law and ALF involuntary discharges).

¹² See *infra* Part III (establishing the need for consumer protection of ALF residents and arguing that landlord-tenant law is an appropriate model for ALF statutory reform).

¹³ See *infra* Part IV (proposing a model ALF discharge policy to protect ALF residents from arbitrary discharge).

¹⁴ Fleming, *supra* note 2, at 246; Stuart D. Zimring, *Housing Options for the Elderly: Opportunities and Challenges*, 31 EST. PLAN. 321, 324 (2004); see also CARLSON, WHO'S IN, *supra* note 2, at 11 ("Assisted living is becoming a viable competitor to, and replacement for, nursing home care."). ALFs emphasize "greater diversity and innovation in service delivery, more consumer control over service options, and private apartments instead of shared rooms in hospital-like settings." Don Redfoot, *Assisted Living: The Next Generation*, CENTER FOR EXCELLENCE IN ASSISTED LIVING (July 2006), <http://www.theceal.org/column.php?ID=1>.

¹⁵ See Fleming, *supra* note 2, at 263-64 (differentiating ALFs from nursing homes based on their private-pay nature). Between 11.5% and 13.4% of ALF residents received Medicaid

residency agreements, ALF residents subscribe to needed services, such as meals, housekeeping, transportation, medication reminders, and assistance with activities of daily living (“ADLs”), which include bathing, dressing, and grooming.¹⁶ Residents continue to drive their own cars, assist in preparing their own meals, build social relationships, and participate in recreational activities both in the community and at the facility.¹⁷ Many thrive once relieved of the burdens of home maintenance and complete self-care.¹⁸

New ALFs continue to be built and the number of ALF residents continues to increase in response to the growing elderly population in need of long-term care.¹⁹ The following discussion describes how the

or other state funding in 2009. Compare ROBERT L. MOLLIKA, NAT’L CTR. FOR ASSISTED LIVING & AM. HEALTH CARE ASS’N, STATE MEDICAID REIMBURSEMENT POLICIES & PRACTICES IN ASSISTED LIVING 7 (2009) available at <http://www.ahcancal.org/ncal/resources/Documents/MedicaidAssistedLivingReport.pdf> (reporting that 134,345 ALF residents received state funding in 2009), with KARL POLZER, NAT’L CTR. FOR ASSISTED LIVING, ASSISTED LIVING STATE REGULATORY REVIEW 2009 Introduction (2009) (stating that of the approximately one million ALF residents living in America, 115,000 receive Medicaid). See generally Nursing Home Reform Act, 42 U.S.C. §§ 1395i-3, 1396r (2006) (imposing stringent regulations on nursing homes to protect residents from abuses that threaten their quality of life).

¹⁶ Lawrence A. Frolik, Walter T. Burke & Michael T. Kirtland, *Housing Options for the Older Client*, PROB. & PROP., Nov.–Dec. 2008, at 40, 42; see also Zimring, *supra* note 14, at 325 (indicating that ALF prices are established in the ALF residency agreement, which outlines the services selected by the resident).

¹⁷ See Cutler, *supra* note 5, at 76 (finding that ALF residents were more likely to continue pre-ALF activities than nursing home residents); Cheryl Cooper & Gordon Walker, *Case Study: Making Affordable Assisted Living Work: The Mountainside Senior Living Story*, AGE IN ACTION (Va. Commonwealth Univ./Va. Ctr. on Aging, Richmond, Va.), Summer 2008, at 4, available at <http://www.vcu.edu/vcoa/ageaction/agesummer08.pdf> (describing an ALF resident pursuing an active life comparable to her life before moving into the facility); see also J. Kevin Eckert, Sheryl Zimmerman & Leslie A. Morgan, *Connectedness in Residential Care: A Qualitative Perspective*, in ASSISTED LIVING: NEEDS, PRACTICES, AND POLICIES IN RESIDENTIAL CARE FOR THE ELDERLY 292, 292 (Sheryl Zimmerman et al. eds. 2001) (confirming the value of “connections between residents and staff, residents and residents, residents and the facilities in which they live, and residents and the larger community” through research employing evaluators visiting ALFs).

¹⁸ E.g., Cooper & Walker, *supra* note 17, at 4 (quoting an ALF resident who asserted that her life improved after moving into the ALF). See generally Debra Street et al., *The Salience of Social Relationships for Resident Well-Being in Assisted Living*, 62B(2) J. OF GERONTOLOGY: SOC. SCI. S129, S129 (2007) (“[E]xamin[ing] how organizational characteristics, transition experiences, and social relationships impact three subjective measures of well-being among assisted living residents: life satisfaction, quality of life, and perception that assisted living feels like home.”); Zimmerman et al., *supra* note 3, at S195 (“[D]etermin[ing] 1-year medical outcomes, nursing home transfer, and functional change of assisted living . . . residents and their relationship to care.”).

¹⁹ See POLICY COMMITTEE, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2005 WHITE HOUSE CONFERENCE ON AGING REPORT TO THE PRESIDENT AND THE CONGRESS: THE BOOMING DYNAMICS OF AGING 8 (2005) (predicting that eighty million Americans will be over the age

increasing demand for assisted living combined with a lack of state oversight has given ALFs unequal bargaining power to manipulate the terms of residency agreements, including the standard by which a resident is evaluated as fit to remain in the facility.²⁰ As a result, ALF residents in most states can be involuntarily discharged without an opportunity to demonstrate that they can still meet the facility's residency standard and without any judicial process to challenge the discharge decision.²¹ Prior to the 1960s and 1970s, tenants were similarly vulnerable to eviction from their homes by landlords who used standard form leases that advanced the interests of landlords over those of tenants.²² Responding to this problem, states enacted statutes that established rights, duties, and remedies for landlords and tenants and guaranteed judicial recourse to challenge eviction decisions.²³

Section A of this discussion describes the evolution of landlord-tenant law and how state legislatures eventually addressed the problem of unequal bargaining power by enacting consumer protection laws for

of sixty-five in 2040, as compared to the thirty-five million Americans in that category in 2000). In the last ten years, the number of licensed facilities increased fourteen percent with a concurrent fifteen percent increase in the sixty-five and older population. Compare ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2004 NAT'L OMBUDSMAN REPORTING SYS. DATA TABLES: TABLE A-6: LTC FACILITIES AND BEDS FOR FY 2004 1, available at http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2004/Index.aspx (reporting 43,943 licensed facilities in 1999 with a sixty-five and older population of 34,227,011), with ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2008 NAT'L OMBUDSMAN REPORTING SYS. DATA TABLES: TABLE A-6: LTC FACILITIES AND BEDS FOR FY 2008 1, available at http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2008/Index.aspx (reporting 50,116 licensed board and care facilities, which include ALFs, with a population of 39,409,722 individuals aged sixty-five and over in the United States). See generally *Start an Assisted Living Business – Franchise Opportunity*, COUNTRYPLACELIVING.COM, http://www.countryplaceliving.com/index.php?option=com_content&view=article&id=22&Itemid=10 (last visited July 31, 2010) (assuring potential investors that demand is the highest ever for senior housing and that assisted living is “the most rapidly growing type of senior housing in the country”); Press Release, TrinityCare Senior Living, Inc., TrinityCare Senior Living Announces \$1.65 Million Investment Agreement (Nov. 19, 2009), available at http://www.marketwire.com/mw/rel_us_print.jsp?id=1079181&lang=E1 (highlighting one publicly traded senior living company that continues to expand through new construction of ALFs).

²⁰ See *infra* Parts II.B.1-2 (presenting the current ALF regulatory environment and the unequal bargaining power that characterize the ALF experience for residents).

²¹ See *infra* Part II.B.3 (describing the lack of recourse available to discharged ALF residents).

²² See *infra* Part II.A.1 (tracing the evolution of landlord-tenant law).

²³ See *infra* Part II.A.2 (discussing the consumer protections supplied to tenants in landlord-tenant law).

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residential tenants.²⁴ Section B outlines the current regulatory environment of ALFs, the role of unequal bargaining power in the ALF involuntary discharge problem, and the current recourse available to discharged ALF residents.²⁵

A. *The Landlord-Tenant Model: Protection from Unreasonable Eviction*

An outgrowth of state police power to protect the health, safety, and welfare of citizens, modern landlord-tenant law amounts to “a kind of ‘consumer law’” that shields tenants from self-serving landlords.²⁶ The need for consumer protection of tenants stems from the inherent right to the sanctity of the home.²⁷ Courts have long espoused the sanctity of the home, particularly related to First Amendment speech, the Third Amendment prohibition against quartering of troops in peace time, the Fourth Amendment right to be free from search and seizure, and the Fifth and Fourteenth Amendments’ guarantee against deprivation of

²⁴ See *infra* Part II.A (describing landlord-tenant law’s solution to the problem of unreasonable eviction).

²⁵ See *infra* Part II.B (presenting the problem of ALF involuntary discharge).

²⁶ Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 545 (1982); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 820 (2001).

²⁷ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 992 (1982); see also *Miller v. United States*, 357 U.S. 301, 307 (1958) (tracing common law principles dubbing a man’s home as his castle back to the thirteenth century). The Court cited William Pitt as supporting the sanctity of the home in 1763 when he said:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Miller, 357 U.S. at 307. For a general discussion of the dominant role of the sanctity of the home in property law, see Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 768–71 (2009), tracing “property’s role in individual identity” from “Hegel’s emphasis on the development of individual identity through control over the material world” and other psychology theorists; John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 786–88 (2006), focusing on the “[h]eightedened [s]tatus of the [h]ome in [m]any [a]reas of [l]aw”; and Radin, *supra* note 27, at 957, exploring “the relationship between property and personhood” and asserting that “an individual needs some control over resources in the external environment,” through property rights, to “achieve proper self-development.” *Contra* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1093–94 (2009) (arguing that the “psychological importance attributed to the home” is a myth that has supported a movement to legislate protections and privileges for homeowners). Stern recognizes the overwhelming societal—and legal—acceptance of the “belief that homes are psychologically vital to their owners,” but questions whether the personal, intangible benefits of staying in one’s home justify the vast adoption of laws protecting homeowners from dislocation. *Id.* at 1096–97.

property without due process of law.²⁸ Generally, legal scholars assert that a person's property is an extension of personhood requiring protection in the form of property rights.²⁹ From this perspective, many view "their home [as] an extension of themselves, or like a part of their family, both in its expressive and protective aspects."³⁰ Justice Clarence Thomas recently confirmed the continued concern for the sanctity of the home in his dissent in *Kelo v. City of New London*, a decision that has been vehemently opposed as a violation of this right.³¹

The following section first traces the evolution of tenant rights, including protections against unreasonable eviction, from common law property principles and describes the factors that led states to develop landlord-tenant statutes.³² Subsequently, this section provides an

²⁸ U.S. CONST. amend. I; U.S. CONST. amend. III; U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* *Kyllo v. United States*, 533 U.S. 27, 34, 40 (2001) (requiring a warrant for surveillance of a home by thermal imaging based on sanctity of the home principles); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (affirming the primacy of the sanctity of the home in Fourth Amendment decisions regarding unreasonable searches and seizures); *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988) (reasoning that the sanctity of the home protects individuals in their homes from targeted picketing); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737-38 (1970) (using the sanctity of the home to justify its refusal to protect the delivery of unwanted materials to an individual's home); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (valuing the sanctity of the home in its holding protecting the possession of obscenity in the home).

²⁹ *Fee*, *supra* note 27, at 787; *Radin*, *supra* note 27, at 957; *Stern*, *supra* note 27, at 1095. *But see id.* at 1096 (arguing that the psychological importance of the home is not supported by research in psychology, sociology, and demography).

³⁰ *Fee*, *supra* note 27, at 788 (footnote omitted).

³¹ 545 U.S. 469, 518 (2005) (Thomas, J., dissenting). In *Kelo*, the City of New London adopted an economic redevelopment plan in an area of the city where a major pharmaceutical company committed to locate. *Id.* at 474. Property owners in the area challenged the city's use of eminent domain against their homes, asserting that the city lacked a valid public use for the property, as required under the Takings Clause of the Fifth Amendment. *Id.* at 472, 475. The Court held that the city's economic development plan constituted a valid public use that was rationally related to a conceivable public purpose. *Id.* at 484; *see also id.* at 490 (Kennedy, J., concurring) (suggesting that takings that "confer benefits on particular, favored entities, and with only incidental or pretextual public benefits" should not survive the rational-basis review that is appropriate under the Public Use Clause). Dissents by Justice O'Connor and Justice Thomas vehemently opposed the majority's holding and rationale suggesting the need for a heightened standard in determining whether economic development constitutes a public use. *Id.* at 501-04 (O'Connor, J., dissenting); *id.* at 521-23 (Thomas, J., dissenting). As the result of this attack on the sanctity of the home, grass roots campaigns have arisen in response to *Kelo*, generally seeking stricter criteria for application of the public use doctrine in order to protect homes from eminent domain. *Fee*, *supra* note 27, at 784. *Fee* posits the alternative approach of requiring governmental entities to compensate homeowners at an amount above market value in recognition of the innate value of the home in the event of a taking by eminent domain. *Id.* at 785. *Fee* argues that such a requirement would deter governmental entities from exceeding their eminent domain authority. *Id.* at 786.

³² *See infra* Part II.A.1 (presenting the historical context of landlord-tenant law).

overview of landlord-tenant statutes, which govern contemporary landlord-tenant relationships.³³

1. The Evolution of Landlord-Tenant Law

Landlord-tenant law grew out of common law property principles.³⁴ Initially, possessory interests in land were conveyed to tenants in exchange for services.³⁵ The land itself was the most valuable component of the leasehold.³⁶ Over time, however, tenants came to value possession of the residential components on the land more than the land itself.³⁷ Concerns by both landlords and tenants for property maintenance brought contractual elements into the leasehold relationship.³⁸ Even though courts continued to view leaseholds as the conveyance of a possessory interest, the contractual side of the leasehold gained favor in the early twentieth century and courts have since deferred to contractual terms in the resolution of landlord-tenant disputes.³⁹

As industrialization transformed the agrarian society into an urban one, the demand for reasonably priced urban rental housing skyrocketed while the supply remained limited.⁴⁰ This imbalance in supply and

³³ See *infra* Part II.A.2 (describing current landlord-tenant law that protects tenants from unreasonable eviction).

³⁴ JESSE DUKEMINIER ET AL., PROPERTY 361 (6th ed. 2006); see also CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY: AN HISTORICAL BACKGROUND OF THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION 7-9 (3d ed. 2002) (describing the legal relations between the feudal lord and tenant within a discussion of property law).

³⁵ MOYNIHAN & KURTZ, *supra* note 34, at 5.

³⁶ *Id.* at 8.

³⁷ Glendon, *supra* note 26, at 508; Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563, 1577 (1995); see also, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (finding the modern value of the lease to be that it provides a tenant with a place to live); MOYNIHAN & KURTZ, *supra* note 34, at 76 ("The relation of landlord and tenant normally arises from a contract whereby the owner of an estate in land transfers a possessory interest . . . in a building on the land, to a transferee in return for a consideration which is usually the payment of . . . rent.").

³⁸ Glendon, *supra* note 26, at 508. See generally Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 839 (1974) (stating that residential leases assure landlords as property owners "of continued income and protect[] the tenant against spiraling rent and eviction without cause"); Merrill & Smith, *supra* note 26, at 821 (describing the contractual component of leases as "reciprocal obligations between the landlord and the tenant").

³⁹ DUKEMINIER ET AL., *supra* note 34, at 374; Glendon, *supra* note 26, at 509-10. See generally Merrill & Smith, *supra* note 26, at 820-33 (identifying the *in rem* and *in personam* elements that are part of modern leases).

⁴⁰ E.g., *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979) (attributing the changes in the urban rental housing market, including the lack of affordable housing, to

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demand gave landlords the ability to develop standard form leases that protected their interests at the expense of tenants.⁴¹ Viewed as “‘grotesque’ demonstration[s] of the economic power of landlords and the ingenuity of their attorneys,” standard form leases required tenant compliance with impossible requirements that were used to justify eviction.⁴²

Fueled by Lyndon B. Johnson’s “Great Society” programs, which sought to increase the availability of accessible housing, tenant actions against landlords multiplied.⁴³ Courts attacked landlords and their standard form leases, applying contract principles such as mitigation of

industrialization and population growth); *see also* Glendon, *supra* note 26, at 510 (describing the lack of “public control over the quality, type and location of housing, rented or otherwise, in the nineteenth century, except in certain of the nation’s largest cities where conditions in the tenements that had appeared with industrial expansion and immigrations were believed to be a menace to public health”).

⁴¹ *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791 (1974) (describing form leases as slanted toward the interests of landlords).

⁴² Bentley, *supra* note 38, at 836, 847 (footnote omitted); *see also id.* at 837 (explaining that inattention to lessee interests and reliance on outdated contracts in standard form leases resulted in inaccurate representation of the rights of landlords and tenants). Standard form leases create unequal bargaining power by forcing non-negotiable terms on tenants with limited resources and options. *Seabrook v. Commuter Hous. Co., Inc.*, 338 N.Y.S.2d 67, 69 (N.Y. Civ. Ct. 1972). The monopoly held by landlords, thus, eliminates any market interest to negotiate specific terms with an individual tenant, leaving landlords holding all the power in the lease and its application. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 115–16 (7th ed. 2007) (expounding on the suspect nature of contracts of adhesion that counter the reasonable rationale for creating such contracts). The New York Court of Appeals connected housing shortages with unequal bargaining power in leases. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1292.

⁴³ Glendon, *supra* note 26, at 521; *see also* Merrill & Smith, *supra* note 26, at 820 (“[I]n the 1960s and 1970s, . . . tenants’ rights lawyers urged the wholesale revision of established tenets of landlord-tenant law to provide greater protection for tenants . . .”). *See generally* Sidney M. Milkis, *Lyndon Johnson, the Great Society, and the “Twilight” of the Modern Presidency*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 1–50 (Sidney M. Milkis & Jerome M. Mileur eds., 2005) (providing an overview of LBJ’s Great Society). The purpose of LBJ’s Great Society was to “address the underlying causes of social and political discontent: alienation, powerlessness, and the decline of community.” *Id.* at 3. Reformers at that time fostered community participation in improving the quality of American life that “evolved into new programmatic and procedural rights.” *Id.* at 36. The courts emerged as “guardian[s] of the ‘rights revolution’” focused on civil rights, consumer protection, and environmental protection. *Id.* During Johnson’s tenure as President, Congress responded to the civil rights movement and the war on poverty with considerable legislation, much of which continues to shape American society today. *See, e.g.*, Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 366 (1965) (authorizing Medicare); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

damages and mutual dependency of covenants to protect tenants.⁴⁴ During the same time, states began enacting statutes that defined the rights, duties, and remedies available to landlords and tenants.⁴⁵ The Uniform Residential Landlord and Tenant Act (“URLTA”) is an amalgamation of such statutes and will be used in this Note as representative of the states’ statutory responses to the problem of unequal bargaining power between landlords and residential tenants.⁴⁶

2. Modern Statutory Protections Against Residential Tenant Evictions

Today, landlord-tenant law codifies the common law principles that protected tenants from unreasonable eviction and promoted public safety and welfare.⁴⁷ Landlord-tenant laws define the terms of the

⁴⁴ For example, in New York, where rental housing plays a central role in the residential scheme, the Court of Appeals stated:

A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.

Park W. Mgmt. Corp., 391 N.E.2d at 1293. See generally John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213, 1214 (1983) (concluding that changes to landlord-tenant law related to mitigation of damages, warranty of habitability, and dependence of covenants exemplifies leases as conveyances). Such protections comport with historical common law principles valuing the sanctity of the home. See *supra* note 27 (providing background on the legal perspectives of the sanctity of the home).

⁴⁵ Glendon, *supra* note 26, at 523. However, state landlord-tenant laws only apply to leases entered for residential purposes. E.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.101 cmt (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx>.

⁴⁶ See *McCall v. Fickes*, 556 P.2d 535, 537–38 (Alaska 1976) (“The . . . Uniform Act constitutes a basic reform of landlord-tenant law, according tenants previously unrecognized rights by recognizing the contractual nature of the landlord-tenant relationship.”) (footnote omitted). To date, twenty-one states—Alabama, Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington—have adopted URLTA. Uniform Residential Landlord and Tenant Act, Fact Sheet, UNIFORM LAW COMMISSIONERS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urlta.asp (last visited Aug. 1, 2010). While this Note examines URLTA as representative of modern landlord-tenant statutes, URLTA does not reflect current law in all fifty states, including some adopting states that modified URLTA to meet their needs. See Chart: Landlord-Tenant Statutes, State by State, <http://realestate.findlaw.com/tenant/tenant-resources/state-landlord-tenant-laws.html> (last visited July 25, 2010) (providing hyperlinks to the landlord-tenant statute of each state and the District of Columbia).

⁴⁷ See *City of Evanston v. O’Leary*, 614 N.E.2d 114, 117 (Ill. App. Ct. 1993) (defining the City of Evanston’s Landlord Ordinance as “a remedial statute granting remedies for the

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landlord-tenant relationship by delineating the rights and duties of both parties.⁴⁸ Landlord-tenant statutes enforce these rights by mandating notice of any alleged lease breach, opportunity to remedy such breach, and access to the judicial process to review any adverse action, such as eviction.⁴⁹ Furthermore, landlord-tenant legislation ensures recourse for tenants by forbidding lease provisions that waive a tenant's statutory rights or remedies, or limit landlord liability.⁵⁰

Landlord-tenant statutes define the duties of landlords and tenants but allow parties to modify some default duties to meet unique needs.⁵¹ Landlord duties include the duty to deliver possession and the duty to maintain the premises, often referred to as the implied warranty of

protection of rights" because it was adopted "in order to protect and promote the public health, safety and welfare of the citizens"). The expansion of landlord-tenant legislation followed the Supreme Court's decision in *Lindsey v. Normet*, which affirmed legislative efforts in Oregon to regulate landlord-tenant relationships that went beyond existing common law remedies. 405 U.S. 56, 71-73 (1972); see also Glendon, *supra* note 26, at 528 (noting that the advent of landlord-tenant legislation compelled courts to shape common law within the legislative limits that transformed relationships between landlords and tenants); Radin, *supra* note 27, at 992-93 (attributing "the revolution in tenants' rights" to the interpretation by courts that tenant rights were closely linked to personhood and therefore worthy of special protection).

⁴⁸ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT arts. II-IV (defining the obligations and remedies of landlords and tenants).

⁴⁹ See *infra* notes 55-63 and accompanying text (explaining process requirements related to eviction).

⁵⁰ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT, which states that

[a] rental agreement may not provide that the tenant: agrees to waive or forego rights or remedies under this Act; . . . agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.

§ 1.403(a) (statutory numbering system omitted). This provision affirms decisions by courts to invalidate unconscionable adhesion clauses commonly found in standard form leases. *E.g.*, *Seabrook v. Commuter Hous. Co., Inc.*, 338 N.Y.S.2d 67, 73 (N.Y. Civ. Ct. 1972). The New Mexico Supreme Court affirmed the URLTA by stating that it allows a "court to make a determination of the underlying fairness of the rental agreement when made and [to allow for] selective enforcement of the contract to bring about an equitable result." *Ramirez-Eames v. Hover*, 775 P.2d 722, 724 (N.M. 1989). See generally Eric M. Carlson, *Protecting Rights or Waiving Them? Why "Negotiated Risk" Should Be Removed From Assisted Living Law*, 10 J. HEALTH CARE L. & POL'Y 287, 287-89 (2007) [hereinafter Carlson, *Negotiated Risk*] (discussing how ALFs incorporate negotiated risk provisions in residency agreements to limit liability).

⁵¹ *Merrill & Smith*, *supra* note 26, at 823-24; *e.g.*, WIS. STAT. ANN. § 704.05(3) (West 2001 & Supp. 2009) (prohibiting tenants from altering the living space they possess unless the landlord agrees to the changes); UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.401(a) ("A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this Act or other rule of law, including rent, term of the agreement, and other provisions governing the rights and obligations of the parties.").

habitability.⁵² Tenants accept statutory duties to pay rent, maintain the dwelling unit, and comply with rules adopted by the landlord.⁵³ Both landlords and tenants retain an unwaivable right of action in the event of noncompliance with the terms of the lease which allows either party to seek recovery of damages or termination of the lease.⁵⁴

Landlords, however, cannot use self-help tactics to evict a tenant.⁵⁵ Landlords must comply with statutory provisions governing evictions.⁵⁶ First, landlords must provide the tenant with adequate notice of the eviction.⁵⁷ The notice, properly served, will inform the tenant of any specific “acts and omissions constituting the breach” and the termination date of the lease.⁵⁸ In addition to notice, landlord-tenant statutes require

⁵² See UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 2.103, 2.104 (establishing the duty to deliver possession of the premises at the beginning of the lease term and specifying the landlord’s duty to maintain the premises). Also called the implied warranty of habitability, the duty to maintain the premises constituted a major focus of landlord-tenant reforms in the twentieth century. Bentley, *supra* note 38, at 871–75; Glendon, *supra* note 26, at 529–30; See also Merrill & Smith, *supra* note 26, at 826 (reporting that “most courts . . . have held that the warranty is mandatory and not subject to modification by the parties”). The URLTA codified the common law warranty of habitability doctrine then recognized in nine states and the District of Columbia. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104 cmt.

⁵³ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.401 (establishing tenant’s duty to pay rent as a condition of a lease); § 3.101 (expecting tenants to keep the dwelling unit clean and safe and requiring tenants to comply with landlord’s rules); § 3.102 (giving landlords the power to write rules and regulations into leases, within designated limits, and requiring tenants to comply); see also § 3.104 (limiting tenant usage of the unit to dwelling purposes and requiring tenants to occupy the dwelling unit).

⁵⁴ See *id.* § 1.105 (creating a private right of action for aggrieved parties and allowing recovery of appropriate damages after mitigation of damages); § 1.403(a)(1) (prohibiting tenants from waiving any rights or remedies put forth in the Act); see also MARGARET C. JASPER, *YOUR RIGHTS AS A TENANT* 77 (2007) (indicating that states devise appropriate remedies, such as damages, specific performance, or equitable relief, for breaches of duty by landlords and tenants).

⁵⁵ JASPER, *supra* note 54, at 66; MOYNIHAN & KURTZ, *supra* note 34, at 112–13. Self-help tactics include changing the locks, physical removal of a tenant’s person or property, or turning off utilities to make the property uninhabitable. JASPER, *supra* note 54, at 66; MOYNIHAN & KURTZ, *supra* note 34, at 112–13; see also Berg v. Wiley, 264 N.W.2d 145, 151 (Minn. 1978) (“[T]he only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord’s claim of breach of a written lease is by resort to judicial process.”). In *Berg*, the court reasoned that modern society provides legal remedies sufficient to eliminate the need for landlords to use self-help tactics against tenants. *Berg*, 264 N.W.2d at 151; see also Simpson v. Lee, 499 A.2d 889, 893 (D.C. 1985) (affirming the abrogation of self-help for commercial as well as residential leases).

⁵⁶ JASPER, *supra* note 54, at 61.

⁵⁷ *Id.*

⁵⁸ E.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201(a) (outlining the contents of proper notice and suggesting at least thirty days notice of termination); see also JASPER, *supra* note 54, at 62 (describing methods of proper service).

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landlords to offer tenants an opportunity to remedy any breach.⁵⁹ Should the tenant fail to remedy the breach in the time allotted, the lease terminates.⁶⁰ Should the tenant refuse to leave, the landlord still cannot employ self-help tactics to remove the tenant.⁶¹ The landlord must resort to filing a lawsuit to regain possession.⁶² On the other hand, if a tenant finds the landlord's eviction to be unjust, the tenant may also file a lawsuit in order to enforce the right of possession.⁶³

Under common law, notice and opportunity to remedy requirements evolved in response to landlords' abuses of summary proceedings to evict tenants before the agreed-upon termination date for the lease.⁶⁴ Incorporation of these common law protections into modern landlord-tenant statutes provides substantial recourse to tenants.⁶⁵ Fundamentally, however, principles of notice and opportunity to remedy, along with the prohibition of self-help tactics, support the ultimate statutory remedy for unreasonable eviction—access to the judicial process.⁶⁶

B. The ALF Involuntary Discharge Problem: Unilateral Discretion of ALFs

ALF residents face problems comparable to those of tenants before statutory reform provided meaningful protections from unreasonable eviction.⁶⁷ ALF-resident relationships are governed by the residency

⁵⁹ *E.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201(a) (allowing tenants fourteen days to remedy any breach); *see also* JASPER, *supra* note 54, at 62 (explaining that proper notice provides tenants with a chance to rectify the breach if possible before forcing a tenant to move).

⁶⁰ *E.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201(a) (providing for termination following a tenant's failure to remedy a breach of the lease).

⁶¹ *See supra* note 55 (discussing the prohibition on self-help tactics in evictions).

⁶² MOYNIHAN & KURTZ, *supra* note 34, at 112-13.

⁶³ *E.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.101 (allowing a tenant to terminate a lease in the event of the landlords' noncompliance with lease terms so long as the tenant provides the landlord with notice of the breach and an opportunity to cure the breach). This statutory option for tenants essentially codifies the common law theory of constructive eviction, which allows a tenant to terminate a lease and the duty to pay rent if the landlord's conduct results in a substantial deprivation of the tenant's right to use and enjoy the premises so long as the tenant gives the landlord notice of each breach and an opportunity to cure any deficit. DUKEMINIER ET AL., *supra* note 34, at 427-28; MOYNIHAN & KURTZ, *supra* note 34, at 97-98.

⁶⁴ Bentley, *supra* note 38, at 847 n.57. Thus, notice and opportunity to remedy requirements protected tenants from unreasonable eviction before the statutory reforms reflected in the URLTA were enacted. *Id.* at 868.

⁶⁵ Glendon, *supra* note 26, at 535.

⁶⁶ *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.105 cmt. ("[A]ny right or obligation described in this Act is enforceable by court action.").

⁶⁷ *See supra* Part II.A.1 (describing the unequal bargaining power in leases that made tenants vulnerable to unreasonable eviction).

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agreement over which ALFs retain almost complete control.⁶⁸ ALF residents accept contracts, drafted by the ALF, without understanding discharge policies that could force them to move when they least expect it.⁶⁹ This Part discusses the components of ALF involuntary discharges.⁷⁰ First, this Part describes the current regulatory environment in which ALFs operate.⁷¹ Next, this Part addresses how unequal bargaining power in the ALF-resident relationship gives ALF management unilateral discretion to set and interpret the material terms of residency agreements, including the grounds for discharge.⁷² Last, this Part outlines the current range of options available to ALF residents facing involuntary discharge.⁷³

1. Current Regulatory Environment

Unfettered by federal involvement in the assisted living industry, ALFs are only subject to minimal state licensing requirements.⁷⁴ State regulations establish the parameters for ALF operation by defining

⁶⁸ See *infra* Part II.B.2 (discussing the role of residency agreements in ALFs).

⁶⁹ See *infra* Part II.B.3 (explaining ALF discretion in establishing discharge policies and delineating the limited recourse options available to ALF residents).

⁷⁰ See *infra* Part II.B (providing background information to the ALF involuntary discharge problem).

⁷¹ See *infra* Part II.B.1 (summarizing the current regulatory scheme of ALFs).

⁷² See *infra* Part II.B.2 (explaining the impact of unequal bargaining power on ALF residents).

⁷³ See *infra* Part II.B.3 (delineating the recourse options available to discharged ALF residents).

⁷⁴ THOMAS D. BEGLEY, JR., NAT'L ACAD. OF ELDER LAW ATTORNEYS, WHITE PAPER ON ASSISTED LIVING 2 (2001). The Executive Vice President and Chief Financial Officer of a senior living corporation demonstrates a corporate perspective on government regulation of assisted living as follows:

[Assisted living is] a very competitive market driven environment and the nice thing about being in a private pay business is the government isn't paying us. So they really don't have any real reason to over-regulate us. There are some fake licensing objectives [for assisted living], but to [sic] the most part, we're a consumer driven business and we operate in a private pay environment.

Ralph Beattie, EVP & CFO, Capital Senior Living Corp., Capital Senior Living Corporation Wall Street Analyst Forum (May 23, 2007) (transcript available at <http://seekingalpha.com/article/36321-capital-senior-living-wall-street-analyst-forum-presentation-transcript>). See generally Patrick A. Bruce, Note, *The Ascendancy of Assisted Living: The Case for Federal Regulation*, 14 ELDER L.J. 61, 69 (2006) (differentiating ALFs from nursing homes primarily by the lack of federal regulation of ALFs before advocating for the development of a federal regulatory scheme for assisted living).

assisted living generally, limiting levels of care, and providing public health and safety standards within which ALFs must operate.⁷⁵

State definitions of assisted living vary widely.⁷⁶ Even the labels for assisted living differ and include “Residential Care Facility,” “Adult Residential Care,” “Personal Care Home,” and “Community-Based Residential Facility,” among others.⁷⁷ Where states attempt to define assisted living, often the language asserts goals and general categories of services without defining specific services and components of the assisted living experience.⁷⁸ For example, Iowa defines assisted living as

provision of housing with services which may include but are not limited to health-related care, personal care, and assistance with instrumental [ADLs] to three or more tenants in a physical structure which provides a homelike environment. “Assisted living” also includes encouragement of family involvement, tenant self-direction, and tenant participation in decisions that emphasize choice, dignity, privacy, individuality, shared risk, and independence. “Assisted living” includes the provision of housing and assistance with instrumental [ADLs] only if personal care or health-related care is also included. “Assisted living” includes twenty-four hours per day response staff to meet scheduled and unscheduled or unpredictable needs in a manner that promotes maximum dignity and independence and provides supervision, safety, and security.⁷⁹

⁷⁵ See generally POLZER, *supra* note 15 (summarizing state licensing regulations based on regulatory agency contact information, current legislative and regulatory efforts, definitions, scope of care, disclosure requirements, admission and discharge criteria, resident assessment, physical plant requirements, medication management, staffing, financing, Alzheimer’s or dementia care, and safety issues); *infra* notes 76–87 and accompanying text (discussing vague regulatory language defining assisted living and levels of care). For an example of public health and safety standards in ALFs, see MONT. ADMIN. R. 37.106.2835–37.106.2982 (2004), MT ADC 37.106.2835 (Westlaw), available at <http://www.mtrules.org/Gateway/Department.asp?DeptNo=37>, which regulates building specifications, medication management, meal preparation, staff training and qualifications, and other details related to the facility and the services offered to residents.

⁷⁶ Fleming, *supra* note 2, at 249; BEGLEY, *supra* note 74, at 6.

⁷⁷ See CARLSON, WHO’S IN, *supra* note 2, at 72–73 (listing the names used for assisted living in each state as determined by a fifty-state analysis of ALF regulation conducted in 2005).

⁷⁸ *Id.* at 14.

⁷⁹ IOWA CODE ANN. § 231C.2(2) (West 2006 & Supp. 2010) (alterations added).

Arizona's definition of an ALF is more concise, but similarly vague: "a residential care institution . . . that provides or contracts to provide supervisory care services, personal care services or directed care services on a continuing basis."⁸⁰ Such vague definitions permit ALFs to provide extensive services, without requiring them to provide any specific services.⁸¹ As a result, ALF management defines the services provided in their facilities, which gives them control over discharge criteria and decisions.⁸²

⁸⁰ ARIZ. ADMIN. CODE § R9-10-101.9 (2008), AZ ADC R9-10-101 (Westlaw), available at http://www.azsos.gov/public_services/Title_09/9-10.htm.

⁸¹ CARLSON, WHO'S IN, *supra* note 2, at 16.

⁸² *Id.* at 16; see Eric M. Carlson, *Assisted Living: Oasis or Mirage*, TALKINGJUSTICE BLOG para. 5 (Feb. 15, 2008, 1:45 PM) (on file with author) [hereinafter Carlson, TALKINGJUSTICE BLOG] ("[A]ssisted living providers argue that the definitional looseness gives facilities the flexibility to provide individualized care. But under many states' laws, there are no assurances that facilities will use this flexibility to benefit residents."); *infra* notes 117-23 and accompanying text (discussing how ALF discretion shapes an ALF's motivations for discharge decisions); see also *Assisted Living Regulations*, *supra* note 8 (informing consumers that existing flexible, consumer-based state regulation of ALFs is the best way to ensure maximum independence and choice for ALF residents). For examples of definitions of assisted living from non-regulatory sources, see generally *Assisted Living Assocs. of Moorestown, L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 415-16 (D.N.J. 1998) (explaining how assisted living intentionally allows residents to age-in-place and how it achieves that goal); Frolik, Burke & Kirtland, *supra* note 16, at 41-43 (describing assisted living in terms of the physical environment, the range of services provided, the costs, admission contracts, and state licensing regulations); Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 136-37 (2004) (pointing out the unsettled nature of any definition but concluding that assisted living includes residences that provide some medical and personal services, placing them between independent living where no such services are provided and nursing homes where extensive skilled nursing services are provided). In a report to the United States Senate Special Committee on Aging, the Assisted Living Workgroup created a consumer-friendly definition of assisted living that states:

Assisted living is a state regulated and monitored residential long-term care option. Assisted living provides or coordinates oversight and services to meet the residents' individualized scheduled needs, based on the residents' assessments and service plans and their unscheduled needs as they arise. Services that are required by state law and regulation to be provided or coordinated must include but are not limited to: 24-hour awake staff to provide oversight and meet scheduled and unscheduled needs; Provision and oversight of personal and supportive services (assistance with [ADLs] and instrumental [ADLs]); Health related services (e.g. medication management services); Social services; Recreational activities; Meals; Housekeeping and laundry; Transportation[.] A resident has the right to make choices and receive services in a way that will promote the resident's dignity, autonomy, independence, and quality of life. These services are disclosed and agreed to in the contract between the provider and resident. Assisted living does not generally provide ongoing, 24-hour skilled nursing.

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In addition to defining assisted living, state regulations limit the levels of care that an ALF can provide.⁸³ States offer little guidance to ALFs regarding the type of care they can choose to provide.⁸⁴ Regulations usually mandate that ALFs provide assistance with ADLs.⁸⁵ States typically do not specify, however, other types of care an ALF may provide.⁸⁶ They simply delineate services that ALFs cannot provide to residents, such as ventilators, gastric tubes, and psychotropic drugs.⁸⁷

ASSISTED LIVING WORKGROUP, ASSURING QUALITY IN ASSISTED LIVING: GUIDELINES FOR FEDERAL AND STATE POLICY, STATE REGULATION, AND OPERATIONS 12 (2003), available at <http://www.theceal.org/ALW-report.php> (bulleted format omitted).

⁸³ CARLSON, WHO'S IN, *supra* note 2, at 19-21. States typically mandate levels of care through licensing requirements, but not all states require ALFs to be licensed. See generally BEGLEY, *supra* note 74, at 4 (describing licensing in general and highlighting Texas for its unlicensed model); BERNADETTE WRIGHT, AARP PUB. POLICY INST., ASSISTED LIVING IN UNLICENSED HOUSING: THE REGULATORY EXPERIENCE OF FOUR STATES (2007), available at http://www.aarp.org/home-garden/livable-communities/info-2007/2007_08_housing.html (reporting on the experiences of Connecticut, Minnesota, New Jersey, and North Carolina with unlicensed housing). Minnesota's ALFs are also unlicensed and are defined by statute as housing with service establishments. MINN. STAT. ANN. § 144D.01(4) (West 2005 & Supp. 2010). Instead of licensing ALFs, Minnesota regulates home care service licensing, which is a necessary component in housing with services establishments. MINN. R. 4668.0012 (2009), MN ADC 4668.0012 (Westlaw), available at <https://www.revisor.mn.gov/rules/?id=4668>.

⁸⁴ Carlson, TALKINGJUSTICE BLOG, *supra* note 82, at para. 7. Some states, seeking to protect ALF residents from the abuse of discretion by ALFs, create multiple levels of care for which ALFs can be licensed. See, e.g., 016-06-001 ARK. CODE R. (Weil 2009), 016 06 CARR 001 (LEXIS), available at <http://170.94.37.152/REGS/016.06.06-005F-8391.pdf> (presenting licensure requirements for Level I ALFs); 016-06-002 ARK. CODE R. (Weil 2009), 016 06 CARR 002 (LEXIS), available at <http://170.94.37.152/REGS/016.06.02-030F.pdf> (presenting licensure requirements for Level II ALFs); N.Y. COMP. CODES R. & REGS. tit. 10, § 1001.5 (2008), 10 NY ADC 1001.5 (Westlaw), available at http://www.health.ny.gov/regulations/nycrr/title_10/ (follow "Search Title 10" hyperlink; then search for "1001.5") (delineating licensure requirements for assisted living residences, enhanced assisted living, and special needs assisted living). In this model, states mandate more restrictive admission and retention criteria, which increase the likelihood of ALF resident discharge. See Zimmerman et al., *supra* note 3, at S202.

⁸⁵ E.g., ALA. ADMIN. CODE r. 420-5-4.06(3)(d) (2004), AL ADC 420-5-4-.06 (Westlaw), available at <http://www.alabamaadministrativecode.state.al.us/docs/hlth/index.html> (requiring ALFs to provide assistance with ADLs to residents).

⁸⁶ See CARLSON, WHO'S IN, *supra* note 2, at 9-10 (suggesting that states could but do not "specify that certain care needs must be met, or explicitly require that a facility meet reasonable care needs").

⁸⁷ For example, Virginia's Administrative Code states the following:

Assisted living facilities shall not admit or retain individuals with any of the following conditions or care needs: Ventilator dependency; Dermal ulcers III and IV except those stage III ulcers that are determined by an independent physician to be healing...; Intravenous therapy or injections directly into the vein, except for intermittent intravenous therapy managed by a health care professional licensed in Virginia...; Airborne infectious disease in a

From these vague provisions regulating levels of care in ALFs, states establish retention criteria that are typically very general and require ALFs to discharge residents when their need for services exceeds the level of care for which the facility is licensed.⁸⁸ For instance, the Virginia Administrative Code states:

communicable state that requires isolation of the individual or requires special precautions by the caretaker to prevent transmission of the disease, including diseases such as tuberculosis and excluding infections such as the common cold; Psychotropic medications without appropriate diagnosis and treatment plans; Nasogastric tubes; Gastric tubes except when the individual is capable of independently feeding himself and caring for the tube . . . ; Individuals whose physical or mental health care needs cannot be met in the specific assisted living facility as determined by the facility.

22 VA. ADMIN. CODE § 40-72-340(G)(1)-(7), (12) (2009) (regulation numbering system omitted), 22 VA ADC 40-72-340 (Westlaw), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+22VAC40-72-340>. States typically prohibit provision of skilled nursing care. Assisted Living Regulations, *supra* note 8; see, e.g., ALA. ADMIN. CODE r. 420-5-4.05(3)(a)2.(vii) (2005), AL ADC 420-5-4-.05 (Westlaw), available at <http://www.alabamaadministrativecode.state.al.us/docs/hlth/index.html> (requiring ALFs to inform residents that skilled nursing services are unavailable in the facility).

⁸⁸ BEGLEY, *supra* note 74, at 16; Carlson, TALKINGJUSTICE BLOG, *supra* note 82, at para. 7; e.g., ALA. ADMIN. CODE r. 420-5-4.03(1)(c)5, AL ADC 420-5-4-.03, (regulation numbering system omitted) (“[ALFs] shall establish and implement written policies . . . [including] [w]hat services the facility is capable and not capable of providing.”); 55 PA. CODE § 2600.228(h)(3) (2007), 55 PA ADC § 2600.228 (Westlaw), available at <http://www.pacode.com/secure/data/055/055toc.html> (defining grounds for discharge as a change in the “functional level” of residents such that the personal care home cannot meet their needs). Indiana’s ALF regulations state:

The resident must be discharged if the resident: is a danger to the resident or others; requires twenty-four (24) hour per day comprehensive nursing care or comprehensive nursing oversight; requires less than twenty-four (24) hour per day comprehensive nursing care, comprehensive nursing oversight, or rehabilitative therapies and has not entered into a contract with an appropriately licensed provider of the resident's choice to provide those services; is not medically stable; or meets at least two (2) of the following three (3) criteria unless the resident is medically stable and the health facility can meet the resident's needs: Requires total assistance with eating. Requires total assistance with toileting. Requires total assistance with transferring.

410 IND. ADMIN. CODE 16.2-5-0.5(f) (2008), 410 IN ADC 16.2-5-0.5 (Westlaw), available at http://www.in.gov/legislative/iac/iac_title?iact=410 (regulatory numbering system omitted); see also ROBERT L. MOLLICA, AM. SENIOR HOUS. ASS’N, AGING IN PLACE IN ASSISTED LIVING: STATE REGULATIONS AND PRACTICE 2 (2005), available at <http://nashp.org/node/776> [hereinafter MOLLICA, AGING IN PLACE] (identifying very general factors used by states when defining admission and retention policies, which include the following: “[g]eneral condition,” “[h]ealth related conditions,” “[f]unctional capacity,” “Alzheimer’s disease and dementia,” and “[b]ehaviors”); ALFA in the States: State Regulations and Licensing, ALFA.ORG, http://www.alfa.org/alfa/State_Regulations_and_Licensing_Informat.asp?Sn

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No resident shall be admitted or retained: [f]or whom the facility cannot provide or secure appropriate care; [w]ho requires a level of care or service or type of service for which the facility is not licensed or which the facility does not provide; or [i]f the facility does not have staff appropriate in numbers and with appropriate skill to provide the care and services needed by the resident.⁸⁹

Some states, however, appear to protect ALF residents through regulations that allow ALFs to retain residents whose needs exceed available services in certain situations.⁹⁰ States enact such provisions in order to facilitate aging-in-place to the maximum extent possible.⁹¹ Yet, states rely on the discretion of ALFs to grant or deny such additional services to residents.⁹²

ID-1844188186 (last visited July 25, 2010) (providing additional examples of assisted living regulations through links to the assisted living regulations in all fifty states). With the discretion afforded to ALFs by minimal, vague state regulations, some ALFs might “provide extensive, individualized services,” while other “less ambitious or conscientious providers [might] cut corners or force out residents who are considered undesirable for one reason or another.” CARLSON, WHO’S IN, *supra* note 2, at 16. Other reasons

frequently cited by states as permissible grounds for discharging residents from [ALFs] include nonpayment; resident’s needs that exceed facility licensure; facility inability to meet resident’s needs; resident’s inability to care for self or to direct care; resident’s posing an imminent danger to self or others; and resident’s failure to comply with facility policies or rules.

BEGLEY, *supra* note 74, at 16.

⁸⁹ 22 VA. ADMIN. CODE § 40-72-340(A) (2009), 22 VA ADC 40-72-340 (Westlaw), available at <http://leg1.state.va.us/000/reg/TOC.HTM> (regulation numbering system omitted).

⁹⁰ See, e.g., OR. ADMIN. R. 411-054-0080 (2007), OR ADC 411-054-0080 (Westlaw), available at http://www.sos.state.or.us/archives/rules/number_index.html (encouraging facilities to accommodate needs of residents as long as such accommodation does not become detrimental to the resident because of the safety and medical limitations of the facility); 22 VA. ADMIN. CODE § 40-72-340(J) (2009), 22 VAC 40-72-340 (Westlaw), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+22VAC40-72-340> (permitting the provision of some prohibited medical services upon request of the resident and approval of a physician). Some state regulations may authorize ALFs to allow residents to remain despite excessive needs if the resident performs or directs his or her own care, experiences only a temporary care need, or permits family members or home health and hospice agencies to provide necessary care. CARLSON, WHO’S IN, *supra* note 2, at 25–32. Other states may allow ALFs to retain residents after evaluating each situation individually. *Id.* at 28.

⁹¹ See CARLSON, WHO’S IN, *supra* note 2, at 34 (indicating that residents benefit when they gain consent to increased services to prevent moving).

⁹² See *id.* (contrasting the benefits of such discharge exceptions with the temptation of facilities to reject resident requests for additional services to avoid inconvenience or expense).

Consequently, without detailed regulation of what services must be provided to residents, each ALF decides for itself, based on its mission and business plan, what services to provide, when a resident's needs exceed those services, and when to discharge a resident.⁹³ When exercising this discretion appropriately, ALFs succeed in maximizing each resident's ability to age-in-place by providing the appropriate care to meet the resident's physical, mental, and emotional needs.⁹⁴ Nonetheless, that same discretion can result in discharge before a resident's needs exceed the level of care the facility can provide, thus restricting the resident's autonomy and precluding aging-in-place.⁹⁵

2. Unequal Bargaining Power and the Involuntary Discharge Problem

Legislators, intending to promote resident independence and the aging-in-place philosophy, have intentionally preserved the right of ALFs and prospective residents to negotiate the terms of residency agreements.⁹⁶ Thus, by omission, states have relegated primary control

⁹³ *Id.* at 33–34; MOLLICA, AGING IN PLACE, *supra* note 88, at 2.

⁹⁴ BEGLEY, *supra* note 74, at 7; CARLSON, WHO'S IN, *supra* note 2, at 44.

⁹⁵ CARLSON, WHO'S IN, *supra* note 2, at 44–45. Discharging too late is also a risk that comes with providers' broad discretion. *Id.* at 45. In these cases, ALFs may intend to maximize autonomy and aging-in-place but end up decreasing the resident's quality of life by not being able to provide needed care. *Id.* ALF residents have been found dead from exposure to extreme weather after having walked away from the facility unnoticed. *E.g.*, Mike Martindale, *Assisted-Living Facility Sued Over Death of Joe Louis' Sister*, THE DETROIT NEWS, July 17, 2008, at 1B (reporting that boxer Joe Louis's sister was found having frozen to death after leaving the assisted living facility where she lived). Other stories tell of assisted living residents that endure infected pressure sores or malnourishment because a facility failed to care properly for their needs. CARLSON, WHO'S IN, *supra* note 2, at 45.

⁹⁶ *See* Fleming, *supra* note 2, at 253. Illinois uses eloquent, but vague language to describe its intention that ALFs retain flexibility and rely on contractual relationships with residents as follows:

The purpose of the Act is to permit the development and availability of [ALFs] based on a social model that promotes the dignity, individuality, privacy, independence, autonomy, and decision-making ability and the right to negotiated risk of those persons; to provide for the health, safety, and welfare of those residents residing in [ALFs] in this State; to promote continuous quality improvement in assisted living; and to encourage the development of innovative and affordable [ALFs] for elderly persons of all income levels. It is the public policy of this State that assisted living is an important part of the continuum of long term care. In support of the goal of aging in place within the parameters established by the Act, [ALFs] shall be operated as residential environments with supportive services designed to meet the individual resident's changing needs and preferences. The residential environment shall be designed to encourage family and community involvement. The services available to residents, either directly or through contracts or agreements, are intended to help

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of ALF-resident relationships to freedom of contract.⁹⁷ In theory, the flexibility that freedom of contract brings to ALF-resident relationships is mutually beneficial.⁹⁸ Through negotiation, a resident can personalize the ALF experience to meet residential care needs and the ALF can maintain control over available services.⁹⁹ Freedom of contract provides

residents remain as independent as possible. Assisted living, which promotes resident choice, autonomy, and decision-making, should be based on a contract model designed to result in a negotiated agreement between the resident or the resident's representative and the provider, clearly identifying the services to be provided. . . . This model supports the principle that there is an acceptable balance between consumer protection and resident willingness to accept risk and that most consumers are competent to make their own judgments about the services they are obtaining. Regulation of [ALFs] must be sufficiently flexible to allow residents to age in place within the parameters of the Act. The administration of the Act and services provided must therefore ensure that the residents have the rights and responsibilities to direct the scope of services they receive and to make individual choices based on their needs and preferences. These establishments shall be operated in a manner that provides the least restrictive and most homelike environment and that promotes independence, autonomy, individuality, privacy, dignity, and the right to negotiated risk in residential surroundings.

ILL. ADMIN. CODE tit. 77, § 295.100(a) (2008), 77 IL ADC 295.100 (Westlaw), available at <http://www.ilga.gov/commission/jcar/admincode/077/07700295sections.html> (regulation numbering system omitted). Michigan relies almost totally on the ALF contract to govern ALF-resident relationships as evidenced through their brief Housing-With-Services Contract Act, which includes minimal requirements and minimal consumer protections in all areas of ALF life. MICH. COMP. LAWS ANN. §§ 333.26501–26507 (West Supp. 2010); see also Carlson, *Negotiated Risk*, *supra* note 50, at 292 (stating that state laws do not address difficult ALF issues and assume “explicitly or implicitly that those issues will be resolved by the resident and the facility”).

⁹⁷ See, e.g., CAL. CODE REGS. tit. 22, § 87616 (2008), 22 CA ADC § 87616 (Westlaw), available at <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/rcfeman4.pdf> (allowing Residential Care Facilities for the Elderly—California’s name for ALFs—to contractually agree to provide proscribed services to residents with statutorily defined prohibited or restrictive health conditions).

⁹⁸ See *Assisted Living in the 21st Century: Examining Its Role in the Continuum of Care: Hearing Before the S. Spec. Comm. on Aging*, 107th Cong. 4 (2001) [hereinafter 2001 Senate Committee Hearing] (statement of Sen. Ron Wyden) (encouraging retention of flexibility in state assisted living regulations in order to foster creativity and innovation in ALFs); MOLLICA, *AGING IN PLACE*, *supra* note 88, at 13 (endorsing state policies that afford ALFs the flexibility to address each resident’s unique needs as they arise); Fleming, *supra* note 2, at 270 (acknowledging that flexibility is both the greatest strength and the greatest weakness of assisted living).

⁹⁹ See FROLIK, *supra* note 3, at 202 (“The goal of any [ALF] is to match its services to its resident’s needs rather than attempting to force the resident to adapt to the services provided by the facility.”). But see BEGLEY, *supra* note 74, at 8 (“There is no indication that in the real world, potential residents would actually negotiate with [ALFs]. It is more likely

the flexibility necessary for both parties to reach an agreement that effectively represents their independent interests.¹⁰⁰ Yet, the economic forces of increased demand and limited supply allow ALFs to dominate contract negotiations with prospective residents who lack alternative housing options.¹⁰¹ Such unequal bargaining power results in vague contractual terms that ALFs can unilaterally define, enforce, or change.¹⁰²

that potential residents would find themselves signing form contracts prepared by the facilities.”).

¹⁰⁰ See RESTATEMENT (SECOND) OF CONTRACTS §§ 1-3 (2007) (defining a contract in terms of promises growing out of an agreement reached through mutual assent of the parties); 1-5 Eric M. Carlson, Long-Term Care Advocacy (MB) § 5.07[2][a] (2009), 1-5 Long-Term Care Advocacy § 5.07 (LEXIS) [hereinafter Carlson, Long-Term Care] (“Proponents of assisted living claim that this flexibility allows facilities and residents to negotiate arrangements that are tailored to a resident’s individual situation.”).

¹⁰¹ See Bruce, *supra* note 74, at 68 (indicating that ALFs developed in direct response to the aging population and increased consumer demands for housing in the assisted living model); *supra* note 19 (showing increased need for long-term care options among the elderly and noting ongoing corporate investment in ALFs).

¹⁰² For example, section seventeen of the Resident Service Agreement (or contract) for Country Care Farm Assisted Living, a Maryland ALF, discloses discharge policies with vague language and gives the ALF unilateral discretion to enforce the policy as follows:

You may be discharged from the facility for the following reasons: The resident requires care of services that the provider is not licensed to provide pursuant to the applicable laws or regulations; The provider has determined that the resident has a physical, psychological or psychiatric condition that requires skilled observation or treatment by a licensed professional that the provider cannot monitor between visits by the licensed professional; The resident suffers from a mental condition that may cause danger to himself/herself or others. The resident has health or personal needs that the provider cannot meet; the resident is regularly disruptive, causes unsafe conditions, or physically or verbally abuses residents or staff, or refuses to cooperate with the provider’s procedures for resolving such matters. The resident fails to pay charges when due and owing, or breaches any representation, covenant, agreement or obligation of this agreement, including any special attachments added to this agreement at the time of admittance. The resident has, for health reasons, been transferred to a skilled nursing facility or hospital, has remained in such facility or facility for at least thirty (30) days and the provider determines that the resident’s absence will be of a prolonged or permanent nature, the provider may determine that resident has been permanently transferred to such other facility. The resident displays physical or verbal threats to other residents or staff. The resident becomes infected with a communicable illness.

Country Care Farm Assisted Living Resident Service Agreement, http://www.countrycarellc.com/images/CC_contract.pdf (last visited July 25, 2010) [hereinafter Country Care Farm] (numbering system omitted); see also MOLLICA, AGING IN PLACE, *supra* note 88, at 2 (“State rules usually set the parameters for admission and retention but allow individual residences to determine whom they will serve and what services will be provided within the parameters set by regulation.”).

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As business entities, ALFs use standard form contracts to bring consistency to residency agreements and to curtail the time spent on negotiations.¹⁰³ To assist ALFs in drafting residency agreements, the Assisted Living Federation of America (“ALFA”), a professional organization for assisted living operators, provides ALFs with a model residency agreement.¹⁰⁴ Similarly, the New York Department of Health provides a model residency agreement for ALFs in its state.¹⁰⁵ Given the high demand for ALFs and the absence of consumer protection regulations, residents lack influence over the terms of such standard contracts.¹⁰⁶ Residents must either accept the ALFs’ terms or forfeit their opportunity to enter assisted living.¹⁰⁷

¹⁰³ E.g., Country Care Farm, *supra* note 102; Application for Residency and Admission Application Agreement, COUNTRYSIDE CHRISTIAN COMMUNITY, http://www.countrysidechristian.info/files/Application_for_Admission_-_Resident_6-6-07.pdf (last visited July 25, 2010) [hereinafter Countryside Application]; see Paul D. Carrington, *The Dark Side of Contract Law*, TRIAL, May 2000, at 73 (recognizing standard form contracts are useful tools when the parties wish to minimize the time and energy spent negotiating every detail of an agreement). *But see* BEGLEY, *supra* note 74, at 8 (questioning the reliance on form contracts by ALFs in light of public policy concerns about the complexity and unfairness toward consumers in such documents); Eric M. Carlson, *Siege Mentality: How the Defensive Attitude of the Long-Term Care Industry Is Perpetuating Poor Care and an Even Poorer Public Image*, 31 MCGEORGE L. REV. 749, 767 (2000) (contending that ALF residents do not really negotiate the terms of their ALF residency agreements because the facilities use standard form contracts).

¹⁰⁴ See Assisted Living Federation of America, Model Residency Agreement, http://www.ctassistedliving.com/pdfs/alfa_resident_agreement.pdf (last visited July 25, 2010) (giving ALFs in Connecticut a sample from which to develop their own residency agreements).

¹⁰⁵ See *Assisted Living Residence Model Residency Agreement*, N.Y. STATE DEP’T OF HEALTH, http://www.health.state.ny.us/facilities/assisted_living/docs/model_residency_agreement.pdf (last visited July 25, 2010) [hereinafter N.Y. Model Agreement] (providing a sample residency agreement tailored to New York laws).

¹⁰⁶ See *Ostroff v. Alterra Healthcare Corp.*, 433 F.2d 538, 544, 544 n.4 (E.D. Pa. 2006) (concluding that an ALF residency agreement was a contract of adhesion and that it was reasonable for the resident to believe that unless she signed the ALF’s contract, she would have no place to live given the limited number of ALF vacancies in the community).

¹⁰⁷ See BEGLEY, *supra* note 74, at 8 (explaining that ALF contracts, like other contracts of adhesion, involve unequal bargaining power allowing ALFs to maintain control over the contracts with a negligible threat of resident challenge to their provisions or refusal to sign the contract prepared by the ALF); Fleming, *supra* note 2, at 253 (“[Vague state] regulation gives [ALFs] substantial flexibility in outlining what services they will provide residents. It also overvalues the negotiation aspect of contracting—the personal care contract in ALFs is generally a take-it-or-leave-it, with no ability to negotiate over terms or conditions.”). Recognizing the potential for abuse of standard form contracts against powerless parties, courts have historically negated unfair provisions in such contracts. Carrington, *supra* note 103, at 73. The Second Restatement of Contracts reflected the common law doctrine that provisions in standard form contracts must be reasonable and just. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). Corporations often include mandatory arbitration, choice of laws, and choice of forum clauses in standard form contracts to protect their interests,

Accordingly, ALFs draft form contracts that protect their own interests in compliance with licensing regulations and profitability.¹⁰⁸ To comply with state regulations, most ALF contracts disclose discharge criteria to residents before admission.¹⁰⁹ In their disclosure statements, however, ALFs tend to simply repeat the vague language of state licensing regulations in order to maintain maximum flexibility in retention practices.¹¹⁰ For example, New York's model residency agreement permits involuntary termination if a resident "require[s] continual medical or nursing care which the [ALF] is not permitted by law or regulation to provide," and discusses discharge criteria generally in terms of resident behavior, failure to pay, and facility demise.¹¹¹ Marketing materials and residency agreements usually do not identify

effectively forcing the weaker party to forfeit important procedural rights. Carrington, *supra* note 103, at 73–74; *see, e.g., Ostroff*, 433 F.2d at 545 (finding a corporate ALF contract to be substantively unconscionable because it imposed discovery restrictions on the resident, mandated arbitration of any resident claims, and reserved its own right to access the courts). By waiving procedural rights, parties also lose substantive rights. Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 367 (2008). ALFs include negotiated risk provisions that limit ALF liability in resident contracts that result in such a waiver of procedural rights by residents. *See Carlson, Negotiated Risk, supra* note 50 at 288; *cf. Miller, supra* note 107, at 365 (arguing that "the law has elevated a mythical notion of contractual autonomy at the expense of corporate social accountability," which explains legislative reliance on contracts in ALF settings and suggests that consumers retain little, if any, autonomy in the agreement).

¹⁰⁸ *See infra* notes 117–23 and accompanying text (describing how vague language in ALF contracts directly benefits ALF profitability).

¹⁰⁹ *See, e.g., ALA. ADMIN. CODE* r. 420-5-4.03(1)(c) (2001), AL ADC 420-5-4-.03 (Westlaw), available at <http://www.alabamaadministrativecode.state.al.us/docs/hlth/index.html> (requiring ALFs to establish and disclose several policies including criteria for resident discharge and appropriate notice procedures without requiring disclosure of appeal mechanisms); *see also* ROBERT MOLLIKA, KRISTIN SIMS-KASTELEIN & JANET O'KEEFE, U.S. DEP'T OF HEALTH & HUMAN SERVS., RESIDENTIAL CARE AND ASSISTED LIVING COMPENDIUM: 2007 16–18 (2007) (listing topics disclosed in ALF contracts, including admission and discharge criteria, and how many states require disclosure of each topic). Although not the focus of this Note, some states require disclosure of residents' rights. BEGLEY, *supra* note 74, at 15. The content of resident rights statements varies widely among states but usually comprises rights related to safety, health standards, personal care standards, grievance procedures, and sometimes appeal rights. *Id.*; *see, e.g., OR. ADMIN. R.* 411-054-0027 (2007), OR ADC 411-054-0027 (Westlaw), available at http://www.sos.state.or.us/archives/rules/OARS_400/OAR_411/411_054.html (defining twenty different resident rights including the right to notice of involuntary discharge and the right to an administrative hearing regarding discharge). States often require ALFs to post rights statements visibly in the facility. *E.g., MO. ANN. STAT.* § 198.088.1(1)–(6)(a) (West 2004); N.Y. PUB. HEALTH LAW § 4660 (McKinney Supp. 2010).

¹¹⁰ *See supra* note 88 (quoting Alabama's and Indiana's discharge regulations); *supra* note 102 (citing an example of contractual discharge language from an assisted living residency agreement).

¹¹¹ N.Y. Model Agreement, *supra* note 105, at pt. XIII.

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any specific behavioral or health triggers for discharge either.¹¹² Thus, when residents sign ALF contracts, they are unlikely to understand the full implications of the ALF's discharge policies.¹¹³

ALFs also comply with licensing regulations by disclosing and abiding by notice requirements that typically mandate fourteen to thirty days notice of discharge decisions.¹¹⁴ Yet, most notice regulations do not require ALFs to convey the reasons for discharge, describe appeal options, or identify resident advocates such as state long-term care ombudsmen.¹¹⁵ Therefore, existing disclosure and notice regulations

¹¹² *E.g.*, Country Care Farm, *supra* note 102; Countryside Application, *supra* note 103; *see* BEGLEY, *supra* note 74, at 14 ("Personal sales pitches and marketing materials may lead consumers to believe that they can remain in the facility for the rest of their lives, glossing over the fact that facility policy or state regulation requires discharge if the resident's health needs exceed a certain level."); *infra* text accompanying notes 117-23 (describing the role of marketing in ALF profitability).

¹¹³ *See* BEGLEY, *supra* note 74, at 15 (comparing the content of ALF marketing materials to ALF contracts and indicating that residents tend to believe the ALF's sales representative and marketing materials without understanding the implications of the admission and discharge criteria as stated in the governing contract until they face a challenging situation in the ALF); CATHERINE HAWES, CHARLES D. PHILLIPS & MIRIAM ROSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., HIGH SERVICE OR HIGH PRIVACY ASSISTED LIVING FACILITIES, THEIR RESIDENTS AND STAFF: RESULTS FROM A NATIONAL SURVEY pt. III.F.4 (2000), *available at* <http://aspe.hhs.gov/daltcp/reports/hshp.htm#chap3F> (presenting survey results suggesting that approximately two-thirds of current ALF residents were uninformed about discharge policies); WRIGHT, *supra* note 83, at 9, 17-19, 25, 33-34 (discussing disclosure and consumer understanding in Connecticut, Minnesota, New Jersey, and North Carolina); Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STAN. L. & POL'Y REV. 373, 380 (1998) (acknowledging that anticipation of every conceivable circumstance necessitating discharge is impossible but contending that "elderly individuals who have moved into [an ALF] on the assumption that it will be their final residence should not have to vacate simply because the requirements of residency or the services provided by the facility were misunderstood or misrepresented").

¹¹⁴ BEGLEY, *supra* note 74, at 17. *Compare, e.g.*, IDAHO ADMIN. CODE r. 16.03.22.221(04) (2006), ID ADC 16.03.22.221 (Westlaw), *available at* <http://adm.idaho.gov/adminrules/rules/idapa16/16index.htm> (promulgating thorough notice requirements that require thirty days notice, including the reason for the discharge and information regarding the right to appeal to the state health department, to terminate a residency agreement), *with* 15-301-47 MISS. CODE R. § 110.08(1)(e) (Weil 2010), CMSR 15-301-047 (LEXIS), *available at* <http://www.sos.state.ms.us/busserv/AdminProcs//PDF/00014590b.pdf> (mandating disclosure in ALF contracts that the ALF must "make the resident's responsible party aware, in a timely manner, of any changes in resident's status, including those which require transfer and discharge" without even specifying a time period).

¹¹⁵ BEGLEY, *supra* note 74, at 17; *e.g.*, 15-301-47 MISS. CODE R. § 110.08(1)(e). The Older Americans Act authorizes federal funding to states for activities that protect the rights of vulnerable elderly citizens if states create an Office of the State Long-Term Care Ombudsman. 42 U.S.C. §§ 3058, 3058g(a)(1)(A) (2006). Ombudsmen assist long-term care residents in resolving complaints against the facility where they reside and receive services. *Id.* § 3058g(a)(3).

permit ALFs to use vague contractual language that fails to inform residents effectively of the risks of involuntary discharge.¹¹⁶

Vague disclosure statements in form contracts also enhance ALF marketing efforts, which directly affect ALF profitability.¹¹⁷ Careful marketing attracts prospective residents who populate waiting lists that ensure maximum residency and generate additional entrance fees.¹¹⁸ An aging, frail, and increasingly service-dependent population, however, detracts from the appealing image of an active, independent community upon which marketers rely.¹¹⁹ As a result, involuntary discharge

¹¹⁶ See *supra* notes 109-15 and accompanying text (discussing the impact of vague disclosure and notice regulations).

¹¹⁷ See BEGLEY, *supra* note 74, at 3 (“Marketing materials for [ALFs] often promise far more than is delivered.”); Zimring, *supra* note 14, at 325 (advising attorneys to stress to their clients that ALFs often “put on a wonderful facade,” with “little to back it up”); see also Edelstein, *supra* note 113, at 375 (inferring from ALF marketing techniques that ALFs often value “making a sale” rather than “helping consumers make informed decisions”); Deann Loonin & Elizabeth Renuart, *Less Than Six Degrees of Separation: Consumer Law Connections to Your Practice (Part II)*, 32 CLEARINGHOUSE REV. 3, 14 (1998) (advocating for consumer law remedies to deceptive ALF marketing practices that convince ALF residents that they can stay forever, when in reality, most residents are required to move because their needs eventually exceed the services provided by the ALF); Dorothy Siemon, Stephanie Edelstein & Zita Dresner, *Consumer Advocacy in Assisted Living*, 30 CLEARINGHOUSE REV. 579, 581-82 (1996) (observing that ALFs use marketing efforts to promote aging-in-place, even though the facilities lack the staff and service capacity to accomplish this attractive goal). It is reasonable for ALFs to employ aggressive marketing plans just as other businesses do, but care must be exercised because the industry “operates virtually without restriction” and targets “a very vulnerable population” with its marketing efforts. *Id.* at 582. ALFA recognizes the primary role of profitability in managing ALFs when it honors ALFs that “shake up commonly accepted best practices to get even better results with ground-breaking ideas to expand their business, improve service delivery, boost the bottom line, streamline operations, and more.” *2009 Best of the Best Award Winners*, ASSISTED LIVING FEDERATION OF AMERICA, http://www.alfa.org/alfa/2009_Award_Winners.asp?SnID=14902583044 (last visited Aug. 15, 2010) [hereinafter *2009 Best Awards*].

¹¹⁸ See Catherine Hawes et al., *A National Survey of Assisted Living Facilities*, 43 GERONTOLOGIST 875, 882 (2003) (“[T]he ability of [ALF] residents to age in place seems more likely to be a product of facility choices about the resident mix they wish to serve and the market ‘niche’ they wish to occupy.”); Stacey Burling, *Housing Slump Has Some Seniors Uncertain*, PHILA. INQUIRER, Dec. 21, 2008, at D01 (describing marketing techniques employed by ALFs and continuing care retirement communities to attract residents during the economic downturn). The American Association of Homes and Services for the Aging, an advocate for aging consumers, documents the reliance of the ALF industry on waiting lists by urging prospective long-term care residents to plan ahead because waiting lists are common and can impact the ability to choose where to live and when to move in. *Planning Ahead*, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, <http://www.aahsa.org/planningahead.aspx> (last visited Aug. 15, 2010).

¹¹⁹ MOLLIKA, *AGING IN PLACE*, *supra* note 88, at 2; see also Carlson, *Long-Term Care*, *supra* note 100, § 5.07[1] cmt. (stating that ALFs “may lose the homelike ambience as they see an increase in the percentage of residents with significant medical problems.”).

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surfaces as a tool to improve marketability.¹²⁰ Involuntary discharges also help ALFs minimize costs.¹²¹ As a resident's need for services increases, an ALF's profit decreases because of the extra costs associated with providing those services.¹²² Thus, ALFs are able to shape retention criteria and discharge residents in order to improve marketability and profitability at the expense of a resident's interest in aging-in-place.¹²³

Not all ALFs, however, operate under suspect motives.¹²⁴ Most embrace the industry-wide mission of providing a residential long-term care option that maximizes choice and dignity in the delivery of services and facilitates aging-in-place.¹²⁵ In that context, involuntary discharges

¹²⁰ *Contra 2009 Best Awards*, *supra* note 117 (recounting the success of ALFs who build their reputation among consumers by “[p]utting seniors’ needs ahead of marketing self-interest”).

¹²¹ Fleming, *supra* note 2, at 255; Telephone Interview with Eric M. Carlson, Directing Attorney, Nat’l Senior Citizens Law Ctr. (Sept. 25, 2009); *see also* Stacey L. Bradford, *10 Things Your Assisted-Living Facility Won’t Tell You*, SMART MONEY, Apr. 19, 2001, <http://www.smartmoney.com/spending/deals/10-things-your-assisted-living-facility-wont-tell-you-10401/?hpadref=1> (informing the public that the ALF business model was not designed to be compatible with ailing, elderly residents, and so, ALFs discharge residents whose needs jeopardize business success).

¹²² Telephone Interview with Eric M. Carlson, *supra* note 121; Lynnette Jones, *Ten Money-Losing Assumptions in Assisted Living: Part 1*, NURSING HOMES (Sept. 2001), http://findarticles.com/p/articles/mi_m3830/is_9_50/ai_78639887/. ALFs often refuse to increase staffing to meet the greater needs of residents in order to control costs and prevent increasing rates. Bradford, *supra* note 121. States also protect their coffers by encouraging aging consumers to live in private-pay ALFs, which are typically not covered by Medicaid, instead of nursing homes where Medicaid is responsible for the higher costs of care. *See* Fleming, *supra* note 2, at 247 (arguing that states who claim to save money by disallowing Medicaid benefits to ALF residents actually waste money by forcing impoverished elderly citizens to live in expensive nursing homes rather than less expensive ALFs).

¹²³ Telephone Interview with Eric M. Carlson, *supra* note 121; *see also* Schwemm & Allen, *supra* note 82, at 185 (“[ALFs] would naturally be concerned about having to absorb potentially open-ended health care costs and might therefore seek to limit these costs by screening out applicants who cannot demonstrate an ability to ‘live independently.’”); *supra* text accompanying note 93–95 (discussing the discretion that ALFs enjoy in determining what services they provide and defining discharge criteria).

¹²⁴ *See* BEGLEY, *supra* note 74, at 2 (admitting that the positive impact of assisted living far outweighs any negative impact); Street et al., *supra* note 18, at S129 (“[S]ome residents express dissatisfaction with their [ALF], but others are highly satisfied and feel that their quality of life . . . has improved.”). ALFA projects the positive motives that drive the industry when it reminds executives that ALFs “are here to care for people . . . provide exceptional service and earn a return on investment—whether it be financial, material, physical, emotional, or spiritual,” and when it encourages ALFs to “channel all those returns and use that energy to fuel [the industry’s] resident-centered mission.” Lisa A. Fordyce, *Predicting an Uncertain Future*, ASSISTED LIVING EXECUTIVE, May–June 2009, at 56, available at <http://www.alfapublications.org/alfapublications/ale20090506/?pg=58#pg58>.

¹²⁵ *Taboo Talking Points in Assisted Living*, ASSISTED LIVING FEDERATION OF AMERICA, http://www.alfa.org/alfa/Taboo_Words_in_Assisted_Living.asp?SnID=1492583044 (last

often are necessary to care appropriately for a resident whose needs can no longer be met by the ALF.¹²⁶ Unfortunately, ALF residents have limited recourse, if any, to address arbitrary discharges or those motivated by ALF self-interest.¹²⁷

visited Aug. 15, 2010) (“[A]ssisted living professionals . . . [tout] the residential approach to care provision and the bedrock belief of choice and dignity in service delivery.”). Courts have affirmed the residential nature of ALFs by subjecting them to the anti-discrimination provisions of the Fair Housing Act (“FHA”), which applies only to dwellings, or “building[s], structure[s], or portion[s] thereof which [are] occupied as, or designed or intended for occupancy as, a residence by one or more families.” 42 U.S.C. § 3602(b) (2006). The FHA also prohibits discrimination “in the provision of services . . . in connection with such [a] dwelling.” *Id.* § 3604(f)(2); see also Eric M. Carlson, *Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 363, 381 n.93 (2007) [hereinafter Carlson, *Disability Discrimination*] (citing six zoning cases where the FHA applied to ALFs without any challenge to their status as dwellings). *Contra* PAUL A. GORDON, AM. HEALTH LAWYERS ASS’N, LONG TERM CARE AND THE LAW: SEMINAR MATERIALS pt. C.1 (New Orleans Feb. 27, 2008), AHILA-PAPERS P02270831 (Westlaw) (contending that the primary purpose of ALFs is provision of services, making the residential component secondary and therefore negating the application of residential laws, such as the FHA and landlord-tenant laws, to ALFs); see, e.g., *Antler v. Classic Residence Mgmt. Ltd. P’ship*, 733 N.E.2d 393, 398 (Ill. App. Ct. 2000) (finding a resident’s contract with an Illinois ALF incongruent with a landlord-tenant relationship because of the services provided); *Starns v. Am. Baptist Estates of Red Bank*, 800 A.2d 182, 188 (N.J. Super. Ct. App. Div. 2002) (refusing to apply the Anti-Eviction Act to a continuing care retirement community because it provided services to its residents in addition to a place to live); *Lindstrom v. Pennswood Village*, 612 A.2d 1048, 1051 (Pa. 1992) (rejecting a claim by residents of a continuing care community that the providers breached the implied warranty of habitability, asserting that the continuing care community agreement was not a residential lease, and stating that the warranty of habitability only applies to residential leases). See generally *Thomas v. Cohen*, 453 F.3d 657, 661–62 (6th Cir. 2006) (precluding application of Kentucky landlord-tenant law in an eviction case because plaintiffs’ residence at a transitional homeless shelter was incidental to the provision of social services); *Klarfeld v. Berg*, 633 P.2d 204, 210 (Cal. 1981) (assessing whether a retirement residence constituted a dwelling unit before deciding if rent control ordinances pertained to the facility); *City of Evanston v. O’Leary*, 614 N.E.2d 114, 116–17 (Ill. App. Ct. 1993) (applying the definition of dwelling unit and statutory exemption language of landlord-tenant law to a transient hotel before ruling on issues in the case); *Burke v. Oxford House of Or. Chapter V*, 137 P.3d 1278, 1281 (Or. 2006) (reviewing statutory exemption language in landlord-tenant law in relation to drug and alcohol facilities before applying landlord-tenant law to the facts of the case); *Sunrise Group Homes, Inc. v. Ferguson*, 777 P.2d 553, 555 (Wash. Ct. App. 1989) (refusing to apply landlord-tenant law to a group home for the developmentally disabled); *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 536 N.W.2d 175, 183–84 (Wis. Ct. App. 1995) (exploring independent living facility’s residency agreement for evidence that provision of amenities was its primary purpose before determining a standard for contract enforcement).

¹²⁶ See *supra* note 95 (discussing the risks to ALF residents who are not discharged when their needs exceed the capabilities of the ALF).

¹²⁷ See *infra* Part II.B.3 (describing recourse options available to ALF residents).

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3. Current Recourse Options Available to ALF Residents Facing Involuntary Discharge

A few states supplement disclosure and notice requirements by providing ALF residents with a right to appeal discharge decisions.¹²⁸ Appeal mechanisms vary widely, even among these few states.¹²⁹ While some provide for appeal to external sources, such as a state ombudsman, a state agency, or the courts, others permit ALFs to define appeal mechanisms themselves, which may be merely an appeal to the ALF manager who likely made the original discharge decision.¹³⁰ Three states stipulate that state landlord-tenant law governs assisted living discharges, thus granting residents rights to disclosure, notice, opportunity to remedy the breach, and, ultimately, access to the judicial process to resolve any dispute with a facility.¹³¹ The majority of states, however, only compel ALFs to disclose minimal information about discharge policies without providing residents any further opportunity to appeal an ALF's discharge decision.¹³²

¹²⁸ BEGLEY, *supra* note 74, at 17; *see, e.g.*, CAL. CODE REGS. tit. 22, § 87224(e), (h) (2008), 22 CA ADC § 87224 (Westlaw), available at <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/rcfeman2.pdf> (providing for resident appeal of eviction to state agency and expressly reserving the right of residents to pursue all other available remedies); 55 PA. CODE § 2600.42(w) (2009), 55 PA ADC § 2600.42 (Westlaw), available at <http://www.pacode.com/secure/data/055/055toc.html> (granting ALF residents the right to appeal discharge decisions through internal facility procedures and any available external procedures).

¹²⁹ BEGLEY, *supra* note 74, at 17.

¹³⁰ *Id.*; *see also* BRUCE VIGNERY & DOROTHY SIMEON, AARP PUB. POLICY INST., ENSURING ASSISTED LIVING QUALITY THROUGH THE COURTS: STATE POLICY ISSUES REGARDING A CONSUMER PRIVATE RIGHT OF ACTION 5 (2000), available at http://assets.aarp.org/rgcenter/health/2000_22_ltc.pdf (identifying seventeen states and the District of Columbia that afford aggrieved ALF residents a private right of action). A statutory private right of action ensures compensation for injuries, performance of duties, and regulatory enforcement in ALFs where risks of consumer abuse, fraud, and exploitation exist. *Id.* at ii. *See generally supra* note 115 (explaining the role of a state long-term care ombudsman).

¹³¹ *E.g.*, IOWA CODE ANN. § 231C.19 (West 2006) (“Chapter 562A, the uniform residential landlord and tenant Act, shall apply to assisted living programs under this chapter.”); MASS. GEN. LAWS ANN. ch. 19D, § 9(a)(18) (West 2002) (stating that ALF residents have the right “[t]o not be evicted from the [ALF] except in accordance with the provisions of landlord tenant law”); MINN. DEP’T OF HEALTH, CONSUMER INFORMATION GUIDE TO ASSISTED LIVING IN MINNESOTA 7 (2007), available at <http://www.health.state.mn.us/divs/fpc/profinfo/cms/als/alsindex.html> (informing consumers in a statutorily mandated information guide that ALF residents are building tenants with rights under Minnesota’s Landlord-Tenant law).

¹³² BEGLEY, *supra* note 74, at 17; *see, e.g.*, 22 VA. ADMIN. CODE § 40-72-420 (2009), 22 VA ADC 40-72-420 (Westlaw), available at <http://legl.state.va.us/000/reg/TOC.HTM> (requiring fourteen to thirty days notice of involuntary discharge without mentioning any appeal process whatsoever). *But see, e.g.*, MO. ANN. STAT. § 198.088.1(6)(d) (West 2004)

Discharged ALF residents usually lack meaningful housing and care options.¹³³ Even if ALFs bear a duty to assist residents with transfer arrangements, residents who have suffered a recent health event may face limited admissibility to other ALFs until their condition improves.¹³⁴ Moreover, waiting lists may delay entry to a new facility beyond the fourteen to thirty days usually afforded by the discharge notice.¹³⁵ Lacking options, discharged ALF residents enter nursing homes, which are more expensive than ALFs.¹³⁶ These residents may regain sufficient health to re-qualify for ALF residency, but nursing home costs can quickly deplete their assets in the interim.¹³⁷ This decrease in assets may qualify residents for Medicaid, but only two-thirds of states offer Medicaid reimbursement in assisted living.¹³⁸ Even in states where

("No [ALF] resident may be discharged without notice of his right to a hearing and an opportunity to be heard on the issue of whether his immediate discharge is necessary."); LEGAL AID BUREAU, INC. OF MARYLAND, TIPS ON REVIEWING THE ASSISTED LIVING AGREEMENT (2004), http://www.peoples-law.org/health/elderly_health_and_medical_care/AL_ResAgr.htm (informing prospective residents that ALF contracts must include a bed-hold policy, comparable to an opportunity to remedy the resident's disqualifying condition, for unavoidable and optional absences from the facility and that such policies should specify reasons for holding a bed, the costs of a bed-hold, and the circumstances that will dictate a release of the hold).

¹³³ See *infra* notes 134–40 and accompanying text (describing how ALF discharge can limit the housing and care options available to residents).

¹³⁴ See Bradford, *supra* note 121 (recounting the story of Howard Wyllie Dresser, a discharged ALF resident whose diabetes and Alzheimer's disease led to another discharge from a second ALF within a few days); *supra* notes 93–95 and accompanying text (discussing ALFs' discretion to determine what services they will provide, thus, allowing ALFs to shape their own retention criteria and making ALFs more likely to reject a prospective resident who has health needs); see also ALA. ADMIN. CODE r. 420-5-4.04(3)(a)3 (2001), AL ADC 420-5-4-.04 (Westlaw), available at <http://www.alabamaadministrativecode.state.al.us/docs/hlth/index.html> (requiring ALFs to assist discharged residents with their transfers).

¹³⁵ E.g., Countryside Christian Community, Assisted Living Information Sheet, http://www.countrysidechristian.info/files/Assisted_Living_Info_Sheet_5-1-07.pdf (last visited July 25, 2010) [hereinafter Countryside Information] (informing prospective ALF residents that "immediate occupancy is not always possible" and that the facility uses two wait-lists, including a standard waiting list requiring a \$30 application fee and a priority waiting list requiring an additional \$2000 deposit).

¹³⁶ Fleming, *supra* note 2, at 265; see also BEGLEY, *supra* note 74, at 2 (reporting that ALFs are attractive to aging consumers because they cost less than nursing homes).

¹³⁷ See Fleming, *supra* note 2, at 246 ("Evictions from the ALFs most often result in the elderly being forced into nursing homes. Nursing homes offer a level of care far greater than ALFs with an increased cost to match . . .").

¹³⁸ BEGLEY, *supra* note 74, at 8. Even such permission, however, limits states to using Medicaid to cover the service costs of assisted living, not the room and board components. *Id.*; cf. *Leocata ex rel. Gillbride v. Wilson-Coker*, 343 F. Supp. 2d 144, 151 (D. Conn. 2004) (holding that Medicaid is not required to fund costs of a recipient's preferred residence because there is no fundamental right to Medicaid benefits). See generally Fleming, *supra*

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Medicaid waivers are available, ALFs prefer private-pay residents and often choose not to accept Medicaid.¹³⁹ Therefore, discharged ALF residents whose health improves to meet ALF retention standards may be forced into a nursing home to receive Medicaid assistance.¹⁴⁰

Regardless of any available appeal mechanisms, discharged ALF residents could choose to pursue federal claims of disability discrimination against ALFs who fail to provide reasonable accommodations under the Americans with Disabilities Act (“ADA”) or Section 504 of the Rehabilitation Act of 1973.¹⁴¹ The Fair Housing Act (“FHA”) could also afford discharged ALF residents relief based on theories of housing discrimination.¹⁴² Some advocates even encourage discharged ALF residents to refuse to leave, engage an attorney, and fight the eviction.¹⁴³ Few ALF residents, however, engage in litigation

note 2, at 266 (proposing that states offer Medicare and Medicaid funding to ALF residents to improve the quality of life for aging consumers and to save the government money).

¹³⁹ BEGLEY, *supra* note 74, at 3.

¹⁴⁰ See Fleming, *supra* note 2, at 246 (indicating that discharged ALF residents often end up in nursing homes in order to receive financial assistance from the government that covers their living and care expenses). See generally FROLIK, *supra* note 3, at 213 (advising ALF residents to make sure their residency agreements establish that their apartment will be reserved in the event of a temporary health event and to determine if they can pay their monthly fee, minus any charges for services, to reserve their unit while they are away).

¹⁴¹ See Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006) (prohibiting disability discrimination in any federally funded program); Americans with Disabilities Act, 42 U.S.C. § 12182(a) (2006) (prohibiting discrimination based on disability in places of public accommodation); 28 C.F.R. pt. 36, app. B (2009) (clarifying that nursing homes and residential care facilities are likely to be subject to the ADA).

¹⁴² See Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006) (prohibiting discrimination in housing); Schwemm & Allen, *supra* note 82, at 151 n.156 (citing ten cases where courts found that an ALF met the FHA’s threshold dwelling requirement making the FHA applicable). The FHA’s ban on handicap discrimination has been interpreted “to prohibit housing providers from imposing a requirement that their tenants be capable of ‘independent living’” even if the facility wants to exclude residents to limit the “potentially open-ended health care costs” that would be associated with their care. *Id.* at 181, 185; see also Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1299–1301 (D. Md. 1993) (holding that an ALF ambulation requirement, which resulted in discharge of residents who required assistance to exit the facility, violated the FHA); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002, 1003 (W.D.N.Y. 1990) (ruling in favor of disabled individuals, including seniors, who were denied admission to public housing because they did not meet the independent living requirement based on the FHA).

¹⁴³ Telephone Interview with Eric M. Carlson, *supra* note 121; see also Carlson, Long-Term Care, *supra* note 100, § 5.06 (encouraging ALF residents to pursue a court action applying state landlord-tenant law because residents are arguably tenants, just like those tenants living in apartment buildings); *Fighting an Assisted Living Discharge*, ELDER LAW ANSWERS, <http://www.elderlawanswers.com/resources/article.asp?id=5391&Section=4&state=> (last visited Aug. 15, 2010) (advising ALF residents to stay when facing an involuntary discharge requiring the ALF to seek a court order to enforce the eviction, which will ultimately give the resident an opportunity to be heard); *Eviction Protections for*

because they lack the time and energy to fight, or they fear retaliation should they prevail and remain in the facility.¹⁴⁴ Consequently, litigation does not provide reasonable recourse to involuntarily discharged ALF residents.¹⁴⁵

In sum, ALFs enjoy unilateral discretion in discharge decisions by virtue of the absence of statutory consumer protections and the unequal bargaining power that favors them in the negotiation of residency agreements.¹⁴⁶ ALFs define discharge criteria, apply such criteria on an individual basis, and control the availability of appeal mechanisms.¹⁴⁷ In similar fashion, landlords of the early twentieth century controlled their relationships with tenants based on an absence of regulation and manipulation of form leases.¹⁴⁸ Statutory reform in the 1960s and 1970s established protections for tenants from unreasonable eviction.¹⁴⁹ By requiring landlords to provide adequate notice of an eviction decision, opportunity to remedy the breach causing the eviction, and access to the

RCFE/Assisted Living Facility Residents, CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, http://www.canhr.org/factsheets/rcfe_fs/html/rcfe_eviction_fs.htm (last visited Aug. 15, 2010) (counseling California ALF residents facing involuntary discharge to exercise their right to a judicial hearing by remaining in the ALF while awaiting the judicial eviction process mandated by state landlord-tenant law). See generally Zimring, *supra* note 14, at 327 (explaining that exploited ALF residents may find recourse through tort, contract, landlord-tenant, or fraud litigation).

¹⁴⁴ See J. KEVIN ECKERT ET AL., *INSIDE ASSISTED LIVING: THE SEARCH FOR HOME* 210–11 (2009) (differentiating ALF residents from consumers of goods because any complaint by an ALF resident must be predicated on the understanding that facility staff might retaliate against a complaining resident); Zimring, *supra* note 14, at 326 (preparing attorneys for the reality that ALF residents can be frail people who are limited physically, emotionally, and psychologically, which might cause them to avoid litigation). Litigation should be used as the last resort to resolve any problem for an ALF resident. *Id.* at 327. An ALF resident's hesitation to challenge a facility's discretionary discharge decision comports with the gerontological concept of psychological adaptation among older people, who express a positive bias toward their physical environment despite its failure to support their needs. Cutler, *supra* note 5, at 71–72. Some states expressly prohibit retaliation against ALF residents who pursue a grievance. See, e.g., 55 PA. CODE § 2600.41(a) (2007), 55 PA. ADC § 2600.41 (Westlaw), available at <http://www.pacode.com/secure/data/055/055toc.html> ("Upon admission, each resident and, if applicable, the resident's designated person, shall be informed of resident rights and the right to lodge complaints without intimidation, retaliation, or threats of retaliation of the home or its staff persons against the reporter. Retaliation includes discharge or transfer from the home.").

¹⁴⁵ Telephone Interview with Eric M. Carlson, *supra* note 121.

¹⁴⁶ See *supra* Part II.B (suggesting that ALFs retain unilateral discretion in relationships with residents).

¹⁴⁷ See *supra* Part II.B (demonstrating that ALF residents are at the mercy of ALFs).

¹⁴⁸ See *supra* Part II.A.1 (relating the history of landlord exploitation of tenants).

¹⁴⁹ See *supra* Part II.A.2 (discussing provisions of landlord-tenant law designed to protect tenants).

judicial process to review the decision, landlord-tenant laws conquered the unequal bargaining power that had previously defeated tenants.¹⁵⁰

III. ANALYSIS

The risk of exploitation through ALF involuntary discharge must be addressed given the realities of an aging population and the growing ALF industry.¹⁵¹ Part III analyzes why and how landlord-tenant laws regarding eviction should apply to ALF discharges.¹⁵² Specifically, Part III.A contends that ALF residents need consumer protection to resolve the ALF involuntary discharge problem they face.¹⁵³ Part III.B then establishes the propriety of applying modern landlord-tenant law to ALFs based on their primary residential purpose.¹⁵⁴ Lastly, Part III.C argues that states should amend ALF statutory schemes with key provisions modeled after landlord-tenant law to guarantee meaningful recourse for residents facing the challenge of involuntary discharge.¹⁵⁵

A. ALF Residents Need Consumer Protection

The law continues to recognize that the places where people live are worthy of protection.¹⁵⁶ ALF residents view ALFs as their homes where they live and express themselves.¹⁵⁷ Landlord-tenant laws protect tenants from unreasonable eviction from their homes.¹⁵⁸ The law, however, does not consistently provide comparable protection through legal process to ALF residents.¹⁵⁹

¹⁵⁰ See *supra* notes 55–63 and accompanying text (outlining statutory eviction protections of notice, opportunity to remedy, and access to judicial review); *supra* notes 40–44 and accompanying text (discussing the standard form leases used by landlords in the nineteenth and early twentieth centuries to exploit tenants).

¹⁵¹ See *supra* note 19 and accompanying text (presenting statistical evidence of the aging population and the increasing number of ALF residents).

¹⁵² See *infra* Part III.A–B (demonstrating meaningful connections between leaseholds and ALFs to justify application of landlords-tenant law in the ALF context).

¹⁵³ See *infra* Part III.A (asserting that ALF residents are vulnerable to unreasonable discharge, thus substantiating the need for consumer protection).

¹⁵⁴ See *infra* Part III.B (identifying ALFs as dwelling units as defined in landlord-tenant statutes, which allows for the application of landlord-tenant laws to the ALF setting).

¹⁵⁵ See *infra* Part III.C (explaining that statutory reform is the best means for addressing the ALF involuntary discharge problem).

¹⁵⁶ See *supra* notes 27–31 and accompanying text (discussing the sanctity of the home principles that continue to undergird American property law).

¹⁵⁷ Cutler, *supra* note 5, at 68.

¹⁵⁸ See *supra* notes 55–63 and accompanying text (discussing eviction protection provisions found in landlord-tenant law as modeled by URLTA).

¹⁵⁹ See *supra* Part II.B.3 (describing the varying, limited, and impractical recourse options available to ALF residents who face involuntary discharge).

Furthermore, ALF residents are particularly vulnerable to the detrimental effects of forced relocation because of their age and diminished health.¹⁶⁰ Aging people benefit from the homelike environment and services offered by ALFs that minimize the need to move multiple times.¹⁶¹ In fact, the ALF setting allows residents to retain the greatest level of functionality possible.¹⁶² Forced relocation, on the other hand, often has negative repercussions for an older person's physical, psychological, and emotional health.¹⁶³ Discharged residents leave behind their home, for the second time, often suffering demoralizing and even debilitating impacts on their well-being.¹⁶⁴ Moreover, their families expend considerable resources to make the move as smooth as possible and states expend additional resources through Medicaid for residents whose personal funds are consumed by the costs of nursing home care.¹⁶⁵ Thus, ALF residents deserve protection from threats to their homes and to their personal well-being.

Additionally, current regulatory schemes governing ALFs threaten the rights of ALF residents.¹⁶⁶ The absence of state oversight leaves primary regulation of ALF-resident relationships to the residency

¹⁶⁰ See CARLSON, WHO'S IN, *supra* note 2, at 23 ("[A] forced move from an [ALF] can itself be a significant demoralizing factor that can have harmful effects on a resident's health and well-being."); Street et al., *supra* note 18, at S130 ("Research has shown that relocation is among the most stressful life events for older adults Forced relocation is particularly stressful, whereas voluntary moves [especially when the older adult participates in the decision to move] are less likely to cause negative outcomes.").

¹⁶¹ Cutler, *supra* note 5, at 76 (citing statistical evidence of improved functionality and well-being of ALF residents based on the setting's homelike atmosphere).

¹⁶² For gerontological research focusing on the impact of ALFs on residents, see generally Bernard, Zimmerman & Eckert, *supra* note 4 at 224-41 (analyzing the factors that influence an ALF resident's ability to age-in-place at the community-level, the facility-level, and the individual-level, including health status, social and economic resources, and demographic traits); Street et al., *supra* note 18, at S129 (introducing research showing the impact of ALF organization, resident transitions, and social relations on the residents' perceived quality of life); Zimmerman et al., *supra* note 3, at S195 (describing research strategies that evaluated medical results, including transfers, and functionality of ALF residents in relation to the care received in the ALF).

¹⁶³ See *supra* note 160 (relating the negative effects of forced relocation as seen in gerontological research).

¹⁶⁴ *Supra* note 160. The ALF resident's loss of home represents a loss of identity. Cf. Radin, *supra* note 27, at 959 ("One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object [such as a house] is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.").

¹⁶⁵ Fleming, *supra* note 2, at 246-47.

¹⁶⁶ See *supra* Part II.B.1 (outlining the general and vague nature of assisted living definitions and operational regulations that leave ALFs in control of defining all aspects of life for ALF residents).

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agreement.¹⁶⁷ ALFs capitalize on the unequal bargaining power generated by market forces and exploit residents through contract terms that fail to specify discharge criteria.¹⁶⁸ Consequently, prospective residents lack the information necessary to make informed decisions about entering a particular ALF.¹⁶⁹ Then, if a person accepts the ALF's ambiguous contract terms, they enter facilities without understanding which events or behaviors might cause their discharge.

ALFs can also discharge residents without any explanation of the cause and still be compliant with state notice regulations.¹⁷⁰ Without knowing what caused the discharge, a resident lacks the ability to correct the problem. Even if the discharged resident could correct the problem, ALFs typically do not offer that opportunity.¹⁷¹ Most notably, ALF resident agreements typically do not include meaningful appeal mechanisms that might allow residents to challenge discharge decisions.¹⁷² Thus, the discretionary discharge decisions of ALFs predictably stand unchallenged.

Courts in the early twentieth century recognized comparable vulnerabilities in tenants.¹⁷³ The common law evolved through tenant litigation, where courts, with due respect to the freedom of contract,

¹⁶⁷ See, e.g., MICH. COMP. LAWS ANN. §§ 333.26501–26507 (West Supp. 2010) (relegating assisted living to freedom of contract by choosing to promulgate minimal statutes and regulations to govern ALFs); ILL. ADMIN. CODE tit. 77, § 295.100(a) (2008), 77 IL ADC 295.100 (Westlaw), available at <http://www.ilga.gov/commission/jcar/admincode/077/07700295sections.html> (defining assisted living specifically as a contractual agreement between resident and facility based on principles balancing consumer protection and consumer willingness to accept risk).

¹⁶⁸ See, e.g., Country Care Farm, *supra* note 102 (serving as an example of ALF contractual language discussing discharge in merely general terms regurgitating the indefinite state statutory or regulatory language that facilities must discharge residents whose needs exceed the services the facility is licensed to provide).

¹⁶⁹ See *supra* note 113 (documenting how uninformed ALF residents are when they sign residency agreements).

¹⁷⁰ See *supra* text accompanying notes 110–13 (indicating that ALFs comply with disclosure and notice requirements without providing specific information to residents).

¹⁷¹ See *supra* note 132 (comparing the minimal and vague language of the Virginia provision regarding appeal mechanisms for ALF residents with the more specific measures employed in Missouri and Maryland).

¹⁷² See *supra* Part II.B.3 (describing the varying, but limited, appeal mechanisms available to ALF residents).

¹⁷³ See, e.g., *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979) (recognizing that tenants are powerless against the “vastly superior bargaining position” of landlords); *Seabrook v. Commuter Hous. Co., Inc.*, 338 N.Y.S.2d 67, 69 (N.Y. Civ. Ct. 1972) (acknowledging the unequal bargaining power that arose from standard form leases and favored landlords with control over the limited supply of rental housing).

established common law policies that protected tenants.¹⁷⁴ States codified these common law principles in landlord-tenant statutes.¹⁷⁵ ALF residents, facing market forces and personal vulnerability parallel to that of early twentieth century tenants, deserve comparable consumer protection.¹⁷⁶

B. ALFs Meet the Threshold Dwelling Requirement of Landlord-Tenant Law

The cornerstone of consumer protections for residential tenants is the recognition that the leasehold is primarily valuable as the tenant's home or dwelling.¹⁷⁷ ALF residents essentially are tenants by another name.¹⁷⁸ Neither ALF residents nor tenants hold an ownership interest in their residence.¹⁷⁹ Both enter contractual agreements to secure a residence and services.¹⁸⁰ Both face potential homelessness at the hand of the property owner.¹⁸¹ Yet states limit the scope of landlord-tenant laws, as modeled by URLTA, to rental agreements for dwelling units.¹⁸² To qualify as a dwelling unit, "a structure or . . . part of a structure [must be] used as a home, residence, or sleeping place by . . . a household."¹⁸³ To show that landlord-tenant law provides an appropriate solution in addressing the

¹⁷⁴ See Glendon, *supra* note 26, at 518 (explaining how judicial activity prior to the statutory reform of landlord-tenant law in the 1960s and 1970s developed policies that benefited exploited tenants).

¹⁷⁵ E.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx>.

¹⁷⁶ Cf. VIGNERY & SIEMON, *supra* note 130, at pt. v (arguing that a private right of action for ALF consumers is "most consistent with an enhanced role for consumers;" eliminates uncertainty about potential legal claims; and "enable[s] consumers to attain the higher level of civil and social rights promised by the concept of [ALFs]"). Some states have already extended such a private right of action to ALF residents. *Id.* at 3.

¹⁷⁷ See *supra* notes 34–39 and accompanying text (explaining how the home or dwelling became the primary focus of leaseholds and turned the lease into a hybrid of both conveyance and contract).

¹⁷⁸ See Zimring, *supra* note 14, at 325 ("[U]nless there is specific law to the contrary, the relationship between the [ALF] and the resident is essentially a landlord-tenant relationship.").

¹⁷⁹ See DUKEMINIER ET AL., *supra* note 34, at 374 (indicating that tenants receive only a possessory interest through a lease while the landlord retains the ownership interest in the property); *supra* Part II.B (describing the involuntary discharge problem in ALFs, a problem that only exists because the residents lack a full ownership interest in their ALF apartment).

¹⁸⁰ DUKEMINIER ET AL., *supra* note 34, at 374; Frolik, Burke & Kirtland, *supra* note 16, at 42.

¹⁸¹ See *supra* Part II.A.2 (outlining modern protections against eviction for tenants implying that without such protections, tenants would face greater risk of eviction); *supra* notes 134–40 (discussing the factors of availability, qualification, and finances that surround ALF discharges and often leave residents with nowhere to turn except a nursing home).

¹⁸² See, e.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.201 (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx>.

¹⁸³ UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.301(3).

ALF involuntary discharge problem, this Part will demonstrate that ALFs serve a primarily residential purpose congruent with the threshold dwelling requirement in landlord-tenant law.¹⁸⁴

Not all places where people live are deemed dwelling units. Landlord-tenant statutes explicitly exclude institutions whose primary purpose is the provision of services—including medical or geriatric services—with a secondary residential purpose.¹⁸⁵ Hospitals, nursing homes, and group homes for the developmentally disabled constitute institutions whose primary purpose is provision of services.¹⁸⁶ Hospitals offer services without any intention of long-term residence for patients.¹⁸⁷ Nursing homes and group homes for the developmentally disabled provide medical and personal services that create a safe living environment for residents.¹⁸⁸ Despite the residential components of

¹⁸⁴ See *infra* notes 185–219 and accompanying text (analyzing multiple perspectives and concluding that the residential nature of ALFs supersedes the services component).

¹⁸⁵ E.g., OR. REV. STAT. § 90.110(1) (2009) (excluding institutions that provide residence incidental to medical or geriatric services from coverage under the state’s Residential Landlord and Tenant Act); UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.202(1) (“Unless created to avoid the application of this Act, the following arrangements are not governed by this Act: residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service . . .”) (statutory numbering system omitted).

¹⁸⁶ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.202 cmt. (identifying prisons, hospitals, nursing homes, and dormitories as places “where residence is incidental to another primary purpose,” and to which the URLTA “is not intended to apply”). Compare *supra* note 2 (quoting the federal definition of assisted living), with the definition of nursing facility included in the Nursing Home Reform Act of 1987, which states that a nursing facility, also called a skilled nursing facility or nursing home, is

an institution (or a distinct part of an institution) which—is primarily engaged in providing to residents—skilled nursing care and related services for residents who require medical or nursing care, rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities.

42 U.S.C. § 1396r(a)(1) (2006) (statutory numbering system omitted).

¹⁸⁷ See Schwemm & Allen, *supra* note 82, at 142–43 (explaining that hospitals are not residential because patients do not choose to live there and because governments regulate hospitals to provide quality care to the acutely ill).

¹⁸⁸ Sunrise Group Homes, Inc. v. Ferguson, 777 P.2d 553, 555 (Wash. Ct. App. 1989) (group homes for the developmentally disabled); FROLIK, *supra* note 3, at 311 (nursing homes). See also the federal statute governing nursing home discharge that states the following:

A skilled nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless . . . the transfer or discharge is appropriate because the

these settings, they do not constitute dwelling units, and thus, residents are not tenants protected by landlord-tenant law.¹⁸⁹

Some argue that ALFs are not dwelling units, asserting that housing is a secondary purpose for ALFs primarily concerned with providing services to residents.¹⁹⁰ Proponents of this perspective cite state licensing regulations that require ALFs to provide custodial care services, which landlords are not required to offer, as evidence that services are the primary feature of ALFs.¹⁹¹ Some courts have refused to apply landlord-tenant law to ALFs, finding residence to be incidental to medical or geriatric services.¹⁹² In *Antler*, the court distinguished ALFs from landlord-tenant arrangements when it found that the personal services provided by the ALF amounted to “special responsibilities toward . . . residents.”¹⁹³ Nevertheless, other courts have implied the primarily residential nature of ALFs by holding them liable under the FHA, which has a similar dwelling requirement.¹⁹⁴

resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility

42 U.S.C. § 1395i-3(c)(2)(A)(ii) (2006) (statutory numbering system omitted). *See generally* FROLIK, *supra* note 3, at 229–63 (providing detailed information about housing options for the disabled, including review of zoning and anti-discrimination laws, to prepare attorneys serving disabled clients).

¹⁸⁹ Common law and statutes protect disabled consumers from exploitation. *Id.* at 246. Both federal and state laws regulate nursing homes specifically. *Id.* at 346–76. Notably, the Nursing Home Reform Act requires compliance with its standards for nursing homes to receive federal funds. 42 U.S.C. §§ 1395i-3(a)–(i), 1396r(a)–(h). In addition, the Older Americans Act requires states to address the risk of elder abuse by operating long-term care ombudsman programs. *Id.* § 3027(a)(12) (elder abuse provisions); *Id.* § 3058g(a)(3) (ombudsman provisions). Nursing homes are further subject to the Fair Claims Act, which allows civil claims against institutions making fraudulent claims for federal funds. 31 U.S.C. § 3729 (2006). At the state level, licensing, tort, and contract laws can generate nursing home liability. FROLIK, *supra* note 3, at 358–70. Group homes for the disabled face similarly pervasive federal and state regulation. *See id.* at 244–46 (discussing zoning, occupancy, permit, and service-related regulations in relation to group homes as well as the Rehabilitation Act of 1973, the FHA, and the ADA, which address disability issues at the federal level).

¹⁹⁰ *See infra* notes 191–94 and accompanying text (discussing the perspective that residential laws should not apply to ALFs because their primary purpose is provision of services to residents).

¹⁹¹ *See* GORDON, *supra* note 125, at C.1 (delineating services provided by ALFs that differentiate them from other settings).

¹⁹² *See supra* note 125 (outlining cases that find ALFs are not dwellings because they provide residence incidental to medical or geriatric services).

¹⁹³ *Antler v. Classic Residence Mgmt. Ltd. P’ship*, 733 N.E.2d 393, 398 (Ill. App. Ct. 2000).

¹⁹⁴ *See supra* note 125 (introducing the FHA and its dwelling requirement). Legal scholars similarly suggest the primarily residential nature of assisted living by prioritizing residential components in their definitions of assisted living. *See, e.g.*, Frolik, Burke & Kirtland, *supra* note 16, at 41 (focusing on the homelike atmosphere and features of assisted living); Schwemm & Allen, *supra* note 82, at 137 (“ALFs are distinguished by the fact that

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Tenants, who are protected by landlord-tenant law, personalize their leases by contracting for assorted services.¹⁹⁵ Leases typically provide that landlords will maintain the premises while tenants will maintain the systems within the dwelling unit.¹⁹⁶ Landlord-tenant statutes intentionally allow the parties to negotiate further provisions related to specific services such as snow removal, landscaping, plumbing and electrical, and trash service.¹⁹⁷ Similarly, ALF residency agreements outline services such as maintenance of the premises and the interior of the apartment.¹⁹⁸ Like tenants, ALF residents can then negotiate for further services as they need such as food preparation, housekeeping, and personal care.¹⁹⁹ ALF residents and tenants may contract for different types of services but both define services in order to maximize their residential experience.

Further evidence of the primarily residential character of ALFs comes from the states. Some states explicitly assert the residential purpose of ALFs in their definitions of assisted living.²⁰⁰ States also

the care they make available to residents is a major component of the services provided, albeit still secondary to the more traditional housing and housing-related services they also provide.”); Carlson, Long-Term Care, *supra* note 100, § 5.07[1] (“An assisted living setting is: a congregate residential setting that provides or coordinates personal services, 24-hour supervision and assistance (scheduled and unscheduled), activities, and health-related services”) (bulleted format omitted).

¹⁹⁵ See *supra* Part II.B.2 (describing the contractual aspect of ALF residency agreements).

¹⁹⁶ See, e.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 2.104, 3.101 (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx> (outlining landlord and tenant duties).

¹⁹⁷ See, e.g., Bolt v. United States, 509 F.3d 1028, 1035 (9th Cir. 2007) (applying Alaska statute that requires landlords to remove snow and ice from common areas); see also UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104(3)–(6) (specifying tasks related to common areas, internal systems such as electrical, plumbing, and water, and garbage removal that fall within the landlord’s duty to maintain the premises).

¹⁹⁸ E.g., Country Care Farm, *supra* note 102 (providing that residents are responsible for any damage inside the apartment while the facility is responsible for safety features such as alarms and fire exits, examples of how ALFs delineate duties of the parties within their residency agreements).

¹⁹⁹ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104(c)–(d) (requiring any alterations to performance of landlord duties be agreed to in writing by both the landlord and the tenant); FROLIK, *supra* note 3, at 201–02 (asserting that ALFs prefer to personalize services for residents rather than forcing standard services on every resident regardless of particularized needs).

²⁰⁰ E.g., IDAHO ADMIN. CODE r. 16.03.22.001(02) (2006), ID ADC 16.03.22.001 (Westlaw), available at <http://adm.idaho.gov/adminrules/rules/idapa16/16index.htm> (stating assisted living’s purpose as provision of “choice, dignity and independence to residents while maintaining a safe, humane, and home-like living arrangement for individuals needing assistance with daily activities and personal care”); ILL. ADMIN. CODE tit. 77, § 295.100(a) (2008), 77 IL ADC 295.100 (Westlaw), available at <http://www.ilga.gov/commission/jcar/admincode/077/07700295sections.html> (defining ALFs as “residential environments with supportive services”); 55 PA. CODE § 2600.1(b)

imply the residential nature of ALFs through licensing regulations. Although regulations generally require ALFs to provide services such as assistance with ADLs, medication management, emergency response, dining, housekeeping, and social planning, they clearly prohibit provision of skilled nursing care in ALFs.²⁰¹ States go on to require discharge of ALF residents whose needs exceed the facility's available services.²⁰² These regulations afford ALFs flexibility to limit the services they provide, which suggests a preference for independent residents with minimal service needs.²⁰³ In fact, ALFs can admit residents without any service needs unlike nursing homes, hospitals, and group homes.²⁰⁴ Thus, states communicate, both explicitly and implicitly, the secondary role of services in the ALF setting.²⁰⁵

The operations of ALFs also suggest that the primary purpose of assisted living is housing.²⁰⁶ ALF residents pay a monthly base amount designated as residency fees and pay additional fees for specific services only if they are needed.²⁰⁷ Such a fee structure reflects the industry's asserted mission as a "residential approach to care provision" grounded

(2008), 55 PA ADC § 2600.1 (Westlaw), available at <http://www.pacode.com/secure/data/055/055toc.html> ("[ALFs] are designed to provide safe, humane, comfortable and supportive residential settings for adults who do not require the services in or of a licensed long-term care facility, but who do require assistance or supervision with [ADLs], instrumental [ADLs], or both.").

²⁰¹ See FROLIK, *supra* note 3, at 198–200 (outlining services provided by ALFs and differentiating those services from nursing home care); *supra* notes 82–84 and accompanying text (outlining ALF regulations specifying services that facilities must make available to residents); *supra* note 87 and accompanying text (presenting the regulatory limitations on nursing services in ALFs).

²⁰² See *supra* notes 88–92 and accompanying text (discussing the regulatory prohibition on retaining residents whose needs exceed services provided by the facility).

²⁰³ See *supra* notes 93–95 and accompanying text (discussing the positive and negative consequences of the flexibility built into ALF regulations).

²⁰⁴ FROLIK, *supra* note 3, at 195; Carlson, *Disability Discrimination*, *supra* note 125, at 387–88.

²⁰⁵ See *supra* notes 200–04 and accompanying text (discussing state ALF regulations that suggest the secondary nature of services). States also suggest the primary residential nature of ALFs through regulations that address health and safety issues related to the physical plant of ALFs. E.g., ALA. ADMIN. CODE r. 420-5-4.11 to .12 (2008), AL ADC 420-5-4-.11–.12 (Westlaw), available at <http://www.alabamaadministrativecode.state.al.us/docs/hlth/index.html>; 410 IND. ADMIN. CODE 16.2-5-1.5 to 1.6 (2008), 410 IN ADC 16.2-5-1.5–1.6 (Westlaw), available at http://www.in.gov/legislative/iac/iac_title?iact=410.

²⁰⁶ See *infra* notes 207–12 and accompanying text (showing how ALFs reflect the residential nature of their facilities through business operations).

²⁰⁷ See FROLIK, *supra* note 3, at 209–12 (describing the components of an ALF contract referring to rent and other details of the physical living unit first and then explaining how individualized services are incorporated into the contract).

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in “the bedrock belief [in] choice and dignity in service delivery.”²⁰⁸ By promoting independence in a home-like environment, ALFs portray themselves as primarily residential facilities.²⁰⁹ Very practically, ALFs market the residential nature of their facilities by emphasizing apartment features, such as the size of rooms, ability to supply personal furnishings, and the kitchen and bath facilities, to prospective residents.²¹⁰ Assisted living corporations also label ALFs as “senior housing” or “senior living” opportunities when marketing to prospective investors.²¹¹ ALFs stress the residential components of assisted living along with the aging-in-place philosophy in order to differentiate the industry from other long-term care options that are service-driven.²¹²

Embracing the aging-in-place philosophy stressed in marketing efforts, ALF residents enter ALFs perceiving them to be viable, long-term

²⁰⁸ *Taboo Talking Points in Assisted Living*, *supra* note 125. ALFA more formally expresses the residential nature of ALFs in its statement of organizational core principles:

ALFA supports the unique philosophy that distinguishes assisted living from other long term care options. The goal of assisted living is to both provide resident-centered care, and provide that care in a residential setting. The philosophy provides residents freedom of choice, independence, and the opportunity to live, aging with dignity, privacy and respect. In contrast to other long term care options, Assisted Living embraces quality of life as well as quality of care, and supports the resident’s decision to live and die in the place they call home.

ALFA *Core Principles*, ASSISTED LIVING FEDERATION OF AMERICA, http://www.alfa.org/alfa/ALFA_Core_Principles1.asp?SnID=564014434 (emphasis omitted) (last visited Aug. 16, 2010). Gerontologists further confirm the residential nature of ALFs by focusing their studies on the benefits of the homelike atmosphere that improve the functionality and quality of life for ALF residents. *See* Bernard, Zimmerman & Eckert, *supra* note 4, at 224–25 (presenting a conceptual model of aging-in-place that is arguably a key characteristic of ALFs, which claim to facilitate residents’ interest in growing older in one setting even as their needs change); Cutler, *supra* note 5, at 75–76 (evaluating the “homeyness” of ALFs and reporting research results indicating that apartment-style ALFs “could be viewed as extensions of a former home”); *id.* at 82 (“[A]n [assisted living] apartment or room in an [assisted living] complex is someone’s home, and environmental research in [assisted living] is most likely to be meaningful if it anchors itself in the study of housing rather than of hospitals, nursing homes, and other health settings”).

²⁰⁹ *See* Cutler, *supra* note 5, at 68 (“Service patterns may vary, but the mainstay of the [assisted living] model will continue to be the design of the living environment, because its symbolism connoting home and independence enhances marketability of the product.”).

²¹⁰ *E.g.*, Countryside Information, *supra* note 135; *cf.* GORDON, *supra* note 125, at Conclusion (advising ALFs to accentuate the services they provide in order to minimize the risk of courts applying housing-based laws, such as landlord-tenant law, to ALFs).

²¹¹ *E.g.*, CountryPlaceLiving.com, *supra* note 19; Press Release, TrinityCare Senior Living, Inc., *supra* note 19.

²¹² *See supra* notes 209–11 and accompanying text (asserting that ALFs view themselves as residential options for long-term care).

alternatives to the home they left behind.²¹³ Residents give up the physical dwelling they called home in order to reside in a more manageable congregate living environment.²¹⁴ They create a unique home in an ALF by furnishing their apartments and subscribing to assorted personal services offered by the ALF.²¹⁵ In this way, ALF residents resemble tenants who make an apartment their own after reaching agreement with landlords about the division of responsibilities.²¹⁶ Therefore, despite the available services, ALF residents view ALFs primarily as their home.²¹⁷

In sum, the residential component of ALFs supersedes the services they offer. Courts, legislatures, ALFs themselves, and most importantly, ALF residents view ALFs as housing, first and foremost, with medical or geriatric services made available secondarily.²¹⁸ ALF residency agreements, analogous to leases, allow residents to personalize their ALF experience with services as needed.²¹⁹ Therefore, ALFs constitute dwelling units, as defined by landlord-tenant law.

²¹³ See, e.g., Cooper & Walker, *supra* note 17, at 4 (profiling Martha, an ALF resident who moved into the facility when she could no longer care for her house and found the facility offered her the quality and activities of life she had enjoyed in her house, without the accompanying responsibilities).

²¹⁴ Implying that residents move into ALFs to address growing needs in the original home, Frolik states:

Congregate housing provides a noninstitutional living environment with a modest amount of support. It helps break down social isolation, while providing individualized living and reducing the demands for cleaning, repair, and maintenance of the living unit. Because they live in a community of other older persons that typically offers a variety of social and recreational events, residents are encouraged to interact with others. Residents live in their own furnished apartments, so they maintain a feeling of autonomy while being freed of the burdens of home ownership.

FROLIK, *supra* note 3 at 191-92.

²¹⁵ See 12 U.S.C. § 1715w(b)(6) (2006) (defining assisted living).

²¹⁶ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 2.104, 3.101 (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx> (outlining landlord and tenant obligations); *supra* text accompanying note 99-102 (discussing the role of negotiation in residency agreements that allows residents to personalize their ALF experience).

²¹⁷ Cutler, *supra* note 5, at 68.

²¹⁸ See *supra* notes 194, 198-217 and accompanying text (focusing on how courts, legislatures, ALFs, and ALF residents demonstrate their primary residential interest in the ALF setting).

²¹⁹ See *supra* Part II.B.2 (discussing the role of the residency agreement in shaping the ALF experience for residents).

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C. ALF Statutory Schemes Should Incorporate Protections Found in Landlord-Tenant Law

Statutory reform of landlord-tenant law established an eviction process that protected the interest and rights of tenants in their homes.²²⁰ States, seeking to ensure the safety and welfare of their citizens, similarly and appropriately retain the power to regulate ALFs.²²¹ Not only would federal regulation of the industry usurp the police power of the states, it would also change the very nature of assisted living by prescribing institutional guidelines comparable to those defining the nursing home industry.²²² Currently, however, state assisted living laws and regulations vary greatly, providing little consistency in how the rights of ALF residents are protected.²²³ As a result, ALF residents face unreasonable risk of involuntary discharge.²²⁴

Landlord-tenant reform, exemplified in the URLTA, effectively addressed tenants' similar needs for protection from unreasonable eviction.²²⁵ Despite a body of common law protecting tenants, statutory protections were needed to ensure that tenants' rights were consistently honored.²²⁶ In the case of ALF residents, however, development of common law protections will be slow given the reluctance of aging, health-compromised ALF residents to engage in litigation.²²⁷ Enhancing ALF statutes with the remedies found in landlord-tenant law would expedite the protection of vulnerable ALF residents, who are likely to

²²⁰ See *supra* notes 55–63 and accompanying text (outlining tenant rights when faced with an eviction).

²²¹ See generally Bruce, *supra* note 74, at 85 (describing the benefits of state regulation in ALFs to be retention of (1) the consumer-driven nature of ALFs, (2) a more efficient response mechanism related to consumer and industry needs, and (3) quality of care unhindered by controlling regulation, which dominates the nursing home industry).

²²² *Assisted Living Regulations*, *supra* note 8. *Contra* Bruce, *supra* note 74, at 61 (advocating uniform regulation of ALFs through federal regulations to ensure the health and safety of vulnerable ALF residents). See generally 2001 Senate Committee Hearing, *supra* note 98 (interviewing senators and others associated with ALFs to assess the current state of assisted living and the potential role of the federal government in the industry). Notably, the federal government has not enacted any federal regulation of the assisted living industry despite public conversations such as the 2001 Senate Committee Hearing. Zimring, *supra* note 14, at 325.

²²³ See *supra* Part II.B.1 (discussing the inconsistencies among state ALF regulations).

²²⁴ See *supra* Part III.A (claiming that ALF residents are vulnerable to unreasonable discharge and need consumer protection).

²²⁵ See *supra* Part II.A.2 (discussing statutory reforms that addressed the unreasonable eviction of tenants).

²²⁶ See *supra* Part II.A.1 (tracing the common law and statutory development of landlord-tenant law).

²²⁷ See *supra* text accompanying note 144 (pointing out the hesitancy of ALF residents to engage in litigation).

become the largest constituency of lessees as the aging population grows in number, wealth, and health.²²⁸

States need not, however, apply landlord-tenant laws wholesale to ALFs. Not all landlord-tenant provisions are applicable to ALFs, which provide services without equivalent in typical leasehold arrangements.²²⁹ In fact, the flexibility currently afforded ALFs and residents should not be altered. Such flexibility can effectively foster aging-in-place, the quality most valued by providers and residents alike.²³⁰ Unfortunately, ALFs, motivated by self-interest, also employ this valuable discretion to discharge residents arbitrarily without thoroughly informing residents of discharge risks or providing meaningful recourse.²³¹ Incorporating the landlord-tenant remedies that successfully addressed the inequities of eviction into the ALF statutory scheme would provide effective, but unobtrusive, consumer protection to ALF residents without unduly limiting the discretion that allows ALFs to meet the changing needs of an aging marketplace.

Thus, states remain the proper authority to regulate ALFs pursuant to their police power. Statutory reform of landlord-tenant law was necessary to ensure protection for tenants from unreasonable eviction.²³² Given comparable vulnerabilities in ALF residents, who are unlikely to pursue litigation, revision of the ALF statutory scheme promises to be the most efficient and effective method for guaranteeing ALF consumers protection from undue risks of unreasonable discharge. Therefore, landlord-tenant provisions are appropriate models for consumer protection measures needed by ALF residents.²³³

²²⁸ See *supra* note 19 (quoting statistics that both demonstrate and predict a growing aging population that will be attracted to the residential and service-oriented features of assisted living).

²²⁹ GORDON, *supra* note 125, at pt. A.1.

²³⁰ The aging-in-place philosophy, central to the industry's success, distinguishes ALFs from other long-term care options. CARLSON, WHO'S IN, *supra* note 2, at 11. "Aging in place" is a term of art referring to "the phenomenon of growing older within a specific environmental setting." Bernard, Zimmerman & Eckert, *supra* note 4, at 224. The term reflects a desire of aging individuals to bring needed services and care into their existing living environment to avoid moving for as long as possible. *Id.* at 238. ALFs support aging-in-place by promoting "independence, privacy, autonomy and decision making" and by meeting the changing needs of residents to minimize the need to move to different facilities as their needs change. MOLLICA, AGING IN PLACE, *supra* note 88, at 1.

²³¹ See *supra* notes 117-23 and accompanying text (discussing ALF motives in defining and implementing discharge policies).

²³² See UNIF. RESIDENTIAL LANDLORD & TENANT ACT (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx> (representing legal consensus on how to reasonably address the rights of landlords and tenants).

²³³ See *supra* Part III.B (demonstrating the primarily residential nature of ALFs that is a prerequisite for application of landlord-tenant laws).

IV. CONTRIBUTION

ALF residents remain vulnerable to exploitation by ALFs that prioritize self-interests over the needs of residents when implementing discharge policies.²³⁴ Currently, most state regulations governing ALFs are vague, providing ALFs with unilateral discretion to determine when a resident must be discharged.²³⁵ Modern landlord-tenant law effectively protects tenants from landlords exercising discretion in evictions.²³⁶ Given the shared interests of ALF residents and tenants in their homes, this Note recommends that states enact positive law, modeled after landlord-tenant provisions, to protect ALF residents from the arbitrary decisions of ALFs that result in the loss of their home.²³⁷

A. *Model Provision: ALF Discharge Policy*²³⁸

1. Prior to admission, an ALF must disclose in the written residency agreement, signed by the facility administrator and the resident or the resident's legal representative, the discharge policy of the facility. Such disclosure shall include:
 - a. retention criteria as defined in section [X] of this Code;
 - b. a list of the specific services the facility provides and a list of the specific services the facility does not provide to residents;
 - c. clearly stated, specific behavioral, health, and financial events, defined by the facility within the limits of the retention criteria delineated in

²³⁴ See *supra* Part III (arguing for the application of landlord-tenant provisions to ALFs to protect ALF residents whose interests can be de-emphasized when ALFs act intentionally to guard their profitability).

²³⁵ See *supra* Part II.B.1 (discussing the regulatory environment that puts ALFs in control of resident discharges).

²³⁶ See *supra* Part II.A.2 (introducing modern landlord-tenant law and its provisions designed to protect tenants).

²³⁷ See *infra* Part IV.A (proposing a model discharge policy to be amended to existing ALF statutory schemes).

²³⁸ The author modeled the provision's language after the URLTA but recognized that the policy might be appropriately enacted through state legislatures or administrative agencies depending on the location of the state's existing ALF provisions. She created a generic numbering system within which she indicated by brackets other sections of the state's statutory or regulatory code that are assumed to exist. She also suggested time periods related to certain provisions, indicated by brackets but urges states to consult with medical and geriatric professionals to determine a reasonable provision given the unique needs of the elderly in this situation.

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- this Code, that determine when a resident may be involuntarily discharged;
- d. procedures for involuntarily discharging residents, including:
 - i. discharge processes, as defined in section [Y] of this Code, related to assisting the discharged resident in locating and transitioning to alternative housing and service provider(s);
 - ii. a written notice to the ALF resident
 - A. specifying the acts and omissions causing the resident's discharge;
 - B. stating a residence termination date of not less than [30] days after receipt of the notice;
 - C. offering the discharged resident at least [60] days following receipt of the notice to remedy the issues stated in the written notice in order to requalify for residence in the facility, provided that the resident agrees to pay the previously arranged monthly residence fee, minus any fees for unused services, until the resident's return;
 - D. informing the discharged resident of mechanisms available to appeal the facility's discharge decision as provided in Part 1.e of this Act.
 - e. appeal mechanisms available to discharged residents, including:
 - i. the right to lodge complaints, to the facility administrator or to external advocates, without intimidation, retaliation, or threats of retaliation by the facility or the staff;
 - ii. appeal to the State long-term care ombudsman, established through section [Z] of this Code;
 - iii. legal action to enforce discharge policies, mandated by the state and the residency agreement, and to recover appropriate relief.

2. An ALF residency agreement may not provide that the resident:
 - a. agrees to waive or forego rights or remedies under this Act;
 - b. agrees to pay the facility's attorney's fees; or
 - c. agrees to the exculpation or limitation of any liability of the facility arising under law or to indemnify the facility for that liability or the costs connected therewith.

B. Commentary

The key components of the model ALF discharge policy are disclosure of discharge criteria, notice of discharge, opportunity to remedy, and access to the judicial process. The policy includes tangential provisions necessary to support an effective scheme of protection for ALF residents at risk of unreasonable discharge. In total, these provisions facilitate effective communication of the risks of discharge to ALF residents and establish recourse options should a resident question a facility's discretionary decision. By providing process requirements for the ALF-resident relationship rather than imposing strict, statutorily-defined criteria on ALFs, this discharge policy protects consumers from unreasonable discharge while retaining the flexibility that makes the ALF setting unique and successful.²³⁹

First, to prepare ALF residents effectively for the risk of involuntary discharge, the model discharge policy mandates disclosure of specific discharge criteria to residents as part of the written ALF residency agreement.²⁴⁰ Further, the policy mandates that ALFs disclose the specific services they are willing to provide to residents.²⁴¹ Such

²³⁹ Compare CARLSON, WHO'S IN, *supra* note 2, at 16 (acknowledging the important role of flexibility in ALFs to effectively meet the needs of residents and foster aging-in-place), with BENTLEY, *supra* note 38, at 858 (recognizing that realistic, flexible lease enforcement mechanisms are necessary to simultaneously allow individual relationships to evolve and to avoid abuse by the landlord).

²⁴⁰ *Supra* Part IV.A, at 1.c (disclosure of specific discharge provision). Provision 1.a assumes that regulations external to this policy exist stating that ALFs must discharge residents whose needs exceed available services. This retains the foundational flexibility necessary for ALFs to assist residents successfully with aging-in-place. Disclosure also encourages cooperation between ALFs and their residents while limiting conflicts by anticipating solutions before they are necessary. See also BENTLEY, *supra* note 38, at 860 (offering similar rationale for enacting landlord-tenant disclosure regulations).

²⁴¹ *Supra* Part IV.A, at 1.b (disclosure of available services provision). The discharge policy intentionally requires disclosure of both the specific services available and the specific types of conduct or events that would serve as triggers for a discharge. This

disclosure serves to inform residents, before they sign a residency agreement, of factors that could force them to move. Additionally, such information allows prospective residents and their families to assess properly whether a particular facility provides the experience desired. Disclosure requirements do not prevent involuntary discharges from ALFs, but they limit the harmful effects of a discharge.

Second, to assist discharged residents in their transition to a new home, the model discharge policy mandates that ALFs provide notice of the discharge decision.²⁴² The policy requires ALFs to explain their decision and afford unquestioning residents a reasonable amount of time to locate and move into a more appropriate environment.²⁴³ The model policy suggests a minimum of thirty days notice based on common practice in tenancies. The model notice provision ensures that discharged residents are informed and consequently positioned to react reasonably and constructively to a very challenging situation.

Third, because not all events that might trigger a necessary ALF discharge are permanent, the model discharge policy provides residents with an opportunity to preserve their home in the ALF for a reasonable amount of time while they recover elsewhere.²⁴⁴ States should use care in defining the time element in this provision because the nature of geriatric health concerns are likely to require more than fourteen days, the timeframe designated in the URLTA for curing any default by a tenant.²⁴⁵ The provision also requires a resident to pay rent to reserve the apartment while attempting to re-comply with defined retention criteria.²⁴⁶ In this way, an ALF would receive full rent proceeds without incurring service costs, which effectively preserves or possibly increases profitability during the resident's temporary absence.

Lastly, the model discharge policy establishes mandatory appeal mechanisms that guarantee discharged ALF residents meaningful recourse should they wish to challenge the ALF's decision.²⁴⁷ The policy

overcomes the temptation for ALFs to disclose vague and general standards that are meaningless to residents.

²⁴² *Supra* Part IV.A, at 1.d.ii (written notice of discharge provision).

²⁴³ *Supra* Part IV.A, at 1.d (inclusion of discharge reasons and minimum time of notice provisions).

²⁴⁴ *Supra* Part IV.A, at 1.d.ii.C (opportunity to remedy noncompliance with retention standards).

²⁴⁵ See UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 4.101, 4.201 (1972) (amended 1974), available at <http://www.nccusl.org/Update/ActSearchResults.aspx>.

²⁴⁶ *Supra* Part IV.A, at 1.d.ii.C (fee structure to retain ALF apartment during temporary absence).

²⁴⁷ *Supra* Part IV.A, at 1.e (appeal mechanisms provisions); cf. Bentley, *supra* note 38, at 875 (asserting that in a landlord-tenant dispute, both parties are more likely to find a satisfactory resolution if a full and fair hearing occurs).

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creates three levels of appeal. First, residents may discuss any grievance with the facility administrator.²⁴⁸ Direct communication may result in mutual understanding sufficient to resolve the situation. If it does not, residents can contact a State ombudsman whose duties include assisting residents in resolving long-term care issues through less formal procedures.²⁴⁹ Ultimately, however, ALF residents could take their concern to the courts, which, as neutral third-parties, could effectively serve as the final arbiter of reasonableness relative to an ALF's discretionary discharge decision.²⁵⁰

In the end, these unwaivable rights of disclosure, notice, opportunity to remedy, and appeal serve as incentives for ALFs to adhere to their own discharge criteria.²⁵¹ ALFs subjected to the risk of judicial review are more likely to honor their commitment to the aging-in-place philosophy in order to avoid liability for unreasonable discharge. By enacting a discharge policy comparable to the one proposed in this Note, states will protect ALF residents by motivating ALFs to use involuntary discharge as a tool to serve resident interests rather than their own.

V. CONCLUSION

ALF residents are the aging and multiplying tenants of the twenty-first century. ALF residents face unilateral ALF discretion due to lack of state regulatory oversight over assisted living and unequal bargaining power in contractual negotiations. Yet, they also retain the right to preserve the sanctity of their home. Therefore, as vulnerable consumers, ALF residents need protection from unreasonable ALF discharge, often driven by the profitability motives of ALFs at the expense of a resident's independence, choice, and autonomy.

Reforms to landlord-tenant laws placed tenants on a level playing field with landlords and shielded them from similar exploitation. Incorporating eviction provisions found in landlord-tenant law requiring

²⁴⁸ *Supra* Part IV.A, at 1.e.i (internal appeal option). Note that Provision 1.e.i also allows expression of grievances or complaints to external advocates, a term intentionally left undefined so as to give residents flexibility to contact the advocate with whom they are most comfortable. Potential advocates might include ALF staff members besides the administrator, the state agency responsible for ALF regulation, or a private attorney. Regardless of the particular advocate to whom a resident complains, however, the Provision protects residents from retaliation within the ALF.

²⁴⁹ *Supra* Part IV.A, at 1.e.ii (State Long-Term Care Ombudsman option); *see also supra* note 115 (explaining the role of ombudsmen).

²⁵⁰ *Supra* Part IV.A, at 1.e.iii (legal action option); *cf.* Bentley, *supra* note 38, at 867 (suggesting that the unique facts of each tenant eviction case should shape a court's determination of a reasonable solution to a landlord-tenant conflict).

²⁵¹ *See supra* Part IV.A, at 2.a (unwaivable rights and remedies provision).

meaningful disclosure, notice, opportunity to remedy, and access to judicial review into ALF statutory schemes will similarly put ALF residents on a level playing field with ALFs. Protections against arbitrary discharge will not, however, destroy the flexibility that allows ALFs to succeed in their socially beneficial mission of providing a residential experience for senior citizens in need of personal services to maximize their autonomy and dignity for as long as possible.

Applying the model ALF discharge policy to the hypothetical scenario introduced at the beginning of this Note may not guarantee Alice's return to her ALF, Avalon. With such protections, however, Alice and her daughters would have understood the prospect of such a discharge when she entered Avalon making the discharge less of a shock. Even if Alice was aware that a broken hip might cause her to be discharged, she would have been allowed time for her hip to heal, which might have brought her into compliance with Avalon's retention criteria once again. While it is unlikely that Alice would have pursued litigation against Avalon due to her age, condition, and need for a home, she would have known that she had that option. Alice's broken hip could have been less of a burden to her and her family if these protections had been available to her.

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* J.D. Candidate, Valparaiso University School of Law (2011); B.A., History, Valparaiso University (1989). With great joy, I dedicate this Note to my parents to whom I am thankful for years of insight and guidance that can never be measured fully. I am also most grateful to Linda Whitton, Professor of Law at Valparaiso University School of Law, my mentor and friend, who graciously encouraged me to research and write on a topic of personal interest to her. Her patience and advice through countless discussions during the research and writing processes improved this Note tremendously. In addition, her personal and professional wisdom has led me through the twists and turns of law school with greater confidence and comfort. Last but not least, I thank Jon, Jenna, and Jon who understood what the phrase "law review weekend" meant and sacrificed to make sure I got through all of them!